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## Legal Ethics For Inquiring Minds

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## **Legal Ethics For Inquiring Minds**

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### **I. Introduction**

Every year, there are rule changes, ethics committee opinions, disciplinary cases, and other developments regarding the legal profession that invite the consideration of inquiring minds. Even a sampling of the year's developments, such as the sampling contained in this outline, can rekindle memories of nearly-forgotten lessons, reinforce awareness of traditional concepts, and identify some less-familiar issues that would be good to keep in mind.

### **II. News**

#### **A. Malpractice**

A study by the ABA Standing Committee on Lawyers' Professional Responsibility includes some interesting information about malpractice claims. For example, the study indicates that malpractice claims from real estate transactions are on the rise. 20.05% of all claims from 2004-2007 arose out of real estate matters. The only category of claims that was higher was personal injury - plaintiff, with 21.56% of all claims. In contrast, fewer than 3% of all claims arose out of the personal injury - defense category.

The study reported that there was a continued increase in large dollar claims (over \$2 million). There were 19 such claims reported in an earlier study of the 2000 - 2003 time frame. In the 2004-2007 period, the number was 44.

The study indicated that firms with five or fewer lawyers accounted for more than 70% of all malpractice claims, which represented an increase from the 65.45% figure in the prior study period. In contrast, the number of claims against the largest firms – those with over 100 lawyers – fell from 10.78%, in the prior study period, to 7.95% in the most recent study period.

Three separate studies by the committee have shown that about 25% of all claims come out of "inadequate document preparation, filing, or transmission." *ABA Malpractice Report Reveals Surge In Claims Related to Real Estate Deals*, 24 *ABA/BNA Lawyers' Manual on Professional Conduct* 572 (2008). In this respect, the report states: "Lawyers do not appear to learn from their mistakes." *Id.* (Quoting from the report).

At the same time, there has been a drop-off in the number of claims based on failure to file claims or complaints. *ABA Malpractice Report*

*Reveals Surge In Claims Related to Real Estate Deals*, 24 ABA/BNA Lawyers' Manual on Professional Conduct 572 (2008).

### **B. Discovery Abuses**

A federal magistrate judge concluded that six attorneys for Qualcomm, Inc. had abused their discovery obligations by "intentionally hiding or recklessly ignoring relevant documents, ignoring or rejecting numerous warning signs that Qualcomm's document search was inadequate, and blindly accepting Qualcomm's unsupported assurances that its document search was adequate." The judge also referred the matter to California disciplinary authorities. Sanctions against Qualcomm were \$8.5 million. The judge did not order monetary sanctions against the lawyers, noting that Qualcomm itself might seek contribution from them. *Attorneys Sanctioned for Discovery Abuse; Client Ordered to Pay Opponent \$8.5 Million*, 24 ABA/BNA Lawyers' Manual on Professional Conduct 30 (2008).

### **C. Criminal Sanctions**

In June of 2008, a federal court sentenced Melvyn Weiss, a co-founder of class action law firm Milberg Weiss, to 30 months in prison for his participation in secret kickback schemes with plaintiffs in class action lawsuits. The court also ordered Weiss to forfeit nearly \$10,000,000 in "ill-gotten gains" and to pay a \$250,000 criminal fine.

According to the indictment, Weiss had been involved in a scheme that earned the firm hundreds of millions of dollars in fees by secretly paying individuals to serve as named plaintiffs in some 225 lawsuits over a quarter of a century. In exchange for the money, the plaintiffs agreed to designate the law firm as lead counsel. Carolyn Whetzel, *Milberg Weiss co-Founder Sentence to 2-1/2 Years for Kickback Schemes*, 24 ABA/BNA Lawyers' Manual on Professional Conduct 295 (2008). See also Tom Gilroy, *Criminal Conduct: Milberg Weiss Founder is Indicted; Others Plead Guilty in Kickback Probe*, 23 ABA/BNA Lawyers' Manual on Professional Conduct 509; Tom Gilroy, *Grand Jury Indicts Milberg Weiss in Alleged Plaintiff Kickback Scheme*, 22 ABA/BNA Lawyers' Manual on Professional Conduct 264.

### **D. Risk Management**

In high-profile scandals, the names of law firm rainmakers have sometimes appeared in news stories about clients who are facing criminal or civil liability. One of the sessions at the 2008 Legal Malpractice & Risk Management Conference explored ways to minimize the risks that top business producers or leaders in law firms sometimes create. A panelist at the conference, Robert Feagin, of the Holland & Knight law firm, listed some useful "planks" for a risk management program. They include:

- The firm should have a well-articulated statement of core values that are demonstrated in how the firm operates every day.
- Partners in leadership positions should be role models reflecting these

core values in how they conduct their practices and how they relate to other lawyers and nonlawyers in the firm.

- Risk management should be completely integrated into practice management, so that practice managers are directly involved in identifying and resolving ethics problems under the supervision and guidance of the professional responsibility partner or loss prevention counsel. Practice managers should discuss departures from acceptable conduct and evaluate whether they reflect a trend that needs to be addressed by some change in course for the firm....

- Compensation for lawyers in the firm should be consistent with the firm's core values, should "visibly support" those values, and should reflect how lawyers observe or depart from them.

- The firm should have a process that enables all persons in the firm to report a violation of the firm's standards to an objective body, on a basis that protects the reporting person from retribution. The process should include an investigation and result in a report.

- The process of investigating reported violations should include elements needed for it to be regarded as fair from a procedural standpoint, such as affording the opportunity to be heard, involving proper people, and being free from bias.

Joan C. Rogers, *Panelists Explore Ways of Managing Risks Relating to Firm's Top Managers, Producers*, 24 ABA/BNA Lawyers' Manual On Professional Conduct 118, 119 (2008).

### III. Louisiana Advertising Rule Changes

In 2008, the Louisiana Supreme Court has adopted extensive changes to the rules concerning "Information About Legal Services." These are the rules about advertising, solicitation, and related matters. The changes were originally to go into effect on 1 December 2008. However, after First Amendment challenges were filed with respect to the new rules, the court moved the effective date back to 1 April 2009, and, still later, to 1 October 2009. See Orders of 31 October 2008 and 18 February 2009. The original order adopting the rule changes, and the two orders changing their effective date can be seen on the Louisiana Supreme Court's website at [http://www.lasc.org/rules/orders/Rule\\_changes.asp](http://www.lasc.org/rules/orders/Rule_changes.asp).

Some highlights of the new rules follow:

### **Rule 7.1**

Rule 7.1(b) provides that the advertising rules do not apply to advertisements broadcast or disseminated in another jurisdiction, if the advertising lawyer is admitted in the other jurisdiction, if the advertisement complies with the rules governing lawyer advertising in that jurisdiction, and if the advertisement is not intended for broadcast or dissemination within the state of Louisiana.

Rule 7.1 ( c ) provides that communications by lawyers on behalf of non-profit organizations that are not motivated by pecuniary gain are not advertisements or unsolicited written communications covered by the rules.

### **Rule 7.2**

One of the provisions of this rule, Rule 7.2(a)(2), provides, in part, that

All advertisements and unsolicited written communications provided for under these Rules shall disclose, by city or town, one or more bona fide office location(s) of the lawyer or lawyers who will actually perform the services advertised. If the office location is outside a city or town, the parish where the office is located must be disclosed.

Rule 7.2( c )(1) includes some new limitations on the content of advertising and unsolicited written communications. For example, it would violate the rule if the advertisement or unsolicited written communication:

(H) contains a paid testimonial or endorsement, unless the fact of payment is disclosed;

(I) includes a portrayal of a client by a non-client or the reenactment of any events or scenes or pictures that are not actual or authentic;

(J) includes the portrayal of a judge or a jury, the portrayal of a lawyer by a non-lawyer, the portrayal of a law firm as a fictionalized entity, the use of a fictitious name to refer to lawyers not associated together in a law firm, or otherwise implies that lawyers are associated in a law firm if that is not the case.

A separate provision, Rule 7.2( c ) (2) states:

A lawyer shall not include in any advertisement or unsolicited written communication any visual or verbal descriptions, depictions, illustrations (including photographs) or portrayals of persons, things, or events that are false, misleading or deceptive.

### **Rule 7.4**

This rule has been updated to make it clear that the prohibitions against solicitation apply to email communications.

It has also been amended to add a new class of persons who should not receive unsolicited written communications. These are individuals with respect to whom

the lawyer knows or reasonably should know that the physical, emotional, or mental state of the person makes it unlikely that the person would exercise reasonable judgment in employing a lawyer.

#### **Rule 7.5**

This rule includes some new details on the content of television and radio advertisements:

Advertisements on the electronic media such as television and radio shall conform to the requirements of this Rule.

(1) *Prohibited Content.* Television and radio advertisements shall not contain:

(A) any feature, including, but not limited to, background sounds, that is false, misleading or deceptive;

(B) lawyers who are not members of the advertising law firm speaking on behalf of the advertising lawyer or law firm; or

(C) any spokesperson's voice or image that is recognizable to the public in the community where the advertisement appears;

(2) *Permissible Content.* Television and radio advertisements may contain:

(A) images that otherwise conform to the requirements of these Rules;

(B) a lawyer who is a member of the advertising firm personally appearing to speak regarding the legal services the lawyer or law firm is available to perform, the fees to be charged for such services, and the background and experience of the lawyer or law firm; or

(C) a non-lawyer spokesperson speaking on behalf of the lawyer or law firm, as long as the spokesperson is not recognizable to the public in the community where the advertisement appears and that spokesperson shall provide a spoken disclosure identifying the spokesperson as a spokesperson and disclosing that the spokesperson is not a lawyer.

#### **Rule 7.6**

This is a new rule on "computer-accessed communications." It incorporates some new provisions on websites, search engines, and email communications.

#### **Rule 7.7**

This rule is titled "Evaluation of Advertisements." It provides for the creation of a committee to evaluate lawyer compliance with the advertising rules. It provides that lawyers may submit advertisements to the

committee in advance to check for compliance. If they do not do so, they are in any event required to file copies of their advertisements or unsolicited written communications with the committee for compliance at the time they disseminate the advertisement or the communication. The committee is supposed to decide on the compliance issue within 30 days. If the committee determines that the advertisement or communication is not in compliance, it is supposed to report that to the ODC, unless “within ten days of notice from the Committee, the filing lawyer certifies in writing that the advertisement or unsolicited written communication has not and will not be disseminated.”

The rule also sets out some exceptions from the filing requirement. One of those is for a communication that includes only a very minimal amount of information specifically listed in Rule 7.2(b).

### **Rule 7.9**

This is a new rule about information provided to clients who request information from the firm. It provides:

**(b). Request for Information by Potential Client.** Whenever a potential client shall request information regarding a lawyer or law firm for the purpose of making a decision regarding employment of the lawyer or law firm:

(1) The lawyer or law firm may furnish such factual information regarding the lawyer or law firm deemed valuable to assist the client.

(2) The lawyer or law firm may furnish an engagement letter to the potential client; however, if the information furnished to the potential client includes a contingency fee contract, the top of each page of the contract shall be marked “SAMPLE” in print size at least as large as the largest print used in the contract and the words “DO NOT SIGN” shall appear on the client signature line.

(3) Notwithstanding the provisions of subdivision (c)(1)(D) of Rule 7.2, information provided to a potential client in response to a potential client's request may contain factually verifiable statements concerning past results obtained by the lawyer or law firm, if, either alone or in the context in which they appear, such statements are not otherwise false, misleading or deceptive.

**(C) Disclosure of Intent to Refer Matter to Another Lawyer or Law Firm.** A statement and any information furnished to a prospective client, as authorized by subdivision (b) of this Rule, that a lawyer or law firm will represent a client in a particular type of matter, without appropriate qualification, shall be presumed to be misleading if the lawyer reasonably believes that a lawyer or law firm not associated with the originally-retained lawyer or law firm will be associated or act as primary counsel in representing the client. In determining whether the statement is misleading in this respect, the

history of prior conduct by the lawyer in similar matters may be considered.

#### **IV. Cases and Ethics Committee Opinions**

##### **A. Louisiana Permanent Disbarment Cases**

###### **In re Lindsay**

976 So. 2d 1261 (La. 2008) (per curiam)

Permanent disbarment of attorney who continued to represent clients and who made court appearances on their behalf for more than 14 years while disbarred.

