

Annual Institute on Mineral Law

Volume 54 *The 54th Annual Institute on Mineral Law*

Article 10

4-12-2007

Legal Ethics - Is There Anything New Under the Sun?

N. Gregory Smith

Louisiana State University Law Center, greg.smith@law.lsu.edu

Follow this and additional works at: https://digitalcommons.law.lsu.edu/mli_proceedings



Part of the [Oil, Gas, and Mineral Law Commons](#)

Repository Citation

Smith, N. Gregory (2007) "Legal Ethics - Is There Anything New Under the Sun?," *Annual Institute on Mineral Law*: Vol. 54 , Article 10.
Available at: https://digitalcommons.law.lsu.edu/mli_proceedings/vol54/iss1/10

This Paper is brought to you for free and open access by the Mineral Law Institute at LSU Law Digital Commons. It has been accepted for inclusion in Annual Institute on Mineral Law by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

6. Legal Ethics - Is There Anything New Under the Sun?

N. Gregory Smith

*G. Frank & Winston Purvis Professor of Law
LSU Law Center*

I. Introduction

The answer to the question in the title is yes. The law of lawyering is subject to rapid change. Change comes as the result of court orders, court decisions, legislative enactments, and the work of bar associations and their constituent groups. The most important changes, for most lawyers, are those that result from actions by the state supreme court. But actions by other courts, and other groups, can also have significant impact on the practice. Local law practice can also be affected by developments outside of the state. Among other things, local law practice can be influenced by congressional enactments, by actions of the American Bar Association, and by decisions of courts and ethics committees in other jurisdictions.

II. News

A. Kickbacks

A Los Angeles grand jury indicted a New York law firm, and two of its partners, alleging that, over a period of 20 years, it paid millions in dollars in secret kickbacks to persons who served as plaintiffs in class action lawsuits and shareholder derivative lawsuits involving major corporations. The kickbacks were alleged to have helped the firm become lead counsel in lucrative cases. The government claimed that the firm received over \$200 million in fees from class action suits and shareholder derivative suits over the period.

The firm and the partners issued a statement denying the allegations. It also said that it had been in negotiations with the government for six months to avoid an indictment of the entire firm for conduct which, even if true, was unknown to 125 lawyers and 240 employees at the firm. The firm also objected to the government's insistence that the firm waive the attorney-client privilege as a condition of avoiding indictment.¹

B. Malpractice Insurance

Idaho and Minnesota have now been added to the list of states that require lawyers to disclose whether they carry malpractice insurance. The Idaho and Minnesota rules do not require that lawyers disclose this

¹ Tom Gilroy, *Grand Jury Indicts Milberg Weiss in Alleged Plaintiff Kickback Scheme*, 22 ABA/BNA Lawyers' Manual on Professional Conduct 264.

information to clients or prospective clients, but the Minnesota rule provides for disclosure of the information to the public.

Nineteen states now appear to have some form of mandatory insurance disclosure rule. Oregon is the only state that actually requires lawyers to carry malpractice insurance.²

C. Accidental Clients

A panel at the June 2006 Annual ABA National Conference on Professional Responsibility considered the topic: "Tort Liability to Third Parties: How Lawyers Can Be Liable for the Sins of the Clients."

One of the issues that came up dealt with so-called "accidental" or "whoops" clients. These are clients that the lawyer did not intend to have. In some cases, these clients can pursue disqualification motions or bring malpractice actions. "Lawyers can get into big trouble when they don't recognize who the client is," said one panelist. Sometimes it is not easy to tell who the clients are. For example, the panel considered the case of a lawyer being approached by an individual manager who wants to start a corporation. He explains that there will be two other shareholders. The lawyer forms the corporation. Later, the manager tells the lawyer that the corporation needs to be dissolved, and he, the manager, will receive the sole asset of the corporation. To whom does the lawyer owe duties in this situation?

One person who was present at the program looked at the issue another way, and suggested that lawyers pay attention to who the client isn't. The idea here is to confirm that you are not representing someone. Do non-representation letters. It was suggested, as well, that reminders of the representational role be included in correspondence along the way. "I represent so and so, and you should get your own lawyer to review these documents."

Another issue that came up in the discussion was that of disqualification based on unsolicited receipt of confidential information from unsolicited email communications. One of the problems here is getting a bunch of confidential information from a new client before the lawyer realizes that his or her law firm already represents the opponent. When that happens, a disqualification motion might be in the offing. There are some precautions that the lawyer can take under Rule 1.18.³ But they

² ABA/BNA Lawyers' Manual on Professional Conduct, vol 22, No 17 (8-23-06), at 415.

³ Model Rule 1.18 provides:

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

may be hard to implement in the email world. Some firms use disclaimers that say that sending an email message to the website is not intended to create a lawyer-client relationship, and that any information that is forwarded will not be treated as confidential, but it's not clear if this will work.

And even if it does, there is another problem. What if the lawyer ends up taking on the new client, and, by the web site disclaimer, the lawyer has already said that the information will not be treated as confidential. Could that impair the attorney-client privilege?

D. Internet Issues

A conference on "blogs and the law" considered several issues regarding use of the internet in law practice. Among the thoughts presented by panelists were the following: Rule 4.2, the "no contact" rule,⁴ applies to internet contacts, just as it does to other types of contacts. The ease of email communications should not cause lawyers to forget the rule. However, the lawyer needs to have knowledge that the person is represented by counsel in the matter for the rule to apply.

Confidentiality is an issue, too. An attorney who engages in "blogging" should not post client names or identifying information. Panelists suggested that firms establish policies on blogging by their lawyers to minimize the risks of releasing trade secrets and harassing co-workers. "Flaming" clients or firm employees is something to be avoided.⁵

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

⁴ The rule provides:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

⁵ Joyce E. Cutler, *Logging Seminar Speakers Detail Problems Firms and Lawyers*

E. Rock Paper Scissors

The attorneys in a Florida case were having problems agreeing on discovery matters. The plaintiff's attorneys filed a motion with the federal district court to designate the location of a deposition. The court denied the motion, but it fashioned what it called "a new form of alternative dispute resolution." In particular:

[A]t 4:00 P.M. on Friday, June 30, 2006, counsel shall convene at a neutral site agreeable to both parties. If counsel cannot agree on a neutral site, they shall meet on the front steps of the Sam M. Gibbons U.S. Courthouse, 801 North Florida Ave., Tampa, Florida 33602. Each lawyer shall be entitled to be accompanied by one paralegal who shall act as an attendant and witness. At that time and location, counsel shall engage in one (1) game of "rock, paper, scissors." The winner of this engagement shall be entitled to select the location for the 30(b)(6) deposition to be held somewhere in Hillsborough County during the period July 11-12, 2006. If either party disputes the outcome of this engagement, an appeal may be filed and a hearing will be held at 8:30 A.M. on Friday, July 7, 2006 before the undersigned.

June 6, 2006 order by Judge Gregory A. Presnell, United States District Judge, Middle District of Florida, Orlando Division, in *Avista Management, Inc. v. Wausau Underwriters Insurance Co.*

III. Louisiana Rules and Court Orders

A. Trust Accounts & Overdraft Notification

Effective April 15, 2006, the Louisiana Supreme Court amended Rule XIX, §28 to provide that lawyers who maintain trust accounts need to execute an agreement with the bank that authorizes the bank to provide notice to the Office of Disciplinary Counsel of any overdraft on the account. A copy of the agreement is to be forwarded to the ODC within 30 days of its execution. If the attorney has an existing account, it is to be made subject to the overdraft notification procedure by November 1, 2006.

B. Advertising & Solicitation Rules

The Rules of Professional Conduct Committee of the Louisiana State Bar Association has drafted some proposed amendments to the Rules of Professional Conduct dealing with lawyer advertising and solicitation. They are still being considered by the Rules Committee and by the Louisiana Supreme Court's Committee to Study Attorney Advertising.

Face When Using Internet, 22 ABA/BNA Lawyers' Manual on Professional Conduct 219 (3 May 2006).

The proposed rules include a new provision on “computer-accessed communications.” It sets forth some content requirements for lawyer web sites. It also makes clear that email solicitations are subject to many of the same restrictions that apply to in-person or telephone solicitations. There is a provision that requires evaluation by the Rules of Professional Conduct Committee of nearly all advertisements for compliance with the rules governing lawyer advertising and solicitation. The proposed rules also contemplate that optional advance written advisory opinions can be obtained.

The draft rules include some exemptions from the advance evaluation requirement for such things as brief public service announcements; listings in law lists or bar publications; communications mailed to existing clients, former clients or other lawyers; written communications requested by a prospective client; basic professional announcements regarding law firm changes that are mailed to other lawyers, relatives, close friends, and existing or former clients.

Additional information can be obtained from the State Bar’s website. <http://www.lsba.org/Quick-Links/NewsDetails.asp?NewsID=110>.

C. Fee Increase

As a result of an order of a March 2007 order of the Louisiana Supreme Court, the disciplinary fee that is assessed to lawyers will increase by \$35 in 2007-08, and by another \$35 in 2009-10.

IV. Louisiana Cases

A. Permanent Disbarment - Short Subjects

In re Melton, 905 So. 2d 281 (La. 2005) (per curiam)

Attorney engaged in the unauthorized practice of law while suspended from practice. While he was suspended, he appeared in court as a counsel for a criminal defendant. He also failed to cooperate with the CDC. One of the charges for which he had been suspended was practicing law while ineligible to do so. The guidelines for permanent disbarment include engaging in the unauthorized practice during a period of suspension and engaging in serious misconduct that was preceded by suspension. The court said that the attorney’s offenses were “egregious” and ordered permanent disbarment.

In re Dyer, 900 So. 2d 824 (La. 2005) (per curiam)

Lawyer permanently disbarred for engaging in unauthorized practice of law following interim suspension and disbarment and for converting settlement funds that he received on behalf of two clients.

In re Carter, 907 So. 2d 62 (La. 2005) (per curiam)

Attorney, who had already been disbarred for, among other things, commingling and converting client funds, was found to have engaged in six additional instances of conversion of client funds, as well as failing to

keep clients informed of the status of their cases, and negotiating settlement checks without client knowledge or permission. He made tardy restitution to some clients, but still deprived those clients of their funds for significant periods of time. The court said that the pattern of fraud and theft over a period of several years “demonstrates with perfect clarity that he lacks the fundamental moral fitness required of attorneys admitted to the bar of this state.” *Id.* at 68. The court ordered permanent disbarment.

In re Aubrey, 928 So. 2d 524 (La. 2006) (per curiam)

Among other things, the attorney neglected legal matters, failed to communicate with his clients, abandoned his law practice without notice to clients, failed to cooperate with the ODC in many investigations, and converted clients funds in excess of \$120,000. He was permanently disbarred. The court said: “The intentional conversion of client funds, coupled with respondent’s abandonment of his law practice without notice to his clients, indicates respondent lacks the requisite honesty and integrity to practice law.”

B. Other Louisiana Cases

1. Bar Admission

In re Vendt

924 So. 2d 89 (La. 2006) (per curiam)

Vendt had been charged as a principal to second-degree murder. He later pled guilty to three misdemeanor charges – simple battery, criminal mischief, and aggravated assault – and was placed on probation. He reported his misdemeanor convictions to the Committee on Bar Admissions when he applied for the bar exam, which he successfully passed. Evidence was taken on character and fitness issues. The ODC was also authorized to conduct an investigation. The Supreme Court denied his application for admission:

[P]etitioner has failed to meet his burden of proving that he has “good moral character” to be admitted to the Louisiana State Bar Association. . . . The gravity of petitioner’s conduct which resulted in his criminal conviction compels this result.

Id. at 89-90.

2. More on Bar Admission

In re Schyberg

924 So. 2d 120 (La. 2006) (per curiam)

Schyberg passed the bar exam, after getting permission from the Supreme Court to take it. The Committee on Bar Admission had opposed his application, based on concerns relating to his 1993 conviction for possession of marijuana and his failure to disclose past criminal conduct

when he applied to law school. The court appointed a commissioner to take evidence and authorized the ODC to conduct an investigation.

Schyberg acknowledged at oral argument that he had not always been truthful about his marijuana use. He also admitted that he had been arrested for threatening his former wife, and that he had not disclosed that when he applied for the bar exam. It also appeared that in connection with his application to law school, he had misrepresented facts concerning where he had attended college; he had failed to disclose that one of his undergraduate schools had placed him on academic probation; he had failed to report that he had been arrested for contempt of court in 1989; he had failed to disclose that he had violated his probation in 1993; and he had not disclosed that he had been arrested for assault and battery in 1998.

He was not admitted.

3. Bar Admission, Yet Again

In re Kirkland

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

Kirkland was given permission to sit for the bar exam even though the Committee on Bar Admissions opposed his application. He passed the exam. Evidence was thereafter taken on whether he possessed the character and fitness to be admitted. At a hearing, Kirkland admitted that he had been expelled from undergraduate university after drugs, alcohol, and other contraband had been discovered in his on-campus apartment. He also admitted that he had not disclosed this when he applied to law school and that his omission was knowing and intentional. The supreme court concluded that Kirkland “failed to meet his burden of proving that he has ‘good moral character’ to be admitted to the Louisiana State Bar Association.” It denied his application for admission.

Cf., **In re Rogers**, 930 So. 2d 896 (La. 2006) (per curiam) (Bar applicant with history of substance abuse and a negative driving record, was approved for conditional admission to the practice of law, subject to a probationary period of five years).

4. Fraudulent Insurance Scheme

In re Stoller

902 So. 2d 981 (La. 2005) (per curiam)

Attorney participated in a fraudulent insurance scheme. He posed as counsel for fictitious clients and negotiated two fraudulent settlement checks. He opened a “client trust account” for the fraudulently-obtained money and wrote checks from that account to himself or to his associate in the scheme. The attorney was convicted of a federal criminal offense of interstate transportation of a check arising out of the scheme. This

amounted to misconduct.⁶ In the disciplinary case, the attorney said that his medical condition should be regarded in mitigation. He claimed that his Parkinson's disease, depression, and the effects of medication all affected his judgement during the time of the misconduct.

The court said that the attorney's argument that his medical condition was responsible for the ethical lapses "might be tenable if his misconduct consisted of an isolated act." *Id.* at 988. However, it didn't. The court said that

a review of the record demonstrates that respondent's actions involved a complex and interlocking series of actions which occurred over a period of one year. . . .

Respondent's repeated and deliberate actions over this lengthy period of time belie his contention that his misconduct was an aberration. Indeed, respondent's own treating psychiatrist conceded that it would be a "stretch" to attribute all of these actions to respondent's medical condition. Considering the record as a whole, we must conclude there is no causal connection between respondent's misconduct and his medical condition. As a result, respondent has failed to prove that the mitigating factor of mental disability is applicable.

Id.

The attorney also argued that his medical condition should be considered as a "personal or emotional condition" that was entitled to some mitigating effect. In this instance, according to the court

there is no requirement that there must be a causal nexus between the misconduct and the personal or emotional problem in order for the factor to be recognized in mitigation. Nonetheless, it would be an exercise in absurdity if we were to hold that a medical condition which does not satisfy the requirements to be considered in mitiga-

⁶ Louisiana Rule 8.4 provides:

It is professional misconduct for a lawyer to:

- (a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) Commit a criminal act especially one that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) Engage in conduct that is prejudicial to the administration of justice;
- (e) State or imply an ability to influence improperly a judge, judicial officer, governmental agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;
- (f) Knowingly assist a judge or judicial officer in conduct that is a violation of applicable Rules of Judicial Conduct or other law; or
- (g) Threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.

tion as a mental disability could be entitled to the same weight if simply re-labeled as a personal and emotional problem. Thus, while we accept respondent's medical condition as a personal or emotional problem, we determine it carries very little weight in mitigation.

Id. at 988-99.

The court ordered permanent disbarment. Chief Justice Calogero and Justice Weimer dissented. They favored disbarment. Justice Weimer said that the majority was "correct to be wary" about excusing ethical lapses because of personal problems. However, he noted that the attorney had had a "spotless record" for 27 years, and he was "convinced that this behavior, although inexcusable, is an aberration." *Id.* at 990.

5. Settlement Checks

Block v. Bernard, Cassisa, Elliott & Davis

927 So. 2d 339 (La. App. 1st Cir. 2005)

Attorney Block was retained by the Mannings to pursue personal injury claims arising from a vehicular accident. The Mannings signed a 1/3 contingent fee agreement. Block delegated some work to Labat, an associate he employed. Labat later left the firm. The Mannings wanted to retain Labat, but were willing to allow Block to serve as co-counsel. Block declined, and was discharged. He recorded his fee agreement to create a lien on settlement proceeds.

The insurer, represented by the Bernard firm, agreed to settle for \$1.85 million. Block told counsel for the insurer that he should include Block's name as a payee on the settlement check. Labat advised otherwise, and the Mannings declined to have the check so written. Over Block's protest, the check was written to Labat and the Mannings, who agreed to indemnify the insurer against any claims by Block.

It was later determined that Block was entitled to about \$490,000 as a fee. He sued the law firm, among others for his fee. He claimed, among other things, that by omitting his name from the settlement check, the Bernard firm had violated the law.

Block's claim against the law firm was not successful. The court said that normally a lawyer does not owe a duty to his client's adversary. However, facts showing malice or an intent to harm could give rise to a different result. But it said, on this point:

Even if the omission of Mr. Block's name as a payee on the settlement check was deliberate, as all parties concede, that action cannot rise to the status of an intentional tort absent a legal duty owed by the defendant attorneys to avoid harm to Mr. Block, the breach of that duty being the legal cause of damages, and the requisite malicious intent on their part in the breach of the duty. We question whether the conduct at issue can form the basis of an intentional tort, as such a conclusion presupposes that the defendant attorneys,

rather than their client, had the power to make the ultimate decision as how the check was drawn.

Id. at 345-46. The facts, said the court, were insufficient to show malicious intent.

Block claimed that the firm owed him a duty under R.S. 37:218, which provides for a lien in settlement proceeds if the fee contract is recorded.⁷ The court said that “the practical effect” of the statute is to require that the attorney and his client be named as payees on settlement checks. Moreover, the court took

judicial notice that the prevailing litigation practice among both the insurance industry and the legal profession is to include as payees on a settlement check the names of the client, the client's present and former attorneys, and in some cases other third parties having an interest in the funds.

Id. at 346-47.

However, the court also said that it could not conclude that the custom had acquired the force of law. The court acknowledged that the situation was different with respect to health care providers, but that was not the situation in this case.

The court also considered an argument that the Bernard firm owed a duty under Rule 1.15 to turn funds over to a person who is entitled to receive them.⁸ However, the court said that the “defendant attorneys were

⁷ The statute provides:

A. By written contract signed by his client, an attorney at law may acquire as his fee an interest in the subject matter of a suit, proposed suit, or claim in the assertion, prosecution, or defense of which he is employed, whether the claim or suit be for money or for property. Such interest shall be a special privilege to take rank as a first privilege thereon, superior to all other privileges and security interests under Chapter 9 of the Louisiana Commercial laws. In such contract, it may be stipulated that neither the attorney nor the client may, without the written consent of the other, settle, compromise, release, discontinue, or otherwise dispose of the suit or claim. Either party to the contract may, at any time, file and record it with the clerk of court in the parish in which the suit is pending or is to be brought or with the clerk of court in the parish of the client's domicile. After such filing, any settlement, compromise, discontinuance, or other disposition made of the suit or claim by either the attorney or the client, without the written consent of the other, is null and void and the suit or claim shall be proceeded with as if no such settlement, compromise, discontinuance, or other disposition has been made.

B. The term “fee,” as used in this Section, means the agreed upon fee, whether fixed or contingent, and any and all other amounts advanced by the attorney to or on behalf of the client, as permitted by the Rules of Professional Conduct of the Louisiana State Bar Association.

⁸ Rule 1.15(d) provides:

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. For purposes of this rule, the third person's interest shall be one of which the lawyer has actual knowledge, and shall be limited to a statutory lien or privilege, a final judgment addressing disposi-

never 'holders' of the check, and thus should not be considered as having 'received,' 'held,' or 'possessed' the funds represented by the check, for purposes of Rule 1.15." *Id.* at 348.

But the court was not pleased about what had happened in this case. It said:

The very fact that the present litigation is ongoing suggests that Mr. Block's concerns regarding his ability to obtain his fee from the funds held by Mr. Labat were legitimate, if not prescient.

By pursuing Sentry, Mr. Block will necessarily expose his former clients to the indemnity claim asserted by Sentry. Should Sentry be held liable for Mr. Block's fee, it may seek indemnity from either Mr. Labat, the Mannings, or both. The Mannings, of course, could have avoided this result by permitting Mr. Block to be included as a payee on the settlement checks. For whatever reason, they chose not to do so, to their potential peril. Of course, they may have recourse against Mr. Labat, but such recourse may ultimately be of little practical benefit to them should they encounter the same obstacles Mr. Block did. The end result may be that the Mannings will ultimately pay over \$1,170,000.00 in attorney fees, in addition to litigation expenses, interest, and court costs, out of a total damages recovery of \$1,960,000.00. Such a result, should it occur, would be a sad commentary on both our legal profession and the present mechanics of the contingent fee system, and would cry out for the formulation of a certain method of prevention of such situations in the future, protecting all clients (both plaintiffs and defendants) from unnecessary double fee payments.

Id. at 349.

6. Gifts

In re Cabibi

922 So. 2d 490 (La. 2006) (per curiam)

Cabibi was a sole attorney in a firm. His daughter, Bird, was the firm's sole employee. His practice focused on title work. Hirsch, a long-time friend of the Cabibi family, contacted Bird and told her that she would like to leave Cabibi a medical office building at her death. She asked Bird to draft a codicil to this effect. Bird, who was a notary public, did so, and mailed it to Hirsch. Hirsch executed an olographic codicil in substantially the same form as the one prepared by Bird and delivered it

tion of those funds or property, or a written agreement by the client or the lawyer on behalf of the client guaranteeing payment out of those funds or property. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

to the firm. Cabibi reviewed the codicil after it was delivered and told Bird to put it in Hirsch's file.

When Hirsch died, Cabibi filed a petition to probate the codicil and four wills. Those wills, which were executed in the 1980s when Cabibi's father, a lawyer, was alive, left property to Cabibi's father or to Cabibi. Hirsch's niece objected, claiming that Cabibi had violated Rule 1.8(c) by preparing a codicil that gave himself a substantial gift.⁹

Cabibi said that he had not prepared the codicil because the codicil that Hirsch executed was olographic. The court invalidated the codicil. Cabibi did not appeal.

During the probate proceeding, Cabibi contacted the state bar, which suggested he take the matter up with the ODC. When he did so, the ODC filed formal charges against him. In the disciplinary hearing, Bird testified that Cabibi's father had represented Hirsch but that Cabibi himself had not done so. Cabibi testified as to the same. He also said that he had not executed any influence over Hirsch with respect to the codicil, and that when he first saw it, it had already been executed.

The Disciplinary Board recommended suspension, but the Supreme Court decided not to impose formal discipline. It said that because Cabibi's employee, his daughter, had prepared an instrument providing for a substantial gift for Cabibi, "[o]bjectively, this constitutes a violation of Rules 1.8(c) and 8.4(a)." But it also found that no harm had been caused by the misconduct, which was unintentional and attributable to the fact that Cabibi thought of Hirsch as a friend rather than as a client. "In summary, given the long-standing, close personal relationship between the Cabibi and Hirsch families and the extremely limited interaction between Mrs. Hirsch and respondent as an attorney, we decline to impose formal discipline in the matter." 922 So. 2d at 497. Justice Johnson dissented.

7. Trust Account

In re Yonter

930 So. 2d 956 (La. 2006) (per curiam)

Yonter deposited settlement funds into his trust account in which his clients' former counsel claimed an interest. According to an agreement that Yonter had entered into with the former counsel, the funds should have been deposited with the court registry. But he did not deposit them with the court for nearly a year, and only after being ordered to do so by

⁹ The rule provides:

A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift, is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, or grandparent.

the trial court. During the time the funds were on deposit in the trust account, the trust account balance “frequently dropped below the amount in question.” The supreme court said that this conduct fell below “the high standard of care this court required of attorneys who have control over funds belonging to others.” There were mitigating circumstances, including the absence of selfish motive, the attorney’s belief that he was acting in his clients’ best interest (he claimed that “he was merely complying with the directives of his clients, who had asserted that some of the attorney’s fees and costs claimed by counsel . . . were not related to the settled case.”), and the fact that the Yonter had been ordered to pay attorney’s fees to the former counsel in connection with the court order to deposit the funds in the court registry. Nonetheless, Yonter was suspended for a year and a day.

