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Legal Ethics: That It Should Come To This!

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I. Introduction

There is no shortage of reported decisions in which lawyers are disciplined for misconduct. Nor is there an absence of news accounts of lawyer misdeeds. The reputation of lawyers does not seem to be on an upward trajectory. What to do? Discipline more lawyers more harshly? Amend continuing legal education rules to require more hours of instruction in legal ethics? Provide money payments to lawyers who report on the misdeeds of other attorneys? Ramp up the level of character and fitness investigations for bar applicants? Take comfort in the possibility that things could be worse? Conclude that things are not so bad after all?

II. News

A. Airplane Crash

New Jersey lawyer Richard Weiner sent letters to families of seven victims of an airplane crash. Each letter said, in part:

I read of your catastrophic loss and though I don’t know you personally, I want to send you my condolences. When I looked into the crash, I became very upset when I realized this accident should have never occurred except for the gross negligence of the airline and various other defendants including the Port Authority of New York and New Jersey.

Each letter also included information about Weiner’s firm, and said that “I feel we will be eminently qualified to handle your case should you decide that you wish the services of an attorney.”

Some of the letter recipients notified the National Transportation Safety Board, which, in turn, notified the U.S. Attorney’s Office. The U.S. Attorney’s Office made contact with Weiner about his communications. In September of 2009, Weiner entered into a settlement with the Federal government for violating a federal statute that prohibits lawyers from soliciting legal work until 45 days after an air carrier accident. In the settlement, Weiner acknowledged that he had violated 49 U.S.C § 1163(g) (2), and that, as a result, the United States had civil claim against him. He paid $5000 to settle.

B. Malpractice Insurance

On April 16, 2010, the Texas Supreme Court announced that there was no demonstrated need for a rule that would require Texas lawyers to disclose to clients and to prospective clients whether they carry malpractice insurance. This announcement was in agreement with an earlier recommendation of the Texas State Bar’s board of directors. In a letter to the State Bar, the Chief Justice of the Texas Supreme Court wrote:

We should be concerned if clients are unable to recoup sums occasioned by lawyer malpractice, or if the public would view the non-existence of such insurance as a critical factor in the decision to retain a lawyer. But, as your process demonstrated, there is little evidence of either circumstance.

Half the states have approved rules requiring some type of disclosure. Texas joins four other states – Arkansas, Connecticut, Florida, and Kentucky – in rejecting a malpractice insurance reporting requirement.


C. False Credentials

Loren Friedman attended medical school for a year, until he was dismissed for poor academic performance. He thereafter applied to law school, but he failed to disclose his medical school record, because he believed that it would harm his admission prospects. He was admitted to the University of Chicago law school. While he was enrolled there, Friedman altered his law school transcript (to make it look more favorable) and submitted it to many law firms. Using the phony transcript, he managed to obtain summer employment, including a stint at the Sidley & Austin law firm.

When he ultimately applied for bar admission, Friedman did not disclose the transcript fraud, but he did disclose that he had been dismissed from medical school and that he had omitted that information from his law school application. The transcript problem surfaced when the hiring partner at Sidley & Austin was given a copy of Friedman’s real transcript by a recruiter, and the partner wondered how the firm could have hired him with the record shown in the transcript. When Friedman, who had by now been admitted to the bar, was confronted with the transcript problem, he notified disciplinary authorities of his transcript falsifications. It was also discovered that he had plagiarized a paper while he had been in law school.

The Illinois Supreme Court suspended Friedman from the practice of law for at least three years, with the suspension to run “until further
III. Cases and Ethics Committee Opinions

A. Louisiana Permanent Disbarment Cases

In re Tooke
22 So. 3d 902 (La. 2009) (per curiam)

Attorney Tooke was found to have engaged in numerous acts of misconduct, including neglect of legal matters, failure to communicate with clients, failure to supervise his non-lawyer assistant, conversion of client funds, and engagement in conduct involving fraud, deceit and misrepresentation. He admitted that he had converted approximately $30,000 of client funds, but an audit revealed that the actual amount was more than twice that amount. Tooke was permanently disbarred.

In re Jackson
27 So. 3d 273 (La. 2010) (per curiam)

Jackson was convicted for "fixing" a traffic ticket for compensation while he was serving as an assistant city attorney in New Orleans, assigned to traffic court. The ODC charged him with violating Rule 8.4, for committing a criminal act that reflects adversely on his honesty, trustworthiness, or fitness as a lawyer. The Louisiana Supreme Court ordered permanent disbarment, stating:

Respondent fraudulently used his position as an Assistant City Attorney to dismiss DWI charges against his own client. In doing so, respondent intentionally interfered with the administration of justice and misused his governmental position to obtain a significant benefit for his client. We find this conduct amounts to intentional corruption of the judicial process. This conduct led to respondent's conviction of malfeasance in office, which is a felony. [27 So. 3d at 277].

In re Cooper
23 So. 3d 886 (La. 2009) (per curiam)

Attorney engaged in several acts of misconduct, including failure to provide competent representation, neglect of legal matters, failure to communicate with clients, forgery, check kiting, and conversion of at least $168,000 in client and/or third party funds. She was permanently disbarred.

In re Cofield
26 So. 3d 729 (La. 2010) (per curiam)

Cofield held himself out to prison officials as an attorney after he had been disbarred. He also pled guilty to possession of drug paraphernalia. He was permanently disbarred.
In re Smith
29 So. 3d 484 (La. 2010) (per curiam)

Lawyer Smith served as director of the Louisiana Film Commission. Following the filing of federal criminal charges, Smith admitted that he had conspired to falsely inflate movie budgets so that a film production company could obtain larger state tax credits. He also admitted receiving cash bribes in the amount of $67,500. Smith was permanently disbarred. The Louisiana Supreme Court observed that he had been convicted of felonies, and that attorneys occupying a position of public trust are held to a higher standard of conduct than ordinary attorneys.

In re Petal
30 So. 3d 728 (La. 2010) (per curiam)

While suspended from the practice of law, Petal engaged in unauthorized practice of law. He also pled guilty to a conspiracy to commit bribery, in violation of federal law. The conspiracy was to give cash payments to Mark Smith, the lawyer in the preceding case, in order to obtain film tax credits. Petal claimed that he had had no actual knowledge of the bribery, and said that this should be mitigating. However, the Louisiana Supreme Court said that once a lawyer is convicted of a crime, “he is only permitted to introduce mitigating circumstances that are not inconsistent with that guilt.” 30 So. 3d at 735. Petal was permanently disbarred.

In re Matthews
30 So. 3d 737 (La. 2010) (per curiam)

Matthew, a disbarred lawyer, nonetheless engaged in the practice of law on a number of occasions, in violation of the prohibition against unauthorized practice. Permanently disbarred.

In re Bates
33 So. 3d 162 (La. 2010) (per curiam)

According to the summary provided by the Louisiana Supreme Court in its reported opinion:

The deemed admitted facts establish respondent neglected legal matters, failed to communicate with clients, failed to refund unearned fees, failed to pay third-party medical providers, issued an NSF check from his trust account, practiced law while ineligible, refused to return an unearned fee and documents to a client until the client dismissed his disciplinary complaint, engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, gave false statements to the ODC, and failed to cooperate with the ODC. [33 So. 3d at 174-75].

Moreover,

[i]n accepting fees, then failing to do any substantial work, respondent converted more than $51,000 in client funds. He has
abandoned his law practice and appears to have no intention of ever providing refunds of the unearned fees. [*Id.* at 175].

The court ordered permanent disbarment.

**B. Other Cases and Materials, From Louisiana and Elsewhere**

1. **Continuing Legal Education**

   **In re Fazande**
   
   23 So. 3d 247 (La. 2009) (per curiam)

   Attorney Fazande became ineligible to practice law because he had failed to comply with mandatory CLE requirements for 2002. While ineligible, he was retained by a bail-bonding company to obtain a bond reduction for Travis Martin. He filed a motion to reduce the bond, without Martin's knowledge or consent. He later filed a second motion to reduce the bond. When this conduct came to the attention of the Louisiana Supreme Court, it said:

   [R]espondent accepted compensation from a third party, who directed the bond reduction portion of the representation, without the knowledge or consent of Mr. Martin. Furthermore, it is undisputed that during the time he represented Mr. Martin, respondent was ineligible to practice law due to his failure to comply with MCLE requirements in 2002. This conduct by respondent is in violation of the following Rules of Professional Conduct: Rules 1.1(b), 1.2(a), 1.4, 1.8(f), 1.16(a), 5.4(c), 5.5(a), 8.4(a), and 8.4(d) [*23 So. 3d at 252-53*].

   The court ordered suspension for six months, but deferred all but thirty days of that on condition that Fazande be placed on probation and attend "one full day of Ethics School." [*Id.* at 253.

   **In re Oldenburg**
   
   19 So. 3d 455 (La. 2009) (per curiam)

   Attorney Oldenburg attended LSU's Recent Developments CLE program in November of 2002. However, his check for payment for the program bounced. LSU reported the lack of payment to the bar association, and this resulted in a declaration that Oldenburg was ineligible to practice law. While ineligible, he agreed to represent a client in a child custody matter, and he appeared in court on behalf of that client. He later paid the amount that he owed for the CLE program, and he was reinstated to practice.

   The ODC filed formal charges for practicing law while ineligible to do so. He was suspended for six months, most of which was deferred, subject to satisfaction of the terms of a two year probation.
2. Bar Admission

In re Nathan
26 So. 3d 146 (La. 2010) (per curiam)

Andrea Nathan conditionally failed the bar exam. She filed an application to take the exam a second time, and she submitted an affidavit stating that her responses to the bar application questions had not changed. She was granted permission to take the exam, and she passed it. However, a question about her character emerged. According to the opinion in this matter:

The evidence presented during the hearing reflects that petitioner went to the Committee's office in Metairie to file her bar application by hand on December 15, 2006, the last day for filing applications for the February 2007 bar exam. At that time, the Committee's staff informed petitioner that her application was not properly completed and notarized. Petitioner was told that she could return later in the day with the completed application. When petitioner returned to the Committee's office, her application had been "notarized" by a Baton Rouge attorney. However, the document did not bear a notary seal or bar roll number, and the signature of the notary appeared to be quite similar to that of petitioner's. Skeptical that the notary's signature was authentic, the Committee contacted the attorney, who denied notarizing the application for petitioner. The attorney subsequently gave a sworn statement confirming this information under oath. [26 So. 3d at 147].

When confronted with the notarization problem, Nathan did not deny the forgery. She "attempted to explain her dishonest conduct as a momentary lapse in judgment because of the stress she was under at the time." Id. Nathan was denied admission to the bar. However, she was permitted to reapply for admission in a year.

Justice Johnson dissented. She regarded Nathan's behavior as an "aberration," and would have granted conditional admission, subject to a probationary period of two years.

3. Settlements and Communication with Clients

In re Ungar
25 So. 3d 101 (La. 2009) (per curiam)

Kim Bullock Cutrera and John Meehan retained attorney Ungar to represent them in a putative class action lawsuit against The Equitable Life Assurance Society of the United States. The suit alleged breach of contract, fraud, and deceptive practices by the Equitable in the marketing and sale of "vanishing premium" life insurance policies. Ungar accepted the representation on a contingency fee basis. He associated with the Houston law firm of O'Quinn & Laminack, which, in turn, associated the New York City law firm of Milberg, Weiss, Bershad, Hynes & Lerach.
Ungar had an agreement with O'Quinn to share any attorney's fees generated from the litigation “65% to your firm [O'Quinn] and 35% to Randy J. Ungar & Associates.” 25 So. 3d at 102.

The trial court denied class certification. While an appeal was pending, Ungar attempted to settle the litigation with Equitable’s local counsel. This effort failed. The Milberg Weiss firm began settlement negotiations with Equitable’s national counsel. A “global settlement” was reached, in which Equitable agreed to pay $15 million to settle the cases that had been filed against it. Plaintiffs’ counsel proposed, among themselves, to allocate $4 million to settlement of client claims and to divide the remaining $15 million among themselves. Only after the global settlement was negotiated did the lawyers contact their clients to obtain consent. According to the opinion in the case,

O'Quinn attorney Angie Levinthal called Mrs. Cutrera to offer her the sum of $100,000 to settle her claims against the Equitable. Mrs. Cutrera asked Ms. Levinthal for details concerning the settlement, including the amounts the other plaintiffs would be receiving; however, Ms. Levinthal said she could not disclose this information because it was confidential. Mrs. Cutrera also inquired how much the plaintiffs' lawyers were going to obtain from the settlement, but Ms. Levinthal merely advised, falsely, that the lawyers were “taking a loss” on the case. Finally, Mrs. Cutrera expressed concern whether any attorney's fees would be taken from her portion of the settlement. In response, Ms. Levinthal told Mrs. Cutrera that respondent's contingency fees were not being deducted from her recovery but were being paid directly by the Equitable. At Ms. Levinthal's request, respondent wrote to Mrs. Cutrera on December 21, 2000 to confirm this advice, stating:

No additional attorneys fee will be charged to you out of your settlement as my fees will be paid directly by the defendant. You are relieved of your contingency fee with Randy J. Ungar & Associates.

Notably, the letter did not advise Mrs. Cutrera that respondent would collect an undisclosed amount of fees out of the $11 million portion of the settlement allocated by plaintiffs' counsel as attorney's fees. Moreover, the letter did not provide Mrs. Cutrera with any details of the Settlement Agreement. [Id. at 103].

When Mrs. Cutrera discovered that a release document required her to certify that she had been provided with details of the settlement, she refused to sign. She hired attorney Thomas Cortazzo to represent her. Cortazzo sent a letter to Ungar and to lawyers at O'Quinn and Milberg Weiss requesting details of the settlement in order to allow Mrs. Cutrera to evaluate the $100,000 settlement offer. He also requested a copy of the
“Settlement Agreement, all exhibits thereto, and any other related documents.” *Id.* at 104.

Ungar did not provide Cortazzo a copy of the settlement agreement. However, he did hire Richard Stanley as his “ethics counsel.” On Stanley’s advice, Ungar filed a motion on Mrs. Cutrera’s behalf to set aside the order of dismissal in the litigation. He also decided to waive his fee.

Cortazzo learned from the Milberg Weiss firm that the settlement was for $15 million and the lawyers were proposing to retain $11,460,000 in fees and costs. Mrs. Cutrera eventually agreed to settle for $550,000, out of which she paid Cortazzo a $90,000 fee.

Client Meehan had earlier agreed to settle for $170,000. He had asked Ungar for a copy of the settlement agreement, who agreed to provide it to him, but he eventually got his a copy of the agreement from an O’Quinn attorney instead.

Meehan and Mrs. Cutrera filed complaints about Ungar with the ODC. The Louisiana Supreme Court summarized the principal disciplinary issue as follows:

While the underlying facts of this case are very complex, the crux of the misconduct alleged by the ODC is that respondent intentionally withheld information from his clients regarding the Equitable settlement in order to facilitate collection of an excessive fee. [*Id.* at 110].

Ungar blamed many of the problems on out-of-state co-counsel and characterized any failure to communicate with his clients as negligent. But the court rejected this defense. It said:

As a threshold matter, we reject any attempt by respondent to deflect culpability from himself to his out-of-state co-counsel. While there is nothing inherently wrong with dividing responsibilities among co-counsel, no division of labor agreement can relieve respondent of his ethical duties and responsibilities to his clients, Mrs. Cutrera and Mr. Meehan. [*Id.*].

The court then went on to conclude that Ungar’s conduct had fallen short of professional standards:

Turning to respondent's actions, a critical factual question is whether respondent intentionally misled his clients concerning the existence of the Settlement Agreement. The hearing committee, which had the benefit of actually seeing and hearing the testimony of respondent and the other witnesses, concluded that respondent's actions were intentional and deliberate. Based on our independent review of the record, we cannot say the hearing committee's factual findings are manifestly erroneous.
In brief to this court, respondent makes much of the fact that Mrs. Cutrera did not ask him for a copy of the Settlement Agreement. However, a plain reading of Rule 1.4 makes it clear that it is incumbent upon respondent to provide relevant information to his clients; it was not his client's duty to request it. Moreover, it is beyond dispute that such a request was made once Mrs. Cutrera retained Mr. Cortazzo to represent her, but even at this point, respondent did not turn over the Settlement Agreement, notwithstanding that it was in his file and had been there for several months.

Based on these findings, we conclude the rule violations, as found by the hearing committee and disciplinary board, are supported by the record.

... The misconduct in this case, which involves elements of dishonesty and self-interest, is clearly serious in nature. Further, respondent's actions caused his clients actual harm, especially with regard to Mrs. Cutrera, who was required to retain new counsel. However, we recognize respondent eventually took some steps (admittedly belated) to minimize the harm of his actions by consulting counsel to determine his ethical duties, seeking to have the order of dismissal in Duncan set aside, and ultimately waiving his fee. [Id. at 110-111].

The court imposed a three year suspension. Three justices dissented. They were of the view that Ungar should have been disbarred. Justice Knoll, in dissent, wrote in part, as follows:

It gives me great pause to think what would have happened if Ungar's roadblocks to truth had been successful and Mrs. Cutrera had simply acquiesced to Ungar's self-motivated and deceptive counsel to sign the release. Had this happened, Ungar's egregious conduct would have been swept under the carpet and he would have been free to use his license to practice law to feather his own nest to the detriment of a future, unsuspecting public. Ungar's use of his license to practice law in this manner causes great harm to the legal profession and the public. Such questionable conduct should neither be condoned nor tolerated. Moreover, Ungar's conduct causes the public to harbor a real disdain for the legal profession and forever tarnishes the legal profession. Abraham Lincoln once said, "[R]esolve to be honest at all events; and if in your own judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer." Abraham Lincoln, Notes for a Law Lecture (July 1, 1850). [25 So. 3d at 113].

See also Kentucky Bar Association v. Mills, 318 S.W.3d 89 (Ky. 2010) (Lawyer who fraudulently misled clients into accepting settlement
of Fen-Phen litigation that allowed lawyers to obtain millions of dollars in unearned fees was permanently disbarred; the clients were misled about the size of the settlement, the way individual disbursements were calculated, and how much money the lawyers were receiving).

4. Fraud

In re Hutton
25 So. 3d 767 (La. 2009) (per curiam)

Attorney Adam Hutton’s brother Steve was killed in an automobile accident while working for Halliburton in Saudi Arabia. Before Steve died, he was divorced from Landra Hutton, who had had two children from a prior marriage. Landra was identified as the primary beneficiary of a life insurance policy that Steve had obtained through his employer.

Accessing computer records, Adam learned that the value of the life insurance policy was in excess of $800,000. He could not confirm, through those records, who the beneficiary was, but Halliburton told Adam that neither he nor his two siblings were designated beneficiaries. Adam (correctly) concluded that Landra was likely to be the beneficiary. Adam did not believe that Landra should benefit from the death of his brother. He met with Landra and asked her to sign an assignment. The assignment, which Adam had drafted, was described in the opinion as follows:

[I]n consideration of the sum of $25,000, Landra assigned to respondent “any and all sum or sums now due or owing said assignors, and all claims, demands and cause or causes of action of whatever kind and nature which said assignors had or now have or may have against HALLIBURTON, INC. AND/OR JOHN HANCOCK INSURANCE COMPANY, arising out of the injury and death of Steven Allen Hutton, ...” [25 So. 3d at 769].

The assignment did not say that the life insurance policy was worth more than $800,000, and Adam did not mention that to Landra. Instead, he told Landra that there was “a chance” she could be the beneficiary of Steve's life insurance policy; that he did not think that was what Steve would have wanted; and that he would like for her to sign those rights over to him in exchange for $25,000. According to Landra, however, respondent told her that he did not know if she was still the beneficiary of the life insurance policy, but in the event she was, the funeral home needed “a guarantee” that if there were any unpaid expenses from Steve's funeral she would cover them. Having remained on friendly terms with her former husband since the divorce, and not wishing to prevent him from receiving a proper burial, Landra signed the assignment. [ld.].
Adam paid Landra $25,000, and sent the assignment along to Halliburton. Later, as directed by Adam, Landra wrote to Halliburton and instructed it to remit proceeds of the insurance policy to him. When the money came, Adam split it evenly with his two living siblings. Thereafter, Adam exhausted his share of the funds.

Landra subsequently brought a lawsuit seeking recovery of the life insurance proceeds. She also filed a complaint with the ODC. The Louisiana Supreme Court summarized the evidence as follows:

It is undisputed that respondent drafted an assignment of life insurance benefits for execution by his former sister-in-law, and paid her $25,000 in connection with the assignment. At the time that he presented the document to Landra, respondent knew that the value of his brother's life insurance policy was in excess of $800,000, and that neither he nor his siblings were the designated beneficiaries of the policy. Rather, respondent was certain that Landra was the beneficiary, but he did not believe that she should benefit from Steve's death, regardless of the legally binding election made by Steve. The hearing committee made a factual finding that respondent misled Landra as to the true purpose for the assignment of rights and for the $25,000 payment. This finding is supported by the record, and based on this finding, respondent violated Rules 8.4(a) and 8.4(c) of the Rules of Professional Conduct. [*Id.* at 775].

The court also said: "Following his brother's death, respondent used his legal training to defraud Landra of the life insurance proceeds to which she was entitled because he decided that she should not receive them. Such conduct by a lawyer is simply indefensible." [*Id.* at 776. The court ordered disbarment.

**In re PRB Docket No. 2007-046**
989 A.2d 523 (Vt. 2009)

Two attorneys were partners in a law practice and represented a client in a serious criminal matter. During trial, a potential witness contacted them, claiming to have information that tended to show their client's innocence. The lawyers obtained a continuance until the following day to check out the witness's potential testimony. They arranged to interview the witness by telephone and to record the call. During the call, the witness asked the lawyers whether they were recording the interview. One respondent said "No," and the other, attempting to distract the witness, added "She's on speaker phone, so I can hear you." But the lawyers were recording the call. The witness later filed complaints with the Office of Disciplinary Counsel against both lawyers.