###### **In re Thomas**

973 So. 2d 686 (La. 2008) (per curiam)

Permanent disbarment of lawyer who engaged in the practice of law after being placed on interim suspension.

###### **In re Patrick**

970 So. 2d 964 (La. 2007) (per curiam)

Permanent disbarment ordered for lawyer who failed to return unearned fees, engaged in conduct involving dishonesty, fraud, deceit, and misrepresentation, and practiced law after he was disbarred. The dishonest conduct included: 1) falsely telling a client that his daughter faced a felony charge when, in fact, she had only been charged with a misdemeanor; and 2) falsely claiming to have spoken with the FBI to obtain a reduction in the charge against the daughter.

###### **In re Fleming**

970 So. 2d 970 (La. 2007) (per curiam)

Permanent disbarment was ordered for a lawyer who failed to act with reasonable diligence and promptness in representing her clients, failed to communicate with her clients, failed to comply with her obligations upon the termination of her representation, failed to make reasonable efforts to expedite litigation, failed to provide competent representation, failed to return unearned fees, engaged in conduct prejudicial to the administration of justice, engaged in a conflict of interest, engaged in the unauthorized practice of law, and failed to cooperate with the investigation of disciplinary matters. In ordering permanent disbarment, the Louisiana Supreme Court stated:

The voluminous record of this proceeding demonstrates respondent has engaged in a pattern of collecting fees from at least thirty-nine clients without performing any work and without refunding the unearned fees, essentially converting the fees to her own use. The aggregate amount of the converted fees is nearly \$165,000.

970 So. 2d at 981.



**In re McKee**

976 So. 2d 152 (La. 2008) (per curiam)

McKee was permanently disbarred for various acts of misconduct, many of which involved issuing worthless checks. In one of the worthless check episodes, McKee entered into an agreement with the Espinosas to purchase their home. The act of sale was set for January 31, 2003, at which time McKee was required to pay the Espinosas \$72,718.98 in certified funds. At the closing, McKee did not have certified funds, but she wrote a personal check in that amount. In an attempt to prove that the check was good, McKee produced documentation purporting to show that she had obtained a \$529,000 default judgment on behalf of a client in a personal injury case. However, she failed to disclose to the Espinosas that the default judgment had been set aside. The Espinosas granted McKee an extension until February 5, 2003 to produce the certified funds. She did not produce the funds by that date; however, she did move into the house. When McKee refused to move out, the Espinosas retained a lawyer to evict her from the premises.

**B. Fees**

*1. Contract for Labor v. Attorney-Client Relationship*

**Clegg v. USAgencies Insurance Company**  
985 So.2d 781 (La. Ct. App. 1 Cir. 2008)

Attorney Michael Clegg and USAgencies entered into an agreement in which Clegg would be the exclusive agent in Louisiana for USA “for all litigation files that are assigned after January 1, 2006.” The agreement was to commence on December 15, 2005, with a term of two years and the possibility of extensions. When USA sent files to attorneys other than Clegg, Clegg claimed that the contract was breached. He claimed entitlement to lost revenue.

The trial court held that, despite the existence of any fee agreement or contract between an attorney and a client, a client had the right to discharge the attorney at any time. Therefore, the trial court granted the exception of no cause of action

The court of appeal set forth some background principles regarding the attorney-client relationship:

An attorney-client relationship is traditionally considered one of mandate or agency, which is generally subject to the principal's withdrawal at any time.... In 2003, after the initial adoption of the current Rules of Professional Conduct for attorneys, which were re-enacted in 2004, our supreme court reaffirmed a client's “absolute right to discharge his or her lawyer at any time.” In *re Jones*, 2002-3131, p. 5 (La.10/21/03), 859 So.2d 666, 670. In *Francis v. Hotard*, 2000-0302, p. 3 (La.App. 1 Cir. 3/30/01), 798 So.2d 982, 985, writ not considered, 2001-1323 (La.6/22/01), 793 So.2d 1263, this court

also confirmed the right, even if the attorney and client had a contract. In *Jones*, the supreme court explained that “an attorney may not ‘force his continued representation [on] a client....’ “ *Jones*, 2002-3131 at p. 6, 859 So.2d at 670, quoting *Scott v. Kemper Insurance Company*, 377 So.2d 66, 70 (La.1979). “The existence of an attorney-client relationship turns largely on the client’s subjective belief that it exists.” ....

Based on a client’s right to terminate counsel at any time, an ancillary rule developed defining the attorney’s right to sue for fees. “When an attorney is discharged before entirely earning his fee, he cannot rely on commercial laws to collect” fees for unearned services.... If the client made an advance payment, the attorney must return “any advance payment of fee or expense that has not been earned or incurred.”.... However, despite the unenforceability of “contract provisions on compensation” as a basis for collecting unearned fees, the discharged attorney does remain “entitled to compensation for services actually rendered prior to his discharge.” .... When fees are owed, the provisions of a prior reasonable fee schedule or agreement may be used as a guide to calculate the amount of fees owed.... In the absence of a prior fee agreement, the fees are traditionally set based on quantum meruit .... Of course, with or without a contract, an award of earned fees is subject to the court’s review for reasonableness.

985 So. 2d at 783-784 (omitting some citations).

Although there was an argument in this case that the contract was one of employment, or labor, instead of one that created an attorney-client relationship, the court concluded that it did create an attorney-client relationship. In that context, the damages that Clegg claimed were based on legal services performed by other attorneys, rather than services that Clegg provided. The court then reasoned:

It is undisputed that the fees claimed by Clegg were unearned and did not flow from services actually rendered by Clegg to USA. Based on the client’s right to cease using the services of a particular attorney, which logically includes the client’s right to send future work to another attorney, a claim for unearned fees, even if denominated as lost revenue, is not allowed by the Louisiana jurisprudence cited above or contemplated by the Rules of Professional Conduct, Rule 1.5(f) & 1.16(d). Thus, no cause of action exists for the collection of the unearned fees prayed for by Clegg.

*Id.* at 785. The court of appeal therefore affirmed the judgment of the trial court in this respect. However, it remanded the case to allow Clegg to have an opportunity to amend the complaint to state a cause of action for detrimental reliance.

## 2. Sanctions and Fees

**a. Wrongful Default Judgment**

**Filson v. Windsor Court Hotel**  
990 So. 2d 63 (La. Ct. App. 4 Cir. 2008)

This matter arose out the filing of a default judgment. The initial lawsuit was filed on behalf of Lea Filson and her husband Ron. The Filsons sought damages arising out of personal injuries sustained by Mrs. Filson while she was employed by the Windsor Court Hotel. She claimed to have become ill on account of sewer gas and mold in the building. The building owners are Sean Cummings and Ekistics, Inc. They were two of the defendants named in the lawsuit filed by attorneys Patrick Lee and Laurie White, on behalf of the Filsons. Cummings and Ekistics retained Howell Crosby and the law firm of Chaffe McCall to represent them.

According to the published opinion in the case, on August 11, 2003, Crosby telephoned Lee and left a voicemail message requesting an extension of time to file responsive pleadings on behalf of Cummings and Ekistics. On August 12, 2003, Lee returned the call and granted the extension. Lee explained that he was having trouble serving another defendant and that he would let Crosby know when the responsive pleadings would be due. However, on September 17, 2003, the Filsons filed a motion for default and obtained an order of preliminary default against Cummings and Ekistics. Neither Crosby nor anyone else in his firm received any notice from Lee before this was done. On September 25, 2003, the Filsons confirmed the preliminary default at an evidentiary hearing. The duty judge signed a judgment awarding damages, interest, costs, and expert fees in favor of the Filsons in the total amount of \$1,973,636.52.

Crosby first learned of the default judgment on September 30, 2003, when the sheriff served a copy of it. That same day, Crosby sent a letter by hand delivery to Lee expressing his surprise at Lee's breach of the agreement. Lee responded by denying that he had ever agreed to an extension and indicating that he would not agree to rescind the default judgment. Cummings and Ekistics thereafter sought to vacate both the order of preliminary default and the subsequent judgment. on grounds of "fraud or ill practices."

After an evidentiary hearing, the trial court found that the default judgment was an absolute nullity under on account of several defects, including improper citation and service and an invalid preliminary default. It also concluded that the judgment was relatively null for fraud or ill practices, because Cummings and Ekistics had withheld filing a responsive pleading based on their attorney's reasonable belief that they had an extension and that the Filsons would give them notice before taking any action against them in the suit. The trial court also concluded that Cummings and Ekistics were entitled to reasonable attorneys' fees.

On appeal, the Fourth Circuit affirmed the trial court's decision to vacate the default judgment as well as the award of attorneys' fees. However, it amended the trial court's judgment by casting only Lee in judgment for the payment of the attorneys' fees and costs, concluding that "the record does not indicate that the [plaintiffs] participated in or had any knowledge of the informal extension granted by their attorney." 990 So. 2d at 66. The trial court subsequently determined that Lee should pay \$34,644.66 in attorneys' fees and costs. Lee appealed. Referring to the Louisiana Supreme Court's decision in *State Department of Transportation and Development v. Williamson*, 597 So. 2d 439, 442 (La. 1992), the Fourth Circuit said that:

Based on Rule 1.5(a) of the Rules of Professional Conduct, the Louisiana Supreme Court has itemized the following considerations for determining the reasonableness of attorneys' fees:

Factors to be taken into consideration in determining the reasonableness of attorney fees include: (1) the ultimate result obtained; (2) the responsibility incurred; (3) the importance of the litigation; (4) amount of money involved; (5) extent and character of the work performed; (6) legal knowledge, attainment, and skill of the attorneys; (7) number of appearances made; (8) intricacies of the facts involved; diligence and skill of counsel; and the (10) the court's own knowledge.  
*Id.* at 67.

In this instance, the court observed that:

considerable efforts on the part of Mr. Cummings's and Ekistics's attorneys were necessary to obtain the ultimate result: the successful overturning of default judgments against their clients, the successful defense of that reversal in the appellate court, and the successful protection of the award of attorneys' fees. The litigation also involved a considerable amount of money. The trial court specifically determined that all fees requested were related to nullifying the default judgment. It further determined that Mr. Lee could not escape liability for his ill practice just by withdrawing as counsel of record, because he put into motion a series of events that caused other people consequences that had to be handled. Based on the record before this Court, the trial court did not err or abuse its discretion in arriving at these conclusions.

*Id.* at 67-68.

Accordingly, the court affirmed the amount of the award for fees and costs.

### **b. Death of Litigant**

#### **Illinois Central Railroad Company v. Broussard**

2008 WL 4405166 (Miss. Ct. App. 2008)

On April 12, 2006, a complaint in a personal injury lawsuit was filed behalf of Edwin L. Broussard. It alleged that Broussard had been injured as a result of exposure to asbestos while he was an employee of Illinois Central. The Railroad filed an answer, and sought discovery. Later, the Railroad learned that Broussard had died approximately one year and eight months before the complaint was filed. The Railroad filed a motion to dismiss and sought attorneys fees. The complaint was dismissed, but the trial court rejected the claim for fees.

On appeal, the Railroad contended that the filing of a lawsuit in the name of a plaintiff who had died one year and eight months before the filing of the lawsuit was in error and required the assessment of sanctions. The court of appeals concluded that the denial of fees was erroneous:

Because Illinois Central had a complete defense, due to the plaintiff's death one year and eight months prior to the filing of the lawsuit, it follows that there was no hope of success on his claims; thus, this situation falls within the definition of "frivolous" set forth in Rule 11 and the Act. Accordingly, we find that the circuit court abused its discretion by denying an award of attorneys' fees.

One judge dissented, and explained:

Broussard's attorneys had no intention of filing a lawsuit that was without merit. When this case was initiated, Broussard was living and had a viable suit based on his exposure to asbestos during his employment at Illinois Central. Broussard was one of 147 plaintiffs who filed suit against Illinois Central for asbestos-related injuries. In November 2005, after changes in the venue laws, many of the plaintiffs' claims, including Broussard's, were dismissed to be re-filed in the appropriate jurisdictions. Broussard's attorneys attempted to contact Broussard, but were unsuccessful. Facing an impending statute of limitations, they filed the claim in the Circuit Court of Warren County. In November 2006, Broussard's counsel discovered that Broussard was deceased and requested that the action be dismissed. It was at this point that Illinois Central discovered that Broussard had been deceased since August 2004.

