Recent Significant Ethics Cases

This is a continuation of The Journal of the Legal Profession's yearly survey and report of recent legal ethics opinions and cases. The purpose of this series is to point out important and noteworthy Bar Association Committee Opinions as well as appellate court cases involving questions of legal ethics which have been decided within the past year. Although regulation of legal ethics is traditionally a matter of state concern, through these opinions, a practitioner can get some feeling for how various jurisdictions have interpreted ethical rules in certain case situations.

The first series of opinions are informal opinions decided by the American Bar Association's Standing Committee on Ethics and Professional Responsibility based on its interpretation of the Model Rules of Professional Conduct and the Model Code of Professional Responsibility. Following those opinions is a selection of various state appellate court decisions regarding legal ethics.

I. Mailing Letters Seeking Employment to Corporation's In-house Counsel

According to the Committee, "[n]either the ABA Model Rules of Professional Conduct nor the former Model Code of Professional Responsibility prohibits a lawyer from mailing letters to a company's house counsel offering his services and providing information about the lawyer's prior positions and activities in a specific area of law." 1

This opinion was made in response to an attorney's inquiry as to whether or not sending a form letter which listed biographical data and work experience to a company's in-house counsel for the specific purpose of seeking employment with the company was impermissible solicitation. 2 As the Committee phrased them, the main issues presented were whether the letter constituted an impermissible announcement under DR 2-102(A)(2) of the Model Code and whether this was an impermissible means of solicitation.

2. Id.
3. Id.
of employment under DR 2-103(A), DR 2-103(C) and DR 2-104(A) of the Model Code and Rule 7.3 of the new Model Rules.  

Using the rationale of Bates, In re R.M.J., and Central Hudson Gas, the Committee decided that the attorney could send out the proposed letter. It determined there was a less restrictive means of regulating attorney conduct than a blanket prohibition on such types of announcements. The less restrictive means include the requirement that a copy of the letter either be submitted to the Bar Association or kept for future reference. The Committee determined that this was “especially true in this particular case because there is little likelihood that the announcements would mislead other lawyers”.  

Under the Model Rules, there appears to be no direct prohibition against the proposed mailings. According to Rule 7.3, a lawyer cannot solicit business “with whom the lawyer has no family or prior professional relationship, by mail, in person or otherwise, when a significant motive for doing so is the lawyer’s pecuniary gain.” Solicitation, however, does not include letters which are more or less in the form of advertising “distributed to persons not known to need legal services of the kind provided by the lawyer.” In Re R.M.J., prohibited direct solicitation of lay clients by attorneys in order to mitigate the potential harm which might result from a professional soliciting business from a person untrained in the law. In the situation presented here however, “[t]his potential for harm is ordinarily absent where the solicitation is directed solely to other lawyers, who are capable of analyzing the background of the lawyer and the benefits which might be afforded their own clients through the use of the lawyer’s services.”  

4. Id.  
9. Id.  
10. Id.  
11. Id.  
12. Id.  
15. Id.
As with the rest of the ABA opinions to follow, the Committee put a caveat in this opinion that the various jurisdictions may differ in their interpretation and therefore local rules and opinions govern and should be consulted.\footnote{16}

II. \textit{Duty to Disclose Adverse Legal Authority}\footnote{17}

When does an attorney have to inform the Court of legal authority adverse to his theory of the case? The Committee answers this question as follows: "A lawyer who learns of a controlling court decision which may be interpreted as adverse to his client’s position must promptly advise the court, even though the issue is not presently under consideration but may be revived at some later stage in the proceeding."\footnote{18}

The inquirer was faced with a situation where he learned of a recent controlling decision contrary to his client’s position and also contrary to a ruling of the trial court in his case.

