RECENT ETHICS OPINIONS AND CASES OF SIGNIFICANCE

This Article is a contribution to *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 the regulation of the bar is traditionally a matter of state concern, these decisions may serve as persuasive authority, as they reflect the emerging ethical norms across the country. This Article covers the 1998 calendar year and consists of ethics-related state and federal decisions, ABA formal opinions, and the opinions of several State Bar Associations.

CASES OF SIGNIFICANCE


Respondent Bradley mailed several brochures to the general public proclaiming the advantages of living trusts. In the brochures, Bradley was described as a “leader in the creation of quality living trust documents.” Eventually, Bradley had the brochure published and inserted in the *Cincinnati Enquirer* newspaper.

The Office of Disciplinary Counsel filed a complaint alleging that the brochures’ statement was “self-laudatory” and in violation of Ohio’s Disciplinary Rules. The dispute was submitted to a panel of the Board of Commissioners on Grievances and Discipline. The panel agreed that the language was self-laudatory and found Bradley in violation of DR 2-101(A)(1) (a lawyer shall not use any form of public communication that contains any false, fraudulent, misleading, deceptive, self-laudatory, or unfair statement). The panel concluded that Bradley should receive a public reprimand. On review, the Supreme Court of Ohio concurred with the panel. The court held that Bradley was therefore publicly reprimanded.

*Columbus Bar Association v. Dye*, 694 N.E.2d 440 (Ohio 1998):

In September 1994, Vickie Stringer and her brother, Rodney Stinger, were arrested for conspiracy to distribute cocaine and for possession and
distribution of cocaine. A few days later, Vickie asked her friends to contact Respondent Dye regarding her representation on the matter. The friends delivered $25,000 to Dye, which Vickie intended to cover only her representation. Although Dye believed that he was hired to represent both Vickie and her brother, neither party actually discussed the fees that would be required to represent Rodney.

Dye represented both Vickie and her brother at the ensuing bond hearing. Afterward, Vickie informed Dye of her decision to terminate him. Twice she requested the return of her money, less valid charges accrued up to the point of termination. Dye did not return the money.

In April 1995, the federal district court held a “conflict of interest” hearing, in which Dye represented Rodney. The hearing was conducted to determine whether a conflict could result from Dye’s original representation of both Vickie and Rodney. At the hearing, and in open court, Dye explained that his original concern upon meeting Vickie was her “psychiatric condition.” Dye continued to state that he thought about whether or not to get a psychiatrist involved and that he felt Vickie was not in touch with reality. Following the hearing, attorneys for the other defendants involved immediately filed motions seeking to have Vickie examined by both psychiatrists and psychologists.

Based on these events, the Columbus Bar Association filed a complaint against Dye with the Board of Commissioners on Grievances and Discipline alleging several ethical violations. A panel of the Board concluded that Dye violated DR 1-102(A)(5), 2-106(A), 4-101(B)(1) and (2), 5-105(A) and (B), and 9-102(B)(4). The Board adopted the panel’s findings and recommended that Dye be suspended from the practice of law for two years. Additionally, it recommended that Dye refund the entire $25,000 to Vickie Stringer.

The Supreme Court of Ohio adopted the findings and recommendations of the Board. The court found three violations in this case. First, Dye did not properly return the remainder of Vickie Stringer’s $25,000 fee. Second, Dye should not have represented both Vickie and Rodney, as this arrangement would adversely affect his independent professional judgment. Finally, Dye revealed a client’s confidence in open court and to her detriment. The court therefore ordered that Dye be suspended from the practice of law in Ohio for two years. Additionally, he was ordered to pay full restitution to Vickie Stringer in the amount of $25,000.
In re Charges of Unprofessional Conduct Against 97-29, 581 N.W.2d 347 (Minn. 1998):

Appellant was an attorney practicing primarily in workers' compensation law. In November 1996, Appellant received a resume from the Complainant responding to his advertisement for a legal secretary position. Although Appellant did not regard the Complainant suitable for the job, Appellant noticed that the Complainant was injured and out of work, thus believing he was potentially eligible for workers' compensation.