### *3. Reasonableness*

#### **In re Jones**

990 So. 2d 731 (La. 2008) (per curiam)

Attorney Jones represented Viola Hilbun in connection with a personal injury matter. Because the investigation revealed that Hilbun had been at fault in the accident, the case represented a financial risk. As a

result, Jones agreed to represent Hilbun for a 50% contingency fee. The fee agreement also permitted Jones to charge additional fees if additional legal services were required.

Eventually, the case settled for \$15,000. In accordance with Jones's request, the insurance company, issued one check in the amount of \$7,660.74 payable to Hilbun and Jones, and another check in the amount of \$7,339.26 payable to Hilbun, Jones, and Medicare. After properly endorsing the checks, Jones deposited the first into his trust account and forwarded the second to Medicare.

Medicare subsequently forwarded a refund check to Jones in the amount of \$6,650.78. This check was properly endorsed by Hilbun and Jones and deposited into the trust account. Jones's final disbursement statement indicated that Hilbun was entitled to only \$2,950.58 of the \$15,000 settlement. However, Hilbun believed she was entitled to the entire \$6,650.78 Medicare refund. Accordingly, she did not authorize disbursement of the funds. Jones nonetheless disbursed the funds, paying the remainder of his claimed fees and expenses as well as all outstanding third-party providers. He deposited the sum of \$2,950.58 into the registry of the court.

Disciplinary proceedings commenced against Jones after Hilbun complained to the ODC. The hearing committee found that Jones had charged an unreasonable fee. In particular, it found that an additional \$2,000 fee charged by Jones for requesting the issuance of two separate settlement checks was unreasonable, as was a \$166 fee charged to Hilbun for paralegal services. In addition, the hearing committee found that Hilbun had disputed Jones's fee, had not authorized disbursement of the Medicare refund, and that Jones had disbursed the remaining settlement funds over his client's objection. The hearing committee concluded that Jones's conduct violated Rules 1.5 (charging an excessive fee), 1.15(e) (failure to deposit disputed funds into a trust account), and 8.4(a) (violation of the Rules of Professional Conduct).

The Louisiana Supreme Court concluded that the record supported the factual findings of the hearing committee, and that Jones had violated the Rules of Professional Conduct as charged. It ordered a public reprimand. It also ordered Jones to pay restitution to his client. Two justices dissented, and would have imposed a harsher sanction.

#### *4. Withdrawal From Representation*

##### **Lee v. Daniels & Daniels** 264 S.W.3d 273 (Tex. Ct. App. 2008)

This case involves a dispute about fees in the context of a withdrawal from representation. One of the issues was whether an arbitrator should have awarded the withdrawing attorney a fee based on his efforts

to obtain the withdrawal. According to the description provided by the court,

Cummings employed the law firm of Daniels & Daniels in November 2002 to provide “legal services” in connection with his divorce and child custody dispute. Both Daniels and Cummings signed a written three and one-half page engagement letter drafted by Daniels. Lee also signed as Guarantor/Obligor. In January and again in March 2004, Daniels sought to withdraw from the representation of Cummings on the grounds of non-payment of fees and difficulty in representation caused by the actions of Cummings and his mother. Cummings opposed both motions to withdraw, and the trial court denied the motions. Daniels then successfully sought mandamus relief from this court on the basis that he had established good cause justifying his withdrawal.... Thereafter, Daniels brought this suit against appellants to recover additional fees, including his attorney fees for self-representation in securing permission to withdraw. Ultimately, the arbitrator awarded Daniels \$15,046.13 as “attorneys's fees in connection with the withdrawal and Mandamus,” plus \$1,802.97 as accrued interest and continuing interest until paid, separate from the damages awarded on the breach of contract action. On appeal, appellants seek to vacate this part of the arbitration award arguing it contravenes public policy prohibiting unconscionable fees.

264 S.W.3d at 280.

Citing Texas Disciplinary Rule of Professional Conduct 1.04(a), the court observed that “[a] fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable.” *Id.* It also noted that “[i]mplicitly, if not explicitly, the Disciplinary Rules demand that a reasonable legal fee be charged only for legal services.” *Id.*

In this instance, the withdrawal provision in the parties’ written agreement required Cummings to pay Daniels’ hourly rate for all time spent incident to withdrawal, regardless of whether or not legal services were rendered on behalf of Cummings. And Daniels sought reimbursement for all time spent in his efforts to terminate his attorney-client relationship with Cummings including time spent in adversity to his own client. None of that time, said the court, was spent engaged in “legal services” performed or rendered on behalf of Cummings. It was time spent for the benefit of Daniels. The result was an unconscionable fee:

No lawyer could form a reasonable belief that time spent adversarial to the client and in pursuit of the lawyer’s own interests is the rendering of “legal services” for the client. Thus, no lawyer could form a reasonable belief that fees incident to such time spent were reasonable. Therefore, we hold the particular withdrawal provision at issue here, which because of its broad nature allows the recovery of

such fees, is unconscionable and contravenes Texas public policy as a matter of law.

*Id.* at 281.

The court acknowledged that its conclusion “may impose a burden on a withdrawing attorney with legitimate reasons to terminate the attorney-client relationship.” *Id.* But it also stated that “an attorney’s relationship to his client is not to be guided by “the morals of the marketplace.” *Id.*

### **C. Mitigation**

#### *1. Bipolar Disorder*

##### **In re Belz**

258 S.W.3d 38 (Mo. 2008)

After six years of treatment for bipolar disorder, Belz’s physician took him off his medication. Belz thereafter suffered a relapse and he began to steal client funds, using them to pay his mortgage and some expenses of his law firm.

When Belz took the money, he recorded the transaction and wrote down how much he owed. He also paid back some of the money. He eventually informed his law partners about the theft, reported his own conduct to disciplinary authorities, and repaid the stolen funds.

The disciplinary panel concluded that Belz had violated rules prohibiting commingling, conduct involving dishonesty, and conduct prejudicial to the administration of justice. Although the panel was aware that Belz had made restitution, it recommended disbarment. It did not perceive the bipolar condition as mitigating.

On appeal, disciplinary counsel argued that disbarment was always required for attorneys who misappropriate client funds. But a majority of the Missouri Supreme Court said that it was appropriate to consider both aggravating and mitigating circumstances in such a case. And it said:

This Court agrees with ... other jurisdictions that in a rare but appropriate case a sanction other than disbarment may be appropriate for intentional misappropriation where mental illness is shown to have played a role in the misconduct and other substantial mitigating factors are also present.

258 S.W.3d at 46.

The court also noted that Belz had self-reported his misconduct. If he had not done so, the court was of the view that his “misconduct probably never would have come to light.” *Id.* And it observed that Belz had repaid the money.

Even so, the court said that “misappropriation of client funds presents a paramount risk to the integrity of the legal profession.” *Id.* And it stated:



Even when such conduct is recorded properly and undertaken in a manic state, as it was here, this Court condemns this conduct in the strongest possible terms. Mr. Belz acted with a dishonest and selfish motive in taking his clients' funds, he did so multiple times, and he had substantial experience with the law. A stayed suspension is simply not appropriate for this type of misconduct. *Id.* at 47.

The court suspended Belz from the practice of law indefinitely, with leave to seek reinstatement in three years.

## 2. *Drugs and Alcohol*

### **In re Doyle**

978 So. 2d 904 (La. 2008) (per curiam)

Doyle was found to have converted client and third-party funds, to have settled cases without the approval of his clients, to have failed to communicate with clients, and to have neglected their legal matters. The Louisiana Supreme Court concluded that he had “knowingly and intentionally violated duties owed to his clients and as a professional, causing actual harm.” 978 So. 2d at 911. Under these circumstances, the baseline sanction was disbarment. However, there were mitigating circumstances:

The record indicates that in 1993, respondent realized he was suffering from a grave disability in the form of an addiction to drugs and alcohol. Respondent requested that this court transfer him to disability inactive status and he thereafter admitted himself to a long-term substance abuse treatment facility. Since being admitted to treatment, respondent has achieved and maintained sobriety. He has demonstrated a cooperative attitude during these proceedings and is remorseful for the harm caused by his addiction. Respondent also has an excellent reputation in the legal community and in the community at large, as evidenced by the compelling character testimony offered on his behalf before the hearing committee.

*Id.*

Although there was no definitive showing of a causal link between the chemical dependency and the misconduct, the hearing committee “accepted respondent’s belief that his chemical dependency was the cause in fact of the misconduct.” *Id.* at 909, footnote 3. The court imposed a three-year suspension.

### **In re Bertucci**

990 So. 2d 1275 (La. 2008) (per curiam)

On April 29, 2004, attorney Bertucci was detained by the Baton Rouge City Police Department after a traffic stop and found to be in unlawful possession of various drugs and drug paraphernalia. He was later diagnosed as “polysubstance dependent.” He obtained substance abuse

treatment, and entered into a contract with the Lawyers Assistance Program.

Bertucci was charged with a federal misdemeanor count of unlawful possession of controlled substances. He entered into a pre-trial diversion agreement, which provided that prosecution would be deferred for a period of eighteen months, subject to Bertucci's fulfillment of conditions set forth in the agreement, including successful completion of a drug rehabilitation program. He successfully completed the pre-trial diversion program.

In June of 2004, Bertucci notified the ODC of the circumstances surrounding the federal charges. In October, the Louisiana Supreme Court transferred him to disability inactive status pursuant to a joint petition filed by Bertucci and the ODC. He was reinstated to active status in January of 2006, based upon the parties' joint petition indicating that he had achieved "a large measure of success." 990 So. 2d at 1276. He was thereafter charged with violating Rule 8.4(b) (commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer).<sup>1</sup> He admitted the misconduct.

When the matter reached the Louisiana Supreme Court, it confirmed that Bertucci had violated the Rules of Professional Conduct as alleged in the formal charges. With respect to the sanction, the court stated:

Respondent's conduct was knowing and violated duties owed to the public. However, his conduct stemmed from substance dependence which he has worked to overcome. By all accounts, respondent's efforts have been successful thus far. Moreover, as the hearing committee pointed out, respondent's clients were not harmed by his wrongful conduct, and he has an unblemished record consisting of many years of practice as a competent and well respected criminal defense attorney.

Under the unique circumstances of this case, we conclude that the sanction recommended by the disciplinary board is appropriate. Accordingly, we will suspend respondent from the practice of law for two years. We will defer the suspension and place respondent on unsupervised probation for two years, subject to the conditions recommended by the hearing committee.

*Id.* at 1278.

## D. Judges

### 1. *Ex Parte Communications & Improper Statements*

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<sup>1</sup> He was also charged with violating Rule 8.4(a), which provides that it is professional misconduct to violate the Rules of Professional Conduct.

**In re Lee**

977 So. 2d 852 (La. 2008) (per curiam)

Lee got into trouble for some intemperate comments and for ex parte communication with a judge. During the course of some litigation over contested ownership of some stock, Lee obtained, from his client's son, a draft act of donation that purported to evidence the intent of the litigation opponent to divest herself of the stock. It was later determined that the document was the work product of opposing counsel and had been taken from her file without her knowledge or consent. Lee was told, by his client's son, that the document had come to him by mail, in an envelope that had no return address. Instead of asking for more information about the document, and instead of returning it to opposing counsel, Lee submitted the document to the judge as a supplemental exhibit after the close of evidence.

Later, the son gave Lee another document, which appeared to be a note from opposing counsel to his client and her husband urging them to destroy material evidence. The son told Lee that he had found the note in an envelope that had been stuck in the door of his office. Rather than challenging the son about the questionable circumstances relating to this note, Lee went directly to the judge, and, in an ex parte session, told the judge that the note appeared to implicate opposing counsel in an effort to destroy material evidence.

Subsequently, in open court, the judge announced that he would recuse himself from further participation in the case. After the judge left the courtroom, Lee was heard to say, in reference to the judge, "Dexter has no balls, he has no balls at all. That's his problem, he just has no balls." 977 So. 2d at 854.