Pursuant to Rule 3.3(a)(3) of the Model Rules and DR 7-106(B)(1) of the Model Code, a lawyer must disclose adverse legal authority to the court which was not disclosed by the opposing counsel.\footnote{19} In the opinion of the Committee, the lawyer must promptly disclose the adverse authority "where the same case is still pending in the same court notwithstanding that the precise issue is not presently being considered by the court."\footnote{20} "[The attorney’s] duty as an officer of the court to assist in the efficient and fair administration of justice compels [him] to make the disclosure immediately."\footnote{21}

The Committee noted however, that even after disclosure, the attorney may "challenge the soundness of the other decision, attempt to distinguish it from the case at bar, or present other reasons why the court should not follow or even be influenced by it."\footnote{22}

\footnotesize{\begin{flushleft}
16. \textit{Id.} \\
18. \textit{Id.} \\
19. \textit{Id.} \\
20. \textit{Id.} \\
21. \textit{Id.} \\
22. \textit{Id.}
\end{flushleft}}
III. Use of “Of Counsel” Designation While Sharing Office Overhead on the Basis of Gross Receipts.\(^{23}\)

This case involves the situation in which the attorney is limiting his practice and will no longer be a partner in the firm but wishes to be designated as “Of Counsel” with regard to his former firm and to share in the office overhead based on the percent of the total business he generates.\(^{24}\)

According to a prior opinion\(^{25}\) “it would be misleading to refer to a lawyer by the ‘of counsel’ designation who ‘shares in the profits and losses and general responsibility of a firm’.”\(^{26}\) In this case however, the lawyer will not share in the general responsibility, profits and losses. He will only be sharing in the overhead in proportion to his gross receipts.\(^{27}\) This mere sharing of overhead does not make the lawyer a ‘partner’ or make the ‘of counsel’ designation inappropriate.\(^{28}\)

IV. Use of Pseudonym by Lawyer/Author\(^{29}\)

The inquirer is a lawyer/author who asks if it is permissible for a lawyer to use a pseudonym with regard to his recent publication.\(^{30}\) The Committee answers the inquiry by saying that the use of a pseudonym is permissible, but “if the lawyer wishes to identify the publication as having been written by a lawyer, the reader should be informed that the lawyer is using a pseudonym.”\(^{31}\) According to the Committee, the failure to indicate that the author is an attorney using a pseudonym may constitute “misrepresentation” pursuant to Rules 8.4 and DR 1-102(A)(4).\(^{32}\)

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24. Id.
27. Id.
28. Id.
30. Id.
31. Id.
32. Id.
V. Representation of Co-worker Against State Agency Employer

This opinion arose in response to an inquiry made by a lawyer who wanted to know whether he as a lawyer employed in a non-lawyer capacity by a state agency could represent "employees of the same agency before other agencies in cases against the employing agency over objection of that agency." The lawyer's position was not one such that he was privy to confidential information regarding his clients' cases nor would the cases relate to matters in which he had substantially participated as a state employee.

The Committee decided that, although neither set of Rules absolutely prohibit such conduct, "the likelihood that the representation will be adversely affected by the lawyer's employment interests is such that the private representation would normally be improper." This decision is based upon the effect of the lawyer's state agency employment on the client rather than upon the state agency itself based on Model Rule 1.7.

The Committee found that such representation would not be proper due to the ability of the lawyer's employer to "impose formal or informal sanctions" on him or to make things "unpleasant" for him, and therefore he could easily be "materially limited" by his own interests; even client consent would not be sufficient under these circumstances.

In the final analysis, the Committee concluded that "the representation would be adversely affected unless the lawyer is willing to, and will, make an irrevocable commitment to take whatever ac-

34. Id.
35. Id.
36. Id.
37. Id.
38. Id. Model Rule 1.7 provides in part that:
   (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. . .
39. Id.
tions may be necessary, including voluntary termination of employment, to assure that no action by the state agency will adversely affect the private representation."^40

VI. Reasonable Legal Fees^11

Rule 1.5 of the Model Rules of Professional Conduct provides that "a lawyer’s fees shall be reasonable."^42 The Committee was presented with the question of whether or not this restriction also includes unreasonably low fees as well as unreasonably high fees. The Committee replied that this rule "prohibits only unreasonably high fees [and] is not intended to, and does not, in any manner restrict lawyers from charging less than normal fees or indeed charging no fee at all."^43

The Committee based its decision on several factors. First it was noted that Rule 1.5 replaced DR 2-106 of the Model Code which prohibited "illegal or clearly excessive" fees.^44 The intent behind the rewording of the rule was "to impose a stricter standard on lawyers who would charge too much by changing the "clearly excessive" to a test of "reasonableness."^45 Another factor was that the rule was designed to protect the public interest and not the "protection of lawyers from price competition."^46 Finally, the Committee noted that the rendering of legal services at either low or no fee constitutes "public interest legal service" under Rule 6.1.^47

The following is a brief discussion of four state court appellate decisions involving questions of legal ethics. Although none of these opinions have a particularly earth-shattering effect on the field of the regulation of conduct of attorneys, each should give the practitioner and scholar alike a bit of insight into some of the do’s and don’t’s of legal conduct.