8. Termination of Representation

In re Turissini

927 So. 2d 1105 (La. 2006) (per curiam)

Attorney disbarred for several violations, including failing to communicate with clients, failing to pursue matters she was retained to handle, failing to cooperate with the ODC, and failing to return her client’s file, despite numerous requests to do so. The court cited 1.16(d) in connection with the lawyer’s obligations upon termination of representation. That rule provides:

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. Upon written request by the client, the lawyer shall promptly release to the client or the client’s new lawyer the entire file relating to the matter. The lawyer may retain a copy of the file but shall not condition release over issues relating to the expense of copying the file or for any other reason. The responsibility for the cost of copying shall be determined in an appropriate proceeding.

9. Inappropriate Arrest Warrant & Attorney Remorse

In re Downing

930 So. 2d 897 (La. 2006) (per curiam)

Downing represented Timothy Martin in a child custody matter. He filed an ex parte motion for civil warrant, alleging that Debra Martin was refusing to allow Timothy to exercise visitation rights. After securing the warrant, Timothy went to Debra’s home with two police officers to enforce his visitation rights. However the children did not wish to go with Timothy. Timothy falsely informed respondent that Debra had refused to

allow the children to go with him. Without verifying the assertion, Downing filed an ex parte motion for Debra's arrest for failing to comply with the warrant. Debra was subsequently arrested at the workplace.

Debra's attorney filed a complaint with the ODC. When Timothy admitted that he may have been "mistaken" in asserting that Debra had refused to let the children go with him, Downing apologized to Debra's attorney. In the disciplinary proceedings, Downing said that he had believed that Debra was an unrepresented party. He admitted that the common approach to dealing with a party's failure to comply with a visitation order is to file a rule for contempt and hold a hearing, but he said that this was the first time he had encountered a situation of refusal to comply with an visitation order and, in the future, he would utilize rules for contempt.

The supreme court concluded that Downing had acted incompetently in filing the ex parte motions for civil warrant and arrest. It said:

The record as a whole suggests that respondent's actions were negligent, resulting from his lack of understanding of the relevant procedures in custody cases, and were not the result of any improper motive. Nonetheless, respondent's failure to research the law resulted in the improper arrest of Debra and exposed Timothy to a lawsuit by his ex-wife. We find that respondent's conduct violated Rule 1.1(a) of the Rules of Professional Conduct and was prejudicial to the administration of justice, in violation of Rule 8.4(d).¹⁰

With respect to sanctions, the court noted that the case involved only a single count of misconduct. It ordered a fully-deferred three-month suspension.

Justice Johnson and Justice Knoll dissented, on the view that an actual period of suspension was warranted. Justice Weimer concurred, but wrote separately on the issue of remorse. He was concerned that the attorney's lack of remorse had been regarded as an aggravating factor in earlier disciplinary proceedings, and said that a "lack of remorse should not be applied whenever one offers an explanation or mounts a defense. A lack of remorse should be applied to those who truly lack remorse in the face of obvious wrongdoing." *Id.* at 906. However, concurring in the result, he noted that the Supreme Court had not made a specific finding that the attorney had exhibited a lack of remorse.

10. Fraud, Forgery, Misrepresentation, and Misstatement

In re Calahan

930 So. 2d 916 (La. 2006) (per curiam).

¹⁰ 930 So. 2d at 904. Rule 1.1(a) states: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Rule 8.4 is quoted in an earlier footnote.

Attorney Calahan engaged in several acts of serious misconduct, including the following: In one matter, the "Hebert" matter, he charged his client a \$12,500 legal fee to write a one-page demand letter. The demand letter was directed to another lawyer who had charged the client an excessive fee. It appeared that the \$12,500 amount represented a contingent fee that was in excess of 40% of the amount of the recovery. But there was no written contingent fee agreement. Later, according to the reported opinion, the attorney "conjured up a timesheet showing that he worked on Mr. Hebert's case for 81 hours, which coincidentally was enough time to justify the entirety of the \$12,500 fee." The court described this as a "fabrication." The court also said that his defense "bordered on perjury." *Id.* at 937.

In the "Payton" matter, the attorney filed a petition for divorce on behalf of Ms. Payton, without allowing her to review it first. The petition included false allegations of harassment and abuse, sexual and physical, even though Ms. Payton had told him that she had not been harassed or abused by her husband. He also forged Payton's signature on the affidavit verifying the truthfulness of the allegations in the petition. Based on the false allegations, the trial court issued a restraining order against Ms. Payton's husband. When Ms. Payton found out what the lawyer had done, and inquired, he told her this was "standard wording in a restraining order" and that he had no idea how her signature had been forged. After Payton filed a disciplinary complaint, the lawyer suggested that his client was "emotionally disturbed," "dependent," and "in serious need of professional counseling for her emotional stability." However, in response to a direct question by the ODC about whether he had signed his client's name on the affidavit did he reluctantly admit that he had done so. He said he had done so as "a matter of convenience to the client and to the court system." *Id.*

The "Temple" matter involved allegations by the lawyer, reported in a New Iberia newspaper, that a Sergeant Colleen Temple of the New Iberia Police Department had a "special relationship" with a convicted felon, that may have involved sexual intimacy. A few days later the lawyer admitted that he had no proof of this. Temple sued for defamation, and the trial court found that Calahan's statements were false and defamatory and made with actual malice.

In the "Myrick" matter, he defrauded a blind woman into signing a contingent fee agreement by assuring her that it was just a form "to let me know that you came by." He then sent a letter to the insurance company stating that he had been retained to represent Ms. Myrick, and offering to settle her claim for a fraction of what it was worth. Later, Ms. Myrick learned that she had not signed a simple "registration form." She also learned that the contingent fee agreement bore the signature of a witness and a notary, neither of whom were present at the time she had

met with the lawyer. Myrick fired the attorney. When the insurance company sent a settlement check to Ms. Myrick, the lawyer told the insurance company that her boyfriend had stolen it and she wanted to put a stop payment on it. He told the adjuster to send the replacement check to him. When the insurance company did so, he endorsed the check with both his signature and that of Ms. Myrick. Eventually, a trial court ordered the lawyer to return the money, and to pay an additional \$10,000 in damages and attorney's fees for his conduct, which the trial court described as "nothing short of fraud."

Calahan was disbarred.

11. Bad Affidavits

In re Landry

934 So. 2d 694 (La. 2006) (per curiam)

In March 1997, Landry accepted a position as a title attorney with Authentic Title, Ltd. In July of that year, he acted as a closing attorney for a home refinance transaction for Walter Wallendorf. Because Walter's wife, Patsy, had died several months earlier, Landry determined that it was necessary to open a succession. Walter told Landry that he and Patsy had no children and no property other than the home and its furnishings. Walter also told Landry that "there was no will" when Patsy died. When Landry asked Walter for the names of witnesses who could verify these facts, Walter told him that he and Patsy had not socialized much and that he could not think of any.

Landry prepared an affidavit of death and heirship based on the information Walter had provided. The affidavit stated that Patsy had died intestate. Walter signed the affidavit and respondent notarized it. A second affidavit was executed by two secretaries employed by Authentic Title. It repeated the information contained in Walter's affidavit. These secretaries swore in the affidavit that they were "well acquainted" with Patsy and they knew that she had died intestate. But they did not know Patsy and did not know that she had died intestate. Landry reviewed the affidavit and notarized it. The affidavits were included with a petition for possession. In August 1997, the court rendered a judgment of possession in favor of Walter.

In 1998, Landry learned that Patsy had died testate. She had executed a will leaving all of her assets, including the home, to two children of Shirley Walker. In subsequent litigation, the court set aside the earlier judgment of possession in Walter's favor. The two Walker children later filed a civil suit against Landry and others. The suit was settled for \$70,000.

In the ensuing disciplinary proceedings Landry admitted he had violated the Rules of Professional Conduct submitting affidavits in which

the affiants declared personal knowledge of facts that they did not know. On the issue of sanctions, the court said, in part:

With regard to the affidavit of death and heirship executed by Walter, stating that Patsy died without leaving a will, we find respondent's conduct was largely negligent. Although respondent probably should have undertaken a more detailed investigation to confirm the correctness of Walter's statement that Patsy died intestate, there was nothing in the statement to indicate it was false on its face.

The same cannot be said of the affidavit executed by respondent's office staff. It is undisputed that respondent knew his notarial secretaries were not "well acquainted" with Patsy, and that they had no personal knowledge of whether she died intestate. The only logical conclusion which can be drawn from respondent's actions is that he knowingly and intentionally filed this false affidavit into the court records. Respondent's actions caused actual harm to Walter and Shirley's children. In addition, respondent's actions caused harm to the court system, which must be able to rely on the truthfulness of representations made by counsel.

