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Legal Ethics - A Few Things You Should Know

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I. Introduction

In recent years, there have been frequent and substantial changes in the laws and rules that govern the legal profession. Most of the changes have occurred at the state level, but the practice of law can also be, and often is, significantly affected by new rules or decisions of federal courts, and it is sometimes affected by acts of the United States Congress. Moreover, decisions of the ABA's Standing Committee on Ethics and Professional Responsibility can influence how state disciplinary authorities apply the Rules of Professional Conduct. Accordingly, a program on legal ethics should deal with more than state-level developments. At the same time, it should be acknowledged that, every year, there are more professional responsibility developments than can reasonably be catalogued in written materials for an hour-long CLE presentation on the subject. As a result, only selected developments are referenced here.

II. In the News

A. California and Mandatory CLE

Not all lawyers are pleased to be subject to mandatory CLE requirements. A California lawyer recently expressed his displeasure in the courts.

Warden, a 73 year old California lawyer, was placed on inactive status for failure to comply with mandatory CLE requirements. He sued the State Bar, claiming that the California CLE scheme was unconstitutional. More particularly, Warden claimed that exemptions from the CLE requirements for state officials, retired judges, and law professors lacked any rational basis and that the scheme therefore violated equal protection. A California appellate court agreed, and ordered reinstatement of Warden's right to practice law.

The court said:

> In sum, we hold the CLE program is unconstitutional. It violates equal protection by forcing some attorneys licensed by the Bar who represent individual clients in private practice, and not others, to comply with the program for reasons having no rational relationship to a legitimate state interest.

62 Cal. Rptr. 2d at 49-50.

Warden may not be successful in the end. The California Supreme Court has granted the State Bar's petition for review, superseding the

decision of the appellate court. *Warden v. State Bar of California*, 62 Cal. Rptr. 2d 32 (Ct. App. 1997), review granted, 938 P.2d 371 (Cal. 1997)

B. Crash Victim Solicitation

In October 1996, federal legislation was adopted that prohibits lawyers from soliciting victims of aircraft accidents, or their families, until 30 days after the accident. The anti-solicitation provision was added to the Federal Aviation Reauthorization Act. The new provision states:

> In the event of an accident involving an air carrier providing interstate or foreign air transportation, no unsolicited communication concerning a potential action for personal injury or wrongful death may be made by an attorney or any potential party to the litigation to an individual injured in the accident, or to a relative of an individual involved in the accident, before the 30th day following the date of the accident.
>
> 49 U.S.C. § 1136(g)(2).

The legislation also provides for a monetary penalty for violation of the no-solicitation rule. See 49 U.S.C. § 1155(a).

Of course, lawyers have long been prohibited, by state ethics rules, from making direct solicitations to non-clients. Rule 7.2(a) of the Louisiana Rules of Professional Conduct says that

> [a] lawyer shall not solicit professional employment in person, by person to person verbal telephone contact or through others acting at his request or on his behalf from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

In March of 1996, the Louisiana Supreme Court amended Rule 7.2 of the Rules of Professional Conduct to prohibit Louisiana lawyers from sending targeted written solicitations to accident victims within 30 days of the accident. See Rule 7.2(b), Rules of Professional Conduct. In short, the Louisiana rules already prohibit much of the conduct covered by the new federal legislation.

C. Malpractice

The ABA Journal provided some interesting "estimates" on the subject of legal malpractice. Estimated annual amount of U.S. compensatory awards for legal malpractice: $5.8 billion. Estimated annual amount of punitive damages for legal malpractice: $580 million. Estimated percentage of lawyers who do not carry malpractice insurance: 40 percent. Percentage chance in a given year that a lawyer in private practice will face a legal malpractice claim: 20 percent.

Figuratively Speaking, ABA Journal, Oct. 1996, at 12.

A recent report by the ABA shows that "[b]y far" the types of activities that draw the most claims of malpractice are "commencement of

action/proceeding" and "preparation, filing, transmittal of documents." These activities together make up about 45 percent of all claims.

ABA Report Examines New Data on Legal Malpractice Claims, 13 ABA/BNA Lawyers' Manual on Professional Conduct 110 (April 30, 1997).

D. Communications with Represented Persons

Model Rule 4.2 of the Model Rules of Professional Conduct 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 by law to do so.

Where adopted, this rule has often been interpreted to prevent contacts with employees of represented organizations. Federal prosecutors, in particular, are unhappy with state ethics rules that forbid them from contacting employees of organizations that are represented by attorneys. Attorney General Janet Reno has issued a regulation that purports to exempt lawyers of the federal government from such state rules. Recently, a decision of the United States Eighth Circuit Court of Appeals invalidated the Justice Department's regulation. See *U.S. ex rel. O'Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252 (8th Cir. 1998). The court said that the attorney general had no authority to issue such a regulation.

Coincidentally, the Conference of Chief Justices is giving some thought to a proposed change to Model Rule 4.2. In its current draft form, the new rule would widen the scope of permissible contacts by government lawyers. Among other things, the proposed rule would bar government lawyers from communicating only with members of a represented organization's "control group." *See* News, 14 ABA/BNA Lawyers' Manual on Professional Conduct 20 (Feb. 2. 1998); Legal News, US Law Week, January 20, 1998 (vol 66, no 27, page 2421).

E. Restatement

The ALI's work continues on its draft *Restatement of the Law Governing Lawyers.* The ALI has now tentatively approved five the planned nine restatement chapters. Charles Wolfram, the chief reporter for the project, predicts that the restatement will be completed in 1999.

Proposed sections on lawyer civil liability prompted the most debate at last years' ALI meeting. One of the provisions that received a lot of attention was one that would have imposed tort liability on lawyers for an intentional breach of any fiduciary duty set forth in any other part of the restatement, at least when such breach causes damages. So, for example, a lawyer would be liable, under the proposed rule, for an intentional violation of the obligation to maintain client confidences or of the obligation to avoid conflicts of interest when the client is damaged by the violation.

The principal debate was over the appearance of the word "intentional." Why, it was argued, should a lawyer only be liable for an intentional breach of a fiduciary duty? After considerable discussion, and on a very close vote, the word "intentional" was dropped. So, under the new tentative rule, a lawyer could be liable to a client in tort for any breach of a fiduciary duty. However, at the moment there is other language in the restatement indicating that liability will be appropriate only to the extent provided by law governing breach of fiduciary duty.

See *Restatement on Lawyers*, 65 U.S.L.W. 2781 (1997).

It is not clear how all of this is going to come out. Of course, even when the restatement is completed, it will not be binding authority. But it may have considerable persuasive influence on questions like lawyer liability. So there is something at stake in the ALI's debates.

F. Ethics 2000

Perhaps not to be outdone by the ALI, the ABA itself has launched a comprehensive study of the rules of lawyer conduct. The initiative, called Ethics 2000, is supposed to result in the creation of a special committee to assess the ethics rules before the turn of the century.

It has been only 15 years since the ABA generated its Model Rules of Professional Conduct, which form the basis of the professional responsibility rules in Louisiana and most other states. The new initiative could, of course, result in the promulgation of some new rules, or even a new code of rules.

ABA Starts "Ethics 2000" Project For Sweeping Review of Rules, ABA/BNA Lawyers' Manual on Professional Conduct, May 28, 1997.

G. Zero Fees

A recent unreported decision from Colorado shows what can happen when a lawyer charges an unreasonable fee. (*Eich v. Gregory A. Maceau P.C.*, Colo. Ct. App., No. 96CA1354, 11/28/97, referred to in News, 14 ABA/BNA Lawyers' Manual on Professional Conduct 20 (Feb. 4, 1998).

Irene Eich was injured in an automobile accident by an uninsured, intoxicated, driver. Attorney Maceau was hired to represent her on a standard one-third contingency fee contract. Maceau made a $100,000 demand on Eich's insurer, because Eich carried $100,000 of uninsured coverage. Eich had already incurred over $70,000 in medical expenses. The insurer quickly paid the full amount of coverage. Maceau took $33,333.33 as a fee.

Eich subsequently discharged Maceau, and sued him, claiming that his fee was unreasonable. The jury found that Maceau did not prove the reasonableness of his fee, and determined that the value of his services was zero. The court cited Rule 1.5 for the proposition that contingent fee arrangements, like other fee arrangements, must be reasonable, and it

ordered Maceau to refund the entire fee.

Maceau claimed that he had worked over 44 hours on the case, but the court accepted the jury's conclusion that there was no value to the services that he had provided. Commenting on this result, Lester Brickman, an advocate for contingent fee reform said: "Contingent fee cases of this sort are a form of theft." News, 14 ABA/BNA Lawyers' Manual on Professional Conduct 21 (Feb. 4, 1998).

H. Bias and Prejudice

The ABA Standing Committee on Ethics and Professional Responsibility has proposed a revision to Model Rule 8.4(d) of the Model Rules of Professional Conduct. The current rule prohibits lawyers from engaging in conduct "prejudicial to the administration of justice." The committee would like the Comment that accompanies the rule to include the following paragraph:

> A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socio-economic status violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the forgoing factors does not violate paragraph (d).

Earlier proposals of a similar nature have proven to be controversial and have not been adopted. Illinois law professor Ronald Rotunda discerns First Amendment problems with the new proposal, because it applies to words as well as conduct.

Legal News, 66 U.S. Law Week 2342, 2343 (Dec. 9,1997)

III. Selected Opinions from Outside Louisiana

A. Contempt of Court

Black v. Blount
938 S.W.2d 394 (Tenn. 1996)

Blount, a Tennessee lawyer, got into trouble after a jury verdict did not go his way. He represented the plaintiff in a personal injury action. The jury returned a verdict of $35,000 in favor of his client. After the verdict was read, Blount directed a "thumbs down" gesture to the jury, and muttered that the verdict was "unjust." Before the conclusion of the proceedings, Blount abruptly exited the courtroom, waving his hands in the air, and complaining about a travesty of justice. Later, in the hallway outside the courtroom, Blount approached some of the jurors and angrily said he hoped that they "could live with themselves." 938 S.W.2d at 396. He also pushed and jabbed his opponent, telling him that "You're the most unethical attorney I know, you defrauded the Court and jury throughout this entire trial, and you lied to the Court and jury." Id.

Blount was charged with and convicted of two counts of criminal

contempt of court.