In another case, before the same judge, opposing counsel filed a recusation motion. When the judge reviewed the motion, and said that he would sign it voluntarily, Lee told the judge that he had "little balls and when you get f\* \* \*ing big balls you let me know." *Id.* at 854. When the judge told Lee "that was enough," Lee replied, "I'll f\* \* \*ing decide when it's enough," and he left the conference room. *Id.* at 855.

The Louisiana Supreme Court said, of the Lee's behavior:

[T]he undisputed evidence establishes that respondent made extremely vile and insulting remarks to the trial court. Likewise ... the evidence supports the conclusion that respondent engaged in an ex parte communication with Judge Ryland when he discussed the "burn the tape" note with him. Although respondent suggests he made this communication in the good faith belief that he was disclosing another attorney's misconduct, the language of Rule 3.5(b) clearly and broadly prohibits all ex parte communication with a judge during the course of a proceeding. As the committee observed, there were procedures available to respondent for reporting

possible misconduct on the part of another attorney.  
*Id.* at 858.

The court observed that “[t]he common theme which runs through this proceeding is respondent’s lack of respect for the dignity, impartiality, and authority of the district court.” *Id.*

Lee was suspended for six months, most of which was deferred subject to the condition that Lee attend ethics school and obtain five extra hours of CLE in professionalism.

## 2. *Temper, Temper*

### **State v. Rogers**

2008 WL 4414699 (Tenn. Ct. App. 2008)

Contempt of court sanctions are sometimes imposed on attorneys who engage in inappropriate conduct, especially courtroom conduct. In this case, according to witnesses who were present in the courtroom, attorney Rogers engaged in inappropriate behavior immediately after Judge Hagler announced that the court was in recess. While the judge was leaving the courtroom, Rogers called out to the judge about a motion that he had noticed for hearing, but the judge indicated a desire to recess rather than hear it. When the judge turned his back, Rogers threw his file on the table, “flipped the bird” in the judge’s direction, and used the “F” word to express his opinion about the situation.

Although the judge himself did not observe Rogers’ conduct, others who were present in the courtroom did. Criminal contempt of court proceedings were initiated against Rogers. He was assessed a \$50 fine and a suspended 10-day jail sentence. Rogers admitted his misconduct, but he said that he had been ill on the day of the incident, that he had not intended to disrupt courtroom proceedings, and that he had intended to express the expletive to himself.

The court of appeals affirmed the contempt of court sanction. It said:

Such behavior by an officer of the court clearly offends the dignity and authority of the court, and can be said to embarrass the court in its administration of justice. Nor does the fact the Court called a recess and the Judge was leaving the bench when the conduct occurred, render the behavior excusable.

## 3. *Campaign Contributions*

### **In re LeBlanc**

972 So. 2d 315 (La. 2007) (per curiam)

LeBlanc had a Jones Act case before Judge Green. Following a bench trial, the judge awarded LeBlanc’s client \$1.5 million in damages. Subsequently, Judge Green telephoned LeBlanc several times to ask him to make a contribution to the campaign of his niece, Jalila Jefferson, who

was running for a seat in the Louisiana House of Representatives. LeBlanc eventually stopped by Judge Green's office and gave him an envelope containing \$800 in cash, which he intended to be a contribution to Jefferson's campaign. The exchange of cash, and the conversation between LeBlanc and Judge Green, were recorded on videotape by the FBI. Upon Judge Green's request, LeBlanc later made a second contribution, in the amount of \$1000. This contribution came in the form of a check from LeBlanc's law firm.

Judge Green was eventually convicted in federal court on bribery and mail fraud charges. He resigned his judicial office and permanently resigned from the practice of law. LeBlanc was charged with violating Rule 8.4 of the Rules of Professional Conduct, by engaging in conduct prejudicial to the administration of justice and by knowingly assisting a judge in conduct that violates the Code of Judicial Conduct. Judge Green was subject to the provisions of Canon 7(A)(1)(d) of the Code of Judicial Conduct, which states that a judge shall not "solicit funds for, pay an assessment to, or make a contribution to a political organization or candidate or purchase tickets for political party dinners or other campaign functions."

LeBlanc answered the formal charges and generally admitted the factual allegations. However, he pointed out

that Judge Green's request for a campaign contribution was made more than six months after the entry of judgment in the Jones Act case ..., and that at no time did Judge Green "suggest, infer, or intimate any relationship between the decision entered in September 2001 and the request for a campaign contribution for his niece." Respondent also admitted that in retrospect, he should not have assisted Judge Green in conduct that violated the Code of Judicial Conduct; however, he stated that he "was not mindful of the prohibition" at the time he made the campaign contribution. Respondent maintained that his "lapse was unintentional and in no way consciously made."

972 So. 2d at 317.

But he also generally admitted the rule violations. In considering the disciplinary matter involving LeBlanc, the Louisiana Supreme Court observed that "much of this case turns on respondent's subjective intent." *Id.* at 320, footnote 7. The hearing committee had concluded that LeBlanc "was credible when he testified he had no intent to offer a bribe ... or influence the outcome of the case in any way, and that his actions were negligent rather than intentional." *Id.* The court could not say that this determination was clearly wrong. LeBlanc had also claimed that he had been unaware of the judicial conduct rule, but the hearing committee did not believe that. In the end, the Louisiana Supreme Court noted that "[a]ssisting a judge in a violation of the Code of Judicial Conduct is very

serious misconduct by a lawyer.” *Id.* at 315. It imposed a year and a day suspension from the practice of law. Two justices dissented, on the ground that the period of suspension was too long.

#### **E. The No Contact Rule**

##### **Louisiana State Bar Association Rules of Professional Conduct Committee**

Opinion 07-RPCC-014 (10/12/07)

The ethics committee considered whether a lawyer could provide a second opinion to a person already represented by counsel in a matter without first obtaining the consent of the already-employed lawyer. The question related to Rule 4.2 which prohibits a lawyer from communicating about the subject matter of representation with a person known to be represented by counsel, without that lawyer’s consent.

The committee observed that many lawyers have come to believe that Rule 4.2 prohibits contact of any kind with any person who has a lawyer. But it said that that is not the case. The committee said that if a lawyer already represents a client in connection with a matter, the rule prohibits the already affiliated lawyer from communicating about the subject matter of the representation with someone known to be represented by another lawyer in the same matter, unless an exception (such as consent by the opposing lawyer) applies.

In the corporate context, the committee said that the rule prohibits a lawyer who already represents a client in a matter from communicating about the subject of the representation with anyone whom the lawyer knows is a constituent of an organization already represented by counsel, if the constituent supervises, directs, or regularly consults with the organization’s lawyer about the matter or has authority to obligate the organization in the matter, or if the constituent’s act or omission in connection with the matter may be imputed to the organization for liability purposes.

If these situations do not apply, Rule 4.2 is not triggered. In particular, the committee said that the rule does not prohibit a lawyer who does not already represent a client in connection with a matter from giving a second opinion to a represented person. At least in this context, said the committee, Rule 4.2 is not an “anti-poaching” rule.

#### **F. Belligerence**

##### **In re Thomas**

976 So. 2d 1245 (La. 2004) (per curiam)

Thomas was charged with several violations of the Rules of Professional Conduct. In one case, in which he represented the plaintiffs in a medical malpractice action, Thomas became involved in a heated discussion with opposing counsel (Vezina) in the anteroom of a judge’s chambers. According to the findings of the hearing committee, Thomas “made

physical contact with Mr. Vezina and pressed Mr. Vezina against the wall with his chest, placed his hands on Mr. Vezina's chest, directed abusive language at Mr. Vezina, and physically and verbally threatened Mr. Vezina." 976 So. 2d at 1254. Thomas argued, before the Louisiana Supreme Court, that his conduct had not amounted to a battery. But this was of "no moment," said the court. It said: "For purposes of this disciplinary proceeding, it suffices to say his actions were intended to disrupt a tribunal and were prejudicial to the administration of justice." *Id.*<sup>2</sup>

In another case, Thomas appeared over an hour late to a trial before an administrative law judge. When he did appear, Thomas "made no comment about his tardiness, nor did he apologize to the court, his clients, or opposing counsel. When questioned by the court about his tardiness, respondent answered in a belligerent manner." *Id.* at 1248. Thomas was also unprepared, demonstrated a lack of familiarity with the procedural rules, and acted in a rude and arrogant fashion toward the judge. The Louisiana Supreme Court found his abusive language and lack of preparation to be "shocking." For these, and other, instances of misconduct, Thomas received a three-year suspension from the practice of law.

## **G. Conflicts of Interest**

### *1. Settlement of Malpractice Case*

#### **In re Petal**

972 So. 2d 1138 (La. 2008) (per curiam)

Petal was charged with several acts of misconduct, including failing to comply with mandatory CLE requirements, charging a non-refundable legal fee, and improperly attempting to settle his own malpractice liability to a client. With respect to the latter claim, Petal sent a letter to his client in which he proposed to settle any liability he had to her for \$25,000. He did not, in the letter, advise his client that she had the right to seek the advice of independent legal counsel in connection with the settlement, as required by Rule 1.8(h). Petal was suspended for nine months.

### *2. Terms of Settlement*

#### **The Florida Bar v. Rodriguez**

959 So. 2d 150 (Fla. 2007) (per curiam)

The Friedman law firm represented 20 clients in a suit against DuPont, for damages arising out of the use of a fungicide called Benlate. In the course of representing one of its clients, the firm discovered that DuPont had concealed its testing of Benlate in Costa Rica. The test plants in Costa Rica exhibited significant damage. DuPont ordered the plants to be destroyed. The firm subsequently filed a motion to strike DuPont's pleadings in the case, which the court referred to as the Tree Farm case. The

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<sup>2</sup> The court said that such conduct violated Rules 3.5(c) and 8.4(d).

trial court judge orally ruled that she would enter an order striking DuPont's pleadings. After the judge made this ruling, DuPont approached the law firm to try to settle the Tree Farm case, as well as the other Benlate cases the firm was handling.

DuPont's attorney negotiated with Rodriguez and another attorney at the firm. Rodriguez learned that DuPont was requesting, as a condition of settlement, a restriction on the firm's right to practice. The firm engaged in research to determine whether it was ethical to enter into such an agreement. The firm's researcher informed Rodriguez that the law was unclear, but that it appeared that DuPont's objective could be achieved by hiring the firm after the firm finished representing the twenty Benlate clients.

Settlement negotiations continued, and DuPont eventually agreed to settle the cases for \$59 million, if the firm would restrict its right to practice. DuPont agreed to pay the firm \$6,445,000 in exchange for the firm's agreement not to pursue future claims against DuPont and for the firm to possibly perform future work for DuPont on an hourly basis. The firm agreed to recommend the settlement to its clients. The court described the next events as follows:

On August 8, 1996, the parties appeared before the trial judge and announced that a settlement for the Benlate clients had been reached and requested that the judge vacate and seal the order striking DuPont's pleadings. The parties did not inform the judge about the engagement agreement. Also, because all but two of the Benlate clients had the right to accept or reject the settlement, DuPont insisted that the clients only be told the amount that they were being offered to settle their respective cases. DuPont further insisted that the clients keep the amount they received confidential. To enforce these conditions, ten percent of the settlement amounts were to be held in escrow for two years and, should any breach of confidentiality occur, approximately \$6,000,000 of the clients' settlement monies would be lost. Rodriguez never told the clients about the engagement agreement.

After the terms of the settlement and engagement agreements were agreed upon [one of the firm's attorneys] traveled around the state to meet with clients and convince them to accept DuPont's settlement agreement. [He] told the clients that if they did not accept the settlement offer, the firm would no longer represent them. On August 12, 1996, the firm received \$6,445,000. Thereafter, on August 16, 1996, the firm received \$59,000,000 from DuPont. When one client refused to settle, Rodriguez filed a motion to withdraw representation .... At the hearing on this motion, Rodriguez did not tell the judge about the engagement agreement.



... [N]o clients, other than Davis Tree Farm, were made aware of the engagement agreement.