The end result was a six-month suspension, all but 30 days of which was deferred.

12. Advocate as Witness

Nicholas v. Nicholas

923 So. 2d 690 (La. App. 1st Cir. 2005)

This was an action in which a former wife filed a motion for contempt, claiming that her former husband had failed to pay court-ordered spousal support. The court entered an order finding the former husband in contempt. He appealed. One of his claims on appeal was that the counsel for his former wife acted as an advocate and a witness in the same proceeding, in violation of Rule 3.7 of the Rules of Professional Conduct.

The attorney for the former wife did, in fact, testify in the contempt hearing. The testimony related to the former husband's failure to make spousal support payments to her client. The attorney testified because her client was ill and not present on the day of the hearing.

At the time of the hearing, Rule 3.7 of the Rules of Professional Conduct provided:

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

- (1) The testimony relates to an uncontested issue;
- (2) The testimony relates to the nature and value of legal services rendered in the case; or

(3) Disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

(c) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

In 2004, Rule 3.7 was amended to eliminate subsection c. With respect to the application of the rule to this case, the Louisiana Supreme Court said:

As this court has previously noted, this rule prohibits attorneys from acting as advocates in trials in which they are likely to be called as witnesses, but it does not prohibit attorneys from testifying at a trial about facts essential to the case. . . . As in this case, in [a previous case] the plaintiff's attorney was allowed to testify concerning non-payment by the defendant when no other witness was available to provide such testimony and the court found no violation of Rule 3.7.

In the case at hand, it was unforeseeable that [the former wife] would become ill on the date of the hearing and be unable to testify regarding [the former husband]'s continued failure to pay as court-ordered. Moreover, the prior court orders directed [the former husband] to make the payments to [the former wife]'s attorney, on her behalf. [The former wife]'s attorney, therefore, had first-hand knowledge about [the former husband]'s failure to abide by the court's orders, and was the only other person besides [the former wife] with that knowledge. Under these circumstances, it certainly would have worked substantial hardship on [the former wife] to disqualify her attorney from testifying to these essential facts regarding [the former husband]'s noncompliance with the court's prior orders.

Id. at 695. Since the substantial hardship exception applied, the rule was not violated.

V. Materials from Other Jurisdictions

1. Metadata

ABA Formal Op. 06-442

August 5, 2006

In this opinion, the ABA Standing Committee on Ethics and Professional Responsibility offered some advice about “metadata.” This is information that is embedded in electronic documents. It is not immedi-

ately visible; however, using the right software commands, this information can be retrieved.

The committee offered the following examples of metadata:

Metadata is ubiquitous in electronic documents. For example:

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

The ethics committee noted that the Rules of Professional Conduct contain no specific provision about the propriety of reviewing and using metadata in documents prepared by others. It said:

The most closely applicable rule, Rule 4.4(b), relates to a lawyer's receipt of inadvertently sent information. Even if transmission of "metadata" were to be regarded as inadvertent, Rule 4.4(b) is silent as to the ethical propriety of a lawyer's review or use of such information. The Rule provides only that "[a] lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." Comment [3] to Model Rule 4.4 indicates that, unless other law requires otherwise, a lawyer who receives an inadvertently sent document ordinarily may, but is not required to, return it unread, as a matter of professional judgment.¹¹

¹¹ Model Rule 4.4(b) provides:

A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

The committee did not characterize transmittal of metadata either as inadvertent or as advertent, but it indicated that the resolution “may be fact specific.”

The committee noted that some authorities “have addressed questions related to a lawyer's search for, or use of, metadata under the rubric of a lawyer's honesty, and have found such conduct ethically impermissible.” But the committee rejected that view, and stated that “the recent addition of Rule 4.4(b) identifying the sole requirement of providing notice to the sender of the receipt of inadvertently sent information, as evidence of the intention to set no other specific restrictions on the receiving lawyer's conduct found in other Rules. “ And the committee said that the question as to whether the receiving lawyer had an obligation to provide notice of receipt of metadata to the sender was a subject that was outside the scope of its opinion.

So the committee concluded that lawyers have no ethical duty to refrain from reviewing and using metadata. It observed that attorneys who are concerned about metadata can take steps to reduce risks, such as avoiding the use of redlining programs, not including electronic comments in earlier versions of documents, and sending hard copies or scanned copies to opponents.

Louisiana 4.4(b), it should be noted, is broader than Model Rule 4.4(b). The Louisiana version states:

A lawyer who receives a writing that, on its face, appears to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear that the writing was not intended for the receiving lawyer, shall refrain from examining the writing, promptly notify the sending lawyer, and return the writing.

Even so, it is not obvious that the presence of metadata in an otherwise intentionally-sent document would engage the provisions of the rule.

2. More Metadata

Maryland State Bar Association Committee on Ethics Opinion 2007-09 (10-19-06)

The Maryland ethics committee has also considered metadata issues, this time, in the discovery context. It took the position that lawyers who receive electronic discovery materials have no obligation to refrain from viewing or using metadata or to notify the sender that they have received it. But it said that the sending attorney generally has a duty to take reasonable measures to avoid disclosure of confidential or work product materials embedded in electronic discovery. It said that the duty arose out of the Rules 1.1, on competence, and Rule 1.6, on confidentiality.

The committee also noted that some issues regarding metadata could be subject to recent amendments to the Federal Rules of Civil Procedure dealing with electronic discovery.

3. Death Wish

Virginia State Bar Standing Committee on Legal Ethics Opinion 1816 (2005)

A hypothetical question came to the Virginia ethics committee regarding how a lawyer should proceed when his or her troubled client wishes to receive the death penalty. The question involved a hypothetical client who had tried to commit suicide both before and after incarceration. According to the question, the client had been found competent to stand trial. The client also claimed that he was not guilty of capital murder, since his actions were not intentional or premeditated. Nonetheless he instructed his lawyer not to present evidence at the punishment phase because he wanted to “commit suicide” through the imposition of the death penalty.

The committee opined that the lawyer is not necessarily prohibited from presenting evidence or taking other steps to protect the client, if the lawyer believes that the client is not making an informed, rational, and stable decision. Even though Rule 1.2 tells the lawyer to abide by the client’s decision regarding the objectives of the representation, and even though that concept seems to have been involved here, the committee noted that Rule 1.14 also needed to be considered. This is a rule that allows the lawyer to take appropriate actions if he or she believes that the client cannot act in his or her best interests.¹² This permits the lawyer to do what is reasonably necessary in order to protect the client.

4. Federal Debt Collection Practices Act

Wilson v. Draper & Goldberg PLLC 443 F.3d 373 (4th Cir. 2006)

¹² Model Rule 1.14 provides:

(a) When a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client’s interests.

Chase hired the Draper firm to act as trustee in foreclosing on a deed of trust against debtor Wilson. Wilson sued the firm, claiming that it had violated the Fair Debt Collection Practice Act, 15 U.S.C. §§ 1692 et seq. She claimed that the firm had failed to correctly verify the debt, and had continued collection efforts after she had contested the debt. She also claimed that the firm had communicated with her directly instead of through her attorney.

The firm argued that it was not subject to the Act because, as a substitute trustee foreclosing on a deed of trust, it was not acting in connection with a debt and was not a debt collector, for purposes of the Act. The trial court granted summary judgment for the law firm, concluding that it could take advantage of an exception for fiduciaries whose debt collection activities are incidental to their fiduciary obligations. However, the 4th Circuit reversed.

The court said that, under the Act, a “debt” is an obligation to pay money arising out of a transaction. A mortgage liability would qualify, thought the court. Indeed, the firm had referred to the obligation as a debt when it had notified Wilson that she was in default.

The court noted that there was an exemption for debt collection activity that is incidental to a bona fide fiduciary obligation. However, the court indicated that the trustee’s actions in foreclosing on property were not *incidental* to its fiduciary obligation. The court said that they were “central to it.”

The court also concluded that a separate exemption for those who enforce security interests was not applicable. It said that exception applied when that was the person’s only role in the debt collection process. A dissenting judge said that the majority’s decision reflected “a Shakespearean distrust of lawyers.”