B. Working Too Hard

In re Fordham

668 N.E.2d 816 (Mass. 1996) cert. denied, 117. S.Ct. 1082 (U.S. 1997)

Fordham, a Massachusetts attorney, was publicly censured for overbilling a 21 year old client who was charged with operating a motor vehicle while under the influence of intoxicating liquor. Fordham's client was taken into custody after failing a field sobriety test. The police found a partially full quart bottle of vodka in his car. Subsequent breathalyzer tests for the client registered .10 and .12 respectively.

Fordham billed by the hour. His bills showed 227 hours of time spent on the defense. The total billed for the defense, which was successful, was $50,022.25. Even though it was conceded that the attorney acted diligently and in good faith, the Massachusetts Supreme Court concluded that the hours billed were excessive. The court said that the usual fee for this type of case was less than 1/3 of the amount billed.

The court thought that many of the hours spent on the case were attributable to the lawyer's inexperience with criminal matters in general and with intoxication cases in particular. It said:

> Fordham's inexperience in criminal defense work and OUI cases in particular cannot justify the extraordinarily high fee. It cannot be that an inexperienced lawyer is entitled to charge three or four times as much as an experienced lawyer for the same service. A client "should not be expected to pay for the education of a lawyer when he spends excessive amounts of time on tasks which, with reasonable experience, become matters of routine."
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> 668 N.E.2d at 822-823 (quoting *In re Larsen*, 694 P.2d 1051 (Wash. 1985).

C. Bad Bills

In re Berg

3 Cal. Stat Bar Ct. Rptr., 1997 WL 469003 (Cal. Bar Ct. 1997)

Berg, a California lawyer, engaged in fraudulent billing practices. He had been retained to represent dentists in 41 malpractice actions. The dentists were covered by insurance by The Dentists Insurance Company, which agreed to pay $150 an hour for the representation. Between March and December 1997, the insurance company paid Berg in excess of $357,000. Most charges were billed at $150 an hour, but some were billed, without notice, at $175 an hour.

Berg regularly billed the insurance company for work before it was actually performed, but the billing statements nonetheless showed a date the services were purportedly rendered, a description of those services, and the time that was allegedly spent in performing the work. The lawyer's

billing statements frequently indicated that he had worked more than 24 hours a day. On some days, he billed for more than 100 hours of work.

Berg had an employee count the pages of documents received in particular cases, and multiply that number by three minutes to determine the hours to be billed. Berg described his method as "bulk billing."

He did not prepare pleadings, memoranda, or other evidence of productive work on the files in question. He had no time records to support the billings. Berg claimed that the time records had been destroyed within 90 to 180 days after each billing.

In the disciplinary proceedings, the lawyer claimed that he later performed the work for which he had billed. But the disciplinary authorities were unimpressed. The billing statement were fraudulent when issued. The insurance company ultimately received a judgment against Berg for $286,000. The disciplinary court recommended that Berg be disbarred.

D. Structured Settlement and Time Value of Money

In re Fox

490 S.E.2d 265 (S.C. 1997) (per curiam)

South Carolina attorney LaVaun Fox was publicly reprimanded for collecting a clearly excessive fee in a contingency fee case. Fox had been associated with another attorney, Screen, to work on a wrongful death case. The client had agreed to a 1/3 contingency fee arrangement. The case settled. The settlement provided for an immediate cash payment of $175,000, and some annuities. When Screen received the lump sum payment of $175,000, he took out $152,132 in attorneys' fees, $51,000 of which were allocated to Fox.

The client brought an action for accounting with respect to the fee, and there was a settlement in which Screen and Fox acknowledged error in the calculation of the fee. Thereafter, disciplinary proceedings were undertaken against Fox. The court described the "problem" as follows:

> The problem in this case centers around the manner in which Screen and Respondent valued the wrongful death settlement (more specifically, the annuities made part of the settlement), and how they collected their fee out of it. When they were calculating the settlement, they did not discount the annuities to present value. Instead, they added up the guaranteed payments that would be paid in the future ... [and] valued the entire settlement at $371,340. From this, they calculated their attorneys' fee at $123,255.
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> 490 S.E.2d at 268.

An additional fee of $28,877 was paid to another attorney who had worked on an aspect of the case, bringing the total to $152,132.

The court then said:

> It is well-settled that in valuing structured settlements like the one

> here, the cost method should be used..... The premium paid to purchase the annuity contracts here was $110,818. When added to the initial $175,000 case payment, the settlement would be valued at $285,818. Thus, using this figure, a one-third contingency fee would be approximately $95,000. If the settlement's value had been appropriately discounted, it is obvious the fees paid here were excessive....
>
> Valuing the settlement based on guaranteed future payments or total cash payout would most likely not have presented an ethical problem had the fee not then been taken up-front (i.e. out of present-day dollars). A basic understanding of the value of money over time would indicate this method, of taking the fee from present-day dollars but not valuing the annuity at present-day dollars, would result in a windfall for the attorneys.
>
> Id. at 268-69.

And even though Screen did the calculations on the fees, the court said that it was appropriate to discipline Fox. Fox had been included in the settlement discussions, he was aware of how the settlement was being valued for purposes of calculating attorneys' fees, and how the fees were to be paid from up-front money. So he was publicly reprimanded.

E. Confidentiality

One of the most basic duties of a lawyer is to maintain the confidentiality of client information. Rule 1.6(a) of the Rules of Professional Conduct provides, among other things, that "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation." Rule 1.8(b) further provides that "A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation." Sometimes a lawyer can encounter more than ethical problems with respect to the misuse of client information.

U.S. v. O'Hagan
117 S.Ct. 2199 (U.S. 1997)

The Dorsey law firm was engaged to represent Grand Met in a proposed acquisition of the Pillsbury Co. A Dorsey lawyer, who was not involved in the representation itself, learned of the proposed acquisition, and began to buy shares of stock and options in Pillsbury. When he started his purchases, Pillsbury was selling for $39 per share. After Grand Met announced a tender offer, the price rose to nearly $60 per share. The lawyer made a $4.3 million profit.

The SEC investigated. The lawyer was indicted for defrauding his law firm and his client by using non-public information for his own trading purposes. He was alleged to have used the profits to conceal previous embezzlement and conversion of client trust funds. He was convicted and

sentenced to prison.

The lawyer in this case was an "outsider," rather than a company "insider." The principal issue before the Court was whether he could be properly convicted of securities fraud for making unauthorized use of company information for personal gain. The Court said yes.

The Court said that a fiduciary who pretends loyalty to the principal while secretly converting the principal's information for personal gain defrauds the principal. 117 S. Ct. at 2208. "A company's confidential information ... qualifies as property to which the company has a right of exclusive use. The undisclosed misappropriation of such information, in violation of a fiduciary duty ... constitutes fraud akin to embezzlement." Id. (citations omitted). Furthermore, if such misappropriation occurs in connection with the purchase of securities, and without disclosure to the principal, the misappropriator may violate federal law. Said the Court:

> We turn next to the §10(b) requirement that the misappropriator's deceptive use of information be "in connection with the purchase or sale of [a] security." This element is satisfied because the fiduciary's fraud is consummated, not when the fiduciary gains the confidential information, but when, without disclosure to his principal, he uses the information to purchase or sell securities. The securities transaction and the breach of duty thus coincide. This is so even though the person or entity defrauded is not the other party to the trade, but is, instead, the source of the nonpublic information.... A misappropriator who trades on the basis of material, nonpublic information ... gains his advantageous market position through deception; he deceives the source of the information and simultaneously harms members of the investing public.
>
> Id.

However, the Court said that if the government were to succeed with its misappropriation theory it would also need to show that there had been a willful violation of Rule 10b-5 and that the defendant had knowledge of the rule. The Court also concluded that the lawyer's conduct could be found to violate Section 14(e) and Rule 14e-3(a), which prohibit securities trading based on material non-public information about a tender offer. The critical point, of course, is that a lawyer who "misappropriates" client information could be subject to criminal liability.

F. Insurance Company Control of Settlement

Formal Opinion 96-403

ABA Ethics Committee

In this opinion, issued August 2, 1996, the ABA Ethics Committee considered a problem that comes up in insurance cases: how does the lawyer, hired by the insurer to represent the insured, deal with a provision in the insurance policy that authorizes the insurer to control the defense and

settlement of the claim in its sole discretion, without consultation with the insured?

The Committee initially noted that the insurance contract itself does not define the lawyer's ethical obligations, and that the "essential point of ethics involved is that the lawyer so employed shall represent the insured as his client with undivided fidelity." Opinion at 2. If the lawyer is to proceed with the representation at the direction of the insurer, the Committee said that the lawyer must "make appropriate disclosure sufficient to apprise the insured of the limited nature of the representation as well as the insurer's right to control the defense." Id.

The Committee considered the potential relevance of Model Rule 1.2, which provides, in part, that "[a] lawyer shall abide by a client's decision concerning the objectives of representation," and that "[a] lawyer may limit the objectives of the representation if the client consents after consultation." In this situation, the Committee said the lawyer's obligations would be satisfied by a "short letter clearly stating that the lawyer intends to proceed at the direction of the insurer in accordance with the terms of the insurance contract and what this means to the insured." Id. No formal acceptance by the client of this arrangement is necessary, said the Committee. The insured would manifest consent to the limited representation by accepting the offered defense after being advised of the terms on which it is offered.

If insurer and insured should later disagree about whether a proposed settlement is acceptable, or about who has the right to decide that question, the Committee said that the attorney may consult with his client or clients as to a proposed course of action, or advise them to seek independent counsel.

Thus, for example, the lawyer might remind the insured that the policy gives the insurer the right to control the defense and settle the claim without the consent of the insured or that rejecting the proposed settlement might result in a forfeiture of rights under the policy. Ultimately, however, although the insurer hired the lawyer and pays his fee, the insured retains the power to reject the defense offered by the insurer under the policy and to assume the risk and expense of his own defense. Id. at 3.

In most cases, noted the Committee, an insured would be delighted to have litigation resolved within policy limits. It said:

> So long as the lawyer has apprised the insured of the limitations on the representation offered under the insurance policy and the insurer's right to settle the matter ... and the lawyer does not know that the insured objects to the proposed settlement within policy limits, the lawyer may follow the directions of the insurer to settle, without further communication with the insured. In the unusual case addressed in this opinion, however, where the lawyer knows that the insured objects to a settlement within policy limits, the lawyer must give the insured an opportunity to reject the defense offered by the insurer and

to assume responsibility for his own defense at his own expense.