959 So. 2d at 155-56.

Subsequently, based on the complaint of one of the Benlate plaintiffs, the Florida Bar conducted an investigation into allegations that the firm did not adequately explain the settlement agreement to its clients, and that a possible conflict of interest had occurred. The matter eventually came before the Florida Supreme Court. The court concluded that the settlement arrangements had run afoul of Florida Rule 4-5.6(b), which deals with restrictions on the right to practice. It states:

A lawyer shall not participate in offering or making ...

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.

The court said that “[a]ttorneys who engage in such engagement agreements receive severe sanctions.” *Id.* at 161.

But this was not all. The court also said:

Rodriguez ... engaged in extremely serious misdeeds. He was scheduled to serve as first chair if any of the Benlate cases went to trial and he was responsible for the significant hearings. Yet to satisfy his own greed, he engaged in actions that directly conflicted with the interests of his clients. He became an agent for DuPont while still representing his Benlate clients against DuPont. In fact, due to the funds that were held in escrow to prevent any breach of confidentiality, the firm represented the Benlate plaintiffs as a fiduciary (the escrow agent) for two years after signing the engagement agreement. Thus, Rodriguez was representing adverse interests because he was on retainer to DuPont during that two-year period.

*Id.* at 160.

The court ordered a two year suspension and a disgorgement of fees. It also remanded for a determination of the amount to be disgorged. In other disciplinary cases, other lawyers in the firm were also sanctioned for their conduct in connection with the settlements. One of them was disbarred.

### 3. *Death Threats*

#### **State v. Robinson**

179 P.3d 1254 (N.M. Ct. App. 2008)

Robinson was tried on criminal charges involving sexual conduct with a minor. The trial resulted in hung jury. Before the state could retry Robinson, he was indicted for solicitation to commit first degree murder of, among other victims, one of the two attorneys who had prosecuted his original trial. He entered into a plea agreement related to these charges,

in which he pleaded guilty to two counts of criminal solicitation to commit aggravated battery. Based upon a motion by Robinson, the district court ruled that Robinson had demonstrated an appearance of impropriety in the continued prosecution of the present case by either assistant district attorney and it disqualified the entire district attorney's office from retrying him.

On appeal, the court considered whether a criminal defendant could create a disqualifying conflict of interest by threatening to have one of the prosecutors murdered. The argument was stated in the following way:

Defendant maintains that ADA Berenson had a personal interest — in her continued health and safety — in prosecuting Defendant, which conflicted with her professional obligation to represent public justice. Defendant argues that ADA Trabaudo's extensive involvement with ADA Berenson and the solicitation charge means that Trabaudo also had a disqualifying interest that should prohibit her from prosecuting Defendant. Defendant further argues that the Second Judicial DA's Office did not have adequate screening mechanisms in place to shield the Office from the disqualifying interest to dissipate the appearance of impropriety.

179 P.3d at 1257.

Prosecutors have a special role in our system of justice. They have the “distinctive role of disinterested and impartial public advocates.” *Id.* at 1258. As a general proposition, noted the court, prosecutors should be disqualified from participating in state criminal prosecutions where they are victims of the crime being prosecuted, because they will have improper personal interests in securing a conviction. On the other hand, the court observed: “When a prosecutor is victimized by other actions for which the defendant is separately prosecuted, ... courts have held that the prosecutor does not have a conflict of interest .... Many courts have specifically observed that threats on the life of a prosecutor from a criminal defendant will not cause a disqualifying interest in the prosecution of a different offense.” *Id.* at 1260.

This was the result in the case involving Robinson:

We recognize that the district court supported its ruling to disqualify ADA Trabaudo and the entire Second Judicial DA's Office by reference to the concern of all those in the DA's Office about keeping Defendant in custody while he was awaiting retrial, due to his solicitation charge against one of their prosecutors. However, Defendant's alleged solicitation and his conviction for two counts of criminal solicitation to commit aggravated battery indicate that he poses a danger to the public, to any substituting prosecutor from any district, and to the witnesses in this case, whom he had also threatened. Furthermore, neither Defendant nor the district court describe how

the DA's Office attempted to keep Defendant incarcerated and why it was improper. For these reasons, we are not persuaded that ADA Trabaudo's or the other ADAs' desires for Defendant to remain in custody is evidence of improper interest or bias.

*Id.* at 1261.

#### 4. *Migratory Paralegals*

##### **T.S.L. v. G.L.**

976 So. 2d 793 (La. Ct. App. 3d Cir. 2008)

One issue that has come up in several jurisdictions is the extent to which the concept of "imputed disqualification" applies when a secretary or a paralegal obtained material confidential information about the opponent's case on account of previous employment. The Rules of Professional Conduct do not address the issue directly; however a comment to the ABA Model Rules of Professional Conduct states the following:

The rule in paragraph (a) [which is the imputed disqualification rule] does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a non-lawyer, such as a paralegal or legal secretary.

*Model Rules of Professional Conduct*, Rule 1.10, comment [4].

The issue came up in this case. The trial court had denied a motion to disqualify a lawyer based on the "conflict" of her paralegal. The court of appeal reversed, reasoning as follows:

We find that the trial court abused its discretion in denying relator's motion to disqualify counsel. A lawyer is responsible for the conduct of their nonlawyer employees, and the lawyer "having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer." La. Rules Prof. Conduct Rule 5.3. Without informed, written consent, a lawyer is prohibited from representing a person in the same or substantially related matter in which a firm with which the lawyer was previously associated represented a client with materially adverse interests from the person or "about whom the lawyer had acquired information protected by Rules 1.6 and 1.9( c ) that is material to the matter." La. Rules Prof. Conduct Rule 1.9(b). Here, a paralegal employed by the attorney for respondent had prior access to relator's privileged information while working for relator's former counsel. Therefore, because respondent's counsel is responsible for the conduct of her employees and because her paralegal has a direct conflict of interest in this case, this conflict disqualifies her from representing respondent. Therefore, we reverse, set aside, and vacate the trial court's ruling. We remand this matter to the trial court for further action in accordance with this ruling.

976 So. 2d at 793-94.

## **5. Former Clients**

### **Styles v. Mumbert**

79 Cal. Rptr. 3d 880 (Cal. Ct. App. 2008)

Delia Styles obtained a default judgment of \$730,000 against Edward Mumbert, a bail agent. Mumbert appealed from this judgment. He also sued the attorney who represented him in the action, Anthony Pagkas, for malpractice. While the appeal was pending, Styles assigned to Pagkas her interest in the default judgment. Pagkas then moved to substitute himself in place of Styles in the appeal from the default judgment. Pagkas wished to do this in order to “offset” any future malpractice award against him.

The court of appeals was not pleased with the motion for substitution. It noted that Pagkas had been Mumbert’s attorney in the very matter in which Pagkas was now seeking substitution. It stated:

Few precepts are more firmly entrenched than the fiduciary nature of the attorney-client relationship, which must be of the highest character. So fundamental is this precept that an attorney continues to owe a former client a fiduciary duty even after the termination of the relationship. For example, an attorney is forever forbidden from using, against the former client, any information acquired during such relationship, or from acting in a way which will injure the former client in matters involving such former representation. These duties continue after the termination of the relationship in order to protect the sanctity of the confidential relationship between and attorney and client.

Therefore, even though Pagkas no longer represents Mumbert, he continues to owe Mumbert the duty to protect their prior confidential relationship.

70 Cal. Rptr. at 883 (citations omitted).

The court observed that Pagkas could use confidential information to defend himself in the malpractice action. However, the case in which he sought to be substituted was not the malpractice case. The court denied Pagkas motion for substitution, and stated:

Pagkas's actions make a mockery of the Rules of Professional Conduct. We cannot conceive of, and the case law is devoid of, a scenario which could do more violence to the attorney-client relationship and the public trust in the legal system, than what Pagkas and his firm have done and seeks to do. Despite the well founded opposition to the motion, citing to the relevant Rules of Professional Conduct and supporting case law, Pagkas and his attorney continue to urge that we grant the motion without cogent argument or cite to relevant supporting authority. Under these circumstances, sanctions are appropriate. Sanctions are awarded in the amount of \$5,260 to

appellant Mumbert against Pagkas and his attorney.  
*Id.* at 885.

#### 6. *In-House Advice*

Law firms sometimes designate in-house lawyers to advise them concerning legal and ethical obligations. There is some authority for the proposition that communications between a firm lawyer and the firm's in-house ethics or malpractice expert may not be privileged against the client because the consultation involves a conflict of interest. *See, e.g., Koen Book Distributors v. Powell, Trachtman, Logan, Carrie, Bowman & Lombardo*, 212 F.R.D. 283 (E.D. Pa. 2002). The idea is that the interests of the firm and the interests of the client diverge in situations where the lawyer gets advice about a professional responsibility issue relating to the client. For example, the lawyer might seek advice regarding the handling of a potential malpractice claim by the client.

A New York ethics committee took a different approach. New York State Bar Association Committee on Professional Ethics Opinion 789 (2005). The committee thought that it would be impractical to require the firm to use outside counsel whenever a professional responsibility issue arises. It regarded the lawyer's interest in carrying out ethical obligations as inherent in the representation itself, rather than an extraneous interest affecting the lawyer's professional judgment. The committee also thought that, even though the in-house lawyer represents the firm, he or she did not necessarily represent interests differing from those of clients. Nor did the committee think that the law firm needed to tell the client that such a consultation had occurred. In some cases, though, the firm might owe the client a duty to inform the client about the conclusions that result from the advice. An example would be when the firm concludes that the client may have a malpractice claim against it.

There have been some other developments related to this issue.

#### **ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 08-453 (2008)**

In this opinion, the ABA ethics committee considered several issues arising from a lawyer's consultation with the firm's in-house ethics counsel. Initially, it observed that, unless a client has expressly directed that information be confined to specific lawyers in the firm, it would not violate the Rule 1.6 duty of confidentiality to consult with another lawyer in the firm about the client's matter. The committee also thought that the duty of communication, arising under Rule 1.4, generally would not require the lawyer to inform the client about the ethics consultation. But a duty to communicate the conclusion of the consultation could arise in some cases. An example would be when the conclusion is that the lawyer should not assist a client's proposed course of action.

On the conflicts of interest question, the committee took the position that the in-house consultation does not involve a per se conflict of interest. The existence of a conflict would depend on the nature of the consultation and the interests of the firm and the client. The committee noted that there was a difference between a discussion focused on helping the lawyer conform to applicable ethics standards and a discussion focused on protecting the interests of the lawyer or the firm. In particular, if the consultation is about a professional lapse that has already occurred, and the primary intent is to protect the interests of the lawyer or the firm, there could be a significant risk that the lawyer's representation of the client will be materially limited by a conflicting interest.

The committee also expressed the view that, in general, the in-house ethics counsel represented the firm itself, as opposed to individual lawyers in the firm. Applying Rule 1.13 to this situation, the committee noted that the in-house ethics counsel could also represent a "constituent" of the firm (one of the firm's lawyers), but not if the lawyer who seeks the consultation has been engaged in misconduct. In that situation, thought the committee, the interests of the firm and the individual lawyer would be adverse.<sup>3</sup>

**Asset Funding Group, LLC v. Adams & Reese, LLP**  
2008 WL 4948835 (E.D. La. 2008)

In what the federal district court described as a case of first impression in Louisiana, the court evaluated a claim by the Adams & Reese law firm that a number of communications between Adams & Reese attorneys and the firm's in-house counsel were protected by the attorney-client privilege against discovery by Asset Funding Group, a client of the firm. Quoting from *Cacamo v. Liberty Mutual Fire Ins. Co.*, 789 So. 2d 1210 (La. Ct. App. 4 Cir. 2001), the court said:

To establish attorney-client privilege, several elements must be proven: (1) the holder of the privilege is or sought to become a client; (2) the communication was made to an attorney or his subordinate in a professional capacity; (3) the communication was made outside the presence of strangers; (4) the communication was made to obtain a legal opinion or services; and (5) the privilege has not been waived. It is the defendant's burden to prove the applicability of the privilege.

Slip Op. at 1.

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<sup>3</sup> Rule 1.13(g) of the Louisiana Rules of Professional Conduct provides:

A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Rule 1.7 is the basic conflict of interest rule.

Relying on the *Upjohn* case,<sup>4</sup> the court stated that the attorney-client relationship at issue in the law firm context was analogous to that between a corporation and its in house corporate counsel. And it noted that communications by corporate directors, officers or employees to in-house corporate counsel for the purpose of obtaining legal advice for the corporation may be protected by the attorney-client privilege.

The court referred to several cases in which law firms were permitted to receive the benefit of the attorney-client privilege. However, it then stated:

While the cases that [Adams & Reese] relies on recognize the attorney-client privilege for intra-firm communications, none of these cases addressed whether the privilege can be asserted against the firm's current client.... Asserting the privilege against a current client seems to create an inherent conflict against that client.  
Slip Op. at 2.

The court also referred to the *Koen Book* case, which is referenced in the background portion of this section of the outline. The court further stated:

A law firm's communication with in-house counsel is not protected by the attorney-client privilege if the communication implicates or creates a conflict between the law firm's fiduciary duties to itself and its duties to the client seeking to discover the communications. Following the reasoning in *Sunrise*,<sup>5</sup> Adams & Reese's communication with in-house counsel is not protected by the attorney-client relationship because it creates a conflict between the law firm's fiduciary duties to itself and its duties to Asset.

In the instant case, the documents and communications listed in the privilege log which are related to the conflicts were created pursuant to conversations between [Adams & Reese's] attorneys while [Adams & Reese] represented Asset. Adams & Reese owed a fiduciary duty at that time to Asset.

In-house counsel privilege should exist in Louisiana but is not relevant to the instant case. Therefore, Asset is entitled to discovery of the documents in defendant's privilege log.  
Slip Op. at 4.

The court also rejected claims that the documents were protected under Rule 1.6 of the Rules of Professional Conduct – the confidentiality rule – or the work product doctrine.

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<sup>4</sup> *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981).

<sup>5</sup> *In re Sunrise Securities Litigation*, 130 F.R.D. 560 (E.D. Pa. 1989).

## H. Sex with Clients

### **Pierce v. Cook**

992 So. 2d 612 (Miss. 2008)

Mr. and Mrs. Cook hired attorney Pierce to represent them and their son in a medical malpractice case. The couple separated a couple of years later. About a month after the separation, Pierce and Mrs. Cook began an affair. Mr. Cook learned of this. Pierce was fired from the medical malpractice case. Mr. Cook obtained a divorce from his wife on the ground of adultery. Pierce and the former Mrs. Cook later married.

Following the divorce, Mr. Cook sued Pierce. The jury awarded Mr. Cook \$300,000 on an alienation of affection claim, \$200,000 on a breach of contract claim, and \$1 million on a claim for intentional infliction of emotional distress. Pierce appealed. One of his claims was that the breach of contract claim was really a malpractice claim, which needed to be supported by expert testimony, and was not. The Mississippi Supreme Court rejected this claim:

In the end, we find that it is of no moment as to whether Cook's claim was one of legal malpractice or breach of contract. Even assuming *arguendo* that Cook asserted a claim for legal malpractice, Cook still was not required to provide expert testimony to support his claim. Clearly, based on the facts of this case, Cook did not need an expert to testify as to the standard of care owed by an attorney to his client. Ordinary jurors possess the requisite knowledge and lay expertise to determine if an adulterous affair between an attorney and his client's wife is a breach of a duty owed by an attorney to his client. Expert testimony would not lend guidance under this circumstance.

992 So. 2d at 618.

Pierce made other arguments on appeal as well, including an argument that the intentional infliction claim was time-barred, but the court rejected the arguments and affirmed the result at trial.

### **In re Ryland**

985 So. 2d 71 (La. 2008) (*per curiam*)

Attorney Ryland represented Gremillion in her divorce and related matters. During the course of the representation, Ryland and Gremillion began to become attracted to each other. The day after the judge signed a divorce decree and a judgment regarding child custody and support, leaving only a partition of the community property to be determined, Ryland and Gremillion entered into a consensual sexual relationship. The affair ended after a number of months. When it ended, Ryland withdrew from the representation. Ryland reported himself to the ODC. Two weeks later, Gremillion filed a complaint with the ODC concerning his conduct. The ODC filed a charge alleging that the conduct violated Rule 1.7(a)(2),



dealing with conflicts of interest, and 8.4(a), which states that it is misconduct to violate one of the Rules of Professional Conduct. Ryland admitted that his conduct had violated the Rules of Professional Conduct.

The Louisiana Supreme Court concluded that Ryland had violated the rules as charged, “by engaging in a consensual sexual relationship with a client whom he was representing in a divorce matter.” 985 So. 2d at 73-74. It also said that “[t]his conduct had the potential to cause harm to respondent's client, but as the committee and board found, little or no actual harm resulted in this case.” *Id.* at 74.

In considering the sanction, the court described how it had addressed the matter of sexual relationships between lawyers and clients. The first case was *In re Ashy*, 721 So. 2d 859 (La. 1998).

In *Ashy*, the lawyer falsely advised his female client that she might be the subject of a criminal investigation. During a meeting with the client, Ashy told her that she was “very attractive,” asked if she “minded” if he “hit on her,” and kissed her without her consent. At a later meeting, Ashy told the client that he wanted to have a sexual relationship with her. He kissed her, touched her breast and buttocks, and placed her hand on his crotch. He also gave her some money to buy lingerie and a dress to wear to his office. Ashy told the client that if she did not sleep with him he would do what he could to help her, but he couldn't guarantee results; however, if she did sleep with him, “everything would disappear.” The client eventually learned that no warrant was going to be issued for her arrest and filed a complaint against Ashy with the ODC.

We subsequently determined that Ashy's conduct violated Rule 2.1, because his sexual overtures to his client threatened his ability to exercise independent professional judgment and render candid advice. Likewise, we identified a violation of the conflict of interest provisions in Rule 1.7, as Ashy placed his own interests ahead of his client's interests by refusing to put forth his best efforts unless the client responded to him sexually. After conducting a detailed analysis of the jurisprudence in other states, we found a wide range of sanctions have been imposed in similar cases of sexual misconduct, ranging from public reprimands to disbarment. We concluded that the appropriate sanction for Ashy's misconduct was a two-year suspension.

*Id.* at 74.

The court next discussed its opinions in *In re Schambach*, 726 So. 2d 892 (La. 1999); *In re Touchet*, 753 So. 2d 820 (La. 2000); and *In re Gore*, 752 So. 2d 853 (La. 2000):

Following *Ashy*, we had little trouble imposing significant sanctions in cases in which the lawyer's sexual relationship with a client caused actual harm. In *In re: Schambach*, 98-2432 (La.1/29/99), 726

So.2d 892, the attorney was suspended for three years for using a consensual sexual relationship to obtain more than \$40,000 from his client, which he refused to repay and later discharged in bankruptcy. In *In re: Touchet*, 99-3125 (La.2/4/00), 753 So.2d 820, the attorney was disbarred for making unwanted sexual demands on six female clients and soliciting sexual favors in lieu of legal fees.

In 2000, we were confronted for the first time with the case of a mutually consensual lawyer-client relationship. In *In re: Gore*, 99-3213 (La.1/28/00), 752 So.2d 853, the lawyer began a consensual sexual relationship with a female client whom he represented in a variety of business matters. While the sexual relationship was ongoing, Gore represented the client in connection with her divorce from her husband. Before filing the divorce pleadings, Gore failed to investigate his client's representation that she and her husband had lived separate and apart for more than six months; in fact, the couple still lived together. Considering the conflict of interest issue, we distinguished *Ashy* and *Schambach*, *supra*, on the ground that Gore had not attempted to use his position as attorney to coerce sex or money from the client. Nonetheless, we expressed concern that "the relationship had the potential to create a conflict of interest, especially in light of the fact that [Gore] was representing [the client] in connection with a divorce proceeding." We accepted a petition for consent discipline and imposed a six-month suspension, followed by two years of supervised probation.

*Id.* at 74-75.

The most recent case that the court discussed was *In re DeFrancesch*, 877 So. 2d 71 (La. 2004):

More recently, we considered a case which in some respects was similar to both *Gore* and *Ashy*. In *In re: DeFrancesch*, 04-0289 (La.7/2/04), 877 So.2d 71, the lawyer had a prior sexual relationship with a woman whom he later agreed to represent in a criminal case. The fee for the representation was \$2,000, which the client was supposed to pay in weekly installments. On one occasion when the client failed to pay her installment, DeFrancesch proposed that she accompany him to Mississippi for a sexual rendezvous as a "punishment" for failing to pay timely. DeFrancesch later analogized his demand for sex "as a penalty fee, like, [on a] Discover card." When the client balked at the demand, DeFrancesch assured her that so long as she paid her fee installments on time each week thereafter, "this will never happen again, okay. But, if you miss, then that's the punishment, that's the late fee, ..." Ultimately, DeFrancesch and the client did not engage in sexual relations, as DeFrancesch told the client that there was "no sense aggravating everybody over this." At

the client's request, DeFrancesch subsequently appeared in court when she entered a guilty plea in her criminal case.

We noted that as in *Gore*, DeFrancesch and the client had a prior consensual sexual relationship, although the relationship had terminated by the time DeFrancesch made the "sex as a penalty" demand. As in *Ashy*, there was an element of coercion in DeFrancesch's implied threat that he might cease to represent the client if she did not submit to the "sex as a penalty" arrangement; however, unlike *Ashy*, DeFrancesch never threatened to limit his efforts on his client's behalf if she refused to engage in a sexual relationship with him. Indeed, we pointed out that DeFrancesch ultimately withdrew his request for sex and continued to represent the client in her criminal case until it was concluded to her satisfaction. We continued:

Nonetheless, as we observed in *Ashy*, the particular evil that results from a lawyer's sexual relationship with a client is the loss of emotional detachment which in turn threatens the objectivity and reasonableness that form the basis of the lawyer's independent professional judgment. *Ashy*, 98-0662 at p. 15, 721 So.2d at 867 (quoting Annotations to Model Rule 2.1). The potential for harm which results whenever a lawyer allows his personal interests to conflict with his client's interests is so great that **any such violation must be viewed as being very serious, even if actual harm is not readily identifiable**. The baseline sanction for this misconduct is a suspension from the practice of law. [Emphasis added.]

Considering all the circumstances, we suspended DeFrancesch for two years, with all but one year and one day deferred.

*Id.* at 75-76.

Applying the teachings of these cases to the present one, the court reached a conclusion about the sanction:

Based upon this jurisprudence, we find that the fully deferred suspension recommended in this matter is appropriate. Like the respondent in *Gore*, respondent did not cause actual harm to his client as a result of their sexual relationship, nor did he threaten to limit his efforts on her behalf unless she agreed to the sexual relationship. However, this case does not involve the additional misconduct seen in *Gore*, and thus does not warrant the period of actual suspension we imposed in that case. Accordingly, we will adopt the disciplinary board's recommendation and suspend respondent from the practice of law for ninety days, fully deferred with the conditions recommended by the board.

*Id.* at 76.

## **I. Office Space**

### **Louisiana State Bar Association Rules of Professional Conduct Committee**

#### **Opinion RPCC-017 (2008)**

In this opinion, the ethics committee said that lawyers are not forbidden from sharing office space with nonlawyers. However, a lawyer who chooses to do this should watch out for some problem areas. The committee observed that a nonlawyer might offer office space to a lawyer with the expectation of getting something other than rent in return. The nonlawyer may wish to use the lawyer's services to enhance his or her own products or services. Or the nonlawyer may wish to market the lawyer's services for a profit. By way of example, the committee mentioned that the nonlawyer might desire to sell business entity formation packages that would be completed by the lawyer.

The risks of sharing space with a nonlawyer include: disclosing information to the nonlawyer in violation of the duty of confidentiality; entering into prohibited fee sharing arrangements with a nonlawyer; assisting a nonlawyer in the unauthorized practice of law; breaching the prohibition against paying someone for client referrals; and undertaking legal work for the nonlawyer without satisfying, where applicable, the rule limiting lawyer business transactions with clients.

## **J. Attorney-Client Privilege**

### **1. Email**

#### **Scott v. Beth Israel Medical Center Inc. 847 N.Y.S. 2d 436 (Sup. Ct. 2007)**

This was a case in which a physician, Scott, sued Beth Israel Medical Center, claiming that he had been terminated without cause and that, pursuant to an agreement, the medical center owed him \$14,000,000 in severance pay. The medical center claimed that he had been terminated for cause and that it did not owe the money.