Appellant phoned Complainant and told him that he would not be considered for the legal secretary position. However, Appellant then asked Complainant about his injury and whether it arose out of his job. Upon answering that it had, Complainant testified that Appellant further inquired into the Complainant's injury, the employer's insurance company, his qualified rehabilitation consultant, and whether he was presently represented by counsel. Complainant responded that he was represented by attorney P.B. Appellant assured Complainant that he was "in good hands," but asked if he knew of P.B.'s potential appointment to the district court bench. Appellant concluded by asking Complainant if he would mind if Appellant contacted him if P.B. indeed became a judge.

Appellant's version of the conversation differed from the Complainant's. Appellant alleged that Complainant independently offered the information regarding his workers' compensation claim to Appellant. Further, Appellant maintained that it was Complainant who requested that Appellant represent him if P.B. became a judge in the future. Most importantly, Appellant testified that his call was only intended to "assist him with understanding that he had certain rights under Minnesota Workers' Compensation law and to tell him that if he didn't have an attorney, that he should have an attorney."

In January 1997, Appellant called Complainant upon learning that P.B. had been appointed to the district court bench. After mentioning P.B., Complainant told Appellant that "it probably wasn't a good time to talk" and ended the call. Appellant called Complainant again, believing his phone had malfunctioned. Complainant was angered and hung up again. Nevertheless, Appellant called back a third time, purportedly to apologize to Complainant.

Complainant filed a complaint against Appellant in February 1997. The Fifteenth District Ethics Committee determined that no discipline needed to be imposed. However, the Director of the Office of Lawyers Professional Responsibility disagreed and issued an admonition, conclud-
ing the phone calls violated Minnesota Rules of Professional Conduct 7.3 regarding solicitation by telephone. After a hearing, the panel determined that the three calls in January 1997 were not violations of the rule because Appellant could have believed they were requested by Complainant. However, the panel concurred with the admonition for the first call made in December 1996, as it was a solicitation in violation with Rule 7.3.

On review by the Supreme Court of Minnesota, the Appellant first argued that the December 1996 telephone call was not a solicitation because “he never asked to be hired as Complainant’s attorney.” Again, Appellant alleged his call was only intended to help the Complainant understand his rights under Minnesota Workers’ Compensation law. The court stated that a “solicitation” is not limited to a “direct request to represent a party.” Instead, “it can be found in the totality of the circumstances . . . .” The circumstances in this case provided evidence that the panel’s determination that the 1996 call was a solicitation was not clearly erroneous.

The Appellant next argued that the application of Rule 7.3 was unconstitutionally overbroad and vague. The court cited Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447 (1978), in which the United States Supreme Court upheld a total ban on in-person solicitation, as authority in this case. The court specifically cited the following language from Ohralik: “the potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person.” Therefore, under the same rationale, the court held that Rule 7.3 was a constitutional restraint on commercial speech based on Appellant’s conduct.

In re Shaw, 696 N.E.2d 126 (Mass. 1998):

The case concerned the proper sanction for an attorney who made false statements under oath, filed a false affidavit, and issued false and misleading opinion letters under oath. In 1986 and 1987, Respondent represented Thomas A. Toomer in numerous business transactions. While Toomer had only paid the Respondent a portion of his legal fees, Respondent still loaned Toomer $47,000. Respondent thought Toomer would repay the loan through one of his business transactions.

In September 1987, Toomer requested that Respondent prepare an affidavit to provide financial assurances to a third party involved in one of Toomer’s transactions. In the affidavit, Respondent attested to the
existence of $500,000,000 which Toomer had available to purchase bank instruments. Respondent had no reasonable basis to make such a statement.