Id. at 3-4.

G. Conflicts of Interest When Representing Lawyers

The principal conflict of interest rule is Rule 1.7. The Louisiana version provides:

> Loyalty is an essential element in the lawyer's relationship to a client. Therefore:
>
> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
>
> (1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>
> (2) Each client consents after consultation.
>
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) The lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) The client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

A recent decision of the ABA Standing Committee on Ethics and Professional Responsibility discusses some conflicts that can arise when one lawyer takes on the representation of another.

Formal Opinion 97-406
ABA Ethics Committee

The specific situation that the Committee considered was when one lawyer takes on the representation of another at a time when the two each have clients with adverse interests.

The Committee said that "[w]hen one lawyer represents another, the ethical propriety of their representing persons whose interests are directly adverse depends upon the effect of such representation on each lawyer's ability to represent his 'third party' client in full compliance with the Model Rules." Opinion at 1. The situation was governed by Rule 1.7(b). The critical question was whether the relationship between the two lawyers might materially limit the representation provided to either of their clients. The Committee said:

> One lawyer's duty to, or interest in the work of the other lawyer may materially limit the lawyer's representation of his third- party client in any case in which the relationship between the lawyers might cause

> either or both of them to temper advocacy on behalf of their opposing third-party clients. For example, a material limitation may exist if a representing lawyer is unwilling to seek sanctions against his opponent, who is also his client, because he is solicitous of the represented lawyer's reputation. Similarly, a material limitation may exist for a represented lawyer if she is unwilling to relay her third party client's demand to advance a transaction closing out of concern that to do so would distract her opponent -- who is also her lawyer -- from working on the matter in which he represents her.
>
> Opinion at 2.

The Committee said that a variety of considerations were relevant to the ethics question, including: 1) the importance of the matter to the represented lawyer; 2) the size of the expected fee; 3) the "sensitivity" of each matter; and 4) the nature of the relationship between the lawyers.

The Committee also considered the extent to which this sort of conflict of interest would be imputed to other lawyers in the firm. "It is a fundamental principle," said the Committee, "that the duties that one lawyer has to a client are shared by all lawyers in his firm." Id. at 3. See Rule 1.10, Rules of Professional Conduct.[1] The Committee concluded that the conflict, if there is one, could be imputed to other lawyers in the law firm, but the analysis was different for the representing lawyer than for the represented lawyer.

The Committee said that if the representing lawyer is disqualified, under 1.7(b), from representing a third-party client adverse to the represented lawyer, then all other lawyers with whom the representing lawyer is associated are also disqualified.

But the concept of imputed disqualification need not disqualify all lawyers associated with a *represented* lawyer. The Committee gave an example:

> [I]f lawyer D represents lawyer E in a purely personal matter -- for example, the sale of E's house or estate planning for E and her husband -- it is hard to see why Rule 1.10 should be read to impute the disqualification that E concludes that she personally has to all lawyers associated with E. No purpose generally thought to be served by Rule 1.10 is served by such an application. Automatic imputation would either deter lawyers from seeking out, as their own counsel, lawyers whom they know best or may deem most qualified, or require that any lawyer having any personal legal matter register the name of the lawyer that represents him in his own firm's conflict data base, to

[1] Model Rule 1.10(a) states: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2."

assure that the possibility of disqualification, however remote, is considered in future conflicts checks.

.... It is unreasonable to assume ... that all lawyers in the firm share the personal reservations that may lead one lawyer in the firm to conclude that she cannot be an effective advocate for a third party against a lawyer who also represents her.

Id. at 4.

The Committee acknowledged that its reading of the imputed disqualification rule went beyond the literal language of Rule 1.10, but said that it was working on a draft exception to the rule that was consistent with its views in this opinion. Opinion at footnote 11.

H. Communicating with Persons Represented by Counsel -- When the Government is Involved

Rule 4.2 of the Rules of Professional Conduct provides, in part:

In representing a client, a lawyer shall not communicate about the subject of the representation with a party 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 by law to do so.

A recent decision of the ABA Ethics Committee considers how the rule applies when the lawyer desires to communicate with a government official.

Formal Opinion 97-408

ABA Standing Committee on Ethics and Professional Responsibility

The committee said that the no-contact rule "provide[s] protection of the represented person against overreaching by adverse counsel, safeguard[s] the client-lawyer relationship from interference by adverse counsel, and reduce[s] the likelihood that clients will disclose privileged or other information that might harm their interests." Opinion at 2. The text of the rule does not identify the persons with whom contact is forbidden, but the committee said that the commentary "makes clear that the rule's protections extend to represented organizations as well as individuals." Id. But the commentary indicates that some communications with government representatives might be allowed because of the "authorized by law" exception in the text of the rule. The official comments to the rule state:

"Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter." Id.

The committee concluded that Rule 4.2 "is generally applicable to communications by lawyers with represented government entities." But it also said: "At the same time, we also agree that the no-contact rule must not be applied so as to frustrate a citizen's right to petition, exercised by direct communication with government decision makers, through a lawyer." Id. This means, according to the committee, that Rule 4.2 "permits a

lawyer representing a private party in a controversy with the government to communicate directly with government decision makers in certain limited circumstances within the ambit of the right to petition, even though it would in the same circumstances prohibit communication with a represented private person or organization without consent of counsel." Id. at 3.

However, the committee said that "the most responsible way" to accommodate the "tension between a citizen's right of access and the government's right to be protected from uncounselled communications" would be to make the lawyer contacts subject to two conditions.

> First, the government official to be contacted must have authority to take or recommend action in the controversy, and the sole purpose of the communication must be to address a policy issue, including settling the controversy.
>
> Second ... the Committee believes it essential to ensure that government officials will have an opportunity to be advised by counsel in making the decision whether to grant an interview with the lawyer for a private party seeking redress. Thus the lawyer for the private party must always give government counsel advance notice that it intends to communicate with officials of the agency to afford such officials an opportunity to discuss with government counsel the advisability of entertaining the communication. When the lawyer for the private party wishes to communicate in writing with government officials, the policy of fairness embodied in the rule also dictates that the lawyer must give government counsel copies of the written material at a time and in a fashion that will afford her a meaningful opportunity to advise the officials whether to receive the communication from the lawyer for the other side.
>
> Id.

On the other hand, "[i]n situations where the right to petition the government has no applicability, either because it is not the sole purpose of the contact to address a policy issue or because the government officials with whom the lawyer wishes to communicate are not authorized to take or recommend action in the matter, Rule 4.2 should be considered fully applicable to a lawyer's communications with officials of a represented government entity, just as it would apply to lawyer's communications with officials of a private organization." Id.

The committee pointed out that Rule 4.2 did not prohibit communications that had nothing to do with the representation. And it noted that "whistle blower" statutes, or other statutes, may authorize lawyers who represent clients to receive information from government officials without consent of government counsel.

I. IOLTA

Mandatory IOLTA programs require lawyers to place client funds in

interest bearing accounts and require the interest to be forwarded to an organization that uses the funds to pay for indigent legal services and other purposes. The Louisiana IOLTA rules are set forth in Rule 1.15 of the Rules of Professional Conduct.

Questions have sometimes arisen about the constitutionality of mandatory IOLTA schemes. A recent decision of the United States Fifth Circuit Court of Appeals concluded that the Texas program is unconstitutional.

Washington Legal Foundation v. Texas
Equal Access to Justice Foundation,
94 F.3d 996 (5th Cir. 1996), cert. granted, 117 S.Ct. 2535 (U.S. 1997)

In 1996, the United States Fifth Circuit Court of Appeals considered the constitutionality of the Texas IOLTA program. It held that the program amounted to an impermissible taking of interest, at least to the extent that clients whose money was deposited in IOLTA accounts did not assent to the state's use of the interest generated on those funds. The conventional wisdom in favor of these mandatory schemes is that no taking results because, in there were no IOLTA program, the deposits of client money would produce no interest in the first place. That is, absent IOLTA, attorneys would deposit client funds into non-interest bearing accounts.

The Fifth Circuit rejected the conventional wisdom. It questioned the idea that IOLTA schemes "have unlocked the magic that eluded the alchemists." It saw the interest proceeds "not as the fruit of alchemy, but as the fruit of the clients' principal deposits." The "traditional rule that interest follows principal must apply." 94 F.3d at 1004.

Other courts that have considered the issue have upheld the validity of IOLTA schemes, on the theory that if there were no IOLTA program the deposits of client money would not produce any interest. The United States Supreme Court granted certiorari in June, 1997.

J. E-Mail and Confidentiality

Some ethics committees have begun to consider whether the lawyer's use of electronic mail may run afoul of the obligation of confidentiality that arises under Rule 1.6 of the Rules of Professional Conduct. The issue recently came before the North Dakota State Bar Association Ethics Committee.

Opinion 97-09
North Dakota State Bar Association Ethics Committee

The committee said that the lawyer's duty under Rule 1.6 not to reveal information relating to the representation implies that a lawyer should have a reasonable expectation that the means of communication used will maintain confidentiality. It noted that some ethics opinions had concluded that a lawyer violates confidentiality obligations if the lawyer uses unencrypted e-mail without first discussing the risk of disclosure with the

client and obtaining client consent for the use. But it also noted that recent and "well-reasoned" opinions have concluded that a lawyer may communicate "routine" matters by using unencrypted e-mail without violating Rule 1.6. Further, the committee said that

> [i]n view of improvements in technology and changes in law, there now exists a reasonable certainty and expectation that unencrypted e-mail may be regarded as confidential. Although interception of electronic messages is possible, it is no less difficult than intercepting an ordinary telephone call.

The committee's opinion includes some discussion of Internet technology. It also refers to provisions of the United States Code making it illegal to intercept e-mail communications and providing that interception does not destroy the otherwise-privileged character of such communications. *See* 18 U.S.C. 2511 and 18 U.S.C. 2517(4). *See also* Opinion 97-5, Vermont Bar Association Committee on Professional Responsibility (lawyer does not violate confidentiality obligation by using e-mail to communicate with client).

K. Web Sites and Lawyer Advertising

A Utah ethics committee recently issued an opinion that discusses lawyer advertising on a web page.

