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Legal Ethics: Learning from the Mistakes of Others

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I. Introduction

Most of the materials collected here consist of accounts of lawyers who have violated one or more of the standards of the legal profession. By understanding what they did, and why they were disciplined, other lawyers might be able to avoid their mistakes.

II. News

A. Migratory Lawyers

In 2009, the ABA House of Delegates voted 226 to 191 to change Model Rule 1.10 to permit law firms to use screens (Chinese Walls), without client consent, in order to avoid imputed disqualification in the migratory lawyer situation.

The typical migratory lawyer situation is one in which a lawyer who personally worked on one side of a case at his or her old firm joins a new firm that is working on the other side of the case. The traditional analysis is that the migratory lawyer is a Typhoid Mary who infects everyone in the new firm with a conflict of interest. Which would normally result in disqualification of the migratory lawyer's new firm unless the new firm obtains the consent of the migratory lawyer's former client to stay in the representation, typically in connection with the new firm's erection of a screen around the migratory lawyer. However, the new rule eliminates the consent requirement. Screening and notice are now sufficient.

There are several requirements that have to be met, including notice, as mentioned above. The notice is to be in writing, and it must indicate that the former client can have a court evaluate the quality of the screen.

It should be recalled that the Model Rules are merely models, and that individual states are free to adopt or reject the change. So the elimination of the consent requirement is also just a model. See Rick Valliere, ABA Delegates Modify Conflicts Rule, Allow Screens When Lawyers Change Firms, 25 ABA/BNA Lawyers' Manual on Professional Conduct 88 (2009).

B. Malpractice Insurance

In 2009, the Connecticut Superior Court Rules Committee voted not to adopt a rule that would have required lawyers to disclose to clients whether they carry malpractice insurance. Connecticut thereby became
one of a handful of states to reject a mandatory disclosure rule (others are Arkansas, Florida, and Kentucky).

Twenty-four states have adopted rules requiring lawyers to reveal whether they carry malpractice insurance. Nineteen of these require the disclosure to be made on annual bar registration statements. Five other states require the disclosure to be made directly to clients. Most states that have the first type of requirement allow the public to access the information.


C. Louisiana Advertising Rules

In 2008, the Louisiana Supreme Court adopted extensive changes to the rules concerning “Information About Legal Services.” These are the rules about advertising, solicitation, and related matters. The changes were originally to go into effect on 1 December 2008. However, after First Amendment challenges were filed with respect to the new rules, the court moved the effective date back to 1 April 2009, and, still later, to 1 October 2009. *See* Orders of 31 October 2008 and 18 February 2009. The original order adopting the rule changes, and the two orders changing their effective date can be seen on the Louisiana Supreme Court’s website at http://www.lasc.org/rules/orders/Rule_changes.asp.

On June 4, 2009, the court announced that some changes had been made in the rules in response to some recommendations from the bar association. The press release stated, in part:

The new rules resulting from the additional review balance the right of lawyers to truthfully advertise legal services with the need to improve the existing rules in order to preserve the integrity of the legal profession, to protect the public from unethical and potentially misleading forms of lawyer advertising, and to prevent erosion of the public’s confidence and trust in the judicial system. The effective date of the new rules remains October 1, 2009.


Some of the amendments transformed prohibitions into disclaimer requirements. For example, a provision that had prohibited use of a celebrity’s voice or image was deleted, and another provision that had allowed the use of non-lawyer spokesperson, so long as they were not celebrities, was changed into a provision that permits the use of non-lawyer spokespersons so long as they provide a disclosure statement identifying themselves as non-lawyers and disclosing that they are being paid for their role, if that is the case. A provision that had applied the
general rules about advertising to some "computer-accessed communications," was also modified to engage those rules "when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain." See Order of 4 June 2009 (available on the Louisiana Supreme Court's website).


D. Juror Misconduct

A California lawyer, Francis Fahy, was selected to be a juror in a case in which a patient had sued an ophthalmologist for medical negligence in performing laser eye surgery. Juror deliberations began on April 16. Although the jury took a number of votes, it was unable to reach a verdict. By April 21, the jury appeared to be deadlocked eight to four in favor of the defendant. When the judge assigned to the case was informed of the deadlock, he urged the jury to continue to deliberate.

Fahy told the other jurors that if the judge would not declare a mistrial, he would change his vote for the defense to break the deadlock so he could return his attention to his law practice. On April 26, he changed his vote, thereby creating a verdict in favor of the ophthalmologist.