In October 1987, Respondent suggested that Gregory Arabian loan money to Toomer so that he could complete a currency transaction with a number of European banks. Respondent assured Arabian that Toomer would repay four times the amount of Arabian's original loan. Also, Respondent stated that Arabian's loan would be protected by a surety bond. Arabian agreed and loaned Toomer the money, giving Respondent $10,000 to secure the bond. However, Respondent never secured the bond. In fact, Respondent later knowingly testified falsely that Arabian told him he could keep some of that money as his fee. Finally, Respondent signed an affidavit, under penalty of perjury, that Arabian told him that Arabian did not need the bond as security.

A hearing committee found that Respondent violated DR 1-102(A)(4) and (5) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, and misrepresentation, or in conduct that is prejudicial to the administration of justice), and DR 7-102 (A)(4),(5) and (6) (in his representation of a client, a lawyer shall not knowingly use perjured testimony or false evidence, knowingly make a false statement of law or fact, or participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false). Finally, the committee found the Respondent's misrepresentations in the opinion letters violated DR 1-102 (A)(4), (5) and (6) and DR 7-102 (A)(5). The Board of Overseers adopted the findings of the hearing committee. It recommended that Respondent be suspended from the practice of law for one year.

On review, the Supreme Judicial Court of Massachusetts held that the Respondent's actions were even more serious than similar instances of attorney misrepresentations. The court noted that while Respondent's misconduct was done in relation to his representation of one client, it involved numerous transactions and harmed different people. The court, citing a prior decision involving attorney disbarment, noted that "an attorney who lies under oath engages in 'qualitatively different' misconduct from an attorney who makes false statements and presents false evidence." The court concluded that the evidence in this case depicted an attorney who was clearly willing to serve his own needs by violating ethical norms of professional conduct. Accordingly, the court vacated the one year suspension and entered a suspension from the practice of law for two years.
In re Goebel, 703 N.E.2d 1045 (Ind. 1998):

The Respondent was a partner in a law firm in Crawfordsville. One of Respondent’s partners represented another client (“guardianship client”) in a guardianship matter. That partner sent mail to the guardianship client at “3813 East 300 South [Street],” but it was returned marked “No Such Street — NSS.”

During this time, Respondent represented a client in a criminal matter. The guardianship client’s husband was a witness in the criminal proceeding against Respondent’s client. The Respondent’s client discovered this fact and told the Respondent of his intent to kill the guardianship client and her husband. Respondent attempted to deter his client from this course of action.

In December 1996, Respondent’s client demanded that Respondent give him the address of the guardianship client. Respondent showed the client the returned envelope that been returned to the firm marked “NSS.” The client wrote down the address. Respondent never reported his client’s actions to the police or notified the guardianship client. Two days later, the guardianship client and her husband were found murdered at their address, 3813 South 300 East.

The Indiana Supreme Court Disciplinary Commission charged Respondent with violating Rule 1.6(a) of the Rules of Professional Conduct for revealing confidential client information about another client being represented by his firm. A hearing officer found that Respondent did not violate Rule 1.6(a) because “(1) the Commission failed to show by clear and convincing evidence that Respondent revealed information relating to the representation of the guardianship client; and (2) that the Commission failed to demonstrate that the Respondent had any motive other than to indicate to the criminal defendant that he did not know the whereabouts of the guardianship client.”

Upon review, Respondent argued that because the information he gave his client was false, it was not within the scope of Rule 1.6(a). In response, the court cited ABA Formal Opinion 94-380 in noting that “[i]nformation relating to representation of a client,’ as stated in Professional Conduct Rule 1.6(a), is a broad definition and has been construed to include all information relating to the representation regardless of the source.” Thus, the term “information” can include the location of a client. Thus, the next issue the court considered was whether Respondent’s disclosure was excepted under 1.6(b).