5. Press Release

Sealed Party v. Sealed Party 2006 WL 1207732 (S.D. Tex. 2006)

A client hired a Louisiana law firm to assist him with a dispute he had with a company. The Louisiana firm referred the matter to a Texas lawyer, Ajamie, who agreed to work on the case with an associate. Negotiations failed, and the Texas lawyers sued. Later, the Texas firm dissolved. Ajamie joined one firm, but his partner and the associate who had been working on the case went to another. The client decided to go with the associate, who had been doing most of the work on the case.

A settlement was reached, and the client signed a confidentiality provision agreeing not to disclose the terms. When Ajamie learned that the matter had settled, he published a press release announcing it. The press release mentioned that the client had valued Ajamie’s long relationship with the company-opponent. Although the press release stated

that the settlement terms were confidential, it said that the client was satisfied with the resolution of the matter. Ajamie did not obtain the client's permission to issue the press release.

The company-opponent sued the client and Ajamie for breaching the settlement agreement. The claims against the client were dropped, but not before the client incurred over \$45,000 in legal fees.

The client brought a cross-claim against Ajamie, claiming breach of fiduciary duty over the issuance of the press release, as well as a claim for disgorgement of the \$66,000 or so in fees that Ajamie had received out of the settlement.

Ajamie claimed that he owned no duty to the client because the attorney-client relationship had ended before the press release was issued. The court disagreed. It noted that Texas Rule 1.05(b)(1) prohibits a lawyer from knowingly revealing confidential information about a client or a former client without that person's permission.

Ajamie claimed that he had not revealed confidential information. He said what he had revealed was part of the public record. The court rejected this claim, stating that lawyers cannot disclose information to outsiders just because it might be part of the public record. In any event, the court noted that the client's opinions about the settlement were not available to the public.

Nonetheless, the court said that the client had failed to prove any actual monetary loss resulting from the lawyer's conduct. The client's insurer and a corporation controlled by the client paid all but \$1000 of the legal bill. And the client had not complied with an order to specify economic and noneconomic damages. The court did not order fee disgorgement either, noting that forfeiture is proper only when there is a clear and serious breach of fiduciary duty, or where the lawyer obtained financial benefits from the breach. Here, the court did not regard the breach as serious enough.

6. Microphones at Trial

Commonwealth v. Downey
842 N.E.2d 955 (Mass. Ct. App. 2006)

The Downey brothers were charged with murder. The trial was filmed by the BEC, and portions of the trial, including a mid-trial discussion between defense counsel and one of the defendants, was aired in the U.S. on "Frontline." The discussion concerned whether the defendant ought to plead guilty to a lesser-included offense.

After his conviction, one of the brothers moved for a new trial on the ground that he had been deprived of effective assistance of counsel because his lawyer had worn a body microphone throughout the trial and had permitted the broadcast crew to listen to and record his conversations

with his lawyer. He claimed that he did not learn about the microphone until the second day of the trial.

After some related proceedings, the trial court eventually concluded that neither of the brothers had knowingly and intelligently consented to the hidden microphone arrangement. Their failure to object when they did become aware of the microphones was not good enough for consent. The court also determined that the lawyers had divided loyalties, and a conflict of interest, because of their allegiance to the broadcasting company. This jeopardized the confidentiality of the attorneys' conversations with their clients. It also caused the defendants not to be as forthright with their lawyers as they might have been without the microphones. The appellate court agreed, and said that the defendants were entitled to a new trial.

7. No-Contact Rule

In re Haley

126 P.3d 1262 (Wash. 2006)

Haley, a Washington lawyer, sued the former chief executive officer of a defunct corporation in which Haley had been a shareholder and director. After the trial, Haley represented himself in seeking to settle the matter. On two occasions, he contacted the former CEO, even though he was aware that the former CEO was represented by counsel. He was charged with violating the "no-contact" rule, Rule 4.2.¹³

The Washington Supreme Court concluded that a lawyer, acting pro se, violated Rule 4.2 if the lawyer contacted a represented party in connection with the matter without the consent of that party's lawyer. It noted that other jurisdictions have reached that conclusion, though still others have taken the contrary view. However, the court said that it would apply this interpretation only in future cases, so it declined to sanction Haley for a violation of the rule.

One justice agreed with the decision not to sanction Haley for a Rule 4.2 violation, but also expressed disagreement with the majority's analysis. He noted that the language of the rule applied when a lawyer is "representing a client." He said: "Lawyers cannot retain themselves any more than pro se litigants can claim legal malpractice or ineffective assistance of counsel." 126 P.3d at 1273. Two justices dissented. They would have sanctioned Haley for the Rule 4.2 violation.

Cf. District of Columbia Bar Legal Ethics Committee Opinion 331 (2005) (permissible for a lawyer to make direct contact with a party's in-house lawyer even though the party was represented by outside counsel in the matter).

8. Disparaging Statements About the Judge

¹³ The rule is quoted in footnote 4 *supra*.

Notopoulos v. Statewide Grievance Commission
No. SC 17341

Attorney Notopoulos applied to be conservator of his mother's estate and of "her person." Probate Judge Berman named Notopoulos conservator of the estate but appointed someone else to be conservator of her person and yet another person to investigate her care and financial assets. Notopoulos had some "dustups" with the judge over fees awarded to the others and a disagreement over a "do not resuscitate order."

After his mother died, Notopoulos wrote a letter to the probate court staff that was highly critical of Berman. Among other things, it said that he had engaged in "reckless interference" with the physician-patient relationship, that he had put the "financial greed of his cronies above my mother's best interest." It also said that Berman was "not merely an embarrassment to his community but a demonstrated financial predator of its incapacitated and often dying elderly."

Berman filed a disciplinary complaint. The Supreme Court concluded that Notopoulos had violated Rule 8.2,¹⁴ which, like its counterpart in many other jurisdictions, makes it unethical for a lawyer to make statements about the qualifications or integrity of judges with reckless disregard for their truth. Notopoulos claimed that his statements were protected by the First Amendment. He lost.

9. Disparagement II.

Grievance Administrator v. Fieger

719 N.W.2d 123 (Mich. 2006), *cert. denied*, 127 S. Ct. 1257 (2007)

Attorney Geoffrey Fieger got into trouble for statements about some Michigan appeals court judges after the court of appeals had overturned a \$15 million medical malpractice judgment in his client's favor.

According to the published opinion of the Michigan Supreme Court, the appellate court overturned the award because there was insufficient evidence to justify submission to the jury and because Fieger had engaged in misconduct during the case. The misconduct was said to have included assertions, without any basis in fact, that defense witnesses had destroyed, altered, or suppressed evidence; and an insinuation, "without any basis in fact that one of the defendants had abandoned the plaintiff's medical care to engage in a sexual tryst with a nurse."

Following the ruling of the court of appeals, Fieger took to the air on his own radio program and addressed the appellate judges as follows:

¹⁴ Model Rule 8.2(a) states: "A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office."

“Hey Michael Talbot, and Bandstra, and Markey, I declare war on you. You declare it on me, I declare it on you. Kiss my ass, too.” Mr. Fieger, referring to his client, then said, “He lost both his hands and both his legs, but according to the Court of Appeals, he lost a finger. Well, the finger he should keep is the one where he should shove it up their asses.”

Two days later, on the same radio show, Mr. Fieger called these same judges “three jackass Court of Appeals judges.” When another person involved in the broadcast used the word “innuendo,” Mr. Fieger stated, “I know the only thing that’s in their endo should be a large, you know, plunger about the size of, you know, my fist.” Finally, Mr. Fieger said, “They say under their name, ‘Court of Appeals Judge,’ so anybody that votes for them, they’ve changed their name from, you know, Adolf Hitler and Goebbels, and I think – what was Hitler’s – Eva Braun, I think it was, is now Judge Markey, she’s on the Court of Appeals. 719 N.W.2d at 129.

Fieger was charged with misconduct. But he asserted some defenses, including a defense that the rules under which he had been charged were unconstitutional because they interfered with his First Amendment rights. In particular, he claimed that the rules were unconstitutionally vague. On that issue, the Michigan Supreme Court observed: “If ‘civility’ and ‘courtesy’ rules can ever satisfy constitutional muster, as we believe they can, it is beyond peradventure that the comments at issue in this case clearly violated such rules.” 719 N.W.2d at 139. Fieger argued that he had been engaging in political speech. But the court said: “To invite the sodomization of a judge, with a client’s finger, a plunger, or one’s own fist, and to invite a judge to kiss one’s ass can hardly be considered an ‘interchange of ideas for the bringing about of political and social changes.’” 719 N.W.2d at 140. The court concluded that the lawyer’s coarse remarks warranted no First Amendment protection when balanced against the state’s compelling interest in maintaining public respect for the integrity of the legal process.

The court concluded that Fieger should be reprimanded.

10. Murder and Bar Admission

In re Hamm

123 P.3d 652 (Arizona 2005), *cert. denied*, 126 S. Ct. 2300 (2006)

James Hamm served 17 years in prison after pleading guilty to the first-degree murder of two men in a bank robbery. He was a model prisoner. He received a sociology degree through a prison education program. While on parole, he graduated from Arizona State University’s College of Law. He passed the bar exam in 1999. In 2004 he filed a character and fitness application. The character and fitness committee recommended that the application be denied, and the Arizona Supreme Court agreed.

The court said that applicants to the bar have the burden of demonstrating good moral character. When there has been serious misconduct, as here, the applicant has the burden of showing complete rehabilitation. Referring to a New Jersey opinion, the court also said that “in the case of extremely damning past misconduct, a showing of rehabilitation may be virtually impossible to make.” 123 P.3d at 658.

In this instance the court was concerned that Hamm had not fully accepted responsibility for the two murders. It noted that Hamm had attempted to distance himself from the murder committed by his accomplice and that he had insisted that the crime was merely a bungled robbery. But the facts were that Hamm and his accomplice had armed themselves, drove the victims to a remote area, and executed them without attempting a robbery. Hamm had shot one of the victims a second time in order to ensure his death.

The court also noted Hamm’s failures in making child support payments to his first wife and his failure to be forthright about that issue. And it noted that he had failed to list on his application a public altercation with his second wife.

11. Truth in Negotiations

ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 06-439 (2006)

The Committee stated that a lawyer who negotiates on behalf of a client does not violate the obligation of truthfulness by engaging in “puffing,” by exaggerating the client’s negotiation goals, or by downplaying the client’s willingness to compromise. Such statements, said the Committee, ordinarily are not considered “false statements of material fact,” under Model Rule 4.1.¹⁵ At the same time, said the Committee, the lawyer must avoid affirmative misrepresentation. The Committee also said that the standard is the same when the lawyer is negotiating in a “caucused mediation,” in which a neutral third party meets privately with each side. The Committee mentioned that Comment [2] to Model Rule 4.1 indicates that under generally accepted conventions in negotiation,

¹⁵ Model Rule 4.1 states: “In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person.”

A comment to the rule states:

This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

certain types of statements are not ordinarily considered statements of fact. However, the Committee noted that it had in Formal Opinion 93-370 (1993), advised that when a judge asks about the limits of a lawyer's settlement authority in a civil matter, the lawyer must not lie about this and should instead simply decline to answer. It also noted that in Formal Opinion 94-387 (1994), it had said that a lawyer has no duty to inform the other party that a statute of limitation has run on the client's claim. However, in Opinion 95-397 (1995), it said that a lawyer engaged in personal injury settlement negotiations must notify the opposing counsel and the court if the client dies.

12. Bad Letter

In re Mertz

712 N.W.2d 849 (N.D. 2006) (per curiam)

Meagan Mertz, the daughter of attorney Monty Mertz, and her dogs encountered Gary Hanson in a park. The dogs approached Hanson and one of the dogs bit his leg. Hanson reported this to the police. The police issued a press release, asking for help in identifying the dogs' owner to determine if the dogs had received rabies vaccinations. Hanson also contacted the local news media about the incident. Meagan Mertz contacted the police and told them that she owned the dogs and they had received rabies vaccinations. Hanson signed a complaint for a vicious-animal-at-large infraction. A police officer also signed a second complaint for an unlicensed-animal infraction.

Attorney Monty Mertz subsequently sent Hanson a letter informing him that he was representing his daughter. The letter accused Hanson of lying under oath when he signed the vicious-animal-at-large complaint and included a draft of a defamation complaint that Mertz said he planned to file against Hanson depending upon "how reasonable or unreasonable" Hanson chose to be.

Part of the letter stated:

You would never have been bitten by [Meagan's dog] had you not attacked her. You must be either an animal hater or ignorant of animals, or both, to conduct yourself the way you did. The other issue here is that my daughter was alone, on a dark, windy, rainy evening. A reasonable argument can be made that you snuck up on her and the dogs The unreasonable, ridiculous, angry, aggressive actions you took were very threatening to [Meagan's dog] and Meagan In an atmosphere where Alfonso Rodriguez is facing the death penalty for abducting a young woman just my daughter's age, one should be very careful about sneaking up on a young woman in the dark. If you do, you should be willing to accept the consequences.

712 N.W.2d at 854.

The draft complaint said that Hanson had "intentionally and maliciously made false and defamatory statements, orally and in writing, about Meagan N. Mertz, stating falsely, among other things, that she committed the public offense of owning a 'vicious dog,' which is defamation per se." The communication also said: "If you wish to minimize the consequences to you for your dishonesty, then you will agree to the dismissal of the charge you signed." *Id.* at 851.

The attorney's letter also offered Hanson a settlement. If Hanson would dismiss the vicious dog claim, the attorney's daughter would admit to the unlicensed dog charge and pay any reasonable out of pocket expenses Hanson incurred as a result of the bite.

Disciplinary proceedings commenced based on the attorney's communication to Hanson.

The key issue before the North Dakota Supreme Court was whether the communication violated Rule 4.4, which states "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person." A comment to the rule states that "a lawyer shall not . . . act on a client's behalf only to harass or maliciously injure another."

The attorney argued that there were many valid purposes for his letter, including stopping Hanson from lying, stopping his daughter's suffering, and compromising the pending infraction and reimbursing Hanson's medical expenses. The court agreed that these were all valid purposes for the letter. But it also concluded that the portion of the letter calling Hanson an animal hater and abuser and the statements suggesting Hanson was sneaking up on Meagan Mertz in the dark do not support the suggested valid purposes. They were inappropriate, said the court, and were in violation of the rule. "[N]o substantial purpose existed for these statements other than to embarrass or burden Hanson." *Id.* at 854.

The attorney was reprimanded and ordered to pay the costs and expenses of the disciplinary proceeding.

13. Aggregate Settlement

American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Op. 06-438 (2006)

The ABA ethics committee considered the duties of a lawyer who was seeking to undertake a settlement involving multiple clients. Model Rule 1.8(g), which concerns this issue, states:

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in

a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

The rule is the same as Louisiana's except that Louisiana's version includes a sensible exception for court-approved class action settlements.

The ethics committee considered what the rule required the lawyer to do, and said:

In seeking to obtain the informed consent of multiple clients to make or accept an offer of an aggregate settlement or aggregated agreement of their claims as required under Model Rule 1.8(g), a lawyer must advise each client of the total amount or result of the settlement or agreement, the amount and nature of every client's participation in the settlement or agreement, the fees and costs to be paid to the lawyer from the proceeds or by an opposing party or parties, and the method by which the costs are to be apportioned to each client.

14. Fraud in Real Estate Transaction

State v. Pacenza

136 P.3d 616 (Okla. 2006)

Attorney Pacenza sold some Oklahoma land to the Richards using a contract for deed. He did not tell them that the land was subject to some tax liens in the amount of \$300,000 and that there was an incomplete foreclosure proceeding against the property. When the title problems came to light, the purchasers sued. Their lawyer also reported Pacenza to disciplinary authorities. Mrs. Richards and her sister testified that they asked Pacenza whether they needed independent legal representation. They testified that he told them that the extra expense would be unnecessary as Pacenza was a "real estate attorney." Mrs. Richards stated that the attorney had been asked whether the title was free and clear and that Pacenza had responded affirmatively. Later, the attorney said that he would remedy the title problems, but he did not.

In defense, the attorney claimed, among other things, that there had been no attorney-client relationship between himself and the Richards and that, despite the title defects, his contract for deed was sufficient to transfer his interest to the Richards. He also said that a contract for deed can be used when the conveyor of the property has no property interest and claimed that he would have had a duty to clear the title only if the Richards had presented him with cash in hand. The court referred to this as "mental jockeying."

There was no attorney-client relationship between Pacenza and the purchasers. But the court said that Pacenza's "actions surrounding the contract for deed, his misrepresentations concerning the ability to clear the title and his lack of any attempt to do so demonstrate a deliberate

course of dishonest conduct reflecting adversely upon his fitness to practice law.” He was suspended for two years and a day.

15. Sarbanes-Oxley

North Carolina State Bar Ethics Committee

Formal Opinion 2005-9 (2006)

The North Carolina ethics committee considered whether an attorney representing a public company could disclose confidential information about corporate misconduct to the SEC even if state ethics rules prohibit such disclosure. The Committee said yes, in light of regulations authorized by the Sarbanes-Oxley Act of 2002.

The Committee noted that Section 205.3(d)(2) of the SEC’s rules permit an attorney to make such a disclosure, in some circumstances, and that the regulations preempt state rules to the contrary.

It should be noted that Rule 1.13 of Louisiana’s Rules of Professional Conduct permit reporting outside the corporation in some circumstances.¹⁶ The relevant SEC rule provides:

(2) An attorney appearing and practicing before the Commission in the representation of an issuer may reveal to the Commission, without the issuer’s consent, confidential information related to the representation to the extent the attorney reasonably believes necessary:

(i) To prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors;

¹⁶ The Louisiana Rule provides, in pertinent part:

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer’s efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(ii) To prevent the issuer, in a Commission investigation or administrative proceeding from committing perjury, proscribed in 18 U.S.C. 1621; suborning perjury, proscribed in 18 U.S.C. 1622; or committing any act proscribed in 18 U.S.C. 1001 that is likely to perpetrate a fraud upon the Commission; or

(iii) To rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors in the furtherance of which the attorney's services were used.

17 C.F.R. § 205.3(d)(2).

16. Billable Hours

In re Myers

127 P.3d 325 (Kan. 2006)

Attorney Myers gave some clients bad estate planning advice, encouraged them to pursue an ill-conceived appeal, and billed his time in one-hour increments, even when he spent less than an hour on the work. He claimed that he did the rounding up only when he spent at least 45 minutes on a particular session.

A hearing panel found that he had violated Rule 1.5 (which prohibits unreasonable fees). His fees were unreasonable because of the rounding and because of the work on the appeal (because it was hopeless). The Kansas Supreme Court agreed that Myers had violated Rule 1.5. It issued a public censure.

17. Lunch & CLE Compliance

Kentucky Bar Association v. Nemes

198 S.W. 3d 600 (Ky. 2006)

October 25, 2005 was the last date a CLE program was offered that would satisfy the Kentucky attorney Jason Nemes' need to comply with CLE requirements within 12 months of his admission to the bar.

Nemes registered for and attended the first day of the program. However, on the second day, he came in late, about 30 minutes late, from the lunch break. According to the Director for Continuing Legal Education for the Kentucky Bar Association, this caused him to be out of compliance with the applicable CLE requirements. The Kentucky Supreme Court issued an order to show cause why Nemes should not be suspended from the practice of law for noncompliance.

Nemes responded that, on the day that he had come late, he had been asked to attend a luncheon by his employer, the Chief Justice of the Kentucky Supreme Court. He had not anticipated that the luncheon would run as late as it did. He said that the Chief Justice had asked him to remain for the entire luncheon and for a short meeting afterwards. Nemes apologized for the tardiness and requested that he be permitted to

make up the missed time at the next regularly scheduled program. But the state bar sought to suspend him from the practice of law, or, alternatively, to have him ordered to make up the portion of the program he missed at a 2006 New Lawyers Skills Program, pay a \$500 fine for his noncompliance, and be ruled ineligible for claiming any hardship related extensions of time for CLE compliance during 2006 and 2007.

The Kentucky Supreme Court did not order the suspension, and it cut the fine to \$300, but it ordered the other penalties that the state bar sought.

18. Assaulting Women While Intoxicated

Oklahoma Bar Association v. Garrett

127 P.3d 600 (Okla. 2005)

Attorney Garrett was arrested, prosecuted, and convicted of sexual assault against two women. He also settled civil lawsuits, for \$50,000 each, arising out of his conduct. Disciplinary proceedings followed.

The first assault took place at a sports bar. While there, he motioned for a 21-year old woman to come to his table. When she reached his table, he placed his arm around her back, asked her name and indicated he knew her parents. He moved his hand down and began rubbing her buttocks. With his other hand, he grabbed her breast. She stepped away from him, but Garrett continued to make suggestive comments.

The second assault occurred a month later. While a woman was leaving the restaurant where she worked, Garrett opened the door to the foyer, walked over to her, pulled her towards him and grabbed her right breast.

In the disciplinary case, Garrett said that he had been drinking heavily on both occasions. Following his arrest, Garrett entered an inpatient treatment facility where he remained for 72 days. Afterwards, he moved to a new town to practice law. He stated, in the disciplinary proceedings, that he did not think he was an alcoholic before the felony charges were filed and that no one in the last twenty years told him he should quit drinking.

The Oklahoma Supreme Court concluded that the misconduct stemmed from the alcohol abuse. It also concluded that Garrett had taken significant steps to deal with his alcoholism. He had been cooperative, remorseful, and apologetic. The court censured him and imposed a one-year probation.

19. Exposure

Columbus Bar Assn. v. Linnen

857 N.E.2d 539 (Ohio 2006)

Attorney Stephen Linnen was indefinitely suspended for conduct arising out of what was described as a "sexual addiction." Over a period

of 18 months, he stalked at least 38 female victims, exposed himself to them, wearing nothing but shoes and a cap, and then took photographs of their startled reactions.

He was eventually apprehended, sentenced to 18 months of work release, fined, ordered to undergo counseling, and placed on probation. In the disciplinary proceedings, he sought mitigation, based on his medically diagnosed sexual addiction. But disciplinary authorities noted that the lawyer had been unwilling to get treatment for the disorder. And the Ohio Supreme Court thought that he had sought the medical diagnosis to raise it as a mitigating factor, not to stop himself from engaging in the conduct. It also took a dim view of his professed regret for the behavior. The court ordered indefinite suspension.

20. Virtual Law Firm

North Carolina State Bar Ethics Committee

Formal Opinion 2005-10 (2006)

The North Carolina ethics committee considered whether lawyers could operate virtual law firms in which they market and provide legal services over the Internet. The firm proposed to ask clients to sign a limited scope of representation agreement. The agreement would inform the clients that the firm would not monitor the status of their cases and would not enter an appearance on their behalf.

The Committee said that such arrangements were permissible, but it identified some concerns. It noted that the Rules of Professional Conduct do permit limited representation agreements, but they must be reasonable and fully disclosed to the client.

The Committee cautioned that the lawyers would need to avoid violating advertising rules in other jurisdictions, avoid engaging in unauthorized practice of law in other jurisdictions, and to be careful to avoid the creation of unintended lawyer-client relationships. Of course, the lawyers would need to provide competent representation, and this would require the lawyer to make the same inquiries, and provide the same level of communication, that would be appropriate in a law office setting.

21. Law Group

Ohio Supreme Court Board of Commissioners on Grievances and Discipline

Opinion 2006-2

The opinion of the Ohio ethics committee considered if it would be appropriate for an Ohio lawyer to name his firm "The X Law Group" when "X" is the lawyer's name and the lawyer employs two attorneys as associates.

The committee noted that the lawyer could not use a name that was misleading. There was nothing wrong with using the word "Group" in

the name of the firm; however, it would need to be used accurately. It would not do for the attorney to use that description if the attorney was a sole practitioner and the only individuals working with him or her are paralegals, other nonlawyers, office-sharing attorneys, or “of counsel” lawyers.

22. Publication in “Federal Law Reports”

North Carolina State Bar v. Culbertson

627 S.E.2d 644 (N.C. Ct. App. 2006)

The letterhead of attorney Culbertson described him as being “published in Federal Reports, 3d Series.” His website said that he was “one of the elite percentage of attorneys to be published in Federal Law Reports – the large law books that contain the controlling caselaw of the United States.”

The North Carolina Bar charged him with violating Rule 7.1, which prohibits lawyers from making false or misleading communications about themselves or their services. The disciplinary commission proposed an admonition. Culbertson objected, but the North Carolina Court of Appeals agreed that an admonition was appropriate.

The court said that the claim about being published in the reporters was misleading because Culbertson did not write any of the opinions in the volumes. His statement about belonging to an elite group was misleading because admission to the court of appeals does not depend upon one’s ability. The attorney claimed that his statements were protected by the First Amendment. But the court said that misleading advertisements can be prohibited without violating the constitution.

XXXXXXXX - XXXXXXXX