During the litigation, the attorneys for the medical center notified Scott's lawyers that the medical center had possession of email correspondence between Scott and his lawyers. They said that no one had yet read the email correspondence, but that the medical center believed that any privilege associated with the communications had been lost as a result of Scott's use of the medical center's email system.

The email messages were written using Scott's email address at the medical center and were sent over the medical center's server. The medical center's email policy stated that the email system "should be used for business purposes only." Moreover, it stated that

[a]ll information and documents created, received, saved or sent on the Medical Center's computer or communications systems are of the Medical Center. Employees have no personal privacy right in

any material created, received, saved or sent using Medical Center communication or computer systems. The Medical Center reserves the right to access and disclose such material at any time without prior notice.

847 N.Y.S.2d at 439.

In light of this policy, the court concluded that the email messages were not made in confidence and therefore they were not covered by the attorney-client privilege. It stated:

[T]he effect of an employer e-mail policy, such as that of BI, is to have the employer looking over your shoulder each time you send an e-mail. In other words, the otherwise privileged communication between Dr. Scott and PW would not have been made in confidence because of the BI policy.

*Id.* at 440.

The law firm had included a statement on email messages it sent that provided that the messages may be confidential and that the law firm should be notified if anyone other than the intended recipient received it. But the court concluded that this notice did not prevent waiver of the privilege. Such a notice, said the court “cannot create a right to confidentiality out of whole cloth.” *Id.* at 444.

## 2. Document Production

### **Sitterson v. Evergreen School Dist. No. 114**

196 P.3d 735 (Wash. Ct. App. 2008)

The Evergreen School District hired David B. Sitterson as a financial adviser to help it raise money by selling bonds. Six months before issuing \$59 million in bonds, the District attempted to terminate Sitterson's contract in order to avoid paying his commission of \$111,250. Sitterson sued the District, and the jury awarded him \$151,000.

One of the issues on appeal concerned the attorney-client privilege. About a month after filing his complaint, Sitterson served the District with a request for production of documents. The District provided approximately 439 pages of documents in response, including four confidential letters between the District and its attorney, Brian Wolfe. The letters concerned the prospective or pending litigation with Sitterson.

Three years later, and 10 days before the trial date, Sitterson sent copies of his proposed exhibits to the District. The copies included the four letters, now identified as exhibits 55, 59, 62, and 64. The District objected to admission of those exhibits on the first day of trial, arguing that they were protected by the attorney-client privilege. Wolfe, still representing the District, explained:

I suspect that we - we provided them to Mr. Turner in the discovery because, you know, you have - you're supposed to provide everything that may lead to admissible evidence. But just because you

provide it doesn't mean that it is admissible evidence.  
196 P.3d at 738.

Sitterson responded that the District had waived the privilege when it produced the documents. The trial court asked Wolfe, “[W]hat role did you have in the release of these documents? I mean, did they not go through you[?]” *Id.* Wolfe responded, “They did. And I just didn’t - I guess I wasn’t thorough enough.” *Id.* The court denied the District’s motion to exclude.

The letters included some sensitive information. For example, in one of the letters, Wolfe commented on the District’s position that a person named Sally Bosckis did not have the authority to offer a two-year contract renewal to Sitterson. He said that a contract renewal letter from Bosckis was “our weak link,” because if Sitterson had worked in reliance on the letter’s renewal for two years, “the district’s position would not pass the smell test.” *Id.*

On appeal, the District argued that it had not waived the attorney-client privilege by producing the four letters in response to Sitterson’s discovery request. The issue was whether an inadvertent disclosure waives the privilege. The District argued that an inadvertent disclosure of privileged documents never results in waiver. Sitterson argued that the court should adopt a “balanced approach” to inadvertent disclosure in which the court considers several factors.

On the question as to who can waive the privilege, the court agreed that the privilege was the client’s, but it said that “an attorney can waive the privilege if he or she is authorized to speak and act for the client on particular matters and discloses privileged material within the scope of that authority.” *Id.* at 739. Here, Wolfe had acted within the scope of his authority when he produced the letters. The court noted that many

courts have expressed concern that the “enormous quantities of documents ... sought by an opponent through discovery” in modern litigation creates an impossible burden on attorneys to attempt to avoid inadvertent disclosure, the consequences of which are “potentially staggering.” ... Commentators have noted that “[u]nder current conditions, some privileged material is likely to pass through even the most tightly woven screen.” ...

*Id.* at 740.

With respect to the test for waiver, the court referred with approval to *Alldread v. City of Grenada*, 988 F.2d 1425 (5<sup>th</sup> Cir. 1993), in which a federal appellate court

adopted a five-part test under which courts consider the circumstances surrounding the disclosure. These factors are (1) the reasonableness of precautions taken to prevent disclosure, (2) the amount of time taken to remedy the error, (3) the scope of discovery, (4) the

extent of the disclosure, and (5) the overriding issue of fairness.

*Id.* at 741.

Applying the *Allread* factors to the case before it, the court concluded that the District had waived its privilege with respect to exhibits 55, 59, 62, and 64:

First, counsel for the District offered no evidence of any precautions he or his office took to prevent the disclosures. Second, the District did not notice or attempt to remedy the error until three years after it was made.... Third, the District produced 439 documents in response to Sitterson's request for production. This is not the "enormous" quantity of documents that would excuse an inadvertent production of privileged documents. Finally, the issue of fairness favors neither the District nor Sitterson; the District clearly slept on its rights to object to the disclosure, and Sitterson used the documents only to discredit defense counsel at trial. Further, the letters at issue dealt only with counsel's analysis of Sitterson's contract claim, specifically whether Sitterson's contract had been extended for one year or two. But the jury apparently awarded damages on the quantum meruit claim, not the contract claim. Thus, we cannot find that counsel's admissions on the contract claim unfairly prejudiced the District.

*Id.* at 742.

#### **K. Ghostwriting**

##### **American Bar Association Standing Committee on Professional Responsibility**

###### **Formal Opinion 07-446 (5-5-07)**

In some instances, lawyers may be tempted to "ghostwrite" pleadings for pro se litigants. In a 1978 informal opinion, the ABA Ethics Committee indicated that a lawyer must make the court aware of the fact that a ghostwritten document that was submitted to the court was really written by a lawyer. Departing from this view, the ABA Ethics Committee has now concluded that lawyers who ghostwrite pleadings need not inform the court or an opponent of what they have done. In so opining, the committee rejected the view that such ghostwriting is inherently misleading and unfairly exploits the alleged tendency of courts to be soft on pro se litigants.

The committee did not think that ghostwritten documents receive special treatment by the court. If the ghostwriting lawyer provided effective help to the litigant, the committee thought that would be evident to the court. On the other hand, if the lawyer did not provide effective help, his or her work would give the litigant no advantage. Moreover, the committee was of the view that there was no inherent dishonesty in-

volved in ghostwriting pleadings. “The lawyer is making no statement at all to the forum regarding the nature of scope of the representation.”

The committee did indicate, however, that disclosure of the lawyer’s role would be necessary if the failure to reveal that role would amount to assistance in fraudulent or dishonest conduct on the part of the litigant.

**Utah State Bar Ethics Advisory Opinion Committee**  
Opinion 08-01 (2008)

This ethics opinion considers the same issue. In earlier opinions, the Utah ethics committee had indicated that ghostwriting of court documents by an attorney could be considered dishonest. However, in this opinion, the committee concluded that unless some other law, outside of the applicable rules of professional conduct, provide otherwise, a lawyer could engage in ghostwriting. It disagreed with the argument that such ghostwriting was improper because provided an unfair advantage to litigants whom judges believe lack the assistance of counsel. Some jurisdictions have court rules that require the disclosure of legal assistance to pro se litigants. But Utah is not one of those jurisdictions. However, the committee noted that lawyers who appear before the United States Tenth Circuit Court of Appeals need to be aware of a case, *Duran v. Carris*, 238 F.3d 1268 (10<sup>th</sup> Cir. 2001) which criticized a lawyer for ghostwriting an appellate brief.

**New Jersey Supreme Court Advisory Committee on Professional Ethics**  
Opinion 713 (2008)

The New Jersey ethics committee considered the same issue. It noted that lawyers have obligations of candor to the court under Rules 3.3 and 8.4. But it also concluded that lawyers who provide limited drafting assistance to pro se litigants are generally not required to notify the court of their role. However, the general rule does not cover all situations. The committee thought that a disclosure obligation would kick in if the lawyer is using the client as a way to unfairly secure the judicial leniency traditionally shown to pro se litigants or unless the lawyer is secretly controlling the litigation. The committee did not consider whether undisclosed ghostwriting violates FRCP 11, which requires attorneys to vouch for their submissions to the court.

**L. Documents**

**Rico v. Mitsubishi Motors Corp.**  
171 P.3d 1092 (Cal. 2007)

Two Mitsubishi corporations and the California Department of Transportation were sued by various plaintiffs after a Mitsubishi Montero rolled over while being driven on a freeway. Subsequently, Mitsubishi representatives met with their lawyer and two designated defense experts to discuss litigation strategy. One of the Mitsubishi representatives,



at a lawyer's direction, took notes related to the session, and typed them on the attorney's computer. The attorney thereafter printed a copy of the notes, which he later edited and annotated.

Less than two weeks after the strategy session, Yukevich, the lawyer who had directed the taking of the notes, deposed plaintiffs' expert witness at the offices of plaintiffs' counsel. Before the deposition began, Yukevich went to the restroom, leaving his briefcase, computer, and case file in the conference room. The printed document that included the notes from the strategy session was in the case file.

Somehow, plaintiffs' counsel, Johnson, acquired Yukevich's notes. He claimed that they had been accidentally given to him by the court reporter. Yukevich insisted that they had been taken from his file while he was away from the conference room. Following an investigation, the court ultimately concluded that the defense had failed to establish that plaintiffs' counsel had taken the notes from Yukevich's file. It ruled that plaintiffs' counsel had come into the document's possession through inadvertence.

On the other hand, Johnson

admitted that he knew within a minute or two that the document related to the defendants' case. He knew that Yukevich did not intend to produce it and that it would be a "powerful impeachment document." Nevertheless, Johnson made a copy of the document. He scrutinized and made his own notes on it. He gave copies to his co-counsel and his experts, all of whom studied the document. Johnson specifically discussed the contents of the document with each of his experts.

171 P.3d at 1095.

A week after he acquired Yukevich's notes, Johnson used them during the deposition of a defense expert. Yukevich himself was not present for this deposition. But when he learned that Johnson had his copy of the notes of the strategy session, he demanded that the notes and all copies be returned. He also filed a motion to disqualify plaintiffs' lawyers and their experts. The trial court ordered disqualification. The court of appeals affirmed.

The California Supreme Court concluded that the notes constituted attorney work product. On the question of Johnson's duty, once he came into possession of the work product, the court articulated the following rule:

When a lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should refrain from ex-

aming the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged. The parties may then proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders and other judicial intervention as may be justified. *Id.* at 1099 (quoting from *State Compensation Ins. Fund v. WPS, Inc.*, 82 Cal. Rptr. 2d 799 (Cal. Ct. App. 1999)).

The court also affirmed the order disqualifying plaintiffs' counsel and all of their experts. Here, it noted that Johnson had made copies of the document and had given copies to the plaintiffs' experts and other attorneys. It concluded that

such use of the document undermined the defense experts' opinions and placed defendants at a great disadvantage. Without disqualification of plaintiffs' counsel and their experts, the damage caused by Johnson's use and dissemination of the notes was irreversible. *Id.* at 1100.

#### **M. Metadata**

There have been several recent developments concerning "metadata." Metadata is information that is embedded in electronic documents.<sup>6</sup> It is not immediately visible; however, using the right software commands, this information can be retrieved.

At least two ethics rules are thought to be potentially relevant to the transmission and receipt of metadata. One is the confidentiality rule. Another rule that has been discussed in this context is the rule regarding inadvertent receipt of confidential information.