The court reiterated that Rule 1.6(b) provides that an attorney may
reveal information relating to the representation of a client to the extent the attorney believes is reasonably necessary to prevent the client from committing any criminal act. Respondent argued that he disclosed the address on the envelope in an attempt to “dissuade” the client from committing the murder. The court, however, did not agree. The court found persuasive the fact that after revealing the address, Respondent did not contact the police or the guardianship client.

In determining the proper sanction, the court began by noting that confidentiality was the core of the attorney-client relationship. Although the court could sympathize with the Respondent’s fear for his own safety, this could not excuse the disclosure of client confidences. The court concluded that “a public reprimand adequately addresses the misconduct.”

_In re Perry_, 509 S.E.2d 632 (Ga. 1998):

Perry was given authority to enter settlement negotiations with an insurance company regarding his client’s automobile accident injury. However, the client did not give Perry the authority to settle the claim without client authorization. Perry, nonetheless, settled the client’s claim without his authorization and placed the settlement draft into his escrow account, even though the insurance company asked that the draft not be deposited until the client returned a signed release of liability. Angered by his actions, the insurance company claimed that it would report Perry to the State Bar if the release was not produced. Thus, Perry returned the release with what was represented to be the client’s signature. In the meantime, Perry assured the client that he was still negotiating a settlement for her. The client later learned about the settlement from the insurance company, at which time Perry gave the client her portion of the settlement proceeds.

A Review Panel of the State Disciplinary Board recommended that Perry receive a 36-month suspension, with conditions on readmission. On appeal, the Supreme Court of Georgia affirmed the sanction. Specifically, the court found Perry’s lack of previous discipline, his inclusion in many civic activities, and the reimbursement of all money owed to his client to be mitigating factors in the present case. However, one condition imposed upon his readmission to the State Bar was that he must take the Multi-State Professional Responsibility Exam (MPRE) and obtain certification from the Board of Bar Examiners. Only one Justice dissented, stating that Perry’s forgery of his client’s signature on the release form warranted disbarment.
Columbus Bar Ass'n v. King, Columbus Bar Ass'n v. Pope, 702 N.E.2d 862 (Ohio 1998):

Attorney King represented Kandy Cantrell in a "slip and fall" action against her former landlord. King intended to file a complaint based on this claim seeking compensation for Cantrell's injuries. In January 1996, King led Cantrell to the law office of Pope. The Respondents (King & Pope) schemed that Pope would telephone Cantrell's former landlord in hopes that the landlord would slander Cantrell, while the conversation would be recorded. When Pope telephoned the landlord, he spoke to the landlord's office manager. Pope maintained that he had received a rental application from Cantrell. The manager advised Pope that the company had evicted Cantrell for not paying her rent. Responding to Pope's questioning, the manager informed him that she suspected that "illegal activity had occurred on Cantrell's premises." Further, she advised Pope not to rent to Cantrell. King amended the complaint against the landlord to include a count for slander.

In response to a complaint filed by the Columbus Bar Association, a panel of the Board of Grievances and Discipline of the Supreme Court found that the scheme to pose as a prospective landlord was a "sham." Additionally, the panel was angered at the Respondent's failure to cooperate with the investigation. The Columbus Bar Association sought "a one-year suspension for each attorney and a stay of each suspension." However, the panel recommended that both attorneys be suspended indefinitely from the practice of law.

On review, the Supreme Court of Ohio adopted the findings of the Board. However, it disagreed with the suspension. Instead, the court suspended King for one year and stayed the suspension on the condition that King work with a mentor during that period. The court suspended Pope for six months and stayed the suspension.


The Rhode Island State Police received a confidential tip that Respondent was a known drug user. During a sting operation, detectives posed as drug dealers attempting to sell illegal drugs. McEnaney was ultimately arrested for purchasing fifty dollars worth of crack cocaine. After the arrest, a search of his car uncovered a partially smoked marijuana cigarette. Thus, Respondent was also arrested for possession of marijuana.
In July 1997, Respondent was charged in a two-count criminal information based on the arrests. However, a diversion program was offered to Respondent, the successful completion of which would have led to the dismissal of the charges. Respondent did not complete the program and the charges were reinstated.

In June 1998, Respondent entered a plea of nolo contendere to each count of the information. Respondent was subsequently sentenced to probation for two years based on the possession of cocaine, and one year for the possession of marijuana.

The Disciplinary Counsel of Rhode Island filed a petition, charging that McEnaney’s sentence constituted a “conviction” under Article III, Rule 24, of the Supreme Court Rules of Rhode Island. Article III, Rule 24 reads:

An attorney admitted to practice in this State who is convicted in a court of record of a crime which is punishable by imprisonment for more than one (1) year in this or any other jurisdiction may . . . be ordered to appear before this court to show cause why his or her admission to the bar should not be revoked or suspended.

The issue in this case was whether a plea of nolo contendere followed by a probationary period constitutes a “conviction” while that probation is being served.

The Supreme Court of Rhode Island initially noted that it did not even need to address the issue. It stated that an attorney need not be convicted of a crime in order to be found to have violated the Rules of Professional Conduct. The court cited Rule 8.4(b), which provides that an attorney shall not “commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer.” By entering the nolo plea, the court held that Respondent had admitted enough facts to be found guilty of the crime charged. Thus, discipline was appropriate.

In determining the proper amount of discipline, the court noted that professional discipline is not intended to punish the attorney. Instead, it is intended to protect the public and the integrity of the bar. The court stated that it could not accept the use of drugs by attorneys. Yet, the court noted that the charges at issue were unrelated to the practice of law and did not involve dishonesty. Therefore, the court suspended McEnaney from the practice of law for thirty days.
In re Caranchini, 160 F.3d 420 (8th Cir. 1998):

Attorney Caranchini appealed a district court’s order to disbar her. The disbarment was ordered in a reciprocal disciplinary proceeding that was initiated after she was disbarred by the Supreme Court of Missouri. On appeal, Caranchini argued that (1) the district court’s order violated the Double Jeopardy Clause because her conduct had already produced sanctions by the Missouri Supreme Court, and (2) the district court denied her due process because a hearing was not conducted to relitigate the underlying conduct which produced the original sanctions.

Caranchini argued that the district court violated the Double Jeopardy Clause because Rule 11 sanctions had already been imposed on her based on her original conduct. The court responded that while disbarment is commonly thought of as “punishment,” attorney discipline is not punishment in terms of the Double Jeopardy Clause. The court cited several other jurisdictions which have held likewise. The court stated that if the opposite were true, then attorneys who were convicted for crimes could not even be disbarred for those crimes. In essence, the state would be forced to allow a convicted attorney to continue practicing law.

Second, Caranchini argued that her due process rights were violated because she was not afforded a hearing to address the facts which led to her original sanction. At the outset, the court noted that federal courts generally defer to the findings of state courts in disbarment proceedings. The court stated that Caranchini had received an opportunity to be heard and litigate the issue which led to the original sanction. Furthermore, the Supreme Court of Missouri gave Caranchini notice and an opportunity for a hearing, in which she could present mitigating factors that applied in the case. Thus, the court determined that Caranchini’s due process rights had not been violated. In closing, the court noted that “[d]ue process does not require relitigation of valid prior judgments.” Accordingly, the court affirmed the district court’s order for disbarment.


On December 9, 1996, Klayman and Orfanedes sent a letter informing Judge Chin of an unrelated matter in which they were involved. The matter was a lawsuit regarding the campaign contributions of John Huang and the Democratic National Committee. Specifically, the letter asked Chin if he had seen or read several articles regarding the matter, some of which noted that Klayman was a member of the group which had brought the lawsuit. Further, the articles listed several Asian-American appointees of the Clinton Administration, of which Judge Chin was one.