40. Id.
42. Id.
43. Id.
44. Id.
45. Id.
46. Id.
47. Id.
VII. Domestic Relations

*Blum v. Blum*[^48^] which was decided by the Maryland Court of Special Appeals, is a typical example of a situation where an attorney acts as a “scribe” in a divorce case. After a series of marital problems, the parties decided to separate. Pursuant to this action, they contacted their attorney for the purpose of drawing up a separation agreement in which Mrs. Blum gave up substantial rights.[^49^] Without informing either of the parties of their rights and without explaining the possibility of any conflict of interest, the attorney prepared the final Separation Agreement based on the handwritten agreement provided to him by the parties.[^50^] In the attorney’s opinion, he was merely a “scribe” with directions to prepare the agreement as he was directed by the parties.[^51^] Subsequently, the wife attacked the agreement on the ground that the Separation Agreement had been fraudulently induced[^52^] and pointed out that the attorney had not informed her of her rights.[^53^]

The court reiterated the old adage that “[w]here there is a potential conflict of interest between the parties, as is true in every domestic dispute, it is inappropriate to attempt to represent them both.”[^54^] Because of the inherent conflict, the court said that even in the situation where the attorney is only acting as a “scribe,” “the very least counsel should have done was disclose to the parties the possible ramifications of his dual representation and their respective rights.”[^55^]

Citing two other Maryland cases[^56^], the court defined what is needed to constitute the full disclosure necessary to fundamental fairness. Full disclosure requires the attorney to inform the parties of his relationship to each as well as the potential problems that may arise because of such relationship as the case proceeds which might “make it desirable for each to have independent counsel.”[^57^]

[^49^]: Id. at 291.
[^50^]: Id. at 296.
[^51^]: Id. at 297.
[^52^]: Id. at 291.
[^53^]: Id. at 296.
[^54^]: Id. at 296.
[^55^]: Id. at 297.
[^57^]: Blum, supra note 48, at 297.
VIII. Attorney Advertising

Recently, the Supreme Court of New Jersey had occasion to deal with the situation where attorneys, wishing to challenge the constitutionality of a state ban on legal advertising by radio, intentionally violated the Disciplinary Rule, even though they were aware that proceedings were taking place by a specially appointed Supreme Court Committee on Attorney Advertising to review the said rule.68 Prior to their actions, the attorneys in In re Felmeister69 informed the Division of Ethics and Professional Services of their intentions to violate the rule. The Division told the attorneys that the special committee was currently reviewing the rule and therefore they should refrain from such a violation. They even informed the attorneys of a public hearing regarding such rule to be held by the Committee.80

The attorneys failed to attend the public hearings and also ignored the directions of the Division and proceeded to place several advertisements on radio.81 Soon after, the Division brought this action against the attorneys for “willful and deliberate violations” of the Disciplinary Rules.82

Pointing out that after all these events had occurred, the special Committee had decided the Disciplinary Rules should be amended to permit advertising via radio and television,83 the court then focused its opinion on the conduct of the attorneys in the manner in which they instituted their challenge—“. . .the question is the Court’s responsibility and authority to assure that its rules of conduct for attorneys are obeyed by all—even while they are under challenge.”84

In affirming the sanctions against the attorneys, the court emphasized that such intentional violations of the Disciplinary Rules should not be tolerated; that “there is a value in assuring orderly change when a disciplinary rule is being revised whether because of alleged illegality or for asserted improvement.”85 According to the