Opinion 97-10
Utah State Bar,
Ethics Advisory Opinion Committee
October 24, 1997

The committee said that "a potential client's access to information through a web site is analogous to telephoning the firm or visiting the lawyer's office to request information." Web site advertising should therefore comply with the rules against false and misleading advertising, retention of copies, inclusion of the name of a lawyer responsible for the advertising and the rule on listing fields of practice.

On the retention of copies requirement, the committee said:

> [A]n attorney must retain a copy of each page of a web site, not just the "home page." Effective web sites are updated and changed regularly, perhaps even daily, and retaining a hard copy of each update may not be efficient or practical. To satisfy Rule 7.2(b), attorneys may elect to keep an electronic copy of the each page for the requisite two years.
>
> Opinion at 1.

The committee was also of the view, however, that a simple listing of name, street address, electronic address, and facsimile number would not amount to "advertising," and would not require copy retention.

The committee noted that "chat rooms" have become popular on

Internet sites. But it warned attorneys against using chat rooms for advertising and solicitation:

> The typical format involves simultaneous participation of several users in a real-time exchange or written messages at a common site that are displayed at each participant's computer terminal. Although these communications can often be reduced to written form, a chat-group communication is more analogous to an in-person conversation due to its direct, confrontational nature and the difficulty of monitoring and regulating it. We, therefore, find that an attorney's advertising and solicitation through a chat group are "in person" communications under Rule 7.3(a) and are accordingly restricted by the provisions of that rule.
>
> Opinion at 2.

The Committee also looked into the applicability of the rules to e-mail communications. Unlike the chat-room discussions, e-mail transmissions are not "live." They are like written advertisements that can be ignored. On the other hand, the committee thought that the speed and mode of e-mail communications can have a "different impact" than a written advertisement. In some instances, that impact might translate into prohibited "coercion, duress, or harassment." Id.

The committee also mentioned an unauthorized practice of law issue. A web site advertisement might induce someone from another jurisdiction to ask for legal help. The committee indicated that if the lawyer provides legal advice to such a person, the lawyer might run afoul of the prohibitions against unauthorized practice.

On a related note, the Tennessee Supreme Court recently imposed a one-year suspension on an attorney for a massive e-mail advertising campaign. The attorney, Canter, posted an immigration law advertisement to thousands of Internet groups and lists. The lawyer did not include a mandatory disclaimer ("This is an advertisement") in the ad. He did not supply regulatory authorities with a copy of it. A hearing committee had found that the e-mail campaign had intruded on recipients' privacy rights and had forced recipients to pay for unwanted advertising. *See* News and Background, 13 ABA/BNA Lawyers' Manual of Professional Conduct 13 (July 23, 1997).

L. Non-Lawyer Employees and Imputed Disqualification

Lawyers are generally aware that "migratory lawyers" may bring conflicts of interest with them when they move to a new law firm. In some instances, those conflicts will be imputed to all of the members of the new law firm. Thus, Rule 1.10(b) states:

> When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was

> associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 [confidentially rule] and 1.9(b) [former client rule] that is material to the matter.

What about "migratory secretaries"? In the following case, the Nevada Supreme Court concludes that disqualification of a law firm may result from the migration of a secretary.

Ciaffone v. Eighth Judicial District Court
945 P.2d 950 (Nev. 1997) (per curiam)

Members of the Ciaffone family sued the Skyline Restaurant over the shooting death of Joseph Ciaffone. The Gillock firm represented the Ciaffones. The Thorndal firm represented the restaurant.

While the litigation was going on, Ingrid Decker was employed by the Thorndal firm as a "temp" in the word processing unit. A few weeks after starting work in word processing, Decker was hired directly by the firm to be a secretary to Clark, a lawyer at the firm.

Clark did not work on the Ciaffone litigation, but Decker was assigned to do some limited "overflow" work on the case while she worked for Clark. Clark eventually left the firm. After he did so, Decker "floated" for awhile, at one time working for a few days for Marshall, the attorney of record in the Ciaffone case.

A few months after Clark left the Thorndal firm, Decker did also. She was employed to be a secretary at the Gillock firm, and she was assigned to be the secretary for the attorney of record in the Ciaffone case. Two months after Decker started work at the Gillock firm, the Thorndal firm moved to disqualify the Gillock firm from the litigation, based on Decker's involvement in the Ciaffone litigation.

Decker denied that she had done any work on the Ciaffone case during the brief time she worked for Marshall, while she was "floating" at the Thorndal firm, but she admitted that she may have done some limited work on the case while she was a word processor. After Decker came to work at the Gillock firm, the new firm "made efforts to screen Decker from any involvement in the Ciaffone" case. 945 P.2d at 952.

The trial court granted the motion to disqualify. The Nevada Supreme Court analyzed the case in light of the language of two "ethics" rules, SCR 160(2) and SCR 187, which are equivalent to Louisiana Rules 1.10(b) (quoted above) and 5.3 (which deals with "Responsibilities Regarding Nonlawyer Assistants"). The latter rule is the one that requires supervising lawyers to take "reasonable efforts" to ensure that the conduct of nonlawyer personnel "is compatible with the professional obligations of the lawyer." And the court concluded:

> When SCR 187 is read in conjunction with SCR 160(2), nonlawyer employees become subject to the same rules governing imputed

> disqualification. To hold otherwise would grant less protection to the confidential and privileged information obtained by a nonlawyer than that obtained by a lawyer. . . . [W]e conclude that the policy of protecting the attorney-client privilege must be preserved through imputed disqualification when a nonlawyer employee, in possession of privileged information, accepts employment with a firm who represents a client with materially adverse interests.
>
> 945 P.2d at 953.

The court declined to issue a writ of mandamus to the trial court to reinstate the disqualified firm.

IV. Orders of the Louisiana Supreme Court

A. CLE

Louisiana lawyers are now required to add another subject to their annual CLE quota: professionalism. By order dated May 23, 1997, the Louisiana Supreme Court amended Rule 3(c) of the Rules for Continuing Legal Education to read as follows:

> (c) Of the fifteen (15) hours of CLE required annually, not less than one (1) of such hours shall concern legal ethics, and not less than one (1) of such hours shall concern professionalism.
>
> Order of May 23, 1997.

What is the difference between legal ethics and professionalism? Amended Rule 3(c) also states:

> Legal ethics concerns the standard of professional conduct and responsibility required of a lawyer. It includes courses on professional responsibility and malpractice. It does not include such topics as attorneys' fees, client development, law office economics, and practice systems, except to the extent that professional responsibility is discussed in connection with these topics.
>
> Professionalism concerns the knowledge and skill of the law faithfully employed in the service of client and public good, and entails what is more broadly expected of attorneys. It includes courses on the duties of attorneys to the judicial system, courts, public, clients, and other attorneys; attorney competency; and pro bono obligations.
>
> Order of May 23, 1997.

The distinction is also discussed in an amendment to Regulation 4.1(b):

> Topics eligible for CLE credit in satisfaction of the Professionalism requirement include the lawyer's responsibility as an officer of the court; the lawyer's responsibility to treat fellow lawyers, members of the bench, and clients with respect and dignity; misuse and abuse of discovery and litigation; the lawyer's responsibility to protect the image of the profession; the lawyer's responsibility generally to the public service; the lawyer's duty to be informed about methods of

dispute resolution and to counsel clients accordingly.

Order of May 23, 1997.

The change became effective on January 1, 1998.

B. Subpoenas of Lawyers by Prosecutors

In December of 1996, the Department of Justice filed a lawsuit challenging Rule 3.8(f) of the Louisiana Rules of Professional Conduct. The rule limited the ability of a prosecutor to "subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless ... [among other things] ... "the prosecutor obtains prior judicial approval after an opportunity for an adversarial proceeding."

Federal rules were less restrictive with respect to attorney subpoenas. The Department of Justice contended that the Louisiana rule was preempted by federal law that regulates subpoenas, grand jury secrecy, and the attorney-client privilege. The DOJ lawsuit sought a declaration that the rule was null and void as to federal prosecutors, and an injunction barring the named defendants from enforcing it. The named defendants were the Louisiana Supreme Court, the Louisiana State Bar Association, the disciplinary board, and the disciplinary counsel. U.S. v. Louisiana Supreme Court, No. 967-7580 (M.D. La., filed 12/23/96). *See* Justice Department Sues in La., State Rules Hinder Confidential Criminal Probes, Suit Says, New Orleans Times-Picayune, Dec. 27, 1996, at A2

On June 1, 1997, the Louisiana Supreme Court ordered an amendment to the rule that removed the requirement of prior judicial approval. The change was effective upon signing. See Order of June 11, 1997. After the order was entered, the parties to the lawsuit stipulated to a dismissal without prejudice.

C. Power of Attorney

On April 30, 1997, the Supreme Court ordered an amendment to Rule 1.8 of the Rules of Professional Conduct, effective June 1, 1997. The order adds a new subpart (k) to the Rule, as follows:

> (k) A lawyer shall not solicit or obtain a power of attorney or mandate from a client which would authorize the attorney, without first obtaining the client's informed consent to settle, to enter into a binding settlement agreement on the client's behalf or to execute on behalf of the client any settlement or release documents. An attorney may obtain a client's authorization to endorse and negotiate an instrument given in settlement of the client's claim, but only after the client has approved the settlement.

D. Disciplinary Enforcement

On September 25, 1997, October 9, 1997, and on November 10, 1997, the Supreme Court ordered some amendments to the Rules for Lawyer Disciplinary Enforcement. As a result of the changes, the Rules now

include a new section 19B on "Interim Suspension for Threat of Harm." The new section provides, in part:

> A. ...Upon receipt of sufficient evidence demonstrating that a lawyer subject to the disciplinary jurisdiction of this court has committed a violation of the Rules of Professional Conduct or is under a disability as herein defined and poses a substantial threat of serious harm to the public, disciplinary counsel shall:
>
> (i) transmit the evidence to the court together with a proposed order for interim suspension ....
>
> B. ...Upon examination of the evidence transmitted to the court by disciplinary counsel and of rebuttal evidence, if any, which the lawyer has transmitted to the court prior to the court's ruling, the court may enter an order immediately suspending the lawyer, pending final disposition of a disciplinary proceeding predicated upon the conduct causing the harm; may order the lawyer to show cause, before a hearing committee panel appointed by the board, why the court should not issue an immediate interim suspension; or may order such other action as it deems appropriate.

The amendments became effective on October 1, 1997, and November 10, 1997.