A new trial was ordered based on the alleged juror misconduct. Fahy was charged with ethical violations for his misbehavior as a juror and for not being candid with the court when questioned about his behavior. He was disbarred. Mike McKee, Jury Duty to End With Disbarment for Calif. Lawyer (March 11, 2009) http://www.law.com/jsp/article.jsp?id=1202428952939

III. Cases and Ethics Committee Opinions

A. Louisiana Permanent Disbarment Cases

1. Short Subjects

In re Engolio
7 So. 3d 1162 (La. 2009) (per curiam)

Permanent disbarment for lawyer who converted clients funds, engaged in the unauthorized practice of law, neglected client matters, failed to communicate with clients, failed to refund unearned fees and return client files upon termination of representation, and failed to cooperate with the ODC in its investigations.
**In re Muhammad**

3 So. 3d 458 (La. 2009) (per curiam)

Attorney who submitted a forged court order in a guardianship proceeding, and who filed a fraudulent bankruptcy proceeding to protect his own home from foreclosure, was permanently disbarred.

**In re Jackson**

1 So. 3d 454 (La. 2009) (per curiam)

Lawyer who engaged in the unauthorized practice of law after being suspended, who engaged in fee splitting during with another lawyer during the time he was suspended, and who failed to report income on his income tax return, was permanently disbarred.

**In re Straub**

999 So. 2d 1123 (La. 2009) (per curiam)

Straub neglected numerous legal matters, failed to communicate with many clients, failed to refund unearned fees, and failed to cooperate with the ODC in its investigations. In one matter, he obtained a loan from his client and then failed to repay it. He was permanently disbarred.

**In re Hodge**

999 So. 2d 1131 (La. 2009) (per curiam)

Hodge converted client funds totaling more than $56,000. Some of the funds represented proceeds of the sale of a client’s property that were in bank accounts established by Hodge’s law firm. Some were prepaid funds of a customer of a client that had been escrowed with the firm. Some were funds for a tax deferred exchange transaction that the client had asked the law firm to hold in a bank account. Hodge self-reported his misconduct to the ODC. He was permanently disbarred.

**In re LaNasa**

998 So. 2d 73 (La. 2009) (per curiam)

In 1993, LaNasa was suspended from the practice of law for two years after he had used client funds without authorization and had made false statements on his application to the Mississippi Board of Bar Admissions. While suspended, he represented a client on criminal charges, and made two court appearances. He also attempted to negotiate a plea agreement on the client’s behalf. The ODC filed one count of formal charges against LaNasa, alleging that his conduct had violated Rule 5.5(a) of the Rules of Professional Conduct, which prohibits the unauthorized practice of law. In ordering permanent disbarment, the Louisiana Supreme Court stated that LaNasa’s “failure to respect the authority of this court clearly demonstrates that he lacks the moral character and fitness to engage in the practice of law in this State.” 998 So. 2d at 77.

**In re Elziey**

9 So. 3d 839 (La. 2009) (per curiam)
Attorney Ellzey conducted real estate closings and worked as a title agent for a title insurance company in connection with real estate loan closings. In a series of transactions, he converted approximately $895,000 in client and third party funds. He also failed to cooperate with the ODC in its investigation. He was permanently disbarred.

**In re Arbour**  
18 So. 3d 747 (La. 2009) (per curiam)

Attorney John Arbour worked as chief financial officer for Kiko Foods, Inc. Over a period of time, he issued numerous checks payable to himself or to cash, and he retained the proceeds for his personal use and benefit. He was arrested. He pled guilty to theft. The police report indicated that Arbour wrote over $275,000 in unauthorized checks. He was permanently disbarred.

**In re Banks**  
18 So. 3d 57 (La. 2009) (per curiam)

Permanent disbarment ordered for lawyer who engaged in multiple acts of misconduct, including theft, making false statements to a judge, converting client funds, making sexually suggestive comments to the mother of a potential client, and making false statements to the ODC.

### 2. Other Permanent Disbarment Cases

**a. False Judgment**

**In re Delsa**  
998 So. 2d 700 (La. 2009) (per curiam)

Delsa neglected several legal matters; failed to communicate with his clients; engaged in conduct involving dishonesty, fraud, deceit, and misrepresentation; and failed to cooperate with the ODC in its investigations.

What the court called the “most egregious of his misconduct” involved the use of a false judgment that he sent to a client, indicating that he had obtained a compromise settlement with the defendants for $595,000, when that was not the case. The court recited the following facts relating to this “judgment”:

1) the judgment in the court record was a copy and not an original document; 2) the judgment was signed by a judge from a different division than that identified in the judgment; 3) the judgment was signed on March 5, 2005, which was a Saturday; 4) the document was purportedly scanned into the court record months before the purported February 25, 2005 hearing date; and 5) the judgment lists all of the defendants, including the two who were previously dismissed.

998 So. 2d at 702. In actuality, no settlement negotiations had taken place. The attorney was permanently disbarred.
b. False Medical Records

_In re Dorhauer_

998 So. 2d 77 (La. 2009) (per curiam)

According to the opinion in this case, while he was employed as an associate with the E. Eric Guirard & Associates firm, attorney Dorhauer had been assigned to represent a personal injury client, Staci Delaune. She, along with her four children, had been involved in an automobile accident in a Wal-Mart parking lot. After the accident, Delaune sought medical treatment for herself and her children from two medical providers. Dorhauer submitted a settlement demand on behalf of his clients to Imperial Fire and Casualty Insurance Company. He attached copies of pertinent medical records from the doctors. Imperial settled the claims for $23,697.65.

Ms. Delaune told Dorhauer that she and two of her children had been involved in a hit and run accident approximately two weeks before the accident at Wal-Mart. Neither Ms. Delaune nor her children had been injured in the earlier accident, and Ms. Delaune had settled her own property damage claim with the tortfeasor's insurer, Louisiana Farm Bureau Insurance Company. However, Ms. Delaune asked Dorhauer whether she could now collect anything for the “aggravation and mental stress” of the earlier hit and run accident.

In February 2005, apparently without the knowledge of Ms. Delaune, Dorhauer sent a settlement demand to Farm Bureau for bodily injuries allegedly suffered by Ms. Delaune and her children in the hit and run accident. In support, he included the same medical records that he had previously provided to Imperial for the Wal-Mart accident. However, the medical records he submitted to Farm Bureau had been altered to reflect that the injuries suffered by Ms. Delaune and her children were associated with the hit and run accident.

Farm Bureau's adjuster discovered the alterations and initiated an investigation. After Dorhauer had been notified of the investigation, he informed the insurer that he wanted to withdraw the settlement demand. He then met with Ms. Delaune and gave her a check for $1,500 drawn on his personal checking account. He also had Ms. Delaune sign a settlement document. When Ms. Delaune asked why Dorhauer was giving her a personal check, rather than a check from Farm Bureau, he told her that there were “some accounting issues.” In fact, Dorhauer had not opened a separate file for the claim at the law firm, and the firm had not been aware of the matter. The ODC characterized this as “off the books” transaction. See 998 So. 2d at 79, n. 1.

Dorhauer was arrested and charged with forgery and insurance fraud. He pleaded guilty to inciting a felony, and was sentenced. Disciplinary proceedings followed.
In imposing permanent disbarment, the Louisiana Supreme Court stated:

Respondent submitted altered medical records to an insurance company to settle a personal injury claim. The hearing committee made a factual finding that respondent was the only person who could have altered the records in question, and based on the testimony and documentary evidence in the record, we cannot say this finding is clearly wrong.

*Id.* at 82.

c. Bank Robbery

**In re Meece**

6 So. 3d 751 (La. 2009) (per curiam)

Meece was arrested and charged with robbing a bank in Mississippi. He pled guilty, was sentenced, and ordered to pay restitution to the bank.

In the disciplinary case, the ODC charged Meece with violating parts of Rule 8.4, including Rule 8.4(b), which provides that it is professional misconduct for an attorney to commit a criminal act that reflects adversely on his honesty, trustworthiness, or fitness.

In permanently disbarring the lawyer, the Louisiana Supreme Court stated that Meece had

intentionally placed others in harm’s way for his own selfish motives. He brandished a handgun during a bank robbery and thereby placed bank employees, customers, and others in grave danger.

6 So. 3d at 753.

B. Other Cases and Materials, From Louisiana and Elsewhere

1. The No-Contact Rule

**New York City Bar Association Commission on Professional and Judicial Ethics**

Formal Opinion 2009-1

This ethics committee was asked to consider an issue arising under the no contact rule. This is the rule that prohibits lawyers from communicating about the subject matter of representation with a person known to be represented by counsel without that counsel’s prior consent.

The question was whether it would violate the rule for a lawyer to send a letter or email message directly to the represented person, if the lawyer simultaneously sends a copy of the communication to the person’s counsel.

The committee decided that this would not work, in part because of the prior consent element of the rule. Moreover, the rule is in place to prevent lawyer overreaching. In this case, the committee noted that there would be a risk that the represented person could make a direct
uncounseled response to the copