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Legal Ethics, Pain, and Suffering

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6. Legal Ethics, Pain, and Suffering

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I. Introduction

The lessons that come to us from the application of legal ethics rules can be instructive, but they often involve a considerable measure of pain and suffering. If presentations like this have any value, perhaps that value could be found in change. The hope would be that, after some exposure to the stories and other matters included in the presentation, a lawyer might thereafter do something that is more consistent with the standards of the profession than he or she might otherwise have done.

II. News

A. Fired Partners

The Sidley Austin Brown & Wood firm demoted or terminated a number of partners during a 1999 restructuring effort. The firm had created a mandatory retirement policy that created a sliding scale for the forced retirement of partners between the ages of 60 and 65. Thirty-two former partners brought age discrimination claims against the firm. In October of last year, the firm entered into a \$27.5 million settlement with the EEOC with respect to their claims. In entering into the settlement, the firm acknowledged that the partners were “employees” of the firm for ADEA purposes. The firm had earlier taken the position that the claimants, as partners, could not be considered to be employees of the firm. Michael Bologna, *EEOC Reaches \$27.5 Million Settlement In Age-Bias Action Against Sidley Austin*, 23 ABA/BNA Lawyers’ Manual on Professional Conduct 533 (17 October 2007).

B. Malpractice Insurance Disclosure

In October of last year, the California State Bar’s Board of Governors declined to adopt a proposal that would have required that state’s lawyers to disclose to clients and the state bar whether they carry malpractice insurance. The board split 8-8 on whether to adopt the proposal, and the outgoing state bar president broke the tie by voting no.

In the meantime, Hawaii and North Dakota joined a growing list of jurisdictions that require some form of malpractice insurance disclosure. Twenty-three states have done this. Two – Arkansas and Kentucky – had previously rejected mandatory disclosure.

Opponents of the California proposal had argued that its adoption would have stigmatized uninsured lawyers, forcing them to buy expensive coverage, and causing an increase in the level of fees those lawyers charge to their low-income clients. Lance J. Rogers, *Two States*

Pass Insurance Status Rules; California Bar Eschews Required Disclosure, 23 ABA/BNA Lawyers' Manual on Professional Conduct 531 (17 October 2007).

C. Attorney-Client Privilege

According to a recent survey, a large number of in-house counsel believe that the attorney-client privilege is "either non-existent or severely damaged" in the context of government investigations.¹ This view has arisen in connection with a Department of Justice policy on investigations, stated in the so-called "Thompson Memorandum," which allows government lawyers to show leniency toward corporations that cooperate with an investigation. One measure of cooperation is whether the corporation agrees to waive the attorney-client privilege and the protection of the work product doctrine. This investigatory approach pressures corporations to give up privilege claims. One worry is that if corporate officers have less assurance that evidentiary privileges will be available to protect sensitive communications, those officers might be reluctant to talk to corporate lawyers. They will not get the advice that they need. *In-House Attorneys Believe Privilege Is 'Severely Damaged,' Survey Finds*, 23 ABA/BNA Lawyers' Manual On Professional Conduct 391 (25 July 2007).

D. Risky Practice Areas

Panelists at an October 2006 Large Law Firm Symposium considered some dangers associated with three of the higher-risk practice areas: Intellectual property, entity formation, and bankruptcy.

Intellectual property work demands more than a conventional conflicts check, according to the panel. In addition to parties, subject areas must also be checked. That is because it is possible to have more than one client pursuing the same technology path.

On the entity formation front, the panel observed that lawyers for closely-held entities can get themselves into unwaivable conflicts. Part of the problem is identifying the client. Is the lawyer representing all of the partners or all of the incorporators? Only the general partners? Only one of the incorporators? Once the entity is actually formed, will the lawyer be representing the entity, and only the entity?

In bankruptcy practice, there are some jurisdictions in which only an actual conflict warrants disqualification or forfeiture of the fee. But in other jurisdictions, a potential conflict is enough. A lawyer who represents a debtor with a lot of creditors may find that some of the creditors are clients of his or her law firm. If so, there are potential conflicts. 22 ABA/BNA *Lawyers' Manual on Professional Conduct* 505

¹ More than 90% of 458 respondents expressed skepticism about the viability of the attorney-client privilege.

(18 October 2006).

E. Discipline and Small Firms

It seems that solo practitioners and small firm lawyers are disciplined more frequently than large firm lawyers. A January 9, 2007 panel discussion, held in conjunction with the ABA Midyear Meeting, explored reasons why that might be so.

According to two panelists, disproportionate discipline of solos and small firm lawyers does not reflect animus against them by bar counsel. One of them suggested that the nature of their practices, such as criminal defense and matrimonial dispute representation, tends to generate disgruntled clients who complain to disciplinary authorities.

Another panelist said that solo and small firm practitioners do not have the institutional oversight that lawyers in large firms have. Such oversight curbs inadvertent and deliberate rule violations. Larger firms also have resources to avoid grievances, including the ability to refund fees to prevent a grievance from being filed.

One panelist, however, asked whether bar counsel might have an institutional bias that favors large firm practitioners. The same panelist wondered if the high concentration of cases initiated by grievances from clients of solo practitioners and small firm lawyers might mean that bar counsel rely too much on such grievances, and unethical behavior by large firm lawyers might go undiscovered.

Another panelist suggested that there may also be an institutional reluctance to pursue cases against large firm lawyers because such lawyers have the resources to mount better defenses and create more costly prosecutions than do solo practitioner and small firm lawyers.

One panelist observed that some lawyers who receive discipline are “frequent fliers” – recidivists whose frequent encounters with disciplinary authorities often result in repeated discipline. This panelist indicated that such lawyers tended to be solo and small firm lawyers and asked whether there is something in the nature of those practice arrangements that enhances the risk of repeat offenses. Martin Whittaker, *Speakers Explore Reasons Why Discipline Most Often Hits Solos, Small-Firm Lawyers*, 23 *ABA/BNA Lawyers' Manual on Professional Conduct* 98 (21 February 2007).

F. Conflicts Check

An article in the *ABA Journal* states:

Deep down, every practicing attorney knows that the most crucial step in taking on a new client isn't the initial contact, or the wining and dining, or even signing the representation agreement.

It's the conflicts check.

But all too often, lawyers treat the conflicts check as almost an afterthought, even though doing so can have disastrous consequences, including loss of clients, ethics sanctions and malpractice claims.

Martha Neil, *Check, Please*, ABA Journal, May 2006, at 50.

One lawyer who was interviewed for the article, Lawrence J. Fox, stated, about conflicts checks:

One, don't rely on your memory. And two, don't rely on your database, because your memory is faulty and your database can't possibly be complete. *Id.* at 52.

The article notes that

[o]ther recommended steps include a daily e-mail alerting all lawyers at the firm about new matters coming in.... Moreover a firm should rely on an in-house specialist, rather than the attorney bringing in a new matter, to determine whether a conflict exists and how it should be handled. *Id.*

The article mentions some real-life examples of conflicts that caused problems for lawyers and law firms, and it refers to some reasons why conflicts problems arise.

G. Unqualified Assistant DA

Ilya Movshovich started working in the San Francisco District Attorney's office as a volunteer, then became a paid law clerk, and then, after the February 2007 California bar exam results were released, he sought promotion to Assistant District Attorney.

But it turned out that Movshovich was not on the list of those who had passed the February bar exam. Indeed, after some further checking, the District Attorney's office learned that he had lied about being a law student. At one point he had produced a document showing that he was a student at the University of San Francisco Law School. But the document was an apparent forgery. The office checked with San Francisco Law School and the University of San Francisco School of Law, but Movshovich had not attended either one.

Movshovich was fired. He said that he regretted the "misunderstandings" that had led to his dismissal, and that he hoped that the situation would not negatively impact his law career. *See Promising D.A.'s Office Law Clerk Fired for Lying*, San Francisco Chronicle, June 1, 2007, at B-3, and reproduced at <http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/06/01/BAGIPQ5QUU1.DTL>

III. Louisiana Cases

A. Permanent Disbarment Cases

The number of lawyers who have been permanently disbarred continues to grow.

1. Short Subjects

In re Stephens

955 So. 2d 140 (La. 2007) (per curiam)

Evidence indicated that attorney had committed three separate armed bank robberies, and would have committed a fourth had a police vehicle not fortuitously driven into the bank's parking lot. Permanently disbarred.

In re Favors

938 So. 2d 677 (La. 2006) (per curiam)

Attorney "failed to provide competent representation to his clients, neglected his clients' legal matters, failed to communicate with his clients; failed to refund approximately \$2,600 in unearned fees, converted approximately \$41,000 of client and third-party funds to his own use, engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, abandoned his law practice when he relocated to Georgia without notice to his clients, and failed to cooperate with the ODC in numerous investigations." 938 So. 2d at 677. The sole mitigating factor – the absence of a prior disciplinary record – was insufficient to outweigh "the applicable aggravating factors," and the court ordered permanent disbarment.

In re Frank

942 So. 2d 1050 (La. 2006) (per curiam)

Attorney, who had been previously disbarred, began to engage in serious misconduct soon after being readmitted to practice. The misconduct included failure to act with reasonable diligence, dishonesty, commingling, misappropriation of client funds, and knowingly filing false documents. He was permanently disbarred.

In re Shortess

950 So. 2d 570 (La. 2007) (per curiam)

Attorney found to have committed several acts of professional misconduct, including conversion of funds belonging to at least fourteen clients as well as an unknown number of third parties. Permanent disbarment.

In re Spradling

952 So. 2d 642 (La. 2007) (per curiam)

Attorney found to have engaged in various acts of misconduct, including conversion of client funds and submission of false evidence in the disciplinary proceeding concerning his misconduct. Permanently disbarred.

In re Sheffield

958 So. 2d 661 (La. 2007) (per curiam)

Permanent disbarment for a lawyer who engaged in Medicaid fraud

and illegally used a physician's registration number to obtain a controlled dangerous substance, both of which are felonies.

In re Domm

965 So. 2d 380 (La. 2007) (per curiam)

Permanent disbarment ordered for a previously disbarred attorney who neglected a client's matter, failed to communicate with the client, failed to return the client's file, failed to cooperate with the ODC during its investigation of the client's complaint, and, while representing another client, "knowingly and intentionally engaged in conduct involving moral depravity with a minor child."

In re Hughes

956 So. 2d 575 (La. 2007) (per curiam)

Judge who was removed from office for pervasive judicial misconduct was also permanently disbarred.

In re Williams

958 So. 2d 655 (La. 2007)

Lawyer who had been declared ineligible to practice law for failure to pay bar dues and the disciplinary assessment nonetheless continued to practice law, handling at least 17 cases during the period of ineligibility. The Louisiana Supreme Court accepted his petition for voluntary permanent resignation from the practice of law.

In re Williams

967 So. 2d 1141 (La. 2007) (per curiam)

Williams, an attorney who had already been disbarred for disobeying court orders, tampering with an accident report, failing to cooperate with the ODC, and practicing law while ineligible to do so, was charged with additional instances of misconduct that arose before and after his disbarment. These included:

his failure to act with reasonable diligence and promptness in representing clients, his failure to communicate with his clients, his failure to comply with his obligations upon the termination of the representation, and his failure to return unearned fees. Even more egregious are respondent's actions involving the unauthorized practice of law, accepting compensation for representing a client without the client's consent, engaging in dishonest and deceitful conduct, and failing to cooperate with the investigation of disciplinary matters.

967 So. 2d at 1147. Concluding that Williams would pose "a threat of danger to the public in the event he is permitted to resume practicing law," the court ordered permanent disbarment.

2. Other Permanent Disbarment Cases

In re Smith

942 So. 2d 34 (La. 2006) (per curiam)

Attorney permanently disbarred for neglecting legal matters, failing to communicate with his clients, converting client and third-party funds, failing to account for or refund unearned fees paid by his clients, failing to return a client's file, and failing to cooperate with the ODC in its investigation.

One interesting feature of the case was that the attorney had already been disbarred, in 1999, and that the misconduct at issue in this case took place before the disbarment. On this point, the Louisiana Supreme Court noted: "Nevertheless, the ODC did not seek to consolidate the two proceedings. Moreover, for reasons which have not been adequately explained in this record, the ODC did not institute formal charges in this matter until February 2004." 942 So. 2d at 40, n. 2.

Justice Johnson dissented, and stated: "Had the Office of Disciplinary Counsel brought all the charges at the time of respondent's initial disbarment proceeding in 1999, he could not have been permanently disbarred, since the court had not yet adopted that sanction. Only by holding the charge over until 2004, was respondent exposed to the more severe sanction." *Id.* at 41.

In re Norris

939 So. 2d 1221 (La. 2006) (per curiam)

Norris withdraw large sums of money from the accounts of his former law firm and converted the funds. The law firm obtained a judgment awarding it more than \$800,000 based on the conversion. Thereafter, the law firm commenced involuntary bankruptcy proceedings against Norris. On four occasions, Norris testified under oath that he had burned \$500,000 he had withdrawn from his bank safety deposit box. Specifically, he testified that the day after he learned of the state court judgment against him, he went to the bank and removed the currency from the safety deposit box, placed it in his briefcase, and took it home, where he doused the \$100 bills with gasoline and burned them in a metal trash barrel in his back yard. Norris was convicted of four counts of perjury based on these false statements.

In the disciplinary case, the Louisiana Supreme Court said:

Respondent committed perjury on four separate occasions in an effort to avoid satisfying a civil judgment owed to his former law partners. His conduct reflects nothing less than a willful attempt to subvert the judicial process to his own ends. We cannot and will not condone conduct by an attorney that is so plainly calculated to frustrate the administration of justice. 939 So. 2d at 1226-27.

He was also permanently disbarred.

In re Aguillard

958 So. 2d 671 (La. 2007) (per curiam)

Following Hurricane Katrina, Attorney Aguillard made Internet contact with a person whom he believed to be a 13-year old evacuee from New Orleans, and arranged to meet her in a park for the purpose of engaging in sexual relations. However, the “girl” was an investigator from the Attorney General’s office, who had been conducting an undercover operation. When Aguillard appeared at the park, he was arrested and charged with computer-aided solicitation of a minor. Later investigation of evidence on his computer’s hard drive revealed that Aguillard had previously engaged in sexual intercourse with a 15-year old girl. He was charged with criminal activity for this as well.

In the disciplinary case, the Louisiana Supreme Court said that “any sanction less than permanent disbarment would require us to ignore the seriousness of respondent’s conduct and the grave harm he has done to his juvenile victim and to the public’s confidence in the legal profession.” 958 So. 2d at 674.

In re Spears

964 So. 2d 293 (La. 2007) (per curiam)

Spears pleaded guilty to a felony count of computer fraud and conspiracy to commit computer fraud, in violation of federal law. The fraud arose out of a scheme in which Spears, an attorney with the Orleans Indigent Defender Program, and Kirkland, a probation officer, offered participants in a drug court probation program a release from probation obligations in exchange for cash payoffs. To carry out their payoff scheme, Spears and Kirkland caused false information to be entered into the drug court’s computer system. Spears was caught when an undercover law enforcement officer, posing as a probationer, paid her \$2500 to obtain a release from probation.

The ODC charged Spears with criminal conduct that reflected adversely on her honesty, trustworthiness, or fitness as a lawyer; conduct involving dishonesty, fraud, deceit, or misrepresentation; and conduct prejudicial to the administration of justice, all in violation of Rule 8.4. Spears was permanently disbarred.

In re Burks

964 So. 2d 298 (La. 2007) (per curiam)

Burks was employed as an assistant city attorney for the City of New Orleans for about twelve years. In his last year, he was assigned as a prosecutor in traffic court. In 2004, Burks met with an undercover FBI agent who was posing as a taxi driver and who pretended to want to resolve several outstanding traffic citations. Burks accepted \$1000 in cash from the agent in exchange for his agreement to drop the charges. The dismissal of the charges was entered in the computer database of the

Louisiana Office of Motor Vehicles, where individual driving records are maintained. Based on this conduct, Burks was charged with and pleaded guilty to one county of felony computer fraud.

Burks was later charged with a violation of Rule 8.4(b), for commission of a criminal act reflecting adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer. When the case came before the Louisiana Supreme Court, it said: "We cannot and will not condone conduct by an attorney that is so plainly calculated to frustrate the administration of justice." 964 So. 2d at 303. Burks was permanently disbarred.

In re Dickson

968 So. 2d 136 (La. 2007) (per curiam)

The ODC filed three sets of formal charges against Dickson, involving five separate counts of misconduct. Some of the charges arose out of the handling of money. For example, in one case, Dickson deposited a settlement check into his operating account, because he did not maintain a client trust account. In another, he withdrew nearly \$40,000 from his client's bank account, using a power of attorney, without accounting for the funds.

Other charges arose out of Dickson's representations that he could improperly influence officials on his client's behalf. He told a client that if he paid him \$18,000, he would "pay off" the judge and the district attorney in order to obtain a more lenient sentence in a criminal matter. It appeared that the client reasonably believed that Dickson had the connections to arrange such a deal. When the client was ultimately unable to pay the full \$18,000, Dickson urged him to plead guilty, and assured him that he could work out a five-year sentence. When the client pled guilty, he was sentenced to ten years.

The Louisiana Supreme Court concluded that Dickson had:

knowingly and intentionally violated the Rules of Professional Conduct by failing to maintain a client trust account, failing to timely pay third-party medical providers, neglecting legal matters, converting client funds, and improperly claiming that he could influence the judiciary. 968 So. 2d at 141.

Considering the misconduct as a whole, the court stated that the appropriate "baseline sanction" was disbarment.

However, the court went on to consider the guidelines applicable to permanent disbarment, and noted that Guideline 2 "applies to conduct involving the intentional corruption of the judicial process." *Id.* at 142. It then stated:

Respondent sought a payment of money from his client, intentionally representing to his client that he had the ability to influence the judiciary. Although there is no evidence respondent

actually attempted to improperly influence the judiciary, his actions clearly resulted in a corruption of the overall judicial process for his personal gain. This court will not countenance any actions by an attorney which suggest that the attorney can improperly influence the judiciary. *Id.*

Dickson was permanently disbarred.

B. Other Disciplinary Cases

1. Bar Admission

Applicants to the bar are required to demonstrate that they have good moral character. They are sometimes denied admission for failure to meet that burden. Sometimes those grounds arise on account of failure to disclose relevant information in connection with the bar application. They can also arise in connection with the administration of the bar exam.

In re Esukpa

947 So. 2d 714 (La. 2007) (per curiam)

Esukpa passed the essay portion of the Louisiana Bar examination, but the Committee on Bar Admissions declined to certify him for admission on character and fitness grounds. The Louisiana Supreme Court agreed, and stated:

The record of this matter reveals that petitioner has applied for admission in Louisiana on fourteen occasions since his graduation from law school in 1990, and on each application he failed to disclose his prior arrests as well as a civil matter in which he was named a defendant. Petitioner admitted that these omissions were knowingly and intentionally made because he feared he would not be admitted in the face of an accurate disclosure.

Under the circumstances, there can be no doubt that petitioner has demonstrated a lack of candor which reflects adversely on his character and fitness. We therefore conclude that petitioner has failed to meet his burden of proving he has “good moral character” to be admitted to the Bar of this state. 947 So. 2d at 715.

See also In re Brown, 951 So. 2d 165 (La. 2007) (per curiam) (Bar applicant, who successfully completed the essay portion of the bar examination, was denied admission on character and fitness grounds. He had a record of five arrests for driving while intoxicated. The Louisiana Supreme Court concluded that Brown had failed to meet his burden of proving that he has good moral character to be admitted to the bar).

In re Rojas

929 So. 2d 1229 (La. 2006) (per curiam)

Rojas was an applicant for the July 2004 Louisiana bar exam who had been accused of cheating on the February 2004 bar exam. Following

an investigation, a commissioner appointed by the Louisiana Supreme Court determined that Rojas had spoken to the applicant sitting next to her during the February Civil Code III examination, in violation of a rule that there be no talking during the exam, and that “the purpose of their talking was to in some way cheat on the exam, since there are no other reasonable hypotheses for the talking.” 929 So. 2d at 1230. The commissioner recommended that Rojas not be permitted to ever practice law in Louisiana. Rojas objected to the recommendation, and the matter came before the Louisiana Supreme Court.

The court accepted the commissioner’s recommendation, stating:

After hearing oral argument, reviewing the evidence, and considering the law, we find it is established by the record that petitioner spoke to the applicant seated next to her during the Civil Code III examination administered in February 2004. We further find that such conduct constituted cheating by petitioner.

Cheating on the bar examination is a particularly egregious act of dishonesty which we cannot excuse or overlook. Accordingly, it is ordered that the application by petitioner seeking permission to sit for the Louisiana Bar Examination be and hereby is permanently denied. *Id.*

See also In re Lamont, 929 So. 2d 1228 (La. 2006) (per curiam) (the bar applicant that spoke to Rojas received the same sanction).

2. Malpractice and Discipline

There is something of a twilight area between the kind of lawyer misconduct that can result in formal discipline and that which is more appropriately handled through malpractice litigation.

In re Brown

967 So. 2d 482 (La. 2007) (per curiam)

In representing some clients in connection with an automobile accident, attorney Brown filed suit against Allstate Insurance Company and its insured. The defendants were not served, however, until over five years had elapsed from the initial filing of the suit. After they were informed that the insurance company considered the case to have been abandoned, the clients filed a complaint with the ODC

The ODC charged Brown with, among other things, failing to provide competent representation to a client, in violation of Rule 1.1, failing to act with reasonable diligence and promptness in representing a client, in violation of Rule 1.3, failing to communicate with a client, in violation of Rule 1.4, and failing to make reasonable efforts to expedite litigation, in violation of Rule 3.2.

The Louisiana Supreme Court did not agree that Brown had violated all of these rules, but it concluded that Brown had failed to competently handle the personal injury matter, had neglected it, and had failed to

expedite the litigation consistent with the interests of his clients.

It then turned to the matter of what to do about the violations:

The question of when ordinary legal malpractice becomes an ethical violation is somewhat unclear. Strictly speaking, virtually any time an attorney allows his client's case to prescribe or to become abandoned, it could be said the attorney lacks competence in violation of Rule 1.1 and failed to act with diligence in violation of Rule 1.3. However, as a practical matter, disciplinary sanctions are not always appropriate in every instance in which an attorney commits minor violations of the Rules of Professional Conduct When significant discipline has been imposed in this context, the cases typically involve situations in which the malpractice is combined with additional misconduct, such as where the attorney acts with deceit or misrepresents facts in an effort to conceal the malpractice from the client 967 So. 2d at 486.

In this instance, the court observed that Brown's actions "were not the product of an evil or dishonest motive," and it also found that they did not cause any actual harm. *Id.* Under the circumstances, the court said that "the matter would be more appropriately considered in a civil malpractice action rather than a disciplinary proceeding." *Id.* However, since the ODC had proved disciplinary violations by clear and convincing evidence, the court ordered a public reprimand. Two justices dissented on the ground that Brown should have been suspended from the practice of law.

3. Fees and Related Problems

Many of the circumstances that result in lawyer discipline arise out of disputes concerning attorney fees. Rule 1.5 sets forth the basic standards, including the standard that the lawyer is not to charge or collect an unreasonable fee. But other rules sometimes have a role in the resolution of fee disputes.

Culpepper & Carroll, PLLC v. Cole
929 So. 2d 1224 (La. 2006) (per curiam),
cert. denied, 127 S. Ct. 495 (2006)

In this case, a law firm brought an action against a former client to collect a 1/3rd contingent fee based on a settlement offer that the law firm had obtained on the client's behalf but that the client had refused to accept. The case arose out of the client's effort to contest his mother's will. The contingent fee agreement specified that the law firm would receive 1/3rd "of whatever additional property or money we can get for you." This meant property or money beyond that provided in the will that was the subject of the dispute.

As a result of settlement negotiations, the mother's estate offered additional property worth approximately \$21,600. The law firm

recommended that the plaintiff accept the offer, but he refused to do so. Thereafter, the law firm refused to file suit, and the client terminated the representation. The former client pursued the matter on his own, but recovered nothing. The law firm eventually sued the former client, seeking approximately \$7,000, and some other amounts, based on the rejected settlement offer. The law firm prevailed in city court, and at the court of appeal.

The Louisiana Supreme Court reversed. Initially, it observed that the client had received “no additional property or money as a result of the litigation against his mother’s estate. Because Mr. Cole obtained no recovery, it follows that Mr. Culpepper is not entitled to any contingent fee.” 929 So. 2d at 1227.

But this did not end the analysis:

Nonetheless, Mr. Culpepper urges us to find that his contingency should attach to the settlement offer he obtained on behalf of his client, even though his client refused to accept that offer. According to Mr. Culpepper, he did the work for which Mr. Cole retained him, and he is therefore entitled to one-third of the amount offered in settlement, notwithstanding Mr. Cole’s rejection of the settlement offer.

With the benefit of hindsight, it would have been in Mr. Cole’s best interest to accept the settlement offer obtained by Mr. Culpepper. However, it is clear that the decision to accept a settlement belongs to the client alone. See Rule 1.2(a) of the Rules of Professional Conduct (“A lawyer shall abide by a client’s decision whether to settle a matter.”). Therefore, regardless of the wisdom of Mr. Cole’s decision, his refusal to accept the settlement was binding on Mr. Culpepper.

To allow Mr. Culpepper to recover a contingent fee under these circumstances would penalize Mr. Cole for exercising his right to reject the settlement. We find no statutory or jurisprudential support for such a proposition. Indeed, this court has rejected any interpretation of the Rules of Professional Conduct which would place restrictions on the client’s fundamental right to control the case. *Id.*

So the law firm was ultimately unsuccessful.

In re Simpson

959 So. 2d 836 (La. 2007) (per curiam)

In this case, an attorney was disciplined for charging an excessive fee and for pursuing vexatious litigation against a client. Simpson had agreed to represent some relatives of Betty Kitchen Bankston, who had died leaving an estate consisting of some \$200,000 in cash and some real estate that was valued in excess of \$1 million. These relatives suspected

that Mrs. Bankston's signature on a will that identified one of her nephews as the sole residual legatee was a forgery. After Simpson had received a report from a forensic document examiner that concluded that the signature on the will "exhibited differences not observed in the other documents sent to him for comparison," he agreed to represent twenty of Bankston's heirs on a one-third contingency fee agreement.

Simpson filed a petition to set aside the will. Five days later, the attorney who had filed a petition to probate the will agreed to withdraw it from probate and told Simpson that the estate would be distributed in accordance with the law of intestate succession, as Simpson's clients had sought. Thereafter, fourteen more heirs signed Simpson's contingency fee contract. He did not inform them that the will contest had already been successful and that they were entitled to their portion of the estate without paying any fees.

Subsequently, Simpson received a check for \$123,145, representing the portion of the cash assets of the succession owed to his 34 clients. Simpson wrote a check to himself for one third of the amount, and distributed the balance to his clients, without providing them with an accounting.

He later filed an "Amended Judgment of Possession" to recognize his fee interest in Bankston's real property. One of Bankston's nieces, Ms. Perry, filed a challenge regarding the amount of Simpson's fee. She also filed a disciplinary complaint. While the fee dispute was pending, Simpson filed a petition against Ms. Perry, alleging that statements made in her pleadings constituted defamation per se and false light invasion of privacy. Eventually, the court of appeal dismissed Simpson's suit. However, the litigation resulted in legal fees for Perry in excess of \$63,000.

The ODC charged Simpson with violations of several of the Rules of Professional Conduct. A hearing committee concluded that Simpson had "tricked the clients into signing contingency contracts when no contingency existed." 959 So. 2d at 842. And it said that Ms. Perry's lawsuit contesting his fee "did not call for the response visited upon her by [Simpson]." It also noted that the allegations of Ms. Perry's petition were not libelous, and commented that "there is absolutely no way a reasonable mind could believe" otherwise. 959 So. 2d at 840.

In the end, Simpson agreed to forego charging a fee to the second group of fourteen clients that had come to him after the will contest case had been resolved. Nonetheless, the Louisiana Supreme Court concluded that Simpson had charged an excessive fee. It said:

[The record reveals that respondent has entered into one-third contingency fee contracts with his 34 clients. Respondent collected \$41,044.12 in fees in September 2000 when he distributed the cash funds of the succession to his clients. Moreover, while respondent

has agreed to forego any contingency fee from the second group of fourteen clients, he contends that he is still owed approximately \$130,000 under his contingency fee contract with the first group of twenty clients. Considering respondent's admission that he worked only twenty to thirty hours on the succession matter before it was resolved, we find these attorney's fees are clearly excessive. *Id.* at 845 (footnote omitted).

And it said the following about the litigation with Ms. Perry:

Turning to the issue of the harassing litigation, we agree with the hearing committee and the disciplinary board that respondent's conduct in the litigation against his client, Jeannette Perry, was nothing short of abusive. Respondent opposed Ms. Perry's lawsuit which she filed in an effort to foreclose his assertion of an improper ownership interest in her aunt's succession, and he filed a merciless defamation suit against her. Respondent even opposed his client when it came to light that she was not served with the suit prior to the entry of the default judgment against her. As a result of this vexatious litigation, Ms. Perry incurred substantial legal fees and suffered needless worry and distress. Respondent's actions caused actual and substantial harm to Ms. Perry, as well as to the legal system. *Id.* at 845.

In the end, the court ordered a three-year suspension, all but one year and day deferred.

4. Client File

A number of disciplinary cases make mention of the lawyer's failure to return the client's file upon termination of representation. Rule 1.16(d) requires the lawyer, upon termination of representation, to take steps to protect the clients interests. It also requires the lawyer to promptly release the entire file upon written request by the client.

In re Hyman

958 So. 2d 646 (La. 2007) (per curiam)

Hyman was charged with failing to return the files of three clients upon termination of representation. In one of the cases, involving a work-related accident, Hyman was discharged several years after filing a personal injury lawsuit and after instituting a workers' compensation claim. In terminating Hyman, the client requested his file. Hyman did not comply with the request. On four subsequent occasions, the new lawyer for the client wrote to Hyman, requesting the client's file. But Hyman did not provide it. Later, motions were filed to compel production of the file in both the court action and the worker's compensation proceeding. The judge in the worker's compensation matter ordered Hyman to produce the file, but he did not do so. Still later, another attorney for the client wrote to Hyman asking for the file, and, when that failed, filed a motion

to compel production. Hyman did not appear at the motion hearing. The judge ordered production, but Hyman did not produce the file within the period ordered by the court. Ultimately, however, after a complaint had been filed with the ODC, Hyman managed to produce the client's file.

Commenting on Hyman's behavior, the Louisiana Supreme Court said that "the potential for harm was significant." 958 So. 2d at 649-50. Hyman was suspended for nine months, all but ninety days deferred, with two years of supervised probation to follow.

5. Existence of Attorney-Client Relationship

In general, if there is no attorney-client relationship, there can be no valid claim for lawyer malpractice. But it is not always obvious whether or not that relationship exists.

Williams v. Roberts

931 So. 2d 1217 (La. App. 3 Cir. 2006)

In this case, two members of a limited liability company (LLC) brought a legal malpractice action against an attorney who had been retained by another member of the LLC to assist in the LLC's formation. In particular, they claimed that Roberts, the attorney, had been in a fiduciary relationship with them and that he had failed to consult with them regarding the contents of an operating agreement and other aspects of the LLC's formation that they alleged to be adverse to them, but favorable to another member of the LLC who had been given sole control of the entity.

The trial court entered summary judgment for the defendants, on the ground that there had been no express agreement for Roberts to represent the plaintiffs. On appeal, the plaintiffs argued that summary judgment was inappropriate because the evidence established that the plaintiffs reasonably believed Roberts to be their attorney.

The court of appeal said, with respect to the central malpractice issue in the case:

To establish a claim for legal malpractice, a plaintiff must prove: 1) the existence of an attorney-client relationship; 2) negligent representation by the attorney; and 3) loss caused by that negligence." . . . In this case, the issue is whether there was an attorney-client relationship between Roberts and the Williams Brothers. 931 So. 2d at 1219-20.

According to the court of appeal, the evidence relevant to the attorney-client relationship included the following:

In his affidavit introduced in support of his motion for summary judgment, Roberts stated that he was retained by Litton on October 16, 2002 to create the L.L.C. and that he drafted the articles of organization, the initial report, and the operating agreement and transmitted them to Litton via e-mail. Roberts was aware that Litton

was meeting with the Williams Brothers and Dockens, the other member of the L.L.C., in order to execute the documents that he had prepared. On October 25, 2002, Litton requested some additions to the operating agreement, which Roberts made and transmitted to Litton by e-mail. Roberts further stated that at no time did he or his firm receive a request from the Williams Brothers to represent them in connection with the creation of the L.L.C. Roberts further stated that he understood, based on information furnished to him by Litton, that the Williams Brothers had their own attorney. Roberts further stated in his affidavit that the first contact he had with the Williams Brothers was when they came to Roberts' office to sign franchise documents, which neither he nor anyone from his firm prepared. Roberts also stated in his affidavit that he represented the L.L.C. in connection with collection efforts against the Williams Brothers with respect to their capital contributions to the L.L.C.

...

In opposition to the motion for summary judgment, the Williams Brothers each submitted identical affidavits. In these affidavits, the Williams Brothers stated that at no time did anyone tell them that Roberts did not represent them or that they should seek independent legal counsel. The Williams Brothers stated that they believed that Litton had requested for Roberts to represent all of them in the formation of the L.L.C. and that they reasonably believed that Roberts represented them. *Id.* at 1220.

The court of appeal noted its agreement with the trial court that "it is not unusual for one party's attorney to prepare a document for several parties to sign and that the Louisiana Bar would be stunned to learn that in doing so, an attorney became the attorney for all parties." *Id.*

In this instance, the:

Williams Brothers presented no evidence, other than their affidavits attesting to their belief that Roberts represented them, tending to show the existence of an attorney-client relationship. Moreover, we note that even though whether an attorney-client relationship exists turns largely on one's subjective belief that it does, a person's subjective belief that an attorney represents him must be reasonable under the circumstances. *Exposition Partner, L.L.C. v. King, LeBlanc & Bland, L.L.C.*, 03-580 (La. App. 4 Cir. 3/10/04), 869 So.2d 934. *Id.* at 1220-21.

Accordingly, the court of appeal affirmed the order of summary judgment against the plaintiffs.

6. Communications

Rule 1.4 of the Rules of Professional Conduct requires, among other things, that the lawyer keep the client reasonably informed about the

status of the matter. This rule is cited with some frequency in formal charges by the ODC.

In re Lawrence

954 So. 2d 113 (La. 2007) (per curiam)

Attorney Lawrence was subject to disciplinary proceedings based on his neglect of some client matters and his failure to communicate with several clients. He had previously been disciplined for failing to communicate with clients and failing to safeguard client property. The Louisiana Supreme Court evaluated the conduct as follows:

The genesis of most of respondent's misconduct in the instant case, as well as his earlier misconduct in *Lawrence I*, is his repeated and willful refusal to keep his clients reasonably informed about the status of their legal matters. As we explained in *Louisiana State Bar Assn v. St. Remain*, 560 So. 2d 820, 824 (La.1990), "[proper communication with clients is] essential to maintain public confidence in the profession."

We are particularly disturbed by the testimony of several clients in this matter who testified that they were forced to call respondent from different telephone numbers in order to get him to answer their calls. There is simply no excuse for such conduct by a member of the bar of this state. 954 So. 2d at 120.

Lawrence was suspended for 18 months.

7. Paying a Witness

Rule 3.4 prohibits lawyers from offering inducements to witnesses that are prohibited by law.

In re Bruno

956 So. 2d 577 (La. 2007) (per curiam)

In 1989, Bruno was appointed to be one of eight members of the Plaintiffs' Legal Committee (PLC) in a federal class action lawsuit arising out of an explosion at the Shell Oil Company refinery in Norco. Bruno was introduced to Jack Zewe, a longtime Shell employee, by a mutual friend. Zewe told Bruno that Shell's attorneys were destroying relevant documents and "teaching witnesses to lie," and he indicated that he would be willing to cooperate with the PLC against Shell, for money. Bruno paid Zewe \$5,000, with the agreement that Mr. Zewe would keep track of his time and expenses and that, at the end of the litigation, he would apply to the court for payment as an expert witness.

Shell learned that one of its employees was providing information to the PLC, and it filed a motion to disqualify the members of the PLC. During a hearing, one of the lawyers who was arguing on behalf of the PLC affirmatively stated that the PLC had made no payments to Zewe. Bruno was present, but he said nothing about this misrepresentation. Nor did he reveal the true facts when another attorney filed a brief with the

court asserting that the PLC had not paid Zewe. However, some 2 ½ months after the hearing on the motion to disqualify, Bruno disclosed to the district court judge that he had paid Zewe and that he had promised Zewe that the PLC would seek additional monies for him at the conclusion of the litigation.

After the explosion litigation was settled, the district court appointed the United States Attorney's Office to investigate and report on Bruno's conduct. Eventually, a federal judge concluded that Bruno had been guilty of paying a witness and failing to be candid with the tribunal. The federal district court ultimately suspended Bruno from practicing law in the federal courts of the Eastern District of Louisiana for a period of one year.

Formal charges were also filed by the ODC, claiming that Bruno had "paid a fact witness for inside information" in violation of Rule 3.4(b) of the Rules of Professional Conduct (which prohibits a lawyer from offering an inducement to a witness that is prohibited by law) and that he had failed to promptly correct the false statements of his co-counsel in violation of Rule 3.3(a)(1) (which prohibits a lawyer from knowingly making a false statement of material fact or law to a tribunal). Bruno admitted his misconduct in his answer to the formal charges, and the issue became one of the proper sanction.

The Louisiana Supreme Court said, of the misconduct: "Respondent's payment to a witness and lack of candor towards a federal judge violated the integrity of the judicial system and undermined the proper administration of justice, causing a potentially adverse effect on the legal proceeding." 956 So. 2d at 582. The court also indicated that the baseline sanction for such misconduct is suspension. It did find mitigating circumstances, including Bruno's good reputation in the legal community, the fact that he had "suffered the imposition of other penalties and sanctions for his conduct," and his expression of "genuine remorse." *Id.*

The end result was a three-year suspension from the practice of law, eighteen months of which were deferred in light of the "significant mitigating factors." *Id.* Justice Victory, in dissent, said that a more severe sanction was warranted.

8. Moonlighting

Lawyers who are employed by law firms can run into serious trouble when they simultaneously try to practice law on the side, without the firm's knowledge.

In re Dowell

938 So. 2d 994 (La. 2006) (per curiam)

In the summer of 2001, Stacy Stratton hired attorney Dowell, an employee of the Windhorst firm, to handle her father's succession.

Although Dowell told Stratton that he would be working on the succession as a Windhorst matter, he asked her to make the retainer payment checks out to himself. In fact, Dowell handled the succession as a private practice matter without Windhorst's knowledge or consent and despite Windhorst's policy of not allowing full-time attorneys to have a private practice. However, Dowell did log time on his Windhorst time sheets with respect to the succession.

Not long after taking on the succession matter, Dowell left the Windhorst firm. He told Stratton that he would continue to work on the succession, but he failed to diligently pursue the matter and thereafter failed to communicate with Stratton. When he did communicate with her, he informed Stratton that he had filed the succession when, in fact, he had not done so.

Some time later, Windhorst sent Stratton a bill in the amount of \$1,965 for work done by Dowell despite the fact that Stratton had already paid for this work with a \$2,000 retainer she had provided to Dowell.

Dowell terminated his attorney-client relationship with Stratton in October of 2002. He returned some of Stratton's file materials. But he failed to return a tax refund check, payable to the decedent, that Stratton had given to Dowell. He also failed to account for the \$2,000 retainer and the tax refund check.

Disciplinary proceedings were commenced after a Windhorst partner had filed a complaint with the ODC. The Louisiana Supreme Court described the misconduct as follows:

The record supports the conclusion that respondent neglected the succession he was hired to handle for Ms. Stratton, failed to communicate with his client, misappropriated the fees due to Windhorst, misappropriated the tax refund check belonging to the decedent's estate, failed to provide Ms. Stratton with a complete copy of her file upon termination of the representation, engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, and failed to cooperate with the ODC in its investigation. This conduct falls far below the high ethical standard expected of attorneys licensed to practice law in this state. 938 So. 2d at 998.

Regarding the sanction, the court stated: "Considering the facts of the case as a whole, with particular emphasis on respondent's dishonesty both toward his client and his law firm, we conclude disbarment is the appropriate sanction." *Id.* at 999.

In re Bernstein

966 So. 2d 537 (La. 2007) (per curiam)

Bernstein was employed by the Lowe Stein firm. On several occasions, when clients paid him directly for the legal services he

provided, he cashed the checks and did not turn the money over to the firm. To cover up his conduct, he told the firm's accounting department to "write off" the client's bill. The conduct came to light when he cashed a client's check, neglected to tell the accounting department to write off the bill, and went on vacation. The accounting department issued a supplemental bill to the client, who supplied the firm with proof that the bill had already been paid. Bernstein's partners confronted him about his behavior when he returned from vacation. Although he initially blamed his secretary for making a "mistake," he later admitted his misconduct, and the firm fired him. However, the firm did not report Bernstein to the ODC.

Bernstein later worked for the Sessions Fishman firm. The firm became aware of the circumstances under which Bernstein had left Lowe Stein, but hired him after he promised that "it would never happen again." Unfortunately, it did.

Eventually, Bernstein began sending clients billing statements on his personal letterhead stationery. When he received a check from the client, he would cash it and keep the money for himself. Because these billing statements did not go through the firm's accounting department, and because he did not enter time worked for these clients in the firm's timekeeping system, the firm did not know about what he was doing.

The scheme came to light when a client, who had questions about a bill, asked the accounting department for more detailed billing information. The firm fired Bernstein and told him that if he did not report the matter to the ODC, the firm would.

Bernstein's lawyer wrote to the ODC and told it that Bernstein suffered from a "condition of mental impairment" that involved "impulsive and uncontrollable urges to cash relatively small checks for payment of his legal services which should have been deposited into his former law firms' accounts." 966 So. 2d at 540.

Bernstein was charged with conduct involving dishonesty, fraud, deceit, or misrepresentation, in violation of Rule 8.4. He did not deny the misconduct, but sought mitigation based on a diagnosed "impulse control disorder" and a "major depressive disorder." In a mitigation hearing, a psychiatrist:

testified that in his opinion, respondent's "diversion" of funds that should have gone to his law firms is not a purely criminal act, but was driven by an impulse to gain relief from the physiological discomfort he was then experiencing. *Id.* at 541.

When the case reached the Louisiana Supreme Court, it observed that the baseline sanction for misappropriation of funds was disbarment. The issue was whether there should be a downward deviation from that sanction due to the evidence that Bernstein suffered from a mental

condition. The court was not persuaded. It said:

Based on our review of the record in its totality, we find Dr. Scignar's conclusion that respondent's actions were beyond his control is at odds with many of the objective facts in this case. For example, although Dr. Scignar testified respondent was not motivated by greed, the testimony of respondent's law partners uniformly established that it appeared respondent was living beyond his means and that his lifestyle was not consistent with the income he earned. Additionally, the record reveals respondent's methods of misappropriating funds evolved over time in order to allow him to avoid detection, suggesting his actions were not purely impulsive.... Finally, respondent himself admitted that he knew his actions were wrong when he testified, "[y]ou mull it over in your head so much that you rationalize any the moral implications of something you know is wrong."

Considering all these facts, we are unable to find that respondent's mental condition was the sole cause or even a principal or substantial cause of his misconduct. While respondent may have used his "lack of fulfillment" as a moral justification for his misappropriation, the record does not support the conclusion that there is any significant causal nexus between any mental disability and the misconduct. Accordingly, pursuant to ABA Standard 9.32(I), we give little weight to respondent's alleged mental disability.

Reduced to their essentials, respondent's actions demonstrate a fundamental lack of honesty which falls far below the standards expected of attorneys admitted to the bar of this state. We are particularly disturbed by the fact that after being dismissed from Lowe Stein, respondent sought employment at Sessions Fishman without disclosing the reason for his discharge. After the facts came to light, respondent represented to his law partners that "it would never happen again." Of course, this representation turned out to be a lie.

Candor and honesty are a lawyer's stock in trade. . . . The record of this case demonstrates to us that respondent has not acted with candor or honesty during his career as a lawyer. Considering the fifteen-year history of deceit and dishonesty evidenced by this record, we would be remiss in our duty to protect the public if we accepted respondent's self-serving assertion that "it won't happen again." *Id.* at 544-45 (footnote omitted). Bernstein was disbarred.

9. Money

Lawyers are charged, under Rule 1.15, with safeguarding their clients' property, including their money. This is the same rule that requires lawyers to operate client trust accounts. A separate rule,

Rule 1.8(a), imposes significant limitations on lawyers' ability to enter into business transactions with clients.

In re Jones

952 So. 2d 673 (La. 2007) (per curiam)

Lawyer Jones was alleged to have engaged in various acts of misconduct. Summarizing the evidence in the case the Louisiana Supreme Court said:

[The evidence produced by the ODC establishes in a clear and convincing matter that respondent failed to communicate with his clients, failed to deposit advance fees into his client trust account, failed to provide accountings, failed to refund unearned fees, failed to place disputed funds in his client trust account, failed to return a client's file upon termination of the representation, converted client funds to his own use, and solicited a representation. These facts establish violations of Rules 1.4, 1.5, 1.15, 1.16, and 7.3 of the Rules of Professional Conduct. 952 So. 2d at 680.

The court had some more specific things to say the handling of funds:

In the Lensey matter, respondent knowingly and intentionally converted more than \$9,000 of Ms. Lensey's funds by placing these funds into his operating account. Even accepting respondent's contention that there was some confusion as to whether the representation was on an hourly basis or contingent basis, the record establishes that respondent knew Ms. Lensey disputed the fee. Therefore, respondent had a clear duty to place the disputed funds in his trust account pursuant to Rule 1.5. His failure to do so amounts to a conversion of client funds. When respondent's conversion is combined with his other fraudulent acts, such as falsely endorsing Ms. Lensey's name to the check, the baseline sanction is disbarment. *Id.* at 680-81 (footnote omitted)

Regarding the solicitation, the evidence showed that Jones approached the parents of a shooting victim at a funeral home, while they were making arrangements for their son's funeral, and asked to meet with them about the killing. The parents did not know Jones, and they had had no prior professional relationship with him. Jones later filed suit on their behalf. But their claims were subsequently dismissed, apparently on the ground that the son had a daughter, which affected the viability of the parents' wrongful death claim. The Louisiana Supreme Court characterized the solicitation as a "very serious professional infraction." *Id.* at 681. Jones was disbarred.

In re Coffield

937 So. 2d 330 (La. 2006) (per curiam)

Keith Davis, a minor, received a substantial monetary award for injuries sustained in a car accident. His mother, Ms. Jones, handled his

affairs until he became 18. Thereafter, he began to handle his own money. When he began to engage in what his mother regarded as excessive spending, she hired attorney Cofield to prepare a full power of attorney to give her control over the affairs of her “disabled and spendthrift” son. Keith signed the document. She requested that Cofield set up a trust for her son and designate her as trustee. Cofield prepared the trust documentation, but designated himself as trustee.

In September 1999, Cofield prepared a line of credit promissory note for \$50,000, listing himself as borrower and Keith as lender. In October, Cofield issued a \$14,000 check from the trust account payable to cash, which Cofield himself then cashed. He treated half of the \$14,000 as a personal loan to himself. He held the other half as a fund out of which to make advancements to Keith.

Ms. Jones sued Cofield on behalf of her son and herself. Just prior to the filing of the lawsuit, Cofield prepared and Keith executed a revocation of the power of attorney in favor of Ms. Jones. After the lawsuit had been filed, Cofield prepared and had Keith execute a statement terminating the services of the lawyer who had sued Cofield and directing that the lawsuit be dismissed. He also prepared and had Keith execute a motion to dismiss the suit, even though Keith was represented in the lawsuit by the attorney who was suing Cofield. The court denied the motion to dismiss the litigation. On April 24, 2000, Cofield was removed as trustee. Disciplinary proceedings followed.

The Louisiana Supreme Court concluded that Cofield had engaged in misconduct, which it described as follows:

Our review indicates the record supports a finding of misconduct in the Davis Trust matter. Respondent acted as the attorney for both Ms. Jones and Mr. Davis. He drew up an irrevocable trust document and named himself as trustee over Mr. Davis’ funds even though he did not have the requisite training or knowledge for such a position. Thereafter, he failed to properly communicate with Ms. Jones. He also requested and obtained a loan from Mr. Davis, who, based on his testimony at both hearings, appears to have some amount of mental disability or deficiency. He also kept Mr. Davis’ cash in his office safe in order to prevent Ms. Jones from learning of her son’s spending habits. When Ms. Jones could get no reasonable explanation from respondent regarding the \$14,000 withdrawal, she retained the services of another attorney to sue him on behalf of herself and her son. Despite the lawsuit, respondent continued to have repeated contact with Mr. Davis and took advantage of his deficient mental capacity in an attempt to have the lawsuit dismissed and his liability released. 937 So. 2d at 341-42.

Cofield’s conduct violated several of the Rules of Professional Conduct, including Rules 1.1(a) (competency), 1.4 (communication), 1.7 (conflicts

of interest), 1.8 (business transaction with client), 1.14 (client with diminished capacity), 1.15(a) (safekeeping property), 2.1 (independent professional judgment), 4.2 (communication with person represented by counsel), and 8.4 (misconduct).

He also engaged in misconduct with respect to three other client matters. He was disbarred.

In re Austin

943 So. 2d 341 (La. 2006) (per curiam)

Before he attended law school, attorney Austin worked as a stockbroker. After being admitted, he set up a law office. He also continued to act as a stockbroker.

Attorney Babineaux began practicing law out of Austin's office. It appeared that Babineaux was largely responsible for organizing and operating Austin's personal injury business. Babineaux also had his own clients. He agreed to pay Austin one-half of all attorney's fees he derived from his own clients. Babineaux did not have a client trust account of his own, but used Austin's for all cases he brought to the firm during the period of his association with Austin.

In 1997, Babineaux began representing Ms. Hutto in connection with an inheritance matter. In February and March of that year, Babineaux received sums totaling \$338,535.36 on Ms. Hutto's behalf, all of which he deposited into Austin's trust account. Ms. Hutto expressed a desire to earn a greater return on her funds than the minimal interest paid on bank deposits. She also requested Mr. Babineaux's assistance in preserving and protecting the funds for her five adult children. Because of Austin's background as a stockbroker, Babineaux approached him about Ms. Hutto's needs. Austin suggested to Babineaux that, under certain conditions, he would be able to guarantee a return of 10% to Ms. Hutto, while still providing for her monthly needs and those of her children. Later, Austin met with Babineaux and Ms. Hutto. Austin and Ms. Hutto agreed that Austin would retain a portion of Ms. Hutto's funds and would pay Ms. Hutto \$2,000 per month, along with payments of \$500 per month to each of her children, with interest at a rate of 10%. This agreement was not reduced to writing.

In 1998, Babineaux left Austin's office to work as a district attorney. Thereafter, Ms. Hutto hired another lawyer, Oubre, to represent her. Acting for Ms. Hutto, Oubre terminated Austin's services, demanded an accounting, and sued him. She also filed a complaint with the ODC, claiming that Austin had represented her as an attorney and had failed to safeguard her money.

The principal issue in the disciplinary case was whether there had been an attorney-client relationship between Austin and Ms. Hutto. The Disciplinary Board concluded that there had been such a relationship. It

also concluded that Austin had violated Rule 1.15 when he withdrew Ms. Hutto's funds from his trust account without notifying her or providing her with any sort of documentation, promissory note, or receipt for the funds. Moreover, it concluded that he had exploited the representation by entering into a business transaction with a client without offering the appropriate safeguards, and had failed to exercise independent professional judgment on her behalf.

The Louisiana Supreme Court disagreed, and concluded that an attorney-client relationship had not been established. Although in some cases it had stated that "the existence of the attorney-client relationship turns largely on the client's subjective belief that it exists," the court referred to the Restatement for a different standard in this case:

A relationship of client and lawyer arises when:

(1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either

(a) the lawyer manifests to the person consent to do so; or

(b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services. . . . *Id.* at 347 (citing Restatement of the Law Governing Lawyers § 14 (2000)).

Applying this test to the facts of the case, the court said:

[W]e find the undisputed facts establish that Ms. Hutto did not manifest an intent that respondent provide legal services for her. To the contrary, Ms. Hutto's testimony, taken in connection with the earlier civil proceedings, reveals that Ms. Hutto twice denied under oath that respondent was her attorney or that he "ever handle[d] any legal cases" for her. Rather, Ms. Hutto steadfastly indicated her attorney was Mr. Babineaux.

Moreover, even assuming *arguendo* that Ms. Hutto could have believed respondent was her attorney, there is nothing in the record to indicate respondent consented to perform legal services for her or that he had a reasonable basis to believe that she was relying on him for such services. The testimony of respondent and Mr. Babineaux, both of whom were found to be credible witnesses by the hearing committee, establishes that respondent contracted with Ms. Hutto to perform investment services for her. Obviously, performing investment services does not constitute the practice of law, as these services are typically offered by non-attorneys such as stockbrokers or investment consultants.

In reaching this conclusion, we recognize there can be a potential for confusion when an attorney wears a multitude of hats. To protect the client, this court has given great deference to the client's

subjective belief whether an attorney-client relationship exists.... Nonetheless, the overarching question is whether there is a reasonable, objective basis to determine that an attorney-client relationship has formed.... In the instant case, the client's subjective belief and the objective facts unite to form one inescapable conclusion: no attorney-client relationship ever existed between respondent and Ms. Hutto. 943 So. 2d at 347-48 (footnotes omitted).²

Because no attorney-client relationship existed, the court concluded that the ODC had not proved that Austin had violated, among other things, Rules 1.8(a) (on business transactions with clients), 1.15 (on safekeeping property), and 2.1 (on exercising independent professional judgment).

The court also considered whether Austin's conduct violated Rule 8.4, but it did not find that Austin's dealings with Ms. Hutto were fraudulent or deceitful.

However, the court did express a cautionary observation:

As a person trained in the law, respondent should have realized that entering into an unwritten investment arrangement with an unsophisticated person involving a substantial sum of money was a transaction fraught with danger. Although we do not find respondent acted dishonestly under the evidence presented, the potential for mischief under such a nebulous agreement is obvious. We take this opportunity to caution respondent, as well all other members of the bar, to be especially vigilant in dealing with the public to avoid the possibility of harm, even when acting outside of the role as attorney. *Id.* at 349.

10. Client Gifts

Gifts from clients are terrific, but they can also entail risks. The relevant rule, Rule 1.8(c), was at issue in the following case.

² The court included, in a footnote, the following language from the *Sheinkopf* case: Human beings routinely wear a multitude of hats. The fact that a person is a lawyer, or a physician, or a plumber, or a lion-tamer, does not mean that every relationship he undertakes is, or can reasonably be perceived as being, in his professional capacity. Lawyers/ physicians/ plumbers/ lion-tamers sometimes act as husbands, or wives, or fathers, or daughters, or sports fans, or investors, or businessmen. The list is nearly infinite. To imply an attorney-client relationship, therefore, the law requires more than an individual's subjective, unspoken belief that the person with whom he is dealing, who happens to be a lawyer, has become *his* lawyer. If any such belief is to form a foundation for the implication of a relationship of trust and confidence, it must be objectively reasonable under the totality of the circumstances. We agree with the court below that this threshold was not crossed in the instant case. [emphasis in original] 943 So. 2d at 348, n. 7.

In re Succession of Walters
943 So. 2d 1165 (La. App. 1 Cir. 2006)

This case involved a dispute over a will in which the testator named her attorney, Groves, who was also her second cousin, as executor and residuary legatee. She also made testamentary legacies to Groves and his children. One of the other legatees challenged the gifts to Groves and his children, claiming, among other things, that the gifts were null and void because Groves or an attorney in his firm had prepared the will.

Rule 1.8(c) of the Rules of Professional Conduct prohibits a lawyer from preparing an instrument giving the lawyer or a person related to the lawyer any substantial gift from a client. And, under the imputed disqualification rule, if another lawyer in the firm would be prohibited from drafting the document, all of the other lawyers in the firm would be prohibited as well.³ However, Rule 1.8(c) includes an exception to the prohibition for relatives. The pre-2004 version of the rule, applicable in this case, was not specific about the closeness of the relationship. It merely included an exception “where the client is related to the donee.” The current version of the rule is somewhat more specific. It states, in pertinent part: “For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, or grandparent.”

The court concluded that the exception applied, and that the gifts to Groves and his children did not violate the rule. It stated:

Since there was no definition contained in the statute at the time the will was drafted, the logical interpretation to be applied to Rule 1.8(c) is that the exception includes those “related” by blood or marriage. Mr. Groves’s relationship to Ms. Walters as a second cousin qualifies under this definition. 943 So. 2d at 1168.

The complaining legatee also claimed that the gift violated Rule 1.7 of the Rules of Professional Conduct, which is the basic conflict of interest provision of the rules. The argument was that neither Groves nor a lawyer in his firm should have prepared the will because the representation was materially limited by Groves’ own interests. In particular, it was argued that a provision of the will requesting that Groves, as residuary legatee, “consider distributing certain unnamed assets” created a conflict of interest because those distributions would come out of his legacy.” *Id.* at 1168.

The court rejected this claim as well. Although it said that it would have been preferable for Groves to have obtained outside counsel for the preparation of the will (which he apparently tried to persuade the testator to permit), the court did not find that the provision created “such a

³ Rule 1.10 states the general rule of imputed disqualification. The most recent version of the Rules of Professional Conduct also include an imputed disqualification provision in Rule 1.8 itself.

conflict of interest as to materially limit him in his representation of [the testator].” *Id.*

11. Unreal Settlement

Fraud is not to be encouraged. And lawyers who try to settle malpractice cases with their clients should recall that there are some rules about that in Rule 1.8(h).

In re Heisler

941 So. 2d 20 (La. 2006) (per curiam)

Heisler represented Butler on a contingent fee basis in a personal injury case. The defendant offered to settle for \$8000. Heisler rejected the offer without telling Butler about it. After filing suit and after undertaking some preliminary discovery, Heisler took no further action on the case.

In 2002, Butler inquired about the status of the case. At this point, no action had been taken on it for over three years. Heisler told her about the settlement offer, told her that he thought it was inadequate, but he also directed her to accept the offer. Realizing that it would not be likely that he could revive the case, Heisler decided to fund the settlement himself, without telling his client the truth. He prepared a simulated settlement sheet for Butler’s signature, reflecting a gross settlement of \$8,000 and deductions for medical expenses, court costs, client advances, and a 40% attorney’s fee. Dissatisfied with the “settlement,” Butler later filed a complaint with the ODC.

Heisler admitted, in the disciplinary proceedings, that he had attempted to remedy his malpractice through an improper settlement. In light of some mitigating circumstances, which included remorse, cooperation in the disciplinary proceedings, and lack of any prior disciplinary infractions during fifty-five years of practice, the court ordered a one-year suspension, fully-deferred, with unsupervised probation.

12. Malpractice Disclosure

Lawyers are fiduciaries for their clients. Does this mean that they should disclose acts of malpractice to their clients?

In re Williams

947 So. 2d 710 (La. 2007) (per curiam)

Attorney Williams was charged with several instances of misconduct, and was disbarred. One of the instances of misconduct included failing to disclose to a client that Williams had committed malpractice.

The Louisiana Supreme Court summarized the instances of misconduct as follows:

The undisputed evidence in the record of this matter reveals that respondent neglected six legal matters, failed to communicate with seven clients, failed to protect one client's interest upon termination of the representation, and failed to cooperate with the ODC in four investigations. Respondent also allowed one client's claim to prescribe and did not inform her that she may have a malpractice claim against him for his failure to file suit on time. This conduct violates Rules 1.3, 1.4, 1.8, 1.16(d), and 8.1(c) of the Rules of Professional Conduct. 947 So. 2d at 713-714.

The court did not explicitly state which rule was violated by the failure to tell the client about the potential malpractice claim. But such a failure could be seen to run afoul of Rule 1.4, on communication, and involve a conflict of interest. The obligation to make the disclosure would also be consistent with the concept that a lawyer is a fiduciary for the client.

13. Fiduciary Duty to Other Lawyers

Although lawyers are fiduciaries to their clients, it is harder to claim that they are fiduciaries for lawyers whom they do not represent.

Scheffler v. Adams and Reese, LLP 950 So. 2d 641 (La. 2007)

In this case, the Louisiana Supreme Court considered the extent to which two lawyers representing the same client might have fiduciary obligations to each other.

Attorney Scheffler was retained by Boomtown Casino Westbank to defend personal injury claims. Boomtown instructed Scheffler to work with and report to attorney Perdigao, of the Adams and Reese firm.

Approximately two years later, Boomtown informed Scheffler that Perdigao had "ethical problems" and that another Adams and Reese lawyer would be taking his place. According to a relatively contemporaneous newspaper article, Perdigao had billed and collected fees outside of the law firm's accounting system. Scheffler apparently had no knowledge of or involvement with these activities. Nonetheless, he received a letter from Boomtown terminating his representation "in light of recent events."

Scheffler sued, alleging that he had claims against Perdigao for negligent interference with a contractual relationship, intentional interference with a contractual relationship, negligence, unfair trade practices, fraud, and breach of fiduciary duty. He also claimed that the Adams and Reese firm was responsible for Perdigao's actions under principles of respondeat superior and that the firm was independently liable for its negligence in failing to adequately supervise Perdigao's activities.

Following a hearing, the district court dismissed all claims, except the one for breach of fiduciary duty. That issue came before the

Louisiana Supreme Court.

With respect to general propositions, the court observed:

Generally, whether a fiduciary duty exists, and the extent of that duty, depends upon the facts and circumstances of the case and the relationship of the parties. As a basic proposition, for a fiduciary duty to exist, there must be a fiduciary relationship between the parties. . . .

. . .

The defining characteristic of a fiduciary relationship ... is the special relationship of confidence or trust imposed by one in another who undertakes to act primarily for the benefit of the principal in a particular endeavor. 950 So. 2d at 647-48.

In this instance, the court concluded that there had been no fiduciary relationship between the two lawyers:

A review of Scheffler's petition reveals that there are no facts pleaded that would establish a legal relationship between the parties that would give rise to fiduciary obligations. In other words, the petition fails to allege facts sufficient to establish the existence of a fiduciary relationship between Scheffler and Perdigao or Adams and Reese. The petition clearly avers that Scheffler and Perdigao were retained individually and independently by Boomtown to represent Boomtown. There is no allegation of a contract between Scheffler and Perdigao or Adams and Reese. Likewise, the petition is devoid of any allegations regarding the existence of a mandate, or agency relationship, between the attorneys, i.e., there is no allegation that Perdigao or Adams and Reese was transacting any of Scheffler's affairs for the benefit of Scheffler; only that the parties were separately retained by Boomtown to represent Boomtown. Neither is there any allegation of a co-ownership interest in the endeavor, such as would derive from a partnership or joint venture agreement between the attorneys.

The petition alleges only that Scheffler was instructed by his client "to work with and answer to Perdigao." Even when construed most favorably to Scheffler, the petition, at best, describes a relationship in which the attorneys acted as co-agents of Boomtown. *Id.* at 648 (footnote omitted).

But the court did not stop here. It also rejected the fiduciary duty claims based on public policy. Scheffler had argued that Perdigao and Adams and Reese had had an obligation to protect his prospective interest in attorney fees. The court said:

[W]e conclude that it is fundamental to the attorney-client relationship that an attorney have an undivided loyalty to his or her client. This duty should not be diluted by a fiduciary duty owed to

some other person, such as co-counsel, to protect that person's interest in a prospective fee. While, as a practical matter, both the client and co-counsel stand to benefit from any recovery, their interests are not always identical. It would be inconsistent with an attorney's duty to exercise independent professional judgment on behalf of his client to impose upon him a fiduciary obligation to take into account the interests of co-counsel in recovering any prospective fee.

...

Accordingly we hold that, as a matter of public policy, based on our authority to regulate the practice of law pursuant to the constitution, no cause of action will exist between co-counsel based on the theory that co-counsel have a fiduciary duty to protect one another's prospective interests in a fee. To allow such an action would be to subject an attorney to potential conflicts of interest in trying to serve two masters and potentially compromise the attorney's paramount duty to serve the best interests of the client. *Id.* at 653.⁴

IV. Materials from Other Jurisdictions

A. Abusive Disciplinary Investigation

Although reported cases of this kind are rare, disciplinary counsel can sometimes engage in inappropriate conduct.

Breiner v. Sunderland

143 P.3d 1262 (Haw. 2006) (per curiam)

Attorney Breiner was the subject of two disciplinary complaints. Both involved claims related to fees in criminal defense representation. Sunderland, an assistant disciplinary counsel, met with Breiner about the allegations in one of the matters. Two years later, Sunderland asked Breiner to respond to 26 questions about the case. Thereafter, on separate occasions, he asked Breiner to provide a complete copy of the original file, identify accounts in which he had deposited money received from the client, and produce twelve categories of financial records. Thereafter,

⁴ The court noted that an earlier case might be read to articulate a different rule. But it stated:

There is only one reported decision in Louisiana that suggests that a breach of the fiduciary duty owed by attorneys engaged in a joint venture might in some circumstances support a cause of action for intentional interference with contract. *Krebs v. Mull*, 97-2643 (La. App. 1 Cir. 12/28/98), 727 So.2d 564, writ denied, 99-0262 (La.3/19/99), 740 So.2d 119. To the extent that *Krebs* deviates from the bright-line rule announced herein that no cause of action will exist between co-counsel based on the theory that co-counsel have a fiduciary duty to protect one another's prospective interests in a fee, it is disapproved.

Id. at 653 n. 10.

[b]y letter dated November 5, 2004, Sunderland sought detailed answers to seventeen additional questions

On March 22, 2005, Sunderland asked Breiner to respond to twenty-four additional questions. Breiner responded on May 19, 2005, and, thereafter, Sunderland sought additional information by telephone on June 23, 2005. Breiner responded on August 26, 2005.

On October 10, 2005, Sunderland sought responses to twenty-nine additional questions. Breiner responded to each question by letter dated January 19, 2006.

On January 26, 2006, Sunderland sent to Breiner one hundred additional questions, many with multiple sub-questions, and, on February 3, 2006, Sunderland forwarded two more questions. 143 P.3d at 1265.

On March 20, 2006, Breiner's attorney wrote to the chief disciplinary counsel, complaining of Sunderland's "oppressive and overreaching behaviors." The chief disciplinary counsel responded by saying that the "requests for information seem appropriate, focused, and necessary to conclude complex investigations into serious allegations of misconduct by clients[.]" *Id.*

On April 12, 2006, Breiner petitioned for a writ of prohibition. The matter eventually came to the Hawaii Supreme Court, which ordered relief. The court stated:

We fully recognize that an attorney has a duty to cooperate with a disciplinary investigation. . . . Sunderland's questions to Breiner, however, require much more than cooperation regarding grievances submitted by Breiner's clients. In fact, Sunderland's questions require Breiner to make admissions, to analyze and apply rules, and to state legal conclusions.... Sunderland's letter-questions are interrogatories of the worst sort inasmuch as they are onerous and, in a number of instances, improper. Many questions ask Breiner to opine on matters that the ODC appears to be trying to establish and for which it bears the burden of proof by clear and convincing evidence. . .

Some "questions" are offensively imperious

Other questions exhibit a complete misunderstanding of the rules at best or constitute harassment at worst

Sunderland's questions and comments, in our view, clearly exceed any rule of reasonableness that can be applied to the broad discretion granted for disciplinary investigation. *Id.* at 1269.

The court ordered Sunderland to be removed from the case. It also established a time deadline for the ODC to complete a review and make a recommendation and, if formal proceedings were to be commenced, an additional time deadline for those proceedings. If the deadlines were not

met, the court ordered that the charges be dismissed. It also ordered the disciplinary board to propose rules concerning

(1) the scope of disciplinary investigations, including, but not limited to, subject matters that may permissibly be investigated or discovered in relation to a complaint or grievance and (2) the means by which an attorney who is the subject of a disciplinary investigation or proceeding may seek protective orders from the Disciplinary Board and this court. *Id.* at 1270.

B. Problems with Fees

1. Sex

Disciplinary Counsel v. Sturgeon

855 N.E.2d 1221 (Ohio 2006) (per curiam)

Ohio lawyer Sturgeon pressured financially vulnerable female clients for sexual favors in exchange for reduced legal fees. Over the course of a year, he fondled one client and made crude comments to her, he persuaded another client to perform oral sex on him, and he exposed himself to another client after making crude comments to her.

The Ohio Supreme Court discussed Sturgeon's conduct as follows:

[His] actions were rude, offensive, and thoroughly unprofessional. He used the attorney-client relationship to gratify his own sexual interests rather than focusing on the legal needs of his clients. His crude behavior would not be acceptable in any social setting, and it was outrageously inappropriate in the midst of an attorney-client relationship. Respondent preyed on women who were in vulnerable legal and financial circumstances, and he tried to seduce them for his own selfish gratification.

. . . [L]awyers must always exercise independent professional judgment and render candid advice to their clients. A lawyer who attempts to engage in a sexual relationship with a client – particularly when the client is clearly not interested in that kind of relationship – puts the lawyer's own personal feelings ahead of the objectivity that must be the hallmark of any successful attorney-client relationship. By repeatedly initiating sexual conduct with clients, respondent called into serious doubt his commitment to a profession in which the clients' interests must always come first. 855 N.E.2d at 1225.

For his actions with the clients, and for lying in disciplinary proceedings, Sturgeon was permanently disbarred.

2. Lawyer Education

Attorney Grievance Commission of Maryland v. Manger

913 A.2d 1 (Md. 2006)

Client Alba Miller approached attorney Manger, a 75-year old

attorney, for assistance with child custody problems. She had been denied joint custody of her two children due to a diagnosis that she suffered from bipolar disorder with paranoid tendencies. Miller agreed to pay Manger on a hourly basis.

There were problems with the legal fees. According to the Maryland Court of Appeals,

A significant portion of Respondent's activity, for which he billed his client, was aimed at educating himself on mental health issues However, Respondent's education at his client's expense went too far. It should have been apparent to the Respondent that he would not be a witness in the case and that educating himself was not a substitute for presentation of expert testimony on the mental health issues.

The bulk of Respondent's research was of a general nature and should not have been billed to the client. A client who engages counsel has a right to expect that the attorney will have sufficient general knowledge to competently represent her. While it may be appropriate to charge a client for case-specific research or familiarization with a unique issue involved in a case, general education or background research should not be charged to the client.

Similarly, the significant amount of time that Respondent devoted to preparing a memorandum to accompany the Petition to Set Aside or Modify the Custody Order, as well as the submission of witness declarations in support of the Complainant, were essentially pointless. While it might have been useful to interview potential witnesses and even obtain their statements for his file, Respondent should have realized that these declarations consisted of inadmissible hearsay. The trial court could not have considered the declarations to prove the substance of the witness statements.

The Court also finds that the Complainant was excessively billed for administrative activities and other items that should have been absorbed as office overhead, such as looking up zip codes, making up Rolodex cards and the like. Complainant should not have been charged for such items at all, and certainly not at an attorney's hourly rate. 913 A. 2d at 5.

There were additional problems with the quality of Manger's work. Although he did a lot of work, in preparing his petition on the custody issue, Manger did not consult the Maryland Rules, statutes or case law concerning child custody. Instead of attempting to show that there had been "a material change in circumstances" related to child custody, Manger "focused his significant efforts on a quixotic attempt to establish that the court was wrong when it entered the custody order in the first place." *Id.* at 5-6. Manger was indefinitely suspended.

3. Inflation

In re Nussberger

719 N.W.2d 501 (Wis. 2006) (per curiam)

L.R., who was the personal representative for the estate of her mother, retained attorney Nussberger to handle the probate of her mother's estate. With the exception of some money that was to be paid to L.R.'s brother, the estate's assets were required to be turned over to the State of Wisconsin to repay governmental assistance that the mother had received during her lifetime. Nussberger told L.R. that it was unfortunate that she would not be receiving any funds from the estate, other than the 2 percent allowed to her as the personal representative's fee. L.R. asked about billing the estate for work that her husband had done to care for her mother's house while it was waiting to be sold. Nussberger responded that she could not receive any additional payment beyond the personal representative's fee. But he suggested to L.R. that he could submit a billing statement for his legal work that was higher than the amount of the fees he had actually earned and then split the extra money with L.R.

L.R. was troubled by the suggestion and contacted the police. They arranged for L.R. to wear an electronic recording device at her next meeting with Nussberger. In that meeting, after some initial discussion, Nussberger raised the possibility of "trying to get a little bit extra."

He explained that, hypothetically, if the actual fee might be \$1500, he could submit a bill for \$2500, which he didn't think would raise any flags with the people reviewing the invoice. After further discussion, Attorney Nussberger said that he would have to review the matter further. He then stated that he would have to look at what his office's regular time was and how much he could potentially pad. 719 N.W.2d at 504.

The idea was never implemented, but the client filed a disciplinary complaint based on the recommendation to inflate the bill. The Wisconsin Supreme Court adopted the conclusion of a referee that Nussberger's conduct constituted counseling a client to engage in conduct that he knew was criminal or fraudulent. It also observed:

While there ultimately may have been no financial harm to L.R. or to the State because Attorney Nussberger's plan was never completed, that does not mean that there was no harm caused by his conduct. L.R. testified that the situation had caused her an immense amount of stress, had adversely impacted her trust for attorneys, and had led her to hope that she never needed to retain another attorney. In addition to the harm to the client, his conduct also certainly harms the reputation of the profession generally. *Id.* at 506.

Nussberger was suspended for 60 days.

4. Change from Contingent to Hourly Fee

**New York County Lawyers' Association
Committee on Professional Ethics
Opinion 736 (9-21-06)**

This New York ethics committee considered whether a retainer agreement could permit a lawyer working on a contingent fee to convert his or her compensation into an hourly rate arrangement if the client refuses a reasonable settlement offer. The committee said that it could not. It was of the view that giving such significant financial leverage to the lawyer in the discussion of settlement options would impermissibly interfere with the client's right to make settlement decisions.

C. No-Contact Rule & In-House Counsel

The no-contact rule is the one that generally prohibits lawyers from communicating about the subject matter of the representation with persons represented by counsel, unless that counsel consents.

**ABA Standing Committee on Ethics and Professional Responsibility
Formal Opinion 06-443 (August 5, 2006)**

The ABA ethics committee said, in this opinion, that a lawyer who represents a client in a matter involving an organization generally may contact that organization's in-house counsel without seeking permission from the organization's outside lawyer. The committee reasoned that the protections provided by Rule 4.2, the no-contact rule, are not needed when the person contacted is a lawyer.

Rule 4.2 prohibits a lawyer from communicating with a represented person about the subject matter of the representation unless the person's lawyer consents or unless the contact is authorized by law or court order. Its purpose is to prevent a skilled advocate from taking advantage of a non-lawyer. It prevents overreaching, shields the attorney-client relationship, and protects uncounseled disclosure of confidential information. In the organizational context, the rule prohibits an opposing lawyer from communicating with a constituent of an organization who supervises or regularly consults with the organization's lawyer about the matter, who has authority to bind the organization in the matter, or whose acts or omissions may be imputed to the organization for purposes of liability.

But the committee thought that it was unlikely that in-house counsel would inadvertently make harmful disclosures. And if in-house counsel did not want to be contacted by an opposing lawyer, he or she could refer the contacting attorney to the organization's outside lawyer.

However, the committee observed that, in some instances, the in-house lawyer could come within the scope of the rule. One of those instances could arise when the in-house lawyer was involved in giving advice or making decisions that gave rise to the issues in the dispute.

D. Confidentiality and the Attorney-Client Privilege

The duty of confidentiality can arise in situations that might surprise some lawyers. That duty is sometimes confused with the attorney-client privilege, which is an evidentiary rule.

Massachusetts Bar Association Committee on Professional Ethics Opinion 07-01 (5/27/07)

The Massachusetts Ethics Committee considered some issues related to a lawyer's receipt of an unsolicited email communication from a prospective client through a link on a law firm's website. In the scenario considered in the opinion, the law firm's website included biographical information for each lawyer and also a link that permitted a viewer to send an email message to the lawyer. The website contained no disclaimer regarding the confidentiality of any information sent to the lawyer.

The committee analyzed a situation in which ABC Corp. used the email link on the firm's website to inform one of the lawyers that it wanted to retain the lawyer to bring a claim against XYZ Corp. and to provide information about the claim. However, the firm was already representing XYZ in unrelated matters, so the lawyer declined to take on the new representation.

The committee said that, in some instances, a duty of confidentiality could arise even if no attorney-client relationship were formed. Under the facts, the committee thought that a prospective client who visited the website might reasonably conclude that the firm had implicitly agreed to consider whether to form an attorney-client relationship.

It also noted that the firm could have avoided this risk by conditioning use of the email link through appropriate disclaimers. In particular, it noted that the firm could have required a prospective client to review and "click" his or her assent to the terms of use before using the link.

The committee also concluded that the firm's receipt of confidential information could limit the firm's ability to represent XYZ Corp. If the email message included information that was relevant to ABC's claim against XYZ, the committee thought that the obligation to maintain the confidentiality of that information would materially limit the firm's ability to represent XYZ. The result, according to the committee, would be disqualification.

The committee noted that Model Rule 1.18, which was not adopted in Massachusetts,⁵ provides for a more lenient treatment of the potential conflict. Under that rule, a lawyer who receives confidential information from a prospective client is prevented from representing an adverse party

⁵ This Rule was adopted in Louisiana.

only if the information could be significantly harmful to the prospective client in the matter. Even where there would be such harm, representation could still be permissible, under Rule 1.18, if the lawyer were to be timely screened.

**Virginia State Bar Standing Committee on Legal Ethics
Opinion 1832 (5/10/07)**

The Virginia ethics committee considered whether a lawyer owes a duty of confidentiality to a prospective client who speaks with the lawyer's secretary.

In the question presented to the committee, a woman called the lawyer's office for a consultation in a matter concerning her former husband. She spoke with the lawyer's secretary. The secretary scheduled an appointment to meet with the lawyer. Later the woman called back and told the secretary that the lawyer had previously represented the sister of her ex-husband. The secretary so informed the lawyer. Before this second call, however, the ex-husband had made an appointment to meet with the lawyer. And the lawyer told the secretary that he would not represent the woman; instead, he would represent the ex-husband.

The woman objected to the representation. She said that she had told the secretary "all the facts" about her case. However, the secretary and the lawyer contend that they did not learn any confidences from the woman. The issue was whether it was permissible for the lawyer to continue to represent the ex-husband against the ex-wife.

The ethics committee concluded that, even though the lawyer had not spoken with the ex-wife, and had not agreed to represent her, he owed her a duty of confidentiality. The committee said that a person who consults with a lawyer may reasonably expect that the lawyer will protect confidential information. Individuals who seek legal assistance must be comfortable that information they reveal to a lawyer will not be used against them.

The committee said that the duty of confidentiality is also triggered when information is given to support staff. It noted that, under Rule 5.3, a lawyer is obligated to instruct and to supervise nonlawyer assistants about the ethical aspects of their work, including the aspect of preserving the confidentiality of client information.

In this instance, the committee said that the lawyer could continue to represent the ex-husband, provided that the secretary was screened from involvement in the representation. If the screen were to be breached, and the lawyer were to learn confidential information that the ex-wife had provided to the secretary, the lawyer might have to withdraw from the representation.

It should be noted that Rule 1.18 includes some provisions relating to duties to prospective clients.

State v. Branham
952 So. 2d 618 (Fla. Ct. App. 2007)

Attorney Kelly was a friend to Michael Branham and his wife, who were having marital difficulties. He made it clear that he would not represent either of them in divorce proceedings, but he agreed to act as a go-between to help them with their difficulties. He was also representing Michael in a negligence case. On one occasion, he went to Michael's house on a social visit. Michael asked Kelly if he was his attorney. Kelly said, "Sure." Michael then said that he was going to kill his wife. He said this several times during their conversation. Kelly told Michael, "You're crazy. I don't even want to hear it. Don't talk like that."

About a week later, Michael's wife was killed. Thereafter, Kelly was subpoenaed to disclose relevant information. He raised the attorney-client privilege, but a judge ordered him to respond, and he did. In the criminal proceedings against Michael, the state sought a ruling that the conversation between Kelly and Michael was not subject to the attorney-client privilege. The trial court ruled that the conversation was covered by the attorney-client privilege. However, the court of appeals said that it was not.

By Florida statute, the privilege applies to communications only if they are made in the rendition of legal services to the client.⁶ The court concluded that this was not the case here. Michael had not asked Kelly for legal advice and Kelly did not give any. It was not enough that Kelly had told Michael that he was his lawyer. The privilege, said the court, "is not established by incantation. Nor does it come into existence simply because a party believes that it exists." 952 So. 2d at 621. In this instance, the conversation was, according to the court, totally unrelated to the lawyer-client relationship between Kelly and Michael. As a result, the information from the conversation was admissible.

A concurring judge observed that even if Michael had asked Kelly for advice with respect to the murder, the privilege would not have applied, on account of the crime-fraud exception.

E. Fraud and Other Wickedness

Rule 8.4 prohibits lawyers from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.

⁶ By way of comparison, article 506(B) of the Louisiana Code of Evidence provides, in part:

A client has a privilege to refuse to disclose, and to prevent another person from disclosing, a confidential communication, whether oral, written, or otherwise, made for the purpose of facilitating the rendition of professional legal services to the client

In re Scanio

919 A.2d 1137 (D.C. Ct. App. 2007)

Lawyer Scanio was involved in a traffic accident in September of 2000. He sought medical treatment, and he missed the next day of work at his law firm. A claims adjuster for the other driver's insurance company contacted Scanio about the accident. He said that he was a partner at his law firm. He sent the adjuster a letter claiming economic loss of \$16,697 as of December 29, 2000. He calculated this by multiplying his hourly billing rate of \$295 per hour by the time lost attributable to his injuries. Later, he told the adjuster that his hourly rate had increased to \$325 per hour and that his economic loss amounted to \$23,034 though February 8, 2001.

The adjuster called Scanio's law firm and learned that he was a non-equity partner — a salaried employee — who was paid about \$122 per hour, and that he had not been docked for sick leave or any other time. Thereafter, the law firm looked at the correspondence between the adjuster and Scanio. It told Scanio that it considered his statements misleading because, as a salaried employee, he was not entitled to a portion of the firm's billings. The firm told him that he was being terminated. It also sent copies of the correspondence to bar counsel. Scanio was charged with a violation of Rule 8.4(c), which prohibits conduct involving dishonesty, fraud, deceit, or misrepresentation.

The disciplinary case eventually came before the court of appeals. It concluded that Scanio had violated Rule 8.4(c). Scanio contended that he had been engaged in "aggressive conduct between business adversaries," and he claimed that he had, in fact, provided information to the adjuster that showed that he was not being compensated at \$295 or \$325 per hour. The court rejected this contention, and noted:

As the Board explained, "[The nature of Respondent's misstatements and material omissions is evidence, by itself, of his intent to deceive [the adjuster] into believing that he had actually lost income at a rate governed by his billing rate." Moreover, the Board's conclusion that the April 3 letter to the firm contained "a series of blatant lies" speaks for itself. 919 A.2d at 1143.

Scanio was suspended for 30 days.

**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 involved 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.

Cincinnati Bar Assn. v. Zins

875 N.E.2d 941 (Ohio 2007) (per curiam)

By the summer of 2005, attorney Zins found that he could not meet his child-support obligations or pay his bills. He decided to use his position at a Citibank branch to steal money. He opened a bank account in one customer's name and applied for a credit card using that customer's identity. He also accessed bank records and changed another customer's address to a vacant apartment near his home and ordered checks for delivery there. By drafting checks from that customer's account and using a debit card to access the first customer's account, Zins stole \$1,236. He tried to use the vacant apartment and a post office box as addresses at which he hoped to obtain credit cards from two other customers, but he was caught before he could do so.

Zins was charged with identify fraud. He pleaded guilty, was required to perform community service, and reported his conviction to the bar association.

The Ohio disciplinary board charged Zins with conduct involving fraud, deceit, or misrepresentation. The Ohio Supreme Court observed that a lawyer who commits crimes of theft "violates the duty to maintain personal honesty and integrity, which is one of the most basic professional obligations owed by lawyers to the public." 875 N.E.2d at 943. The court noted that it had previously disbarred lawyers for theft offenses. Here, however, there were several mitigating factors, including full restitution, cooperation with disciplinary authorities, and genuine remorse. Zins was suspended for two years.

F. Legal Thuggery

There are some purposes for which lawsuits should not be used.

Seltzer v. Morton
154 P.3d 561 (Mont. 2007)

Morton paid an art gallery \$38,000 for a painting bearing the signature of western artist C.M. Russell. Some years later, it was estimated to be worth \$650,000. Morton decided to put it up for auction. The auction house declined to sell the painting, however, because it suspected that the painting was a forgery, and was actually the work of a lesser artist, O. C. Seltzer. It hired art expert W. Steve Seltzer, who is O. C.'s Seltzer's grandson, to examine the piece. Seltzer concluded that the painting had been done by his grandfather. A second art expert reached the same conclusion.

On Morton's behalf, the Gibson Dunn & Crutcher law firm tried to get Seltzer and the other expert to disavow their conclusions. Among other things, the firm wanted the experts to say that they had not thoroughly examined the painting. It threatened to sue them unless they did so. When the experts did not cooperate, the firm sued them for defamation, negligence, and interference with business dealings. The suit was later dismissed when Morton could not find an expert who would certify the authenticity of the painting. Seltzer, on the other hand, produced nine expert affidavits in support of his analysis.

Seltzer sued Morton and Gibson Dunn for malicious prosecution and abuse of process. He introduced evidence that while the firm was suing him it was also seeking compensation from the art gallery for selling Morton a fake. A jury awarded Seltzer \$1.1 million in compensatory damages and \$20 million in punitives. The punitive award was reduced to \$9.9 million by the judge.

The Montana Supreme Court affirmed. The court said that it agreed with Gibson Dunn's position that the mere filing of an unfounded lawsuit does not establish an abuse of process. However, the court was of the view that Seltzer had shown that the law firm had not used the lawsuit as a legitimate means to resolve a dispute but had instead used it as an instrument of coercion to force Seltzer to perform a collateral act – renouncing his opinion – that it could not legally require. It also considered the punitive damages to be appropriate. Summarizing its views on the conduct of the law firm, the court said:

In short, GDC's use of the judicial system amounts to legal thuggery. This behavior is truly repugnant to Montana's foundational notions of justice and is therefore highly reprehensible. Thus, in accordance with Montana's legitimate interest in punishment and deterrence, we conclude that a particularly severe sanction comports with due process. 154 P.3d at 609.

G. Collaborative Law

Never heard of "collaborative law"? It's starting to get some

attention from ethics committees.

**American Bar Association
Standing Committee on Professional Responsibility
Formal Opinion 07-447 (8-9-07)**

In this opinion, the ABA Ethics Committee considered the propriety of engaging in “collaborative law practice.” This involves a type of alternative dispute resolution, in which lawyers and their clients agree to work together cooperatively in order to reach a settlement. They enter into a contract, typically called a “four-way” agreement, in which they agree to negotiate toward a settlement without court intervention, and in which they agree to share information to achieve such a settlement. The four-way agreement includes a provision that if the effort fails, the lawyers will withdraw from the representation and will not be involved in litigation related to the dispute.

Is this sort of thing ethical? The ABA committee thought so. It noted that lawyers are free to limit the scope of their representation under Rule 1.2, if the limitation is reasonable and if the client gives informed consent. It rejected the view of a Colorado ethics committee that collaborative law practice involves a nonwaivable conflict under Rule 1.7. It agreed that a lawyer’s agreement to withdraw from representation if a settlement is not achieved does create “responsibility to a third party,” under Rule 1.7, but it opined that this responsibility does not create a conflict of interest. In that connection, the ABA committee said that a lawyer’s responsibility to a third person amounts to a conflict of interest if there is a significant risk that the responsibility will materially limit the lawyer’s representation of the client. But the committee thought that, in collaborative law practice, the agreement to withdraw does not impair the lawyer’s ability to represent the client. That agreement, thought the committee, is consistent with the client’s limited goals for the representation.

The ABA committee did say that the client’s informed consent to collaborative law practice requires the lawyer to provide adequate information about the contractual terms and rules governing the process, the advantages and disadvantages of the process, and the availability of alternatives to the process. The lawyer must make sure that the client understands that the lawyer will have to withdraw if a settlement is not achieved and that, in that case, the client will have to retain another lawyer.

**Colorado Bar Association Ethics Committee
Opinion 115 (2/24/07)**

As indicated above, the Colorado ethics committee took a different view. The ethics committee thought that the practice of collaborative law violates Colorado Rule 1.7(b), which forbids a lawyer from representing a client if the representation may be materially limited by the lawyer’s

responsibilities to a third person, unless the lawyer reasonably believes that the representation will not be adversely affected and the client consents after consultation. The problem is that the disqualification agreement that is part of a collaborative law arrangement gives the lawyer “responsibilities” to a third person – in this case the opponent. And the committee did not think that the problem could be resolved with consent, because if the collaborative process is unsuccessful, the lawyer’s obligation to the opponent will take priority over the lawyer’s obligation to consider litigation.

The committee noted that some other ethics committees had approved collaborative law arrangements, but it said that those committees had not focused on Rule 1.7.

It contrasted collaborative law with “cooperative law.” The committee said that they are similar, but that cooperative law does not require a lawyer to enter into a disqualification agreement with an opposing party. A cooperative law arrangement would be permissible even if the lawyer entered into an agreement with his or her own client to limit the representation to the cooperative process. The committee thought that such an agreement would represent an application of Rule 1.2’s provision on limiting the scope of representation, as opposed to an agreement with the opposing party to terminate the representation.

H. Metadata

There have been more developments involving metadata.

District of Columbia Legal Ethics Committee Opinion 341 (9/07)

Weighing in on the metadata problem, the District of Columbia Ethics Committee has taken 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.

Ethics committee opinions have reached different conclusions about metadata. Some state that review of metadata is permissible. Others have reached an opposite conclusion.

I. Duties of Departing Lawyer

Disputes sometimes arise over the pre-departure conduct of lawyers who move to new law firms.

Kopka, Landau & Pinkus v. Hansen 874 N.E.2d 1065 (Ind. Ct. App. 2007)

Larry Hansen was an associate at the Kopka law firm until he left to become a partner at the Skiles firm. The same day he resigned from the Kopka firm, three of the support staff and four other associates at that firm also resigned. Within a month, another Kopka associate also resigned. All of these associates and the departing support staff also joined the Skiles firm.

The Kopka firm sued Hansen, claiming that he breached his fiduciary duty to the law firm, broke his contact with it, tortiously interfered with the firm's business opportunities, and wrongfully interfered with the business relationships between the firm and its employees. Kopka also filed some claims against the Skiles firm and one of its partners. In its complaint, the Kopka firm claimed that Hansen had been the managing partner of its Indianapolis office, but it later conceded that Hansen had been as associate. The defendants counterclaimed for malicious prosecution.

The trial court granted summary judgment for the defendants. With respect to the breach of fiduciary duty claim, the court of appeals stated: "although an employee may not actively and directly compete with his current employer, he may prepare to do so without breaching his duty of loyalty." 874 N.E.2d at 1071. The court thought that it did not violate this standard for Hansen to have 1) discussed with a paralegal at the Kopka firm a specific dollar figure that it might take for her to switch to the new law firm; and 2) asked an associate at the Kopka firm whether he wanted to go with him to the new law firm. It said:

He was certainly preparing to compete by questioning KLP employees about their desire, if any, to leave KLP and work for SHCD in the future. He was gathering information about [the paralegal's] salary requirement and [the associate's] willingness to quit his job. He expressed a desire to find positions for all of the KLP employees at SHCD. There is no evidence, however, that Hansen made formal offers of employment with SHCD to KLP employees or that he took actions that constituted anything more than mere preparation to compete with KLP. Consequently, we find that the trial court properly entered summary judgment in Hansen's favor on this count of KLP's complaint. *Id.* at 1071-72.

Neither did the court find a basis to overturn an award of \$22,000 in attorneys' fees against the Kopka firm for engaging in frivolous litigation and malicious prosecution. It noted, in this connection, that the Kopka firm had filed its lawsuit in a venue that was not preferred, had lost all of its claims on summary judgment, had incorrectly claimed that Hansen had been a Kopka partner, and had not produced facts in support of its claims.

J. Out of State Practice

There is more flexibility than there used to be regarding multi-state practice. But that does not mean that there are no limits.

Mitchell v. Progressive Insurance Co.

965 So. 2d 679 (Miss. 2007)

On November 27, 2002, Mississippi resident Carl Mitchell was involved in an automobile accident with Louisiana resident Patrick Benfatti, in New Orleans. On January 16, 2003, Mitchell's attorney, Karl Wiedemann, faxed a letter to Progressive Gulf Insurance Company stating that Benfatti was not insured at the time of the accident and asserting an uninsured motorist claim against Progressive.

In December of 2005, Mitchell attempted to file a complaint against Progressive in Mississippi. The complaint was signed by Wiedemann, a Louisiana attorney, and included his office address in New Orleans and his Louisiana bar number. Wiedemann was not licensed in Mississippi. That complaint was rejected by the Mississippi court clerk. In February of 2006, Mitchell filed a separate complaint against Progressive in Mississippi, this time signed by a Mississippi attorney.

Progressive filed a "Motion to Dismiss, in the alternative, Motion for Summary Judgment." Following a hearing, the court entered a judgment finding that the December 2005 complaint was not legally filed and the February 2006 complaint was filed beyond the statute of limitations and was therefore time barred. Mitchell appealed. The case eventually came before the Mississippi Supreme Court, which affirmed.

On the issue of the validity of the December 2005 complaint, the court said:

This Court finds that the December 5, 2005, complaint was properly refused by the circuit clerk and stricken from the record. Mitchell has presented no evidence that Wiedemann was licensed in Mississippi or had complied with any rule allowing a pro hac vice appearance. 965 So.2d at 684.

The court also found that Wiedemann's conduct, in attempting to file the December 5, 2005, complaint without being admitted pro hac vice, "may merit discipline by the Mississippi and/or Louisiana State Bar." *Id.* at 685. It remanded with instructions to notify the Louisiana State Bar of Wiedemann's conduct, which it characterized as

unauthorized practice of law.

K. Offensive Conduct

Boorish conduct is inconsistent with concepts of professionalism. But it can also lead to lawyer discipline. In some cases, though, the First Amendment can offer protection to the boorish lawyer.

Fieger v. Michigan Supreme Court 2007 WL 2571975 (E.D. Mich. 2007)

Michigan attorney Geoffrey Fieger was reprimanded for some statements he made about appellate court judges on a radio show. He was unhappy with the judges because they had overturned a multimillion dollar verdict for his client. He compared them to Nazis and jackasses, he said that they should be sodomized, and invited them to “kiss [his] ass.”

Fieger was reprimanded based on Michigan ethics rules that prohibited lawyers from engaging in “undignified or discourteous conduct” toward tribunals and that required lawyers to treat everyone in the legal process with “dignity and respect.”

The federal district court concluded that those rules violate the constitutional rights to free speech and due process, because they are over broad and vague. The court acknowledged that it was appropriate to restrict freedom of speech by attorneys in some instances, particularly in the courtroom. But it said that:

the further an attorney’s speech is from the judicial process or the closer it is to the end of a pending case, the less weight that should be given to a State’s interests in regulating this specialized profession.

In this instance, the court was concerned that, in disciplining Fieger, the Michigan Supreme Court had not sufficiently limited the scope of the words “discourteous” and “undignified.” It said:

By leaving the terms undefined, the courtesy provisions regulate almost any conceivable arena of attorney expression and critical speech, both protected and unprotected, including speech that should permit “extensive public scrutiny and criticism.” ... As interpreted, the rules reach any criticism of the tribunal whether it is warranted or unwarranted, political or apolitical, truthful or false, vulgar or artful. There are no exceptions for truth, for political speech, or for speech that does not create a “substantial likelihood of material prejudice” to a pending case.

In addition, the majority failed to differentiate between discourteous and undignified speech that may harm the fair administration of justice and the same type of speech that merely harms the dignity of the judiciary. In promoting the first interest, attorney speech is subject to more limitations based on a less stringent standard, “substantial likelihood of material prejudice.” Whereas, when

enforcing the rules to preserve judicial integrity, attorney speech should be subject to restriction based on a higher standard.

The court concluded that the applicable regulations were over broad and vague. And it granted declaratory relief in favor of Fieger.

**State ex rel. Counsel for Discipline of
Nebraska Supreme Court v. Beach**
722 N.W.2d 30 (Neb. 2006) (per curiam)

Attorney Beach met a waitress at a truck stop and agreed to help her with a felony probation revocation. Although the client was barred from drinking alcohol by the terms of her probation, Beach took her to bars and bought her drinks. He later said that he did this to “balance her wacky head.” Beach sent some letters to the county attorney relating to the matter of his client’s probation.

Without any request from his client, Beach sent her a divorce petition and asked her to sign it. He wrote to her:

Deep in your heart, you know that [your husband] is bad for you and always has been. You also know that for you to have a good life this sub human has to go He is scum and always will be. Honey, you can have a future. Let’s make it a good future. [The judge assigned to the probation revocation case] will know you are sincere if you dump your hubby. 772 N.W.2d at 22.

Without his client’s consent, Beach sent the husband a letter telling him that his client now realized “what a useless piece of shit you are,” and suggested that he kill himself by jumping off a bridge. The waitress later fired Beach.

When disciplinary proceedings were commenced against Beach, he wrote a letter to the bar association, stating that the proceedings were the result of a complaint by “a very dangerous woman attorney.” He sent a copy of the letter to the attorney with a handwritten notation stating: “The practice was more enjoyable before feminazi bitches like you came on the scene.” *Id.* at 34.

He also said, in a separate letter to disciplinary authorities, that “[y]our rules suck in situations like this.” And he also said, “I have several pissed off friends who are meaner than junk-yard dogs and have good memories.”

According to the published opinion in the case, a disciplinary referee:

found that respondent’s client, J.N., “was a drug addicted, psychologically impaired woman in need of legal and personal help.” She retained respondent to represent her with respect to a probation revocation case. Before she finally discharged him as her lawyer, respondent accompanied her to bars and purchased alcoholic beverages for her, in violation of the terms of her

probation; urged her estranged husband to commit suicide; and directed her to sign a divorce petition which he had drafted without being requested to do so. When disciplinary charges were filed against him, respondent directed his verbal fury at the Counsel for Discipline, court-appointed referees, the attorney representing J.N., the bar association, and this court. Some of his letters disclosed confidential information about J.N. to persons having no association with these proceedings. Hostile, threatening, and disruptive conduct reflects on an attorney's honesty, trustworthiness, diligence, and reliability and adversely reflects on one's fitness to practice law. *Id.* at 35.

The Nebraska Supreme Court also observed that “[c]umulative acts of attorney misconduct are distinguishable from isolated incidents and are therefore deserving of more serious sanctions.” *Id.* Beach was disbarred.

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