On December 19, 1996, Judge Chin held a conference in open court and asked the attorneys to explain the purpose of the letter. Klayman maintained that Chin had made several negative remarks regarding the merits of previous lawsuit. Klayman then stated that his involvement in the campaign-finance lawsuit regarding the Clinton Administration may have led Judge Chin to lose impartiality, given the fact that “both Huang and Judge Chin were Clinton appointees and Asian-Americans.” Chin immediately ordered the lawyers to show cause why they should not be sanctioned for violating DR-102 (A)(5) (a lawyer “shall not . . . engage in conduct that is prejudicial to the administration of justice.”) and DR 7-106(C)(6) (“[i]n appearing as a lawyer before a tribunal, a lawyer shall not . . . [e]ngage in undignified or discourteous conduct which is degrading to a tribunal.”).

The attorneys defended their actions by suggesting that because the campaign-finance case elicited such a hostile response from Democrats and the Asian-American Community, it may have caused Chin to lose his impartiality. On February 5, 1997, Judge Chin imposed sanctions on the two attorneys, which revoked their pro hac vice status. The attorneys appealed.

The Second Circuit found no abuse of discretion in the imposition of sanctions upon the attorneys. The court specifically noted that there was “no factual basis for the suggestions made in the December 9 letter other than Judge Chin’s appointment by the Clinton Administration and his race and ethnicity.” The court noted that several other courts have held that race or ethnicity is not a proper ground for challenging a judge’s impartiality. Furthermore, judges sometimes have political backgrounds. Yet, they must be presumed to be impartial absent evidence to the contrary. Finally, the court found the level of sanctions imposed were not excessive. In fact, the court noted the Fourth Circuit affirmed heavier penalties upon an attorney who attacked a judge for having a “Jewish bias.” Therefore, the court affirmed the order of sanctions.
FORMAL OPINIONS

ABA Formal Opinion 98-410:

This opinion focuses on the ethical concerns that arise when an lawyer occupies the dual role as a director of a corporation, while also serving as its legal counsel. The Committee noted that while the Com- ments to the Model Rules of Professional Conduct (Model Rules) provide a warning of the risks associated with such an arrangement, the Rules expressly do not prohibit such a dual role. Therefore, the opinion attempts to discuss the potential problems that an attorney may face and offers some courses of action that an attorney should follow in order to avoid a violation of the Model Rules. The Committee recognized three areas in which issues could potentially arise: (1) Advising the corporate manage- ment and board when the dual roles commences; (2) Protecting confi- dences and the attorney-client privilege; and (3) Confronting and resolv- ing conflicts and other ethical issues that arise in the course of the dual relationship.

A. Advice to Clients Regarding the Dual Role

When the corporate counsel agrees to serve as director of the corpo- ration, the attorney should reasonably assure herself that others under- stand the ethical implications that the arrangement may have. The attor- ney should, therefore, properly explain the potential for conflicts of inter- est and how such conflicts may disqualify the attorney from thereafter acting in either capacity at an important moment in time. Also, the attor- ney should make sure that the possible threats to the attorney-client privilege and the duty of confidentiality are understood by the other officers and the board. If a substantial likelihood exists that a conflict will negate the attorney-client privilege, the attorney should offer to continue only as corporate counsel until that risk passes. If the client has been informed and still wishes for the attorney to act as a director, and the attorney believes that no conflict or other ethical consideration should bar the dual role, than the lawyer may accept the role. In any event, the attorney should consider submitting a written memorandum in addition to her oral explanation to the board.
B. The Lawyer-Director Must Exercise Care to Protect the Corporation’s Attorney-Client Privilege

A problem with the dual role arises in that the responsibilities of a director and that of counsel differ with respect to the application of the attorney-client privilege. When the attorney-director provides the members of the board with business advice in addition to legal advice, the members may be forced to testify about this conversation. Yet, this conversation would be protected if the attorney was only acting in his role of counsel. In sum, the privilege only applies to the purely legal advice. If the attorney also acts as director, the odds increase that the privilege may be lost. Given this fact, the attorney should make clear that the purpose of a meeting is to give pure legal advice.

C. The Lawyer-Director Must Confront and Resolve Ethical Issues that Arise During the Dual Role

First, what should an attorney-director do when asked to represent the corporation in an undertaking she opposes as director? The opinion states that the attorney must decide whether her representation will be “materially limited” under Rule 1.7(b), given her opposition.

Second, a lawyer may be disqualified from giving an opinion regarding the legality of a matter in which she participated as a director. In such a case, it may prove difficult for the attorney to give independent advice, in light of her interest as a director.

Third, at a minimum, an attorney should abstain from voting as a director regarding issues that will directly affect the relations between the corporation and the attorney’s firm.

Finally, in situations in which the directors are named as defendants in a suit, the directors need to have independent representation under Model Rule 1.7(a).

ABA Formal Opinion 98-411:

The opinion addresses the ethical issues that arise when one lawyer consults another lawyer regarding a client matter in which the second lawyer is not involved. As for the consulting lawyer, she has many issues to remember. First, a lawyer must avoid violating her duty of confiden-
ality under Rule 1.6. Note, however, that Comment 7 impliedly permits an attorney to "make disclosures about a client when appropriate in carrying out the representation . . ." In any event, the authority to disclose client confidences through lawyer consultation is limited. One permissible method of consultation includes one that is "general in nature . . . ." Similarly, consultations that are done "anonymously" or hypothetically are permissible if the client's identity will not be revealed. The opinion notes, however, that attorneys should not presume that these methods avoid all risk of client disclosure. The lawyer should be careful not to use facts which would allow the consulted lawyer to identify the client.

Second, disclosure is proper if the client consents after consultation. The lawyer should make the client aware of the consequences that disclosure brings. Third, a lawyer obviously must avoid consulting a lawyer who represents, or is likely to represent, an adverse party.

Finally, the lawyer should determine whether to require assurances from the consulted lawyer to keep the disclosed information confidential.

The consulted lawyer also needs to keep the following issues in mind. First, the Rules do not disqualify a consulted attorney from current or future representation. The committee believed that to find otherwise would hinder the quality of legal representation by discouraging consultation. However, if the consulting lawyer seeks and acquires the consulted lawyer's agreement to keep the information confidential, then the consulted lawyer has a duty. Second, a consulted lawyer must be cautious in giving advice which may ultimately become detrimental to her client. Model Rule 1.7, Comment 1 states that loyalty is paramount in the lawyer-client relationship. Loyalty may be impaired by recommending action which is contrary to the interests of the lawyer's client. Finally, while a lawyer-client relationship is not created between the consulted lawyer and the consulting lawyer's client because of the consultation, a duty of confidentiality undertaken outside of the lawyer-client relationship can limit the consulted lawyer in representing others.

ABA Formal Opinion 98-412:

The opinion addresses what a lawyer's obligations are when she discovers that her client has violated a court order prohibiting the transferring or disposing of assets. Also, the Committee addresses whether a lawyer has an obligation of disclosure when, after unsuccessfully attempting to convince the client to disclose his actions, she subsequently withdraws or is replaced by new counsel.
The opinion states that under Rule 3.3(a)(1), a lawyer must correct any affirmative misrepresentation that she provides to the court. However, avoidance or correction of the misrepresentation does not necessarily mean that the lawyer must disclose the client’s misconduct. Whether withdrawal without disclosure satisfies the lawyer’s ethical obligations depends upon whether the false statement has already been made. If the client insists upon utilizing misrepresentations in the future, the lawyer should withdraw. However, if the false statement has already been given, and the court may continue to rely upon that statement, correction must be given whether or not the lawyer withdraws.