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<sup>6</sup> According to an ABA ethics committee opinion:

- Electronic documents routinely contain as embedded information the last date and time that a document was saved, and data on when it last was accessed. Anyone who has an electronic copy of such a document usually can "right click" on it with a computer mouse (or equivalent) to see that information.
- Many computer programs automatically embed in an electronic document the name of the owner of the computer that created the document, the date and time of its creation, and the name of the person who last saved the document. Again, that information might simply be a "right click" away.
- Some word processing programs allow users, when they review and edit a document, to "redline" the changes they make in the document to identify what they added and deleted. The redlined changes might be readily visible, or they might be hidden, but even in the latter case, they often will be revealed simply by clicking on a software icon in the program.
- Some programs also allow users to embed comments in a document. The comments may or may not be flagged in some manner, and they may or may not "pop up" as a cursor is moved over their locations.

ABA Formal Op. 06-442 (2006).

In *ABA Formal Op. 06-442* (2006), the ABA Standing Committee on Ethics and Professional Responsibility offered some advice about “metadata. It concluded that lawyers have no ethical duty to refrain from reviewing and using metadata. But it observed that attorneys who are concerned about metadata can take steps to reduce risks, such as avoiding the use of redlining programs, not including electronic comments in earlier versions of documents, and sending hard copies or scanned copies to opponents.

In *Opinion 2007-09*, the Maryland State Bar Association Committee on Ethics took the position that lawyers who receive electronic discovery materials have no obligation to refrain from viewing or using metadata or to notify the sender that they have received it. But it said that the sending attorney generally has a duty to take reasonable measures to avoid disclosure of confidential or work product materials embedded in electronic discovery. It said that the duty arose out of the Rules 1.1, on competence, and Rule 1.6, on confidentiality. A recent Colorado ethics committee opinion took the same position.<sup>7</sup>

Contrary to the views expressed in the foregoing opinions, in *Opinion 2007-02*, the Alabama State Bar Disciplinary Commission said that the unauthorized mining of metadata to obtain confidential information amounts to professional misconduct. The panel also said that attorneys who send electronic documents must to reasonable care to avoid revealing secrets hidden in metadata.

In *Opinion 341*, the District of Columbia Legal Ethics Committee took the view that a lawyer is forbidden to review metadata in an electronic document received from an adversary only when the lawyer has actual knowledge that it was inadvertently sent. In any other circumstances, a receiving lawyer is free to use the metadata. But the committee had a somewhat unusual view of “actual knowledge.” It said that this exists not only when a lawyer is told of the mistake before receiving the document, and not only when the receiving lawyer immediately notices upon review of the metadata that it was obviously accidentally sent, but also when the lawyer uses a system to mine all incoming electronic documents with the hope of finding a confidence or a secret. The duty to avoid reviewing the metadata in these circumstances, the committee thought, arises out of the lawyer’s duty of honesty. The committee also observed that lawyers who send electronic documents must take care to avoid providing ones that inadvertently contain accessible confidences or secrets. This obligation arises out of the duty of confidentiality.

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<sup>7</sup> See Colorado Bar Association Ethics Committee Opinion 119 (2008).

**Maine Board of Bar Overseers Professional Ethics Commission  
Opinion 196 (2008)**

In this opinion, issued in October of 2008, the Maine ethics committee confirmed that lawyers are required to avoid the communication of confidential information, regardless of the method of transmission. That requirement, it thought, applied to the transmission of metadata as well. It also said that it is not reasonable for lawyers to remain ignorant of the capabilities of software programs that they use, including the ability of those programs to transmit confidential information.

On the receiving end of things, the committee said that lawyers who receive electronic documents may not take steps to uncover metadata in an effort to detect confidential information that is or is reasonably known not to have been intentionally communicated. It said that an attorney who purposefully seeks to access confidential information in metadata engages in conduct involving dishonesty. The committee indicated that its view was consistent with that in New York State Ethics *Opinions 749* (2001) and *782* (2004).

**N. Dishonesty & Crimes**

*1. Stings*

**In re Crossen**

880 N.E.2d 352 (Mass. 2008)

This is a case in which a lawyer sought to disqualify a judge whom he suspected of bias against his clients by obtaining information about the judge from a phony job interview with one of the judge's former law clerks. More specifically, he pursued

an intricate plan to discredit a Superior Court judge presiding in an ongoing matter in which he represented some of the litigants. The aim of the plan was to influence the outcome of the litigation by forcing the judge's recusal and obtaining reversal of her prior rulings against Crossen's clients. In furtherance of the scheme, Crossen, with his own investigators posing as corporate executives, set up and secretly made a tape recording of a sham job interview for a former law clerk of the judge, during which the law clerk repeatedly was questioned about the judge's personal and professional character and her decision-making process in the ongoing matter involving Crossen's clients.  
880 N.E.2d at 356.

Although the interview did not yield all of the information that Crossen sought, he thereafter met with the law clerk, disclosed the ruse, and demanded that the law clerk cooperate with his efforts to learn of the judge's predisposition. Crossen had learned that the law clerk had submitted a bar application reference letter from someone who did not know him. He told the law clerk that if he did cooperate, he would not bring up

the problem with the bar letter. By this time, the law clerk was working with the FBI, and was wearing a recording device in his conversations with Crossen.

In the disciplinary case, Crossen argued that his conduct was similar to undercover investigators used by prosecutors and testers used by others and that the ethics rules in this area were not clear. The court disagreed. It concluded that Crossen's efforts "far exceeded any acceptable norms of professional conduct." *Id.* at 370. Using "mild" misrepresentations of identity and purpose like those used by "testers" in discrimination cases and undercover investigations was one thing, but Crossen's conduct in this case – his deceitful conduct and his threatening behavior toward the law clerk -- went too far. The court also noted that "[w]hatever leeway government attorneys are permitted in conducting investigations, they are subject not only to ethical constraints, but also to supervisory oversight and constitutional limits on what they may and may not do, constraints that do not apply to private attorneys representing private clients." *Id.* at 378.

Crossen was disbarred.

## *2. Misrepresentation*

### **Attorney Grievance Commission of Maryland v. Smith** 950 A..2d 101 (Md. 2008)

The evening before his client's assault trial was supposed to begin, attorney Smith left the following message on an answering machine for the government's star witness, Jeremie Simpson:

Yeah, this is Sergeant Graham with the Montgomery County Police, Seven Locks Station, trying to reach Jeremie Simpson because we have a warrant for his arrest for assault in the first degree committed on October third. Please give us a call ... to arrange a surrender. Thank you.

There was no such warrant. It appeared that Smith had left the message in an attempt to keep the witness from testifying against his client. Smith was convicted of attempting to impersonate a police officer and intimidating a witness.

Smith was also charged with violating several parts of Maryland Rule 8.4, including the parts prohibiting lawyers from engaging in: a criminal act reflecting adversely on honesty, trustworthiness, or fitness; conduct involving dishonesty, fraud, deceit, or misrepresentation; and conduct prejudicial to the administration of justice.

Bar counsel sought disbarment. However, the court of appeals found significant mitigating circumstances. The misconduct was precipitated, according to the court, by an erroneous accusation by the prosecutor that Smith had tampered with evidence in the case. When Smith called the witness, he was, at least in part, motivated by the desire to inform him

that another person had filed charges against him and that an arrest warrant was outstanding. That information was, in fact, false, but Smith had believed it to be true at the time of the call. There were other mitigating circumstances as well.

The court ordered a six month suspension.

### *3. Theft By Deception*

#### **Treadway v. Kentucky Bar Association**

737 S.W.3d 549 (Ky. 2007)

Treadway served as general counsel and as a member of the board of directors of a company. He learned that another member of the board had undertaken a series of homosexual relationships with young men and teenage boys, some younger than age sixteen. He devised a scheme to make money based on this information. He claimed that he had been contacted by an attorney representing a minor who wanted to sue the other board member. He advised the board member that he had retained the services of a private investigator to assist in the case at a cost of \$10,000. Treadway also advised the board member to settle the unfiled civil suit for \$56,500. The board member, who trusted Treadway as his attorney, issued three checks totaling \$66,500 payable to Treadway's escrow account.

Treadway was later convicted of felony theft by deception, served some jail time, and was placed on probation. He was also charged with lawyer misconduct for violating Kentucky SCR 3.130-8.3(b), which provides that it is professional misconduct for a lawyer to “[c]ommit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects,” and SCR 3.130-8.3(c), which provides that it is professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”

By agreement, Treadway was permanently disbarred.

### *4. DUI*

#### **In re Alexander**

984 So. 2d 702 (La. 2008) (per curiam)

Attorney Alexander was convicted of driving under the influence of alcohol on three occasions. Criminal sanctions were imposed. He was also charged with violating Rule 8.4(b). That rule states that it is professional misconduct to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer. He was also charged with failing to cooperate with the ODC during its investigation.

The Louisiana Supreme Court concluded that facts supported a finding that Alexander had violated the Rules of Professional Conduct as charged. It also stated:

The record reveals that respondent is alcohol dependent and has not yet sought treatment for his alcohol problem. He has knowingly violated duties owed to the public and the legal profession, and his crimes had the potential to cause serious injury to himself and others. The baseline sanction for this type of misconduct is a period of suspension.

984 So. 2d at 706.

Upon considering both aggravating and mitigating factors, the court imposed a year and a day suspension from the practice of law. It also mandated that he enter into a five-year recovery agreement with the Lawyers Assistance Program. Two Justices dissented from the latter order, on the ground that mandating participation could waste LAP resources on a person who might not be committed to recovery. They also observed that any failure to deal with the substance abuse problem could be a factor to consider if Alexander were to reapply for admission to the bar.

### *5. Hacking*

#### **Lawyer Disciplinary Board v. Markins**

663 S.E.2d 614 (W. Va. 2008) (per curiam)

Attorney Markins was an associate with the Huddleston firm. His wife was an attorney with the Offutt firm. Late in 2003, Markins began accessing his wife's law firm e-mail account without her permission or knowledge. He later testified that his purpose was to secretly monitor her activities because he believed that she had become involved in an extramarital affair with a client. As time went on, his interests broadened, and he began to access the e-mail accounts of other lawyers at the Offutt firm as well.

After an Offutt attorney began to suspect that her e-mail account had been improperly accessed, the firm retained a computer expert to investigate. Eventually, the firm learned that, for over two years, Markins had gained access to several firm e-mail accounts on more than 150 occasions. Some of the information accessed involved information about client matters. Some of it involved confidential financial information about the law firm.

Markins eventually told his wife about his activities. The next day, a partner in her law firm, who had learned from the computer expert's investigation that Markins was responsible for the unauthorized access, asked Markins' wife if she was aware of his actions. Although she had just learned of her husband's misconduct, she denied any knowledge of it. Both attorneys were later fired from their respective law firms. Disciplinary proceedings followed.

Markins consistently maintained that he never disclosed to anyone any information he obtained from improperly accessing the various e-

mail accounts. He claimed that he had never used any of the information in an improper manner. A psychologist testified that Markins would not have engaged in the misconduct if it were not for the “significant emotional strain caused by concern for the integrity of his marriage,” and further testified that he was unlikely to repeat this or any similar conduct in the future in light of the resulting professional and personal embarrassment he has suffered and the strain and hardship on his family.

He was charged with violating 8.4(c) for “conduct involving dishonesty, fraud, deceit or misrepresentation,” and Rule 8.4(b) for committing criminal acts that reflected “adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” The West Virginia Supreme Court said, of his misconduct,

Though Respondent initially accessed his wife’s OFN e-mail account with motives very personal to his marriage, his misconduct eventually became more rampant. Out of simple curiosity, he broke into the e-mail accounts of eight of his wife’s unsuspecting co-workers on almost a daily basis for over a two-year period. He did not cease or disclose his actions until he learned OFN’s computer experts were on the verge of discovering who was behind the unauthorized intrusions. Moreover, in addition to confidential personal information, Respondent viewed confidential financial information intended to be read exclusively by OFN partners. With regard to confidential client information, in one instance, his firm and OFN represented separate co-defendants which had interests adverse to each other because Respondent’s client had an indemnity claim against OFN’s client.

663 S.E.2d at 618.

Markins was suspended for two years and was ordered to take extra ethics hours in CLE programs before he could be reinstated.

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