V. Louisiana Legislation

A. Structured Settlements

Recent legislation limits the liability of attorneys in recommending or negotiating structured settlements. RS 37:222, which was approved on July 3, 1997, provides, in part:

> An attorney who acts in good faith shall not be liable for any loss or damages as a result of any act or omission in negotiating or recommending a structured settlement of a claim or the particular mechanism or entity for the funding thereof or in depositing or investing settlement funds in a particular entity, unless the loss or damage was caused by his willful or wanton misconduct.

The statute also provides that good faith is "presumed to exist" when the attorney negotiates with or invests in an entity that is "funded, guaranteed, or bonded by an insurance company" with a "minimum rating of "A+9" "Double A", or the equivalent.

B. Law Firms and Title Insurance

R.S. 12:804 was recently amended to provide as follows:

> A professional law corporation shall engage in no business other than the practice of law, but may hold property for investment or in connection with its legal practice. A professional law corporation may hold a title insurance agency license and serve as a title insurance agent in accordance with Title 22 of the Louisiana Revised Statutes of

1950.

And R.S. 22:1113(B0(4) was enacted to provide:

Any professional law corporation formed pursuant to R.S. 12:801 et seq. or any limited liability company, limited liability partnership, or partnership formed for the practice of law, as authorized by R.S. 37:213, may be licensed as a title insurance agent or title insurance agency.

The changes were approved on July 3, 1997.

VI. Selected Louisiana Cases

A. Attorney Misconduct

Rule 8.4 of the Rules of Professional Conduct provides, in part:

It is professional misconduct for a lawyer to:

(a) Violate or attempt to violate the Rules of Professional Conduct...;

(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.

Several recent cases illustrate how misconduct can arise.

1. Faked Automobile Accident

In re Caulfield
683 So. 2d 714 (La. 1996)

Caulfield, an attorney, and Miller, a former police department employee, were alleged to have staged a fake automobile accident in New Orleans for the purpose of defrauding the Hertz Corporation and its insurer.

A rental car operated by Miller collided with the rear end of a car owned and operated by Caulfield. Miller told the investigating police officer that he had been driving fast because he was anxious to reach his girlfriend's house, and that he had been blinded by sunlight immediately before the collision. After the accident, Caulfield filed a personal injury lawsuit against Miller, Hertz, and Hertz's insurer. He complained of neck pain caused by the accident.

When Hertz inspected the vehicles after the "accident," it began to suspect that the thing had been staged. Evidence at a resulting RICO trial showed that Caulfield and Miller had been acquainted with each other prior to the accident. It showed that Miller was a person of limited financial resources, who could not afford insurance for his own car; however, just before the accident, Miller had rented a car from Hertz at a cost of $141.27, allegedly because his own car was not running well, and Miller also

obtained $1 million in liability insurance from Hertz in connection with the rental. There was evidence that Miller had been employed as a "runner" at Caulfield's law firm prior to the time of the accident. A jury in the civil RICO trial returned a verdict against Caulfield and Miller in the amount of $410,528.88.

The Office of Disciplinary Counsel charged Caulfield with staging a fake automobile accident, and it introduced the entire record of the civil RICO trial into the disciplinary proceedings. After reviewing the record, and after taking additional testimony, the Hearing Committee recommended that Caulfield be disbarred.

Before the Supreme Court, Caulfield contended that the disciplinary authorities had given too much weight to the record in the RICO trial and that, in any event, there was no clear and convincing evidence that he had staged an automobile accident.

The Supreme Court found that the disciplinary authorities had properly applied the clear and convincing standard of evidence. And it concluded that there was "more than ample evidence ... under the clear and convincing standard, that [Caulfield] staged an automobile accident." 683 So. 2d at 717.

On the question of sanctions, the Court said:

> The act of staging a fake automobile accident in order to collect money violates the ethical duty Respondent owes to the public, the legal system, and the legal profession. This court has previously imposed the sanction of disbarment upon attorneys who stage automobile accidents. . . .
>
> . . . [W]e agree with the Hearing Committee and Disciplinary Board that disbarment is the appropriate sanction in this case.

Id. at 719.

2. Negligent Homicide

In re Brown
674 So. 2d 243 (La. 1996)

Attorney Brown was convicted of negligent homicide in the death of Gills, with whom she had lived for four years. Following an argument with Gills at their residence, Brown picked up a gun from beneath her bed. It "went off," wounding Gills in the chest. She died a short time later. Brown's criminal conviction was the basis of a subsequent charge that she had violated the Rules of Professional Conduct.

In considering the case, the Louisiana Supreme Court said that conviction of a crime may warrant discipline, "even though the crime was not directly connected with the practice of law." 674 So. 2d at 246. It also said the following about the purpose of lawyer discipline:

The purpose of lawyer disciplinary proceedings is not primarily to

> punish the lawyer but rather to maintain appropriate standards of professional conduct to safeguard the public, to preserve the integrity of the legal profession, and to deter other lawyers from engaging in violations of the standards of the profession.
>
> Id. at 245.

Decisions from other jurisdictions indicated that suspension was an appropriate sanction for negligent homicide or vehicular homicide. However, the court noted that a "gun, unlike an automobile, is an inherently dangerous weapon." 674 So. 2d at 245. In this case, said the court, "the gun, an inanimate object, did not kill Brenda Gillis. Brenda Brown killed Brenda Gillis. The gun required human volition and Brenda Brown's overt action to kill." Id. at 249. The court concluded that disbarment was the appropriate sanction:

> The gravity of the crime reflects heavily on respondent's fitness to practice law. We cannot overlook the fact that respondent's actions resulted in the senseless destruction of a life and will obviously forever change the lives of the victim's family, particularly, the victim's minor children. The actual resulting injury could not have been more severe. Moreover, respondent demonstrated a violent reaction to an admittedly non-threatening situation. Her response to this apparently stressful situation creates concern regarding her continued ability to represent clients given the pressures associated with the practice of law. The sanction imposed must, of necessity, reasonably correspond with the gravity of the misconduct. Accordingly, under the circumstances of this particular case, we conclude that respondent's conviction of negligent homicide warrants disbarment.
>
> Id.

Cf., *In re Bowman*, 679 So. 2d 1336 (La. 1996) (Attorney suspended from practice after being convicted of "driving under the influence -- resulting in death").

3. Phony Medical Records

In re Castro
699 So. 2d 382 (La. 1997)

Castro was charged with four counts of insurance fraud for altering and forging four medical records of a physical therapist. He did this to induce insurers to pay larger settlements in personal injury cases. The total financial injury to the insurance companies was $1,800.

Castro pleaded not guilty, and blamed the forged records on "an apparently non-existent paralegal." During plea negotiations, Castro admitted that he had fabricated the story about the paralegal.

After receiving his criminal sentence (3 years, suspended, with probation, community service, and restitution requirements), Castro was charged by disciplinary counsel with misconduct. The Supreme Court

ordered disbarment. It said:

> We agree ... that the crime of which respondent was convicted is one that strikes directly a[t] public trust in the profession. This court has disbarred attorneys for similar conduct. . . . Several aggravating factors exist in this case: dishonest or selfish motive, pattern of misconduct, multiple offenses, and submission of false statements during the disciplinary process. While we recognize that respondent is not experienced in the practice of law, this lack of experience is actually an aggravating circumstance under the facts of this case. Respondent began his dishonest conduct almost immediately upon commencing practice and was "caught in the act" in his first five months of practice. His brief time in practice leaves him totally without any time in practice to point to as an example of honest conduct. Further, although respondent now shows some remorse for his actions, we note that for more than a year, respondent failed to take responsibility for his actions and attempted to blame them on a fictitious paralegal.
>
> 699 So. 2d 384.

4. Nonpayment of Taxes

In re Mitchell
681 So. 2d 339 (La. 1996)

Attorney Mitchell pleaded guilty to failure to file income tax returns. He was fined $1000 and placed on criminal probation for one year. After the criminal sanction came down, disciplinary proceedings were initiated, on the theory that the criminal conviction amounted to misconduct under Rule 8.4 of the Rules of Professional Conduct. The Louisiana Supreme Court ordered that Mitchell be suspended from the practice of law for a year and a day, but it deferred the suspension, and placed Mitchell on a two year probation, during which he was ordered to satisfy a number of requirements imposed by the court. *See also In re Shealy*, 700 So. 2d 488 (La. 1997) (One-year suspension, all but six months deferred, and probation, for failure to file income tax return); *In re Thomas*, 700 So. 2d 490 (15 month suspension, all but nine months deferred, and two years of probation, for failure to file income tax return); *In re Stout*, 694 So. 2d 908 (La. 1997) (18 month suspension, with six months deferred, for failing to file tax returns for 8 years); *In re Huckaby*, 694 So. 2d 906 (La. 1997) (per curiam) (One year suspension, with six months deferred, for failure to file a 1987 tax return; the fact that the attorney had been a district judge required that he be held to a higher than usual standard; he had previously been removed from office after pleading guilty to a criminal charge based on the failure to file the tax return).

B. Contingent Fees

Rule 1.5(c) of the Rules of Professional Conduct states, in part:

A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated.

1. Oral Contingent Fees

An oral contingent fee agreement violates the Rules of Professional Conduct. It can also cause other problems.

Tschirn v. Secor Bank
691 So. 2d 1290 (La. Ct. App. 1997),
writ denied, 701 So. 2d 172 (La. 1997)

Tschirn, an attorney, asked Kohnke, a lawyer at Lemle & Kelleher, to represent him in a lawsuit against Secor Bank. Kohnke agreed to undertake the representation. A couple of years later, Kohnke and some other lawyers left the Lemle firm and established the Frilot firm. Tschirn decided to have Kohnke continue to represent him in the litigation with Secor.

There had been discussions between Kohnke and Tschirn about fees, but no fee agreement was ever reduced to writing. The partners of the Lemle firm and the departing partners who formed the Frilot firm entered into a Separation Agreement that set forth the terms of the withdrawal from the Lemle partnership. There was a notation in the agreement that Kohnke had agreed to an oral contingency contract with Tschirn in the Secor Bank case of 1/3 of the recovery plus reimbursement of costs. A subsequent fee sharing agreement stated that any recovery obtained was to be split evenly between the two firms. Tschirn acknowledged the terms of the agreement as well.

Following the conclusion of trial in the Secor Bank case, the jury returned with a verdict of $1.2 million in favor of Tschirn. Defendants issued a draft in the amount of $1.2 million payable to Tschirn, the Frilot firm and the Lemle firm. A dispute then arose over the amount of the contingent fee. Lemle contended that the fee was to be calculated on the gross recovery plus reimbursement of expenses incurred by the firm. Tschirn, Kohnke and Frilot contended that the fee was to be calculated on the amount of the net recovery after deduction of expenses that Tschirn had paid during the proceedings. The difference between these two calculations was $10,628.07. The disputed funds were held in escrow.

After a hearing, the trial court rendered judgment in favor of Lemle on the amount in dispute. Then the issue came before the Fourth Circuit Court of Appeal. It reversed.

The Fourth Circuit concluded that the Fee Sharing Agreement did not specifically state that the contingent fee would be calculated on the "gross recovery." In any event, that agreement was not a contingency fee contract.

But there was testimony from Kohnke and Tschirn that they had agreed that Tschirn would pay the costs of the litigation and that those costs would be deducted from the recovery before the contingent fee would be calculated. The court then stated:

> [W]e find that Rule 1.5 requires that a contingency fee agreement be in writing and must specify if the expenses are to be deducted before or after the fee is calculated. However, if the attorney and client enter into a binding oral contingency fee agreement, we hold that any ambiguity in the agreement shall be construed against the attorney in favor of the client.
>
> 691 So. 2d at 1294.

Lemle lost this battle, but still was paid $189,371.93, plus costs.

2. Meeting of the Minds

Even when a contingent fee agreement is reduced to writing, questions can still arise about the enforceability of the agreement.

Buruzs v. Buruzs
686 So. 2d 1006 (La. Ct. App. 1996)

Buruzs, an appliance repairman, took his son with him on a service call. While his son, age 4, was waiting in the van, the van caught on fire and the child died.

Buruzs consulted with attorney Dunn, and signed a contingency fee contract. The agreement provided for a one-third of recovery fee if settlement were reached without filing suit and 40% if suit were filed.

Dunn asked attorney Wimberly to work with him on the case. They sued the manufacturers of a wheelchair lift, Buruzs' former spouse, and her insurer. A settlement for policy limits ($100,000) was reached with the insurer. However, Buruzs refused to sign the authorization to settle and sent Dunn a letter discharging Dunn as his lawyer. Buruzs apparently expressed an intention to settle the case on his own. Dunn thereafter intervened in the litigation, claiming that he was entitled to $40,000.

The trial court found that Dunn had been discharged for cause. This resulted in a conclusion that Dunn was entitled to quantum meruit recovery instead of the percentage of the settlement amount set forth in the fee agreement.

Buruzs claimed that he had not read the contingency fee agreement, had not been given a copy of it, and had not employed Dunn to file suit against his former wife and her insurer. He claimed that he had wanted to handle that claim on his own, and that he wanted Dunn to handle claims against the lift company and Ford Motor Corporation.

The Fourth Circuit affirmed the decision of the trial court, but did not decide whether Dunn had been discharged for cause. It said:

Because we conclude there existed no meeting of the minds between

> the parties to the purported contingency contract, we hold that no agreement came into existence....
>
> Having so concluded, no necessity exists to consider whether Dunn was discharged with or without cause.
>
> 686 So. 2d at 1009.

With respect to the amount owing to Dunn, the court said: "Where there has been an enrichment in the absence of a contract, the law implies a promise to pay a reasonable amount of compensation." Id. at 1009. Here, the trial court had concluded that Dunn's co-counsel had done "the overwhelming bulk of the work," and had awarded Dunn $1500. Id. The Fourth Circuit found no reason to disturb that result.

The court listed several facts that supported the client's position in the litigation. They included:

> 1) Buruzs was not furnished a copy of the initial contract,
>
> 2) As soon as a contract was signed Dunn immediately asked Jesse Wimberly to handle the claim.
>
> 3) Dunn, despite calls, did nothing to communicate with Buruzs.
>
> 4) Dunn filed a petition without notifying Buruzs or allowing him to review or to verify the pleadings.
>
> Id. at 1008.

C. Securing Payment of Fees

Rule 1.8(j) of the Rules of Professional Conduct says, in part, that "[a] lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may ... [a]cquire a lien granted by law to secure the lawyer's fee or expenses."

In *Saucier v. Hayes Dairy*, 373 So. 2d 102 (La. 1979), the Louisiana Supreme Court took a look at R.S. 37:218, which allows an attorney to secure payment of a fee by entering into a contract with the client that provides for payment of the fee out of the proceeds of the litigation, and by filing the contract with the clerk of the court. One of the issues in the *Saucier* case was whether the statute was inconsistent with the predecessor of Rule 1.8(j), which set forth the same limitation that is quoted above. The Supreme Court did not invalidate the statute, and construed it to provide for a "privilege granted to aid the attorney's collection of a fully earned fee." 373 So. 2d at 117.

R.S. 37:218 provides, in pertinent part, as follows:

> 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 clam shall be proceeded with as if no such settlement, compromise, discontinuance, or other disposition had been made.

A recent case shows how the statute can work.

Martin v. David
685 So. 2d 158 (La. Ct. App. 1996)
writ denied, 682 So. 2d 766 (La. 1996)

Martin, a hotel guest, was injured when a fire broke out at the Royal Motel of New Iberia on June 20, 1992. Martin hired the Shea firm to represent him in a suit against the Davids, who owned the hotel, and Scottsdale, the hotel's insurer. Suit was filed on December 25, 1992. Shortly after suit was filed, lawyer Calahan filed a petition to enroll as counsel of record for Martin. He also filed an amended petition dismissing the Davids from the suit and naming Royal Motel & Hotel, Inc. as a defendant. A week after these events, Martin executed an agreement with Shea purporting to entitle Shea to 1/3 of any recovery Martin would obtain in the personal injury action. Shea also moved to rescind Calahan's enrollment. The trial court concluded that Calahan could prosecute the litigation, observing the at the conflict between law firms had been caused by Martin. On December 3, 1992 Martin settled the case, executing a receipt and release agreement with Scottsdale and its corporate owner. Martin received $150,000, 1/3 of which was distributed to Calahan as fees under the fee agreement between Martin and Calahan.

On December 4 Shea intervened, claiming legal subrogation to Martin's rights against defendants for fees in the amount of 1/3 of any recovery. Martin, Calahan, and Scottsdale were all named defendants in the intervention.

After other procedural developments had occurred, a hearing was held on Shea's intervention petition. In May 1995, the trial court awarded Shea $25,000 in legal fees, plus interest. All defendants were found solidarily liable. Scottsdale, which had already paid out the settlement money, appealed from this order.

The focus was on RS 37:218. Scottsdale contended that the statute permits an attorney to obtain a lien against the proceeds of settlement. Since the settlement proceeds had already been disbursed, Scottsdale claimed that it had been absolved of personal liability. The court disagreed. It said:

The obvious intent of La. R.S. 37:218 is to prevent a client's

> discharging an attorney and thereby depriving the attorney of his earned fee. Therefore, if the attorney with a written contingency fee contract bearing the no consent stipulation 'file(s) and records it with the clerk of court in the parish in which the suit is pending ...', then a defendant who disburses the settlement proceeds without ascertaining and paying the fee to which the attorney is due, will do so to his prejudice.
>
> 685 So. 2d at 162 (quoting from *Scott v. Kemper Ins. Co.*, 377 So. 2d 66, 70 (La. 1979).

Scottsdale raised other issues about the propriety of solidary liability in this situation, but the court found them to be unpersuasive. Returning to R.S. 37:218, the court said:

> Because the settlement and dismissal to which Scottsdale was a party failed to take into account Shea's duly recorded fee agreement, they are null and void, at least as to Shea's claim for legal services rendered. When Scottsdale disbursed the settlement proceeds without ascertaining and paying Shea the fee to which he was due, the insurer did so at its own prejudice.
>
> Id. at 163.

The court said that Scottsdale could have avoided the problem by following its usual practice of issuing the settlement check to the claimant and to both attorneys.

D. Tort Damages for Ethical Violations

Unethical conduct can result in formal disciplinary proceedings. It may also become the basis of a cause of action by the client for damages.

Ratcliff v. Boydell
674 So. 2d 272 (La. Ct. App. 1996)

Boydell and Du Barry represented Ratcliff in a wrongful death action after her husband had been killed in an automobile accident. Ratcliff signed a contingency fee agreement that provided for a fee of 1/3 of the recovery if the case settled before suit were filed and 40% if suit were filed. Suit was eventually filed in 1984. In 1985, during the jury selection phase of the trial, the case was settled for a lump sum of $225,000 plus a structured settlement. Ratcliff elected an annuity plan calling for monthly payments of $1000 for the life of her son, starting on January 1, 2002, and for lump sum payments of $25,000 in 2006, $40,000 in 2011, $60,000 in 2016, $90,000 in 2021, $130,000 in 2026, $200,000 in 2031, and $300,000 in 2036.

After delivery of the settlement documents, Ratcliff and Boydell met to conclude the matter. A dispute arose over the amount of the fee:

> Boydell deducted from the $225,000.00 his forty percent or $90,000.00 and costs of $17,217.50. He also withheld $45,000.00 which was forty percent of $112,000.00 which Boydell considered to

> be the present value of the annuity. Plaintiff questioned the amount of the fee on the annuity and Boydell accused her of not trusting him. She became emotional and left with the check for $72,782.50 which she cashed.
>
> 674 So. 2d at 275.

Shortly thereafter, Ratcliff consulted with a new attorney, Barrios, about her concerns. She then wrote a letter to Boydell questioning his view of the present value of the annuity, and stating that she believed the present value to be between $45,000 and $70,000. Boydell's written response indicated that he was "very disappointed" to receive her letter, and that the estimate "of present day value was based on information from both attorneys and accountants, all of whom were quite familiar with structured settlements." Moreover, the estimate "was as accurate as one can get, and you willingly accepted it." Id. at 276.

Ratcliff ultimately sued over the fee dispute, and the case went to trial. The trial court rendered judgment against her original attorneys for $98,214.00, consisting of $25,214.00 for a refund of fees, $43,000.00 for abuse of process, $12,000.00 for unethical practices, fraud and conversion, and $18,000.00 for intentional infliction of emotional distress. After further proceedings, the trial court also awarded substantial attorneys' fees to Ratcliff. The case was appealed.

The Fourth Circuit's opinion described what had gone wrong in the fee calculation:

> When Boydell left [the settlement] conference, he knew he was under an obligation to determine the cost or value of that settlement in order to compute the correct fee due him under his contract with plaintiff. This information was readily available, but only from an actuary, an economist, or perhaps a broker who sells structured settlements. A certified public accountant without these additional specialties would not be able to provide this information. Boydell knew this, but instead of contacting someone who could provide him with the value he called his own CPA and compounded his dereliction by posing a loaded question to him. Boydell had concluded in his own mind that the value of the $724,000.00 annuity was $112,000.00. He asked the CPA to determine an interest rate which could somehow justify this figure.
>
> Id. at 277.

Boydell's own version of events differed, but the trial court had not believed him. After Ratcliff filed her suit, Boydell and Du Barry filed sixty motions and exceptions and took six devolutive appeals. The Fourth Circuit said that "[v]irtually none of these maneuvers was meritorious." Id. at 279. They also filed suit against Ratcliff for incidental services, defamation and malicious prosecution. They filed suit against Ratcliff's new attorney for defamation and malicious prosecution.

On appeal the Fourth Circuit rejected Boydell's argument that

> claims of damage from fraud, unethical practice, conversion, abuse of process and emotional distress were not cognizable because they involve the behavior of a lawyer. He contends that Art. V § (50(B) of the Constitution confers jurisdiction over such behavior in the Supreme Court. This argument is specious. The Supreme Court has jurisdiction over disciplinary proceedings against a lawyer but a litigant who suffers damages as a result of a lawyer's misconduct has a perfect right to seek redress in court.
>
> Id. at 279.

Boydell also argued that "there is no legal authority for a court to award tort damages to a former client for ethical violations." Id. at 280. The court responded:

> This overlooks the very basis for tort liability which is the duty-risk concept. When a lawyer commits a breach of duty imposed by the ethical rules and that breach is a cause in fact of his client's damage, she has a right to recover in tort. The fact that the Supreme Court might also take disciplinary action against him hardly deprives her of her tort remedy.
>
> Id.

Near the end of its opinion, the court said that the defendants "turned this simple claim for a $25,000.00 refund into a procedural morass and marathon for the purpose of intimidating and punishing plaintiff for daring to sue them." Id. at 282.

E. Sex With Clients

Ethical problems can arise when an attorney establishes an intimate sexual relationship with a client. In Formal Opinion 92-364 (1992), the ABA Ethics Committee observed that such a relationship involved a "danger of impairment to the lawyer's representation" and that if the "impairment is not avoided, the lawyer will have violated ethical obligations to the client." California has adopted a rule that directly addresses the impropriety of some attorney-client sexual relationships. See Rule 3-120, California Rules of Professional Conduct. Although the Louisiana rules do not expressly prohibit sexual relationships between attorneys and clients, this does not mean that such relationships are a good idea.

Sanders v. Gore
676 So. 2d 866 (La. Ct. App. 1996),
writ denied, 682 So. 2d 762 (La. 1996)

Sanders contacted attorney Gore about a collection matter. Although both Sanders and Gore were married to others at the time, they began an intimate sexual relationship that continued for over three years. Gore

eventually convinced Sanders that he wanted to divorce his wife and marry her. He also convinced her to leave her husband, and represented her in obtaining a divorce. After Sanders' divorce, Gore formally asked Sanders to marry him. She agreed. But later Gore broke off the relationship, telling Sanders he was "too weak" to leave his wife.

Sanders sued for damages. Her petition explicitly detailed various events that had occurred in their relationship, recounted numerous "indiscretions," and made disparaging remarks about Gore's marriage, which had survived the affair.

The court rejected Sanders' claim of damages based on breach of a promise to marry, on the ground that contracts in derogation of marriage are against public policy.

But Sanders also alleged an abuse of the attorney/client relationship. Although the court rejected the claim, its language indicates that conduct of the sort in question might give rise to both ethical violations and recoverable damages:

> Although this court finds Mr. Gore's actions ethically reprehensible, Louisiana law does not prohibit sexual relationships between attorneys and their clients. Also, although Ms. Sanders alleges a conflict of interest in his handling of her divorce, she does not allege that Mr. Gore failed to adequately represent her. Nor is it alleged that Ms. Sanders was unaware of this conflict of interest. In fact, Ms. Sanders specifically alleges in her petition that Mr. Gore told her the reason he wanted her to file for divorce was so that he could marry her. Furthermore, Ms. Sanders does not allege that Mr. Gore's handling of her legal affairs caused her any injury that was independent of her claim for breach of the promise to marry.
>
> 676 So. 2d at 872-873.

The courts seem to have concluded that there was at least a conflict of interest involved in the divorce representation. But this was not a disciplinary case; it was a case in which the client sought damages from the attorney for breach of his obligations to her. If she had been able to show injury "independent" of the breach of promise to marry claim, the outcome might have been different.

There was another problem with attorney conduct in this case. The trial court was displeased with the "scandalous" statements contained in Sanders' petition, particularly the "unnecessary comments about Mr. Gore's family and his sexual relationship with his wife." Id. at 874. The court ordered Sanders' attorney to pay sanctions in the amount of $1000 and to write a letter of apology to Gore's wife. Sanders, but not her attorney, sought to appeal the sanction. The Third Circuit rejected her claim on appeal, on the ground that Sanders had no interest in the sanctions imposed on her lawyer. But "assuming arguendo that the issue of sanctions was

properly before this court on appeal, we find that the trial court was well within its authority in levying sanctions based on the egregious language of the petition filed by [Sanders' attorney], a petition which states no cause of action." Id. at 875. The court referenced Articles 863 and 864 of the Code of Civil Procedure.

F. Restrictions on the Right to Practice Law

Rule 5.6 of the Rules of Professional Conduct states:

A lawyer shall not participate in offering or making:

(a) A partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

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

Lawyer employment agreements frequently contain financial provisions relating to the departure of the lawyer. Can those provisions violate the rule?

Warner v. Carimi Law Firm
678 So. 2d 561 (La. Ct. App. 1996)

Warner was employed on a contract basis by the Carimi firm. He worked for the firm for five years until Carimi changed the door locks and refused to allow Warner access to his office. Carimi locked Warner out because Carimi believed that Warner was planning to leave the firm and take files that belonged to the firm. Warner thereafter set up his own practice, handling cases of clients he took with him from the Carimi firm.

Carimi refused to pay Warner wages and fees allegedly due under their employment agreement. Indeed, Carimi demanded that Warner repay monies Carimi had advanced to on or behalf of former clients of the firm, in accordance with an employment agreement between Carimi and Warner. Litigation ensued over these, and other claims.

The employment agreement contained a number of provisions dealing with termination. Among other things, it provided that if Warner "takes over any client . . . the out-of-pocket money advanced to or on behalf of the client by CLF [the Carimi firm] shall be reimbursed to CLF in full within ten (10) days." It provided that Warner "shall personally take over any guarantee of payment CLF has extended on behalf of client." It further provided that Warner's failure to reimburse the firm within the 10 day period would result in Warner owing the firm "liquidated damages for this failure equal to 25% of the owed monies" plus interest. 678 So. 2d at 563. Finally, the agreement provided that if Warner failed to make the required payments, and if he were found, after suit was filed, "to owe any fee or out-of-pocket money whatsoever," he would owe "in addition to those fees and

monies held by the Court to be owed to CLF, an additional sum equal to twenty (20%) percent of [the gross fees plus out-of-pocket money, plus liquidated damages and interest owed] as an attorney's fee." Id.

Carimi claimed that Warner owed it all outstanding costs and advances on any files he had taken, plus liquidated damages and attorneys' fees as provided in the agreement.

Several of Warner's clients (who were former Carimi clients) sought to intervene in the litigation, alleging that Carimi's financial demands on Warner made it impossible for him to handle their cases. These clients sought to annul the employment agreement on the basis that it "impermissibly interferes with their attorney-client relationship and directly inhibits their rights to free choice of legal counsel." Id. at 562. The trial court refused to allow the intervention; it also entered partial summary judgment in favor of Carimi in the amount of $211,702.01, plus liquidated damages, interest, and attorneys' fees.

On appeal, Warner contended that the cost-reimbursement clause of the employment agreement violated Rule 5.6 of the Rules of Professional Conduct, and was therefore void as against public policy. The Fifth Circuit disagreed. It distinguished the case from *Minge v. Weeks*, 629 So. 2d 545 (Ct. App. 1993), where the Fourth Circuit Court of Appeal found unenforceable an employment contract that required the attorney to give his former employer 80% of the fees generated by cases the attorney took with him when he left. The financial disincentives in that contract violated the "language and spirit of Rule 5.6." 678 So. 2d at 564 (citing *Minge v. Weeks*, 629 So. 2d at 547). The present case was different, said the Fifth Circuit:

> Unlike the arrangement in Minge v. Weeks, this agreement does not penalize the attorney who actually performs the work on the case by forcing him to pay most of his fee to the former attorney. Rather, it simply shifts the burden of financing the case from the former attorney to the client's new attorney, which is where the burden should be.
>
> Id. at 565.

Although the court rejected Warner's principal argument about Rule 5.6, it did reverse the summary judgment order. It said that the amount of the attorney's fee to be awarded was an issue of fact. It also concluded that there were genuine fact issues about which clients he "took over," as well as the amounts due on their cases.

G. Prescription of Malpractice Claims

Louisiana has a short prescriptive/peremptive period for attorney malpractice claims. *See* La. Rev. Stat. 9:5605. Questions sometimes arise about when the period begins to run. In the following case, the Louisiana Supreme Court considered a claim that the statute did not begin to run against a lawyer who continued to represent the client after committing the

malpractice and who was working to rectify the results of the malpractice.

Reeder v. North
701 So. 2d 1291 (La. 1997)

On July 10, 1989, Reeder, an investor in a fraudulent check kiting and Ponzi scheme, brought suit in federal court against the organizers of the scheme, claiming various violations of the securities laws. The federal case was dismissed with prejudice in 1990. Then, in May of 1990, Reeder brought an action in state court, asserting claims based on state securities laws. But this action was dismissed on April 26, 1991 on the basis of res judicata. Reeder appealed within the state court system, but eventually, on September 3, 1993, the Louisiana Supreme Court upheld the trial court's dismissal with prejudice, holding that, under the doctrine of res judicata, the federal district court's final judgment barred all subsequent claims, state and federal. Reeder's application for writ of certiorari was denied by the United States Supreme Court on February 28, 1994. Thereafter, Reeder brought a malpractice action against his former attorney, alleging that the attorney had failed to assert all viable state causes of action in the original federal lawsuit.