The matter came before the Vermont Supreme Court, which noted: "Rule 4.1 provides that '[i]n the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a
third person.”’ 989 A.2d at 526. In this instance, the lawyers believed that the witness would have terminated the call if he had thought that the conversation was being recorded. So the court thought that the recording of the call was a “material” fact. Regarding the matter of misrepresentation, the court said:

We also agree that respondents knowingly made a false statement about the recording and thus violated Rule 4.1. One respondent stated in plain terms that she was not recording the conversation, when in fact she was. The second respondent attempted to distract the witness from the issue of recording entirely, by making a statement about the speakerphone. Furthermore, she did not disagree with or correct the misrepresentation made by the first respondent. Both respondents’ actions, therefore, violate Rule 4.1. [Id.]

However, a majority of the court concluded that this conduct did not violate Rule 8.4(c), which states that it is professional misconduct for a lawyer to engage in “dishonesty, fraud, deceit, or misrepresentation.” The court said that this provision was intended to reach only conduct that “calls into question an attorney’s fitness to practice law.” Id. at 529. And it did not think that the lawyer’s conduct violated that standard. Nonetheless, because there had been a violation of Rule 4.1, the court issued a private reprimand.

It also announced that it was establishing a committee “to consider whether the rules should be amended to allow for some investigatory misrepresentations, and, if so, by whom and under what circumstances.” Id. at 530.

5. Ghostwriting

Michigan State Bar Professional Ethics Committee
Informal Opinion RI-347 (April 23, 2010)

In this opinion, the Michigan State Bar Professional Ethics Committee concluded that it was permissible for a lawyer to ghostwrite pleadings for a client and to give advice about what to do in court, without disclosing this involvement to opposing counsel or to the court. The ABA Ethics Committee had reached a similar conclusion in Formal Opinion 07-446 (2007).

The Michigan committee noted that, in accordance with Rule 1.2(b), it was permissible for a lawyer to limit the objectives of representation if a client consents after consultation. It thought that this concept could apply to litigation as well as to transactional work. Such a limitation must be reasonable, the committee said, even though the Michigan version of the rule (unlike the ABA’s model) does not include an express reasonableness requirement.
Observing that other ethics committees and court decisions had reached divergent results on the ghostwriting issue, the Michigan committee took the position that the lawyer need not disclose his or her behind the scenes work unless the client affirmatively represents that no lawyer has been providing assistance. It found persuasive support for this conclusion in the 2007 ABA Ethics Committee Opinion on the subject.

6. Threats:

State v. Hynes
978 A.2d 264 (N.H. 2009), cert. denied, 130 S. Ct. 1083 (2010)

Attorney Hynes wrote a letter, on his law firm letterhead, to the owner of Claudia's Signature Salon in Concord that stated:

I am writing in regards to your company's policy of pricing for different types of haircuts. It has been brought to my attention that your business charges $25 for haircuts but $18 for a Men's cut and $12 for a children [sic] haircut. Such a distinction in price based on gender and age is discrimination in violation of the law. Accordingly, I demand you immediately cease this unfair pricing and charge customers in a more appropriate manner, such as by the length of their hair or the amount of time it would take. [978 A.2d at 268].

He also demanded $1000 to avoid litigation. The shop owner's husband called Hynes and offered $500 to settle. Hynes accepted. A settlement meeting was arranged. Hynes admitted, in the meeting, that he did not represent a client in connection with his demand. He also said that he had never patronized the salon. An undercover agent with the attorney general's office attended. The agent arrested Hynes when he took possession of the $500.

A New Hampshire criminal statute provides: "A person is guilty of theft as he obtains or exercises control over the property of another by extortion and with a purpose to deprive him thereof." N.H. Rev. Stat. § 637:5. Such extortion could be found if, among other things, a person threatens to do "any . . . act which would not in itself substantially benefit him but which would harm substantially any other person with respect to that person's health, safety, business, calling, career, financial condition, reputation, or personal relationships." Id. Hynes was convicted of the criminal offense.

Hynes argued on appeal that threatening litigation was not what the statute contemplated. The New Hampshire Supreme Court agreed that threatening to file a legitimate lawsuit, and accepting a settlement to forego it would generally be permissible. However, threatening a baseless lawsuit was another matter. In this case, the court thought that Hynes lacked standing to bring the threatened lawsuit, so the threatened suit was meritless. It upheld the conviction.
The court noted that some other courts had concluded that threatening a baseless suit was insufficient to support an extortion conviction. But it distinguished those cases on the ground that they had evaluated only the nature of the threat, rather than its consequences. And the New Hampshire statute brought the threat’s potential harm into the analysis.

**State v. Koenig**  
769 N.W.2d 378 (Neb. 2009) (per curiam)

Attorney Koenig represented a client, Garrison, who had been charged with driving without a valid registration or proper proof of insurance. In the course of the representation, he sent the prosecuting attorney a letter that said that new newly elected county attorney was also in violation of the same registration law. In this letter, Koenig included a photograph of the allegedly expired license plate and a copy of a “Motion to Appoint Special Prosecutor,” which he said he would file if Garrison's case was not dismissed. The motion alleged that the “county attorney is presently in violation of the law, in that his personal vehicle is not properly registered in Gage County, Nebraska.” Koenig concluded his letter by stating, “Obviously, these motions are only proposed. Can't you dismiss [this case]? Our lips, of course, are forever sealed if [Garrison's] case gets dismissed.” [769 N.W.2d at 382].

Instead of dismissing the charges against Garrison, the state sought appointment of a special prosecutor. Garrison ended up pleading no contest to the expired license plate charge.

Disciplinary proceedings were initiated against Koenig. Koenig claimed that his statement about sealed lips was intended to be a joke. But the Nebraska Supreme Court did not find the situation to be humorous. It concluded that Koenig’s conduct had been prejudicial to the administration of justice, in violation of Rule 8.4(a). The court said:

A lawyer... can argue to a prosecutor that his or her client should not be prosecuted for an offense because “everybody else is doing the same behavior” and no other prosecutions are occurring. Or, it is even within the bounds of our ethical rules to argue, that a client should not be prosecuted for something because the prosecutor is allegedly doing the same prohibited behavior. But it is altogether different - and a violation of the rules of professional conduct - to offer to a prosecutor to stay quiet about something the prosecutor has done (or is doing) in exchange for dismissing a charge that has been lodged against one's client...

In this instance, Koenig offered to keep mum about what he believed to be illegal conduct by the county attorney in exchange for the dismissal of the charges against Garrison. Koenig's actions were, in
effect, a conditional threat to disclose the county attorney's alleged violation. This a lawyer cannot do. And this conduct is not any less egregious because it occurred in the context of plea negotiations. Id. at 383-84. Koenig was suspended for 120 days.

7. Sex

**Doe v. Hawkins**

42 So. 3d 1000 (La. App. 3rd Cir. 2010)

A law firm receptionist claimed that she fell asleep on an office sofa after drinking alcohol at a social event after work, and awoke to find one of the firm's partners raping her. She sued the partner and the firm. She claimed that when the incident took place, she had been an invitee of the firm and also a client of the firm, because it was doing pro bono work for her on a child custody matter.

The firm moved for summary judgment, claiming that it was not responsible for an "intentional tort by a member of the firm which occurred after hours and was not in connection with the furnishing of legal services." The trial court granted summary judgment for the firm, but the court of appeal reversed. It said, in part:

> When we examine the trial court's analysis of this issue, it is apparent that no differentiation was made to account for the fact that the plaintiff's legal relationship with the firm was multifaceted. Unquestionably, the plaintiff was an employee of the firm and that relationship existed within jurisprudentially, well-defined boundaries. However, beyond that characterization, she was also a social guest after work. And, more importantly, independent of that characterization, the plaintiff, as elaborated upon hereafter, was also a client of the firm. Accordingly, it is clear that the plaintiff's legal relationship to the firm was many-sided with discrete legal ramifications applicable to each. [42 So. 3d 1006].

It also said:

> After considering that the plaintiff was an invitee and/or client, the issue is whether the firm, in accordance with its duty, exercised reasonable care with regard to its premises and this client/invitee. The question of whether the plaintiff relied upon the firm's actions associated with her employment, though relative to other aspects of the duty-risk analysis, is immaterial to the existence of the firm's duty as a business proprietor to this plaintiff. Thus, we find that the firm owed her a duty to refrain itself from conduct likely to cause her injury as both a social and business guest. [Id. at 1010].

The court concluded that the firm had failed to show that it was entitled to judgment as a matter of law. It also pointed to evidence that the plaintiff had submitted that tended to support her claims in the case.
8. Treatment of Judicial Officers and Public Officials

In re Elkins

2009 WL 3878295 (Cal. Bar Ct. 2009)

After attorney Elkins and his brother were removed as co-executors for their father's estate, Elkins sent 53 threatening and intimidating voicemail messages to the administrator of the estate, the administrator's attorney, and the judge who was overseeing the matter.

A number of these messages came to Gregory Henshaw, who had been appointed to be the public administrator of the estate after the brothers had been removed as co-executors. Henshaw had written to Elkins, and had told him that his father's house might need to be sold to pay the debts of the estate and that Elkins should contact him to discuss how the debts could be handled.

In response, Elkins called Henshaw, but, according to Henshaw, the conversation "deteriorated so quickly with the way he was speaking to me" that Henshaw terminated the call. Elkins eventually realized that Henshaw had purposely hung up the phone, which infuriated him. Unable to reach Henshaw by phone, Elkins left 21 messages on his voicemail during one week from May 26, 2005 through June 1, 2005. In the messages, Elkins referred to Henshaw, Murphy [the judge], and Lortie [a court clerk] as "white trash" and "slime liars," and he repeatedly accused Henshaw of conspiring with Lortie and Murphy to accept a bribe from the mortgage company. Elkins made these accusations without any direct knowledge or investigation, based on what he repeatedly characterized as "circumstantial evidence."

Elkins did not stop there. He left a message with Henshaw that said:

[B]uddy boy, you make one more move other than to resign whatever it is you've supposedly been appointed to and I'm going to report your behavior to the State Bar, I'm going to the State Attorney General's Office on you, on Margaret Lortie, on Bryce Murphy. . . . And I will go to the FBI on you too, because I think you're in cahoots, I think you've been taken a bribe. That's what I decided.

Elkins warned Henshaw not to "mess" with him, and he reminded Henshaw that Elkins had been practicing law in California for 25 years.

Henshaw hired William Walker to represent him in connection with the estate. Walker told Elkins to stop calling Henshaw and to communicate only in writing. Elkins then left 19 messages on Walker's voicemail, many of which were more harassing, demeaning, and vulgar than the messages left with Henshaw.

Elkins' conduct came to the attention of the California disciplinary authorities. He was charged with violating, among other things, the California rule against threatening criminal charges to gain an advantage
in a civil dispute and the rule requiring an attorney to maintain the
respect due the courts of justice and judicial officers.

Elkins claimed that the First Amendment protected his statements
maligning the judge’s honesty and integrity. The court concluded
otherwise. He was placed on a two-year probation, and was suspended
for at least 90 days.

In re Wells
36 So. 3d 198 (La. 2010) (per curiam)

Attorney Arden Wells was charged with multiple violations of the
Rules of Professional Conduct. His alleged misconduct included the
following:

While a charge of extortion was pending against him, Wells
prepared an affidavit, which was executed by Charles Chaney, a
prison inmate, that stated that Scott Perrilloux, a district attorney,
accompanied by another attorney and several members of the
Hammond Police Department, had given Chaney $250,000 in cash
to murder Cecilia Colona. Wells did not investigate the allegations
before he prepared the affidavit, and he did not possess any
independent, credible to substantiate them. Considering that Wells
himself was then awaiting trial on a felony extortion charge brought
by Mr. Perrilloux, the ODC alleged that Wells had “intentionally
filed what he knew to be a false affidavit as retribution for
Perrilloux bringing felony charges against him,” in violation of
Rules 8.2(a) (a lawyer shall not make a statement that the lawyer
knows to be false or with reckless disregard as to its truth or falsity
concerning the qualifications or integrity of a judge, adjudicatory
officer or public legal officer) and 8.4(c) (engaging in conduct
involving dishonesty, fraud, deceit, or misrepresentation).

Wells filed a federal court lawsuit, naming some thirty defendants,
including all of the judges of the 21st Judicial District. The judges had
earlier recused themselves from hearing the criminal case in which Wells
had been charged with extortion. Wells claimed that the recusal of the
district judges “manifested bias and prejudice against” him “by violating
his right to due process of law and to be tried before an elected district
judge as envisioned under the Louisiana Constitution.” He sought
declaratory and injunctive relief enjoining the judges “from ever hearing
any case brought by [respondent] personally or as lawyer for any
person.” 36 So. 3d at 201-02.

In the same federal court lawsuit, Wells alleged that District
Attorney Scott Perrilloux and several of his assistants had committed
extortion and perjury, had framed him for extortion, had tainted the
grand jury, had tampered with the evidence and with the jury, had
obstructed justice, and had made knowingly false statements to the court.
The ODC contended that Wells had made these claims without any
credible evidence to support them. Although Wells eventually dismissed the lawsuit, he circulated copies of the petition in various public places.

The hearing committee concluded that Wells had engaged in serious misconduct that violated several of the Rules of Professional Conduct. The Disciplinary Board concluded, in part:

that respondent knowingly and intentionally violated duties owed to his clients, the public, and the legal system. He has consistently abused the legal system to exact retribution against individuals who, in his mind, have wronged him. This conduct has caused significant harm to the legal system in the 21st Judicial District in the form of delay and frustration. Numerous public officials and private citizens have been burdened by the litigation initiated by respondent, and the reputations of certain public officials have been tarnished by respondent's false accusations. [Id. at 207].

The Louisiana Supreme Court agreed with the conclusions of the Disciplinary Board. It ordered disbarment.

9. Outsourcing

**Colorado Bar Association Ethics Committee**

Opinion 121 (June 2009)

The Colorado ethics committee was asked whether lawyers could outsource legal services to attorneys in other states or countries. The committee said yes. But it also said that there were some steps that the outsourcing lawyer should follow.

The committee said that outsourcing was a significant development that had to be disclosed to the client, especially if the outsourcing involved a foreign country. Most clients, thought the committee, would not expect their work to be outsourced. The fee, of course, would have to be reasonable. But the committee was of the view that the outsourcing lawyer could bill the client for the time of the outsourced lawyer at a rate higher than the rate charged by that lawyer. This would not be fee sharing, said the committee, if the outsourcing law firm remains responsible to pay for the other lawyer's services regardless of whether the client pays the outsourcing firm.

On the issue of confidentiality, the committee said that no information protected by Rule 1.6 could be revealed without the client's informed consent. The outsourcing lawyer would also have supervisory responsibility for the other lawyer and should be satisfied that the other lawyer would not engage in the unauthorized practice of law as a result of the arrangement.
10. Settlement of Legal Malpractice Claims

Ohio Supreme Court Board of Commissioners on Grievances and Discipline
Opinion 2010-3 (June 11, 2010)

This Ohio Board considered whether it would be improper to ask clients to forego or withdraw a disciplinary grievance as part of the settlement of a legal malpractice claim. The Board said that this would be improper.

The Board thought that an effort to avoid a grievance against a lawyer through this means would run afoul of Rule 8.4. In particular, the Board was concerned that the practice would be prejudicial to the administration of justice and would reflect adversely on a lawyer's fitness to practice law. In addition, the Board was of the view that it would hinder the disciplinary process. It referenced the lawyer's obligations, under Rule 8.1, to cooperate in disciplinary matters and to respond truthfully in disciplinary investigations and proceedings. [79 U.S. Law Week 1053 (July 13, 2010)].

11. Conflicts of Interest

a. Business Transactions with Clients

In re Baggette
26 So. 3d 98 (La. 2009) (per curiam)

Attorney Baggette was retained by Annie Mae Fuller Anderson and Clara Fuller Tolin, two elderly women, to represent them in a succession matter. Mrs. Anderson also gave Baggette a general power of attorney to handle her affairs.

In the course of the work, Baggette became interested in acquiring succession assets himself. There were tax issues associated with the succession. He told Mrs. Anderson that the estate tax liability was $8.5 million, which was far in excess of her interest in the estate. The ODC later contended that Baggette had intentionally overstated the tax liability in order to acquire the estate assets for a fraction of their value.

Baggette reached agreement with the IRS and with Collins, a claimant in the estate, that provided for estate assets to come to him. In order to pay the amount needed to acquire the assets and to discharge income and estate taxes, Baggette borrowed funds from several sources, including his client, Mrs. Anderson. The loan from Mrs. Anderson was in the amount of $600,000. When the tax matters were resolved, it was determined that a refund in the amount of $172,328.22 was owing to the succession. That refund was paid to Auburn, a closely held corporation controlled by Baggette and his wife. The corporation had been formed for the purpose of acquiring the estate property. The assets thus transferred included shares of bank stock that Baggette later sold for $5.5 million.
Mrs. Anderson died. Her nephew sued Baggette, his wife, and Auburn, claiming that Baggette had defrauded Mrs. Anderson. That litigation settled when Baggette agreed to pay $1.1 million to Mrs. Anderson's heirs. The ODC investigated, and it filed formal charges. At the relevant time, Rule 1.8(a) of the Rules of Professional Conduct provided:

A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

1. The transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

2. The client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

3. The client consents in writing thereto.

The hearing committee concluded that Baggette had run afoul of Rule 1.8(a) by not providing Mrs. Anderson with a written document fully disclosing the terms in which the assets of the consolidated successions were being acquired and Mrs. Collins' interest was being purchased, and not obtaining Mrs. Anderson's consent to these matters in writing. The committee found an additional violation of Rule 1.8(a) stemming from the $600,000 loan, but noted that no actual harm was done to Mrs. Anderson in connection with the loan. [26 So. 3d at 107].

It characterized the violations of Rule 1.8(a) as "technical violations," and it recommended a period of suspension.

The Louisiana Supreme Court considered the 1.8(a) violations to be more serious. It said:

Respondent violated Rule 1.8(a) in two respects: first, he borrowed $600,000 from his elderly client, Mrs. Anderson, without disclosing the terms of the transaction to her in writing (or at all, for that matter), without giving her a reasonable opportunity to seek the advice of independent counsel, and without obtaining her written consent to the transaction. Second, at the time that respondent entered into an agreement to purchase Mrs. Anderson's interest in [the successions], he did not disclose the terms of the transaction to her in writing, did not give her a reasonable opportunity to seek the advice of independent counsel, and did not obtain her written consent to the transaction. These are not mere "technical" violations of Rule 1.8(a), as found by the hearing committee. More disturbingly, the record supports a finding that respondent acted intentionally and with a dishonest motive. The documentary evidence suggests that at the time respondent purchased his client's
interest in the successions, he did not believe that the $8.5 million estate tax would actually be imposed by the IRS. In fact, Jo Anne’s succession eventually collected a refund of the estate taxes it had already paid. By this time, however, respondent’s closely-held corporation, Auburn, already owned the succession assets. [*id. at 110].

The court ordered disbarment.

See also In re Riebesell, 586 F.3d 782 (10th Cir. 2009) (Lawyer borrowed over $100,000 from client and later filed for bankruptcy; the court concluded that the lawyer’s failure to make necessary disclosures under 1.8(a) before he borrowed the money amounted to a false representation within the meaning of an exception to bankruptcy discharge; as a result, most of the debt owed to the client by the lawyer was not dischargeable in the lawyer’s bankruptcy proceeding).

b. Conflicts Involving Affiliates of the Client

GSI Commerce Solutions, Inc. v. BabyCenter, L.L.C.

618 F.3d 204 (2d Cir. 2010)

Johnson & Johnson hired the Blank Rome firm to assist it and its affiliates in compliance matters involving the European Union. They signed an engagement letter that included a conflicts waiver for the law firm’s representation of Kimberly-Clark. Later, after the law firm had increased its representation of generic drug manufacturers, the firm sought to amend the engagement agreement to provide that the firm represented only Johnson & Johnson, and not its affiliates. But the proposed agreement also provided that

should our representation of generic drug manufacturers in connection with patent-related proceedings involve Johnson & Johnson, or any other entity related to Johnson & Johnson, Johnson & Johnson consents, and will not object, to our continuing representation of the generic drug manufacturers in connection with these proceedings, and should we determine that our withdrawal as counsel is necessary for us under the Rules of Professional Conduct to continue to represent the generic drug manufacturers, Johnson & Johnson consents, and will not object, to our firm’s withdrawal at such time. [618 F.3d at 207].

In accordance with the engagement agreement, the law firm advised Johnson & Johnson on a variety of privacy matters, many of which were related to Johnson & Johnson affiliates. One of the firm’s lawyers, Jennifer Daniels, represented BabyCenter, a wholly owned subsidiary of Johnson & Johnson, in connection with such a matter. But the firm did not advise Johnson & Johnson in connection with an E-Commerce Services Agreement between BabyCenter and GSI.

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A dispute arose between BabyCenter and GSI over the E-Commerce Services Agreement. A Blank Rome partner notified BabyCenter that GSI demanded mediation on its claim that BabyCenter had wrongfully terminated the E-Commerce Services Agreement. The parties attempted mediation. Blank Rome partners appeared on behalf of GSI in the mediation proceedings. When mediation failed, BabyCenter informed GSI that it would not continue to arbitration as long as Blank Rome represented GSI. When GSI filed a motion to compel arbitration, BabyCenter moved to disqualify Blank Rome. The district court ordered disqualification. On appeal, the Second Circuit discussed factors that are relevant to a corporate affiliate conflict:

The factors relevant to whether a corporate affiliate conflict exists are of a general nature. Courts have generally focused on: (I) the degree of operational commonality between affiliated entities, and (ii) the extent to which one depends financially on the other. As to operational commonality, courts have considered the extent to which entities rely on a common infrastructure. Courts have also focused on the extent to which the affiliated entities rely on or otherwise share common personnel such as managers, officers, and directors.

. . . . In this respect, courts have emphasized the extent to which affiliated entities share responsibility for both the provision and management of legal services. This focus on shared or dependent control over legal and management issues reflects the view that neither management nor in-house legal counsel should, without their consent, have to place their trust in outside counsel in one matter while opposing the same counsel in another. [Id. at 210-11].

In this case, the court said that

the record here establishes such substantial operational commonality between BabyCenter and J&J [Johnson & Johnson] that the district court's decision to treat the two entities as one client was easily within its ample discretion. First, Babycenter substantially relies on J&J for accounting, audit, cash management, employee benefits, finance, human resources, information technology, insurance, payroll, and travel services and systems. Second, both entities rely on the same in-house legal department to handle their legal affairs. The member of J&J's in-house legal department who serves as "board lawyer" for BabyCenter helped to negotiate the E-Commerce Agreement between BabyCenter and GSI that is the subject of the present dispute. Moreover, J&J's legal department has been involved in the dispute between GSI and BabyCenter since it first arose, participating in mediation efforts and securing outside counsel for BabyCenter. Finally, BabyCenter is a wholly-owned
subsidiary of J&J, and there is at least some overlap in management control.

When considered together, these factors show that the relationship between the two entities is exceedingly close. That showing in turn substantiates the view that Blank Rome, by representing GSI in this matter, "reasonably diminishes the level of confidence and trust in counsel held by" J&J. [Id. at 211-212].

The law firm argued that the engagement agreement contained a valid waiver of the conflict. But the court disagreed. It said:

Although certain provisions of the Engagement Agreement may constitute a waiver by J&J of certain corporate affiliate conflicts, they do not waive the conflict at issue here. Specifically, the waiver is strictly limited to matters involving patent litigation and, even then, only to matters brought by either Kimberly-Clark or a generic drug manufacturer. [Id. at 212-213].

The court affirmed the disqualification order.

c. Deceased Client

In re Hostetter
238 P.3d 13 (Or. 2010)

Attorney Hostetter represented Pearl Ingle in obtaining a series of loans from Andrew Hohn. He drafted documents for the loans. Ingle died in 2004. Thereafter, Hostetter represented Hohn in collecting on the same loans. When the personal representative of Ingle's estate disallowed the loan claims, Hostetter sued the estate. That litigation ultimately settled. However, the personal representative complained to the Oregon State Bar about Hostetter's conduct. Disciplinary proceedings ensued.

A trial panel concluded that Hostetter had violated Oregon DR 5-105(C), which prohibits an attorney, after representing a former client in a matter, from representing another client "in the same or a significantly related matter when the interests of the current and former clients are in actual or likely conflict"; and its successor rule, Oregon RPC 1.9(a), which prohibits an attorney, after representing a former client in a matter, from representing another person "in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless each affected client gives informed consent, confirmed in writing."

One of the issues that came before the Oregon Supreme Court was whether a deceased client is a "former client," under the former client conflict of interest rules. The court said that this was a matter of first impression in Oregon, and it said that no other jurisdiction appears to have addressed it.

The court looked at the language of the rules. DR 5-105(C) provides, in part
Except as permitted by DR 5-105(D), a lawyer who has represented a client in a matter shall not subsequently represent another client in the same or a significantly related matter when the interests of the current and former clients are in actual or likely conflict.

RPC 1.9(a) provides:

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless each affected client gives informed consent, confirmed in writing.

The court then said:

The wording of those rules focuses on the interests of the former client. That focus supports the Bar's position that, because a client's interests can and often do survive a client's death, the rules' protections extend to a former client even after his or her death. But it is not just any interests of the former client that must survive. In the context of the disciplinary rule, it is the former client's interests that pertain to the matter in which the lawyer previously represented the former client. It is those interests that must survive the former client's death.

In sum, we conclude that, pursuant to DR 5-105(C) and RPC 1.9(a), an attorney is prohibited from engaging in a former-client conflict of interest even when the former client is deceased, as long as the former client's interests survive his or her death and are adverse to the current client during the subsequent representation. [Id. at 19-20].

In this instance, the court concluded that the debt collection work undertaken by Hostetter had been substantially related to the loan transactions that he had worked on, and that Hohn's interests were materially adverse to the surviving interests of Ingle. So Hostetter had violated the former client conflict of interest rules.

In a separate matter, involving another client, the court determined that Hostetter had violated the ethics rules by removing a notarized signature page from one deed and placing it on another deed with a different legal description. Hostetter was suspended from the practice of law.

d. Migratory Lawyers and Confidentiality

ABA Standing Committee on Ethics and Professional Responsibility
Opinion 09-455

The ABA ethics committee was asked about confidentiality issues relating to the movement of a lawyer from one law firm to another. The
question was the extent to which the lawyers could exchange information for the purpose of detecting and resolving conflicts of interest.

The committee said that when a lawyer moves to another firm, the lawyer and the new firm have an obligation under the ethics rules and under common law to protect their clients and former clients against conflicts of interest. The information needed to analyze conflicts — normally the persons and issues involved — are protected by Rule 1.6, the confidentiality rule. None of the listed exceptions to confidentiality in Rule 1.6 appears to apply.

However, the committee thought that if Rule 1.6 were interpreted to preclude disclosures for conflicts analysis, lawyers who move to other firms would be unable to comply with the duty to avoid conflicts of interest. So the committee concluded that, notwithstanding the language of Rule 1.6, it would be permissible to disclose the basic information needed for conflicts analysis. Of course, the disclosure could be no greater than reasonably necessary to detect and resolve conflicts of interest.

The committee cautioned, however, that a disclosure must not compromise the attorney-client privilege, such as in the relatively rare situation in which the very identity of the client is privileged. And it said that disclosure must not otherwise harm a client or a former client, such as in sensitive situations in which clients are planning a hostile takeover or considering a divorce. Client consent to disclosure might be required, said the committee, where more than basic information would have to be disclosed in order to permit adequate evaluation of the potential conflict.

e. Migratory Non-Lawyers

In re: Columbia Valley Healthcare System, L.P.

Yvonne and Alberto Leal brought a medical malpractice suit against Columbia Valley Healthcare System. Margarita Rodriguez, a legal assistant, worked on the case while employed by Columbia Valley's counsel, William Gault, at the Brin & Brin firm. While employed by Brin & Brin, Rodriguez was a custodian of records, and she was responsible for filing privileged documents, including investigative material, discussions with consulting experts, defense strategy, settlement negotiations, and attorney notes. She also generated correspondence to Columbia Valley and its insurer. Eventually, Rodriguez left Brin & Brin, but she signed a confidentiality agreement obligating herself not to work on any matter that she had worked on for Brin & Brin. Some eleven months after leaving Brin & Brin, Rodriguez was hired as a legal assistant by Magallanes & Hinojosa, a firm that represented the Leals against Columbia Valley. The firm hired Rodriguez with knowledge that she had worked on the Leal case for Brin & Brin. Attorney Magallanes orally instructed Rodriguez not to work on any
cases in which she had had prior involvement, including cases that she had worked on at Brin & Brin. The firm had another legal assistant who was assigned to the Leal case.

Rodriguez did, in fact, have some contact with the Leal case at the new firm. As reported in the opinion in the case,

[a]ccording to Rodriguez, her contact consisted of the following: (1) filing correspondence related to the Leal case; (2) rescheduling a docket control conference; (3) preparing an order and sending correspondence to counsel concerning a docket control conference; (4) calling Gault's legal assistant regarding the docket control conference; (5) calendaring dates regarding the case on Magallanes' calendar; and (6) making a copy of a birth certificate and social security card in the case at Magallanes' directive on one occasion. [320 S.W.3d at 823].

When Magallanes learned that Rodriguez had scheduled the docket control conference, he again told her not to work on the case, and held a meeting where he informed both Rodriguez and the other legal assistant that they would be dismissed if this happened again. Rodriguez nonetheless had limited continued contact with the file, filing correspondence for Magallanes, handling Magallanes' calendar, and copying a couple of documents.

When Gault learned that Rodriguez was working at Magallanes & Hinojosa, he filed a motion for disqualification. The trial court denied Gault's motion. He filed a mandamus petition with the court of appeals, but lost again. Then the matter came before the Texas Supreme Court. Initially, the supreme court observed:

An attorney who has previously represented a client may not represent another person in a matter adverse to the former client if the matters are the same or substantially related. . . . If the lawyer works on a matter, there is an irrebuttable presumption that the lawyer obtained confidential information during representation. . . . When the lawyer moves to another firm and the second firm is representing an opposing party in ongoing litigation, a second irrebuttable presumption arises; it is presumed that the lawyer will share the confidences with members of the second firm, requiring imputed disqualification of the firm. . . .

A nonlawyer employee who worked on a matter at a prior firm is also subject to an irrebuttable presumption "that confidences and secrets were imparted" to the employee at the firm. The reason this presumption is conclusive is the need "to prevent the moving party from being forced to reveal the very confidences sought to be protected." However, unlike with attorneys, a nonlawyer is not generally subject to an irrebuttable presumption of having shared confidential information with members of the new firm. Instead, this
second presumption can be overcome, but only by a showing that: (1) the assistant was instructed not to perform work on any matter on which she worked during her prior employment, or regarding which the assistant has information related to her former employer's representation, and (2) the firm took “other reasonable steps to ensure that the [assistant] does not work in connection with matters on which the [assistant] worked during the prior employment, absent client consent.” ... Thus, the hiring firm may employ effective screening measures to shield the employee from the matter in order to avoid disqualification. [*Id.* at 824].

In this case, it was clear that the new firm had instructed Rodriguez not to work on any matters that she had worked on during her former employment, so the first step in overcoming the presumption was met. The question was whether “other reasonable steps” had been taken to ensure that Rodriguez did not work on the Leal case. The court answered in the negative:

> [W]e conclude that a simple informal admonition to a nonlawyer employee not to work on a matter on which the employee previously worked for opposing counsel, even if repeated twice and with threat of termination, does not satisfy the “other reasonable measures” a firm must take to properly shield an employee from the litigation. Instead the other reasonable measures must include, at a minimum, formal, institutionalized screening measures that render the possibility of the nonlawyer having contact with the file less likely. [*Id.* at 326].

In this case, Rodriguez had actually done some work on the case. The court had the following to say about that:

> Despite the screening measures used, if the employee actually works on the case at her employer's directive, as happened here, and the employer reasonably should know about the conflict of interest, then the presumption of shared confidences must become conclusive. [*Id.* at 827].

Magallanes & Hinojosa argued that the confidentiality agreement that Rodriguez signed with Brin & Brin should satisfy the “additional reasonable measures” requirement. But the court disagreed. That was not a measure undertaken by the hiring attorney. The court concluded that the appropriate result was disqualification.

12. Inappropriate Receipt of Confidential Information

**Castellano v. Winthrop**

27 So. 3d 134 (Fla. Ct. App. 2010)

A court determined that Marc Winthrop was the father of Desiree Castellano’s child. Winthrop and Desiree subsequently battled over other subjects, including child custody and medical treatment. During the
course of the litigation, Castellano found a USB flash drive that belonged to Winthrop. After looking at the files on the flash drive, Castellano hired a law firm and gave the flash drive to the lawyers. The firm then spent over 100 hours examining the files on the flash drive. The lawyers then used the information to prepare a petition seeking to vacate a prior order, on the ground that Winthrop had committed fraud on the court.

Winthrop sought the return of the flash drive. When the firm refused to return it to him, he filed a motion seeking sanctions against Castellano and disqualification of the law firm that she had hired.

A judge that had been appointed to hear the matter determined that the flash drive contained confidential medical, business, and financial information. The judge also determined that it contained information protected under the attorney-client privilege and the work product doctrine. The judge further found that Castellano had obtained the flash drive illegally.

The judge ordered the disqualification of the law firm. He also ordered Castellano and her attorneys to remove all data from their computers that had been taken from the flash drive and to indemnify Winthrop for any damages caused by improper use of his privileged information. The appellate court affirmed. It said that "disqualification is appropriate where a party obtains an unfair informational or tactical advantage through the disclosure of privileged information to that party's counsel." 27 So. 3d at 127.

The court also said this:

For the benefit of other attorneys facing a similar dilemma, we note that the Florida Bar Commission on Professional Ethics has opined that when an attorney receives confidential documents he or she knows or reasonably should know were wrongfully obtained by his client, he or she is ethically obligated to advise the client that the materials cannot be retained, reviewed, or used without first informing the opposing party that the attorney and/or client have the documents at issue. If the client refuses to consent to disclosure, the attorney must withdraw from further representation. [Id.]

13. Fees

Perdue v. Kenny A.
130 S. Ct. 1662 (2010)

Children in the Georgia foster care system and their next friends filed a class action suit against the Governor of Georgia and other state officials claiming that deficiencies in the foster-care system in two counties violated their federal and state constitutional and statutory rights. The parties entered into a consent decree, which resolved all issues other than fees. Plaintiffs' attorneys sought recovery of fees under 42 U.S.C. § 1988.
The attorneys submitted a request for more than $14 million in attorney's fees. Half of that amount was based on their calculation of the lodestar - roughly 30,000 hours multiplied by hourly rates of $200 to $495 for attorneys and $75 to $150 for non-attorneys. The other half represented a fee enhancement for superior work and results. The defendants objected to the fee request, contending that some of the proposed hourly rates were too high, that the hours claimed were excessive, and that the enhancement would duplicate factors that were reflected in the lodestar amount.

The District Court awarded fees of approximately $10.5 million, consisting of a lodestar calculation of approximately $6 million plus a 75% enhancement: based on

(1) the fact that class counsel were required to advance case expenses of $1.7 million over a three-year period with no on-going reimbursement, (2) the fact that class counsel were not paid on an on-going basis as the work was being performed, and (3) the fact that class counsel's ability to recover a fee and expense reimbursement were completely contingent on the outcome of the case." [130 S. Ct. at 1670].

The matter came before the United States Supreme Court. Initially, the court noted that the general rule is that each party pays its own attorney's fees. However, Congress enacted 42 U.S.C. § 1988 in order to ensure that federal rights are adequately enforced. The lodestar method has emerged as the dominant way to determine the reasonableness of a fee. According to the court, one of the virtues of the method is that it looks to "the prevailing market rates in the relevant community." Id. at 1672.

The court said that prior decisions had resulted in "six important rules" for determining the amount of the fee. Id.

First, a "reasonable" fee is a fee that is sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case. ...

Second, the lodestar method yields a fee that is presumptively sufficient to achieve this objective. ...

Third, although we have never sustained an enhancement of a lodestar amount for performance ..., we have repeatedly said that enhancements may be awarded in "'rare' " and "'exceptional' " circumstances....

Fourth, we have noted that "the lodestar figure includes most, if not all, of the relevant factors constituting a 'reasonable' attorney's fee,"... and have held that an enhancement may not be awarded based on a factor that is subsumed in the lodestar calculation....
Fifth, the burden of proving that an enhancement is necessary must be borne by the fee applicant....

Finally, a fee applicant seeking an enhancement must produce "specific evidence" that supports the award.... [Id. at 1673].

With respect to enhancing the amount of the fee generated by the lodestar method, the court said:

In light of what we have said in prior cases, we reject any contention that a fee determined by the lodestar method may not be enhanced in any situation. The lodestar method was never intended to be conclusive in all circumstances. Instead, there is a "strong presumption" that the lodestar figure is reasonable, but that presumption may be overcome in those rare circumstances in which the lodestar does not adequately take into account a factor that may properly be considered in determining a reasonable fee. [Id.]

The court went on to describe situations in which it might be appropriate to undertake an enhancement of the lodestar amount:

First, an enhancement may be appropriate where the method used in determining the hourly rate employed in the lodestar calculation does not adequately measure the attorney's true market value, as demonstrated in part during the litigation. This may occur if the hourly rate is determined by a formula that takes into account only a single factor (such as years since admission to the bar) or perhaps only a few similar factors. . . .

Second, an enhancement may be appropriate if the attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted. . . .

Third, there may be extraordinary circumstances in which an attorney's performance involves exceptional delay in the payment of fees. [Id. at 1674].

In the case before it, the court thought that the district court had not provided proper justification for the large enhancement. It said that the 75% figure "appears to have been essentially arbitrary." [Id. at 1675. The effect of the enhancement was to increase the top attorney hourly rate to more than $866, and the district court had not shown that this was "an appropriate figure for the relevant market." [Id. at 1676.

Although the determination of a "reasonable attorney's fee" is committed to the sound discretion of a trial judge, that discretion "is not unlimited." [Id. "It is essential that the judge provide a reasonably specific explanation for all aspects of a fee determination, including any award of an enhancement. Unless such an explanation is given, adequate appellate review is not feasible." [Id. So the court reversed and remanded.
14. Criminal Activities

a. Marijuana

In re Clark

25 So. 3d 728 (La. 2009) (per curiam)

Law enforcement authorities arrested Dennis Roberts for possession of cocaine. He told them that, in return for leniency on the cocaine charge, he could arrange to obtain marijuana from attorney Clark. The officers allowed Roberts to call Clark, then they followed Roberts to Clark's house, where Roberts obtained a bag of marijuana. The police handcuffed Clark, made a safety sweep, then got a warrant to search his house. The search yielded additional marijuana, drug paraphernalia, cocaine, and other things.

Clark reported himself to the ODC. Most of the evidence in the criminal case was suppressed, and the district attorney told the ODC that the criminal charges had not been accepted for prosecution. But disciplinary proceedings were initiated. The Louisiana Supreme Court described the evidence in that context as follows:

Respondent has admitted to possessing and using marijuana from 1994 until January 2007. He has also admitted to giving 1/4 ounce of marijuana to Mr. Roberts on the night of his arrest, which under the law is sufficient to constitute the distribution of marijuana. Moreover, at the time respondent was arrested, marijuana and other drugs, as well as drug paraphernalia, were found in his home, all in violation of state law. The fact that this evidence was suppressed in the criminal proceeding against respondent does not require that we exclude it from evidence for purposes of this disciplinary matter. Accordingly, by his conduct, respondent has violated Rules 8.4(a) and 8.4(b) of the Rules of Professional Conduct. [25 So. 3d at 734].

The court ordered a two-year suspension. Justice Weimer dissented. He noted that Clark had a medical condition, glaucoma, and that expert testimony had shown that use of marijuana was therapeutic for that condition. Under the circumstances, he thought that a shorter period of suspension, coupled with probation, should have been imposed.

b. DWI

In re Baer

21 So. 3d 941 (La. 2009) (per curiam)

Attorney Baer was involved in a minor car accident in a parking lot. She was also arrested and charged with driving under the influence of alcohol. She reported her arrest to the ODC, and said that she would be checking herself into a recovery program. She was told to contact Bill Leary, the Executive Director of the Lawyers Assistance Program. She did so, and she entered into a LAP contract.
Later, however, Baer was arrested and charged with another DWI after another parking lot accident. Mr. Leary notified that ODC that Baer had not complied with her LAP contract.

Baer was found to have violated Rule 8.4, the misconduct rule. In considering a sanction, the Louisiana Supreme Court said:

We have imposed sanctions ranging from actual periods of suspension to fully deferred suspensions in prior cases involving attorneys who drive while under the influence of alcohol. However, as a general rule, we tend to impose an actual suspension in those instances in which multiple DWI offenses are at issue, as well as in cases in which the DWI stems from a substance abuse problem that appears to remain unresolved. Both of these concerns are implicated in the instant case. [21 So. 3d at 944].

Baer was suspended for a year and a day.

c. Taxes

In re Cook
33 So. 3d 155 (La. 2010) (per curiam)

Attorney Cook failed to file income tax returns for taxable years 2000 and 2001, despite the fact that he had taxable income in each of those years in excess of $100,000. He was charged with misdemeanor failure to file, and he was later sentenced to supervised probation. Before the criminal matter was resolved, Cook reported the matter to the Office of Disciplinary Counsel. The ODC filed formal charges, alleging that the misconduct violated Louisiana Rule 8.4(b), which states that “[i]t is professional misconduct for a lawyer to ... [e]ommit a criminal act especially one that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects[.]”

Cook admitted the misconduct, but sought mitigation on the ground that he offenses were “motivated by financial pressure and family problems rather than greed.” 33 So. 3d at 158.

When the case came before the Louisiana Supreme Court, it noted that, prior to 1977, it had “typically imposed fully-deferred suspensions on attorneys convicted of the misdemeanor offense of failure to file tax returns.” Id. at 159. However, it also noted that it had departed from that practice in In re Huckaby, 694 So. 2d 906 (La. 1997) (per curiam). The court further observed that it had imposed actual suspensions in other tax cases that followed. It then said:

Considering this jurisprudence as a whole, we conclude the discipline imposed in similar cases has been in the form of suspensions from the practice of law ranging from six months to two years, all or part of which may be deferred. In distilling a common thread from the cases, we find four principal factors have influenced our decisions regarding sanctions in this area: (1)
whether there is a pattern of failure to file over a number of years; (2) the amount of money involved; (3) whether the respondent's actions were selfish or dishonest in nature; and (4) whether respondent is held to a higher standard as a result of having a position as a public official. [Id. at 160-61].

Regarding the current case, the court noted that the two year failure to file was for fewer years than two of its prior cases; that the amount owed ($121,233.00) was comparable to one of its previous tax cases, but greater than that owed in another; and that the hearing committee had found that Cook had not acted with dishonest or selfish motive. Based on this analysis, and taking into account some mitigating circumstances, the court concluded that the appropriate sanction was a six-month suspension, with three months deferred, followed by one year of supervised probation.

The Florida Bar v. Behm
41 So. 3d 136 (Fla. 2010) (per curiam)

In April 2001, the Florida Bar filed a two-count complaint, alleging that attorney Charles Behm had engaged in unethical conduct. The first count of the complaint alleged that Behm failed to prepare and maintain certain required trust account records. The second count alleged that Behm failed to file federal income tax returns and to pay federal income taxes over seven years, despite having taxable income. In disciplinary proceedings, a referee found that Behm had violated applicable ethics rules with respect to both counts. These included rules regarding the proper use of trust accounts and prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation.

The matter came before the Florida Supreme Court. At this level, all of Behm's arguments focused on the count regarding unpaid taxes. With respect to the matter of tax obligations, Behm took the position that he was not obligated to pay federal income taxes because "his time was his life capital and, in practicing law, he was trading his life capital for an hourly fee, both of equal value." 41 So. 3d at 139. The idea was that, in practicing law, Behm had received no profit or net income. This argument did not prevail. According to the Florida Supreme Court,

Behm cites no case or other authoritative source that supports, even tangentially, his primary proposition—that his earnings did not constitute taxable income because the earnings he received in exchange for billable hours resulted in no gain. He ignores numerous United States Supreme Court opinions, more recent than the cases on which he purportedly relies, that address what constitutes "income." [Id. at 144.]

Behm argued that he had a good faith belief that he was not obligated to pay taxes. As to that, the court observed:
There is no support for this time-as-life-capital argument. None of the cases he cites make any statements to this effect, even in dicta. The arguments and cases upon which Behm supposedly relies or relied for support of his "good faith" belief do not provide a plausible basis on which to establish a good faith belief. In fact, Behm's arguments have been expressly rejected and labeled "frivolous" by the federal courts. Id. at 145-46. He was permanently disbarred.

d. A Chat Room

In re Farley  
771 N.W.2d 857 (Minn. 2009)  

Less than a week after being admitted to practice, Farley entered into an internet chat room and engaged in a sexually explicit conversation with an undercover agent posing as a 14-year old girl. He was arrested and eventually pleaded guilty to a criminal solicitation offense.

Farley's situation was also considered by lawyer disciplinary authorities. A panel found that he had violated the prohibition in Rule 8.4(b) against criminal acts that reflect adversely on a lawyer's honesty, trustworthiness, or fitness. However, the panel thought that the conduct was mitigated by the fact that the offense was committed outside of the practice of law and that Farley was getting sex offender treatments. The panel recommended a six month suspension.

The Minnesota Supreme Court thought a different outcome was warranted. It said, of the misconduct:

[W]e are persuaded that the crime for which Farley was convicted is serious, and that Farley's conduct caused harm to the public and to the legal profession. Specifically, his proposal of inappropriate sexual activity to a vulnerable adolescent girl seriously undermines public confidence in the legal profession. [771 N.W.2d at 866].

The court imposed an indefinite suspension, which, under the relevant Minnesota rules, was to last at least a year.

e. A Peeping Tom

Iowa Supreme Court Attorney Disciplinary Bd. v. Templeton  
784 N.W.2d 761 (Iowa 2010)  

Attorney Mark Templeton practiced law for a number of years. Then he took inactive status and began managing a newspaper distribution business. He distributed newspapers in four states and personally delivered the newspapers in the Des Moines, Iowa, area.

Through his newspaper deliveries, Templeton became aware of a house in the Des Moines area where three single women lived. Beginning in March 2007, one of the women began to hear what she
thought was someone walking across the landscape rocks outside her master bedroom and bathroom windows. On several occasions, when she turned out the bathroom lights, she saw a man outside the window.

One of the woman's family members installed a motion-detection camera on a tree outside of the house in an attempt to capture images of the person coming to the windows. Detective work eventually led to Templeton. When contacted by law enforcement authorities, Templeton admitted that he had been peeping into the windows of the house. He was criminally charged. He pleaded guilty to six counts of invasion of privacy—nudity.

Disciplinary proceedings were commenced after the conclusion of the criminal proceedings. The disciplinary commission found that Templeton had run afoul of portions of the misconduct rule, in that he engaged in "a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects"; and that he had engaged in conduct "prejudicial to the administration of justice." The Iowa Supreme Court did not think that there was anything in the record to show that Templeton's conduct was prejudicial to the administration of justice. But it did conclude that he had violated the other part of the rule. It stated:

Here, Templeton engaged in a pattern of criminal conduct by repeatedly looking into the victims' windows. In doing so, he violated [the victims'] privacy, and caused them to suffer emotional distress. Although his conduct was compulsive, the record also establishes he intentionally and knowingly invaded the privacy of these women. This conduct also raises serious misgivings about whether Templeton understands the concept of privacy and respects the law protecting individuals' privacy rights. For these reasons, we find Templeton's criminal acts ...reflects adversely on his fitness to practice law. [784 N.W.2d at 767-768].

The court ordered indefinite suspension.

15. Bad Supervision

In re Bennett

32 So. 3d 793 (La. 2010) (per curiam)

Theresa Adducci worked as a paralegal for attorney John Bennett. She assisted with accountings for disbursement of personal injury settlements. The accounting records were maintained by the Carbo CPA firm. When a case settled, Adducci notified the Carbo firm of the amount and requested checks for disbursement. Adducci also had access to Bennett’s trust and operating accounts.

While Bennett was seriously ill for several months, he did not come into the office very much, and he did not carefully supervise Adducci’s access to the bank accounts. She managed to embezzle approximately
$15,000 from the accounts. Bennett later identified all clients who may have been injured by Adducci’s actions, and he made those clients whole from personal funds. He reported Adducci’s conduct to the parish district attorney.

Disciplinary proceedings were commenced against Bennett for deficient supervision of Adducci. The Louisiana Supreme Court said that his failure to supervise Adducci supported a finding that he had violated Rule 5.3 (obligation to supervise non-lawyer personnel) and Rule 8.4 (misconduct). The disciplinary board had determined that there had been a “lack of causation between respondent’s illness and his failure to supervise because the record reflects that Ms. Adducci engaged in thirteen instances of forgery before respondent was hospitalized and missed work.” 32 So. 3d at 798, footnote 3. The Louisiana Supreme Court concluded that Bennett had acted negligently, and that his negligence caused harm to his clients.

The court suspended Bennett for a year and a day, but deferred the suspension, subject to successful completion of a two year probationary period. Justice Knoll, in dissent, expressed the view that the sanction was too harsh. She said that Bennett had been a victim of Adducci’s criminal conduct, and that Bennett had believed that he had had systems in place for the safekeeping of client property.

**In re Geiger**

27 So. 3d 280 (La. 2010) (per curiam)

Attorney Geiger’s bookkeeper, Tasha Blanchard, had access to all of the bank accounts that were associated with his law practice. She had authority to prepare and sign checks and to reconcile the accounts. She embezzled money from his trust account, causing the account to become overdrawn on several occasions. This caused harm to third parties who were not paid properly.

Geiger himself was charged violations of Rules 1.15 (safeguarding the property of others); 5.3 (requiring supervising attorneys to make reasonable efforts to ensure that non-lawyers comply with the professional obligations of the lawyer); and 8.4 (the misconduct rule).

Although Geiger did not personally benefit from the misappropriation of funds, he was found to have violated the ethics rules. He was suspended for a year and a day, but the suspension was deferred subject to compliance with the terms of a two-year probation.

*See also In re Judice, 26 So. 3d 747 (La. 2010) (per curiam)* (attorney disbarred for various improprieties, including failure to supervise his non-lawyer assistants).
In re Serrett
35 So. 3d 256 (La. 2010) (per curiam)

Attorney Serrett was disciplined for a number of ethical lapses, including neglect of a legal matter, failing to communicate with a client, misrepresenting the status of a case to a client, and failing to properly supervise a non-lawyer assistant. The supervisory failure is noteworthy because the "non-lawyer assistant," a secretary, had embezzled funds that Serrett had withheld from a settlement in order to pay third-party medical providers. When they were not paid, the providers reported Serrett to the ODC.

Serrett admitted the allegations in the disciplinary complaint. He explained, in an effort to obtain mitigation, that, because of family-related health issues, he had turned over day-to-day operations of his law office to his secretary. It was not until he had closed his office to accept a position with the district attorney's office that he had discovered the embezzlement.

In the end, the court suspended Serrett for a year, retroactive to the date of an interim suspension, and imposed a two year probationary period.

16. Contact With Represented Persons

In re Newell
234 P.3d 967 (Or. 2010) (per curiam)

Attorney Newell was charged with violating the no contact rule. The Oregon version of the rule provides, in part:

In representing a client or the lawyer's own interests, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject unless:

(a) the lawyer has the prior consent of a lawyer representing such other person;

(b) the lawyer is authorized by law or by court order to do so.

The issue arose when Newell took the deposition of a represented witness without the consent of the witness's lawyer. Newell argued that his conduct came within the "authorized by law" exception to the rule.

The deposition occurred in connection with a case in which Newell had been representing Jewett-Cameron, a lumber manufacturer and wholesaler, in a suit against Greenwood Forest Products. Jewett-Cameron claimed that it had overpaid Greenwood because of accounting errors and embezzlement by James Fahey, Greenwood's accountant.

On the afternoon of Friday, May 5, Newell had a subpoena served on Fahey, for a deposition scheduled the next day, Saturday, May 6. Newell served Greenwood's counsel with a copy of the subpoena, but he
did not attempt to notify Fahey's criminal defense attorney, Andrew Coit, of the deposition. Fahey attempted to contact his attorney about the deposition, but he was unsuccessful. Fahey appeared for the deposition without his lawyer.

(In the course of the deposition, [Newell] repeatedly asked Fahey questions about the amount of money that Fahey had taken - an issue that was central both to Jewett-Cameron's lawsuit against Greenwood and also to the state's criminal charges against Fahey. Fahey took the Fifth Amendment in response to some of the questions and expressed concern that his criminal attorney was not present to represent him at the deposition. [234 P.3d at 970-71].

Coit reported the incident to the Oregon State Bar, which charged Newell with a violation of Rule 4.2. Newell claimed that Oregon's procedural rules had not required him to serve Fahey's lawyer with the subpoena, and that depositions are recognized as being "authorized by law." Because the deposition had been properly noticed, said Newell, it was permissible for him to proceed with the deposition without the consent of Fahey's counsel.

The Oregon Supreme Court rejected the argument:

The "authorized by law" exception permits a lawyer to communicate directly with another party in those situations without the consent of that party's lawyer. However, nothing in the terms of that exception or the cases interpreting it suggests that the exception goes as far as the accused would take it. The accused would interpret the exception to permit an end-run around the represented person's lawyer. As we understand the accused's argument, as long as a lawyer can subpoena a nonparty witness to testify at trial or in a deposition before the witness has an opportunity to contact his or her own lawyer, the "authorized by law" exception would permit the lawyer to ask that witness unlimited questions without any opportunity for the witness's lawyer to protect his or her client's interests. That interpretation of the exception, if accepted, would undermine the purpose of the rule. [Id. at 410].

The court issued a public reprimand.

17. Contact With Unrepresented Persons

In re Guilbeau

35 So. 3d 207 (La. 2010) (per curiam)

In 2002, Thomas and Zarin Miller contracted with Deltatech Construction to build a house. Shortly after the Millers took occupancy of the house, they began to have problems with the stained concrete flooring on the first floor. The owner of Deltatech, Sandra Tomasetti, arranged for an inspection of the flooring by representatives of Duckback Products and The Sherwin-Williams Company, the manufacturer and
supplier, respectively, of the staining product. The inspection indicated
that the problems had resulted from improper installation or application
of the floor stain. Ms. Tomasetti and the flooring installer, John Arce,
disputed this. They claimed that the stain was defective. Ms. Tomasetti
and Mr. Arce attempted to repair the Millers' floors, but they were not
successful.

In an attempt to recover the expenses she had incurred in the
remediation effort, Ms. Tomasetti asked attorney Guilbeau to look into
filing a lawsuit against Sherwin-Williams and Duckback. Guilbeau was
concerned about who should be the plaintiff, because Ms. Tomasetti had
purchased the floor stain product, but it was now incorporated into the
Millers' home. Guilbeau came up with the idea of having the Millers
assign their rights to Ms. Tomasetti and Deltatech.