If the client has given the false representation, Model Rule 3.3(a)(2) and (4) control. If the lawyer discovers that a client has already provided a false representation in a discovery request, for example, the lawyer should take reasonable steps to correct the fraud. This may require disclosure to the court in some cases.

The opinion next addresses whether disclosure of client misconduct is necessary where neither the lawyer nor client have made affirmative misrepresentations. An attorney does not make an affirmative representation simply by appearing before the court. However, Comment 2 of Model Rule 3.3 states that there are cases in which a failure to make a disclosure constitutes an affirmative misrepresentation. In these cases, the lawyer may be required to withdraw if the client refuses to comply with the court order.

Finally, the Committee addresses whether a lawyer has any continuing disclosure obligations once she withdraws or is replaced by new counsel and the client has violated a court order prohibiting the transfer of assets. The committee concluded that the attorney may not make such a disclosure to the court or to new counsel in the absence of client consent.


The opinion addresses whether an attorney may properly accept a set fee from an insurance company to defend all of its third party insurance defense work if the attorney’s independent professional judgment would not be affected. The Committee states that nothing in the Rules Regulating the Florida Bar prohibits such an arrangement. Thus, a conflict of interest argument would not bar representation on this basis. However, the lawyer owes her client all obligations and responsibilities under the Rules
of Professional Conduct. Thus, the lawyer must provide the client with a full disclosure of the fee arrangement, and the lawyer may not enter into an arrangement that would impair her independent professional judgment. If the lawyer feels her professional judgment would be impaired, she is allowed to decline acceptance of the arrangement.


Among other subjects, the opinion addresses whether an attorney may operate over the Internet. The opinion notes that the practice of law over the Internet is analogous to conducting a law practice by telephone or facsimile, which is permissible, but subject to certain restrictions. First, New York court rules require a posting of a Statement of Client’s Rights and Responsibilities in a lawyer’s office. Thus, one practicing over the Internet should include this text on her web site. Second, the Internet practitioner should continue to check for conflicts before undertaking representation that would conflict with the interests of existing clients. Third, when conducting research over the Internet, competent representation requires that the lawyer takes steps to assure that the information is reliable. Finally, use of Internet e-mail to communicate with clients may pose a risk of disclosing confidential information to others. The Committee notes that the recent criminalization of the unauthorized interception of e-mail enhances the belief that these communications are confidential. Further, the Committee found that there is only small evidence that the use of Internet e-mail will produce greater unauthorized disclosure than other forms of communication. In light of widespread use of e-mail today, the Committee concludes that a lawyer may communicate in this method without violating her duty of confidentiality.


The opinion addresses the question regarding the advertising of a contingent fee arrangement. Specifically, the opinion states that it is improper for attorneys to advertise using statements such as: “You pay no fee unless you win” or “There’s no charge unless we win your case” or “You pay us only when we win.” These type of statements violate DR 2-101(E)(1)(c). A lawyer has a duty to advise the public that contingent fee clients are responsible for costs and expenses of litigation. However, the
previous statements portray a contrary position. In sum, these statements suggest that litigation will not cost the contingent fee client a dime. Although lawyers know the difference between legal fees and costs and expenses, the public may not. Therefore, lawyers may add such statements as: “contingent fee clients are responsible for costs and expenses of litigation” to remedy the problem.


In the opinion, the Committee states that a lawyer who receives unsolicited communication from a former employee of an adversary’s law firm relating to the alteration of documents should refrain from further communication with that employee and should seek judicial guidance as to the use of the communication. The Committee believes that further communication, although unsolicited, would violate the spirit of DR 1-102 (A)(4) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.) and DR 1-102 (A)(5) (a lawyer shall not engage in conduct that is prejudicial to the administration of justice). If the information involves alleged fraudulent or criminal conduct that the opposing counsel may be assisting, the lawyer should communicate with a tribunal or other appropriate authority for further guidance.

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