59. Id.
60. Id. at 776.
61. Id.
62. Id. at 777.
63. Id. at 781.
64. Id.
65. Id.
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court a better way for the attorneys to have challenged the rule would have been by declaratory judgment.\textsuperscript{66} The court analogized this situation to the case where someone violates a court imposed order and then asserts as a defense to his prosecution of such the unconstitutionality of the ruling.\textsuperscript{67} Finally the court noted that “[a]s officers of the Court, attorneys have a peculiar position with respect to the judicial process and compliance with the expressed or stated law. \textit{Respect for the law should be more than a platitude.”}\textsuperscript{68}

IX. Criminal Law

In the recent Texas case of \textit{Pannell v. State},\textsuperscript{69} a defendant on trial for murder raised as a defense to the introduction of his confession, that the district attorney, in violation of Disciplinary Rules, interviewed the defendant (and obtained the confession) without the defendant’s attorney present.\textsuperscript{70}

A Texas statute provided that any confession obtained in violation of a state law was inadmissible into evidence.\textsuperscript{71} A Disciplinary Rule provided that an attorney should not directly communicate with the other party who he knows is represented by an attorney.\textsuperscript{72} The issue that concerned the court was “[d]oes a violation of a disciplinary rule constitute a violation of state law?”\textsuperscript{73}

The court first noted that the Disciplinary Rules were judicially, not legislatively created; thus they are administrative rules. The court concluded that a violation of a Disciplinary Rule is not a violation of a state law and therefore the confession was properly admitted.\textsuperscript{74} The Court said “[w]e agree with our brothers in the federal system that such ethical violations are to be dealt with by means of the administrative mechanisms specially established for dealing with such unethical conduct.”\textsuperscript{75}

\textsuperscript{66} Id. at 782.
\textsuperscript{67} Id.
\textsuperscript{68} Id. at 784. (\textit{Emphasis added}).
\textsuperscript{69} 666 S.W. 2d 96 (Tex. 1984).
\textsuperscript{70} Id. at 97.
\textsuperscript{71} Id.
\textsuperscript{72} Id.
\textsuperscript{73} Id.
\textsuperscript{74} Id. at 98.
\textsuperscript{75} Id.
X. Attorney-Client Privilege

The Supreme Court of Washington recently had occasion to more clearly define who is a client or party in the corporate setting for the purposes of the Disciplinary Rule dealing with *ex parte* communications. In *Wright v. Group Health Hospital* the plaintiff in a medical malpractice action asked for an order “declaring that their attorney had the right to interview *ex parte* current and former employees of defendant health maintenance organization.” The trial court denied the plaintiff’s request and the plaintiff appealed.

The defendant hospital had informed all of its employees not to discuss the case with anyone other than their own attorney. The hospital argued that, because of the corporate status, its current and former employees were clients of the law firm representing the hospital and therefore the attorney-client privilege should protect such employees from plaintiff’s counsel. Determining that the attorney-client privilege applies only to “communications” between an attorney and his client, the court found no attorney-client communication here that would be privileged.

The next argument made by the hospital was that the employees were parties within the meaning of the Disciplinary Rule preventing an attorney from directly communicating with another party who he knows is represented by counsel. The central issue facing the court was “which of the corporate party’s employees should be protected from approaches by adverse counsel?”

The court noted that the purpose of the Disciplinary Rule was “not to protect a corporate party from the revelation of prejudicial facts” but “to preclude the interviewing of those corporate employees who have the authority to bind the corporation.” Therefore, the court adopted what it called the “managing-speaking agent” test. It was held that:

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76. 103 Wash. 2d 192, 691 P.2d 564 (1984).
77. Id. at 564.
78. Id. at 566.
79. Id.
80. Id. at 567.
81. Id.
82. Id.
83. Id. at 569.
84. Id.
current Group Health employees should be considered “parties” for the purposes of the disciplinary rule if, under applicable Washington law, they have managing authority sufficient to give them the right to speak for, and bind, the corporation. Since former employees cannot possibly speak for the corporation, we hold that [the disciplinary rule] does not apply to them.85

As a sidenote the court said that “[t]his opinion shall not be construed...so as to require an employee of a corporation to meet ex parte with adverse counsel. We hold only that a corporate party, or its counsel, may not prohibit its nonspeaking/managing agent employees from meeting with adverse counsel.”86

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85. Id.
86. Id. at 570.