Meanwhile, Mrs. Miller was exploring her legal options. She met
with a lawyer, but did not retain him at that time. She also spoke by
telephone with Guilbeau. Some weeks later, Ms. Tomasetti presented
Mrs. Miller with the assignment of rights that Guilbeau had prepared. It
was signed and returned to Guilbeau, for no consideration.

Thereafter, Guilbeau filed suit against Sherwin-Williams and
Duckback in state court, on behalf of Deltatech and Ms. Tomasetti,
"individually, and as assignee of the rights in this action of Thomas and
Zarin Miller,..." and the flooring installer, John Arce. Sherwin-Williams
removed the case to federal court. Guilbeau did not enroll in the federal
court litigation, informing Ms. Tomasetti that he did not practice in that
court. Ms. Tomasetti interviewed another attorney about the case, but she
decided not to go forward. In January 2006, the federal court dismissed
the suit.

In the meantime, the Millers retained an attorney (Morgan) to
represent them in a suit against Deltatech and Ms. Tomasetti.
Attorney Morgan filed suit in February 2005. Guilbeau filed an answer, denying
any responsibility for the defective flooring, and claiming that the
Millers had no right to bring suit against Deltatech, because of the
assignment they had given to Ms. Tomasetti and Deltatech.

The Millers filed a complaint with the ODC, alleging that Gilbeau
had engaged in a conflict of interest by representing Deltatech at the
same time he had been representing the Millers against Sherwin
Williams.

In the eventual disciplinary proceedings, the hearing committee
rejected the Millers' claim that Guilbeau had been representing them.
According to the opinion in the case:

[Guilbeau] did not intend to nor did he enter into an agreement of
legal representation with the Millers. Mrs. Miller testified she
believed respondent would be representing her in the matter

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involving Sherwin-Williams and her floors; however, the committee did not find her testimony to be credible on this point. She testified at the hearing she had a single three-minute cellular telephone conversation with respondent before she went to meet with Mr. Barrios. She subsequently received the assignment from Ms. Tomasetti, a nonlawyer. She never met respondent in person prior to signing the assignment form. According to [Guilbeau's] testimony at the hearing, he never promised to represent Mrs. Miller or to prosecute her claims against Sherwin-Williams. The committee found at all pertinent times, Mrs. Miller was a mature, sophisticated, and well-educated consumer of contracting services. She could not reasonably have assumed Guilbeau was representing her in a lawsuit based upon a three-minute cell phone conversation. [35 So. 3d at 211].

As a result, the committee did not find that there had been a violation of Rules 1.7 or 1.9, on conflicts of interest. However, the hearing committee did conclude that other rules had been implicated:

[T]he committee found [Guilbeau] did commit misconduct by dealing unfairly with unrepresented persons, and he therefore violated Rules 4.3 and 8.4(c). The committee found it was inappropriate for [Guilbeau] to permit Ms. Tomasetti to transmit the assignment document to Mrs. Miller, an unrepresented person, without any direct, explicit conversation or explanation from him. Although [Guilbeau] claims he believed Mrs. Miller had a lawyer, if that was indeed his belief, he should have transmitted the assignment to the lawyer. [Guilbeau] had an obligation to clarify his professional relationship with Ms. Tomasetti to Mrs. Miller. He should have anticipated that Mrs. Miller could have misunderstood his role with respect to the assignment of rights, but he made no effort to clarify the relationships among the parties or to correct the misunderstanding. He provided no written explanation to Mrs. Miller and obtained nothing from her to indicate her understanding of the relationship other than the assignment itself. In light of the potential for a conflict of interest between Mrs. Miller and Ms. Tomasetti, [Guilbeau] had an obligation to clearly state his position, which he failed to do. His omissions constitute professional conduct by misrepresentation in violation of Rule 8.4(c). [Id. at 211-12].

Rule 4.3 provides:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in a matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an
unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are of have a reasonable possibility of being in conflict with the interests of the client.

Rule 8.4(c) provides that it is “professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” The court applied the rules as follows:

Rule 4.3 has three components which come into play whenever a lawyer is dealing on a client's behalf with a person is not represented by an attorney: first, the lawyer may not imply disinterestedness; second, the lawyer must clear up any misunderstanding about his or her role; and third, the lawyer may not give legal advice if the unrepresented person's interests may be adverse.

In this case, there was a potential for a conflict of interest between Ms. Tomasetti and Mrs. Miller, which respondent did not disclose to Mrs. Miller. Nevertheless, respondent drafted the assignment of rights in favor of Ms. Tomasetti, and Ms. Tomasetti presented the assignment to Mrs. Miller. Because Mrs. Miller's interests were adverse to Ms. Tomasetti's, respondent had an obligation to clearly state his position, which he failed to do. We agree this conduct violated Rules 4.3 and 8.4(c). [Id. at 214].

However, because Guilbeau's conduct was simply negligent, and because, under the circumstances of this case, it caused “little or no harm to Mrs. Miller,” the sanction was a public reprimand. Id. at 215.

18. Confidentiality

Iowa Supreme Court Attorney Disciplinary Bd. v. Marzen
779 N.W.2d 757 (Iowa 2010)

A woman identified as Jane Doe filed a complaint with the disciplinary board against attorney Jesse Marzen. She alleged Marzen had engaged in a sexual relationship with her after representing her in a mental health commitment hearing. After hearing testimony from the woman in a child custody case, a district court judge also filed a complaint against Marzen.

Marzen was a candidate for the position of county attorney at the time the complaints were filed. Accounts of the allegations against Marzen made it into the news. In response to media inquiries, Marzen spoke publicly about the allegations. Marzen won the election, but he still had to contend with the allegations of misconduct.

Three disciplinary charges were brought against Marzen. Count I alleged that Marzen had engaged in sexual relations with Doe when she was his client. Count II alleged that Marzen had made a misrepresentation to a judge during the mental health commitment
proceeding concerning Doe. Count III alleged that Marzen had disclosed information about Doe to the local press that he had obtained in confidence during an attorney-client relationship.

Counts I and III came before the Iowa Supreme Court. The court concluded that the evidence supported the conclusion that Marzen had engaged in a sexual relationship with Doe while representing her, in violation of an applicable ethics rule. Count III arose out of an interview that Marzen had had with a reporter:

On October 27, 2006, Marzen was interviewed by KIMT News Channel 3 of Mason City. Marzen was asked to comment on Doe's allegations and the ongoing disciplinary investigation. Marzen responded, “[Doe] stated she had been in a situation with her probation officer. I didn't find out until later that it was sexual misconduct.” Marzen further told print reporters that Doe ended his representation when she could not pay her bill. [779 N.W.2d at 765].

Marzen contended that the situation involving the probation officer had been a matter of public record and that he did not violate Rule 1.6, the confidentiality rule, by bringing it up to the media. The Iowa Supreme Court rejected this argument. It said that “the rule of confidentiality must apply to all communication between the lawyer and client, even if the information is otherwise available.” Id. at 766. It said, further:

This result is also consistent with the overall structure of our rules of confidentiality. For instance, our rules prohibit an attorney from profiting on information obtained through client confidences, without an explicit exception for information that is otherwise publicly available.... The reason for this omission is clear - the sanctity of the lawyer-client relationship is necessary to ensure free and unrestrained communication without fear of betrayal. On this issue of first impression, therefore, we hold that the rule of confidentiality is breached when an attorney discloses information learned through the attorney-client relationship even if that information is otherwise publicly available. [Id.].

Marzen was suspended for six months.

19. Baseball Cap

Bank v. Katz
2009 WL 3077147 (E.D.N.Y. 2009)

Attorney Todd Bank appeared as a pro se litigant in a New York courtroom. At the beginning of oral argument on a motion, he requested that Judge Anne Katz permit him “to exercise his rights under the First Amendment of the United States Constitution by wearing a baseball hat that displayed the term ‘Operation Desert Storm.’” The judge declined.
She later told Bank, who was wearing "a button-down shirt, blue jeans, socks and shoes," that he was dressed inappropriately. A court clerk also told Bank not to wear the hat in the courtroom.

Bank sued Judge Katz and the court clerk in federal court claiming that any effort by them to prevent him from wearing his hat in future appearances would violate his rights under the First and Fourteenth Amendments.

The federal district judge ruled against Bank, in an opinion that stated, in part:

The function of a courtroom is "to provide a locus in which civil and criminal disputes can be adjudicated. Within this staid environment, the presiding judge is charged with the responsibility of maintaining proper order and decorum." . . . In order to do so, a judge must have the authority to set reasonable limits on the conduct and behavior of litigants appearing before the court. . . . The commonplace rule prohibiting hats in the courtroom is just one widely accepted example of such a limitation. . . .

[A] courtroom is not a public forum for the expression of ideas . . . . A restriction on speech in a nonpublic forum is reasonable when "it is wholly consistent with the government's legitimate interest in preserving the property for the use to which it is lawfully dedicated."

A restriction on wearing a hat in the courtroom . . . is reasonably related to the maintenance of courtroom civility and respect for the judicial process. Judges have an obligation to maintain the dignity of judicial proceedings and to oversee courtrooms in a manner that promotes their integrity. Requiring litigants to remove their hats out of respect for this process is reasonably calculated to advance these valid interests. Similarly, it is appropriate for a court to expect litigants to appear in attire that is suitable to the dignity of a courtroom, rather than to show up in clothes they might have worn to a baseball game. . . .

In addition to being reasonable, restrictions on attire generally do not discriminate against any viewpoint. In this case, there is no allegation that any restriction on Plaintiff's attire was imposed based upon Plaintiff's viewpoint. Regarding his hat, the Complaint does not allege that the restriction on wearing it in the courtroom was based upon its message or viewpoint. Plaintiff does not allege, for example, that a Queens judge prohibited only Yankees hats from her courtroom or that hats with pro-war messages were permitted while anti-war hats were not. Instead, the Complaint alleges only that Plaintiff asked to wear a hat so he could exercise his First Amendment rights, and that Judge Katz told him he could not do so.

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Plaintiff also advances a Fourteenth Amendment liberty interest in the attire he wears in court. As the Second Circuit has noted, "[a] substantial body of precedent suggests the existence of a liberty interest in one's personal appearance." While there may be such an interest, however, restrictions on it have been upheld under "rational basis" review when, in the context in which it is asserted, the interest is not fundamental.

Plaintiff's desire to make a fashion statement is far from a fundamental right. Defendants' regulation of Plaintiff's attire is, therefore, valid "unless it is so irrational that it may be branded arbitrary, and therefore a deprivation of [Plaintiff's] liberty interest." As already discussed, a court's interests in maintaining proper decorum, etiquette, and respect for the judicial process are reasonably promoted by prohibiting litigants from wearing hats in the courtroom or appropriately admonishing them for wearing casual attire. Such actions are "rationally related" to a "legitimate government interest" and survive rational basis review. Accordingly, to the extent Plaintiff is asserting that his liberty interest in wearing jeans or a hat in the courtroom has been infringed, he fails to state a claim on which relief may be granted. [Citations omitted.]