RECENT ETHICS OPINIONS AND CASES
OF SIGNIFICANCE

This Article is a continuation of The Journal of the Legal Profession's annual survey of recent ethics opinions and cases. The purpose of this series is to bring attention to the latest noteworthy decisions involving legal ethics. Although regulation of the bar is traditionally a matter of state concern, these decisions may serve as persuasive authority as they reflect emerging ethical norms across the county. This Article covers the 1996 calendar year.

The decisions discussed in this Article include federal and state court opinions, formal opinions issued by the American Bar Association Standing Committee on Ethics and Professional Responsibility, and opinions of state bar associations.

I. FEES

Texas Professional Ethics Committee Opinion No. 518 (1996). An attorney may not enter into a contingency fee agreement which provides that the attorney fee will be the greater of the fee which would be charged for the same services on an hourly basis or a contingency fee based on the amount recovered by the client.

*Auguston v. Linea Aerea Nacional-Chile S.A.*, 76 F.3d 658 (5th Cir. 1996). An attorney who had withdrawn from a case after his clients repeatedly rejected settlement agreements could not rely on Rule 1.15 allowing withdrawal in arguing that he had just cause for withdrawal and thus was entitled to collect a fee. The Fifth Circuit held that the attorney had no just cause for withdrawal, and thus forfeited any fee he had earned.

II. CONFIDENTIALITY

New York State Bar Association Committee on Professional Ethics Opinion No. 684 (1996). An attorney may not report an unpaid client account to a credit bureau. An unpaid account is a client secret, and an attorney is allowed under DR 4-101(C)(4) to only reveal a client's confidences or secrets necessary to collect a fee. Reporting an unpaid account to a credit bureau would not be necessary to collect a fee. Furthermore,
the only advantage in collecting a fee which would occur by the reporting would result from the adverse effect the reporting would have on the client’s credit, thus violating ethics prohibitions against using a client secret to the disadvantage of the client or to the advantage of the lawyer.

Utah State Bar Ethics Advisory Opinion Committee Opinion No. 96-04 (1996). It is not unethical for an attorney, without prior disclosure to other parties, to record telephone communications with clients, witnesses, or other attorneys if the act, considered within the context of the circumstances, does not involve dishonesty, fraud, deceit, or misrepresentation. It would be unethical for the lawyer to deny that the conversation was being recorded if he were asked. Also, the lawyer’s failure to identify himself, the client, or the purpose of the conversation could constitute unethical misrepresentation.

III. SOLICITATION AND ADVERTISING

_Lawyer Disciplinary Board v. Allen_, 479 S.E.2d 317 (W. Va. 1996). An attorney violated the West Virginia Rules of Professional Conduct by using a telephone call to solicit a prospective client in West Virginia. The attorneys used investigators and others to make telephone calls to clients in potential wrongful death suits on behalf of the attorneys. None of the attorneys had any family or prior contact with the prospective clients, and on at least three occasions, the telephone calls were made within three days of the death of the prospective client’s spouse. Also, Rule 7.4 of the West Virginia Rules of Professional Conduct limiting a lawyer’s right to declare himself a specialist to only those involved in the practice of patent law and admiralty was an unconstitutionally broad regulation of commercial speech. Also, because the attorneys were not regularly engaged in the practice of law in West Virginia, they could not be subject to discipline there.

IV. RIGHT TO PRACTICE

ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 96-401 (1996). The Model Rules of Professional Conduct allow lawyers to practice in a limited liability partnership (LLP) or other similar form of limited liability entity provided that the lawyer rendering legal services remains personally liable to the client, the form of the business organization is accurately described in the communications of the organization, and the legal requirements of the relevant juris-
diction are met. However, as with other forms of business organizations involving the practice of law, the limited liability entity may not include non-lawyer members or have nonlawyers as managing members or otherwise who have the right to direct or control the professional judgment of a lawyer.

V. CONFLICT OF INTEREST

ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 96-403 (1996). A lawyer hired by an insurance company to represent the insured party pursuant to terms of a contract which allows the insurer to control the defense and settle within policy limits represents either the insured or both the insured and the insurer absent express agreement to the contrary. Pursuant to this type of agreement, a lawyer must communicate the limitations on his representation of the insured to the insured party, preferably early in the representation. After this occurs, the lawyer may settle at the direction of the insurer. If the lawyer knows the insured will object to the settlement, the lawyer may not settle the claim or defense without giving the insured an opportunity to reject the settlement and assume responsibility for his own defense at his own expense. The lawyer may advise the court of the settlement, and the court may reasonably conclude that the insurer’s rights under the insurance contract warrant settlement over the insured’s objections.

Florida State Bar Association Committee on Professional Ethics Opinion No. 96-2 (1996). A law firm that represents local law enforcement agencies on civil and administrative matters may represent criminal defendants in the same county if certain conditions are met. The conditions are (1) the matters in which the firm represents the law enforcement agencies and the clients are unrelated; (2) the firm reasonably believes that its independent professional judgment on behalf of its defense clients will not be affected by its representation of the law enforcement agencies; and (3) all affected clients consent after consultation.

VII. ATTORNEY MISCONDUCT

Matter of Martenet, 674 N.E.2d 549 (Ind. 1996). A lawyer’s three convictions for operating a vehicle while intoxicated revealed a general indifference to legal standards of conduct and thus warranted professional discipline.

Nebraska v. Hawes, 556 N.W.2d 634 (Neb. 1996). A public defend-
er could be subject to a criminal contempt charge for failing to appear at a hearing to testify that he communicated the date, time and place of a hearing to his client. The Nebraska Supreme Court held that this information was not confidential in nature, even though it would be used against his client in a preliminary hearing on a failure to appear charge.

VIII. MALPRACTICE

Ohio Board of Commissioners on Grievances and Discipline Opinion 96-9 (1996). An engagement letter between a lawyer and a client should not require a client to prospectively agree to arbitrate fee disputes, malpractice disputes or ethical disputes because arbitration should be a voluntary decision made by a client after consultation with independent counsel if desired. Also, arbitration of an ethical disputes not a decision for an attorney to impose on a client.

IX. PAYMENTS TO WITNESSES

ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 96-402 (1996). A lawyer acting for a client may compensate a non-expert witness for time spent in attending a deposition or trial or in meeting with the lawyer to prepare the testimony. The payment must not violate applicable law of the jurisdiction and must not be conditioned on the content of the testimony. Furthermore, the amount of the fee must be reasonable so as to avoid affecting the witness's testimony.

X. REPRESENTATION OF CLIENTS

ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 96-404 (1996). When a lawyer reasonably believes that a client cannot adequately act in the client's own interest, the lawyer may seek appointment of a guardian or take other protective interest. This does not allow the lawyer to take protective action simply when the client makes what the lawyer believes to be ill-considered decisions not in the client's best interests. Instead, the client must be unable to adequately act in the client's own interests. Furthermore, if a lawyer is unable to assess the client's ability to act, then the lawyer may seek guidance from an appropriate diagnostician without violating the confidentiality requirements of Rule 1.6. The lawyer may also consult with the family members
and others about the client's incapacity to determine if the client is incapacitated. If the lawyer does not wish to take protective action, the lawyer should withdraw from representing an incompetent client because a lawyer who continues the representation would be acting without the client's authority. Withdrawal is permissible however, only where the lawyer can withdraw without material adverse effect on the client as required by Rule 1.16(b). The committee recommends that the lawyer remain with the client and seek appropriate protective action for the client. The protective action sought should be the least restrictive of the client's autonomy that will adequately protect the client in connection with the representation.

Utah State Bar Ethics Advisory Opinion Committee Opinion No. 96-06 (1996). An attorney who is not able to communicate directly with a client because of a language barrier need not have personal knowledge of the language spoken by the client. However, an attorney must be able to communicate adequately with the client, and the language barrier does not reduce the attorney's duty to communicate adequately with the client. When direct communication with the client is impossible, the steps which an attorney should take to communicate with his client will depend on the circumstances of each situation. The attorney must act reasonably to insure that his client understands the issues involved in the case in order to make informed decisions. Furthermore, when using an interpreter, the attorney must act reasonably to insure that confidentiality, possible waiver of attorney-client privilege, and possible conflicts of interest are addressed.

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