The defendants claimed that the malpractice action was time-barred. The malpractice action was brought on September 15, 1994. Defendants claimed this was more than three years after "the alleged act, omission or neglect occurred." The trial court agreed, and granted the exception. On appeal to the Fifth Circuit, Reeder argued that the "continuing representation rule" applied, and that the cause of action for malpractice did not accrue until the United States Supreme Court denied the application for writ of certiorari in February 1994.

The Fifth Circuit reversed. It reasoned:

> In determining when the claim against an attorney comes into existence, and hence when prescription or peremption begins to run, we must determine when the facts ripened into a viable cause of action sufficient to support a lawsuit....
>
> ...
>
> Throughout our jurisprudence, legal malpractice claims did not ripen until the attorney-client relationship was terminated. If a malpractice suit was filed against an attorney while he continued to represent the client on the same subject matter originally undertaken, the suit was premature....
>
> ...
>
> ... While there exists an ongoing, continuous and dependent relationship between the client and the attorney and the attorney is seeking to rectify the alleged act of malpractice, the malpractice action is premature....

> While the attorney-client relationship is in existence and the attorney is actively attempting to remedy the alleged malpractice until the judgment giving rise to the malpractice claim becomes definitive, a legal malpractice claim does not ripen into a cause of action.
>
> 683 So. 2d at 915-916.

Accordingly, the court ruled that the cause of action had not prescribed, because the malpractice action was filed within one year of the date the "judgment became definitive," and had not been "preempted since it is within three years of that date." Id. at 917.

The Louisiana Supreme court reversed. It considered the language of R.S. 9:5605, and concluded that the legislature's intent was clear. In this case, the "act, omission, or neglect" that was the basis of the malpractice complaint was the attorney's failure to include the state law claims the federal complaint, which was filed on July 10, 1989. The court said:

> [T]he court of appeal was wrong in holding that the peremptive period did not begin to run until the "facts ripened into a viable cause of action sufficient to support a lawsuit," i.e., the date the U.S. Supreme Court denied certiorari. Because the negligent act occurred before September 7, 1990, Reeder had until September 7, 1993 to file the malpractice action, "without regard to the date of the discovery of the alleged act, omission, or neglect."
>
> 701 So. 2d at 1296.

The Supreme Court acknowledged that the terms of the malpractice statute "may seem unfair" in "that a person's claim may be extinguished before he realizes the full extent of his damages." However, it also said that "the enactment of such a statute of limitations is exclusively a legislative prerogative." Id. at 1296.

The Supreme Court also found error in the lower court's decision that the peremptive period of the statute was, in effect, suspended during the time when the attorney continued to represent Reeder in the state court proceedings. The court said that, "[a]s a suspension principle based on *contra non valentem*, the 'continuous representation rule' cannot apply to peremptive periods." "Peremption" observed the court, "differs from prescription." Id. at 1298. The court did, however, remand the case for consideration of a claim that R.S. 9:5605 was unconstitutional.

H. Representing Yourself in Malpractice Litigation

Lawyers are sometimes tempted to represent themselves when they are sued for malpractice. One of the issues that comes up is the applicability of Rule 3.7 of the Rules on Professional Conduct, dealing with the "lawyer as witness." The Rule provides, in part:

> (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.

The applicability of Rule 3.7 in the lawyer malpractice context was directly considered in the following case.

Farrington v. Law Firm of Sessions, Fishman
687 So. 2d 997 (La., 1997)

Deborah Farrington and Roger Cope were equal shareholders in a business that they had purchased. After the purchase, members of the Sessions law firm were asked to draft some documents and to assist with corporate matters relating to the business. A dispute arose between the two shareholders, and, at the request of Cope, the Sessions firm filed suit on behalf of the corporation against Farrington. After settlement of that litigation, Farrington brought a malpractice action, claiming that members of the Sessions firm had failed to provide her with adequate advice in connection with the structure of the business and that they had been involved in a conflict of interest when they had sued her on behalf of the corporation. The defendants contended that they had never represented Farrington in an individual capacity.

The defendants were represented by Ezkovich, a member of the Sessions law firm and a defendant in the malpractice lawsuit. When the defendants attempted to take Farrington's deposition, she filed a motion to stay the taking of the deposition until an attorney who was not a member of the Sessions firm was appointed to represent the defendants. She contended that the defendants had a conflict of interest in representing themselves, on account of their former attorney-client relationship with her, and that a protective order was needed to avoid the embarrassment and oppression that she would suffer if the attorneys were allowed "to proceed as advocates on their own behalf." Id. at 998.

The main issue before the Supreme Court was "whether a lawyer who is sued by an alleged former client on grounds of malpractice has the right to conduct adversarial proceedings on his or her own behalf." Id. at 999. The court answered this question in the affirmative.

Initially, the court noted that the Louisiana Constitution guarantees every person the right of access to the courts,[2] and that Louisiana courts

[2] La. Const. Art. I, §22.

have recognized "the right of litigants in civil proceedings to represent themselves in court." 687 So. 2d at 999. The court acknowledged that Rule 3.7 of the Rules of Professional Conduct "prohibits a lawyer from acting as an advocate in a trial in which the lawyer is likely to be called as a necessary witness except under certain circumstances," but said that "Rule 3.7 does not address the situation where the lawyer is representing himself." Id.

The Court was persuaded, at least in part by what it called the "Comments to Rule 3.7." It cited an ABA-prepared annotation to Rule 3.7 (which is not actually one of the official comments to the model rule) for the proposition that the "rationales of the advocate-witness rule do not apply to the pro se lawyer-litigant." See Center for Professional Responsibility, American Bar Association, Annotated Model Rules of Professional Conduct 362 (3d ed. 1996). The court quoted the following from a Connecticut case:

> One reason is that it is unfair to the client that his case be presented through a witness whom the trier of fact would necessarily view as interested because of the witness' zeal of advocacy and likely interest in the result of the case. A second reason is one of public policy: permitting an attorney who is trying a case also to be a witness in establishing its facts will visit on the legal profession public distrust and suspicion arising from the attorney's dual role. That is the reason which Professor Wigmore believed to be the most potent reason for the prohibition of the attorney as a witness on behalf of his client. The public will be apt to think that the lawyer, whether he is an active partner in the conduct of the trial and also a material witness, or an inactive partner and a material witness, will be inclined to warp the truth in the interest of his client. The third reason for the rule is to avoid the appearance of wrongdoing. We do not believe that any of these reasons applies where the attorney seeks only to represent himself in his own case.
>
> Id. at 1000 (quoting from *Presnick v. Esposito*, 513 A.2d 165, 167 (Conn. Ct. App. 1986).

The court also cited a Massachusetts case for the following line of reasoning:

> Any perception by the public or determination by a jury that a lawyer litigant has twisted the truth surely would be due to his role as litigant and not, we would hope, to his occupation as a lawyer. As a party litigant, moreover, a lawyer could represent himself is he so chose. Implicit in the right of self-representation is the right of representation by retained counsel of one's choosing. A party litigant does not lose this right merely because he is a lawyer and therefore subject to DR 5-102 [the Massachusetts rule that corresponds with Rule 3.7].

Id. at 1000 (quoting from *Borman v. Borman*, 393 N.E.2d 847, 856 (Mass. 1979).

The Supreme Court also concluded that the conflicts of interest rules did not preclude a lawyer from representing himself in the defense of a malpractice claim brought by an alleged former client. Among other things, the Court said that by filing her malpractice action against her alleged former lawyers Farrington "has waived any right to suggest that the lawyers will violate Rules 1.7 and 1.9 [conflict of interest rules] by taking an adverse position to her in the suit she had brought against them." Id. at 1001.

However, the Court said that if "during the course of these proceedings, the combined role of lawyer and party is abused, the trial judge, in his discretion, may impose whatever sanctions are necessary to insure the orderly conduct of the proceedings including requiring defendants to procure independent counsel to conduct the adversarial proceedings." Id. at 1001.

I. Conflicts of Interest

Rule 1.7 is the basic rule on conflicts of interest. It provides, among other things, that:

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
>
> (1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>
> (2) Each client consents after consultation.
>
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) The lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) The client consents after consultation.

An interesting 1.7 issue came up in a recent federal district court case.

In re Suard Barge Services Inc.

1997 WL 703000 (E. D. La. 1997), (not officially reported)

Windham sustained a "catastrophic" head injury while aboard a barge that was owned by Suard Barge Services. He wife, as conservator, sued Suard and Hopson Marine Transportation in state court. The defendants, in turn, brought a limitation of liability suit against Windham in federal court.

Windham was represented in both courts by attorney Best. In the federal lawsuit, Best subpoenaed Gray Insurance, the insurer of the prior owner of the barge, to obtain records about a similar accident that had taken

place on the barge when it was owned by Grand Isle Shipyards. Gray refused to provide copies of records to Best. Best filed a motion to compel against Gray.

Grand Isle and Gray moved to disqualify Best from representing Windham on the ground that Best had previously represented Gray in an unrelated matter at the same time that Best had been representing Windham. In an evidentiary hearing, Best testified that his firm had received only one assignment from Gray in the prior 6 years. However, Best conceded that his law firm had been counsel for Gray in that matter at the time he was hired by Windham. Best withdrew from that matter after the conflict of interest issue arose.

Best argued against disqualification on the ground, among others, that Windham had not asserted any claim for damages against Gray. The question, though, was whether the subpoena and the motion to compel were sufficient to make Best "directly adverse" to Gray. Here is what the magistrate thought:

> On this record, I do not find that the subpoena itself was "directly adverse" to Gray's interests. However, I find that Windham's motion to compel and for sanctions, filed while Best represented both Windham and Gray, was directly adverse to Gray. The comments to the Model Rules state that "a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated." ... Best is clearly acting as an advocate against Gray, who was a current client in another matter, and Gray will obviously be prejudiced if sanctions are assessed against it.
>
> 1997 WL at 3.

The magistrate said that Best violated Rule 1.7. What about disqualification? Here, the magistrate did not think that Best should be altogether disqualified from representing Windham. Disqualification was never "automatic." Best could continue to represent Windham, but could not do so in connection with matters concerning Gray (the subpoena and the motion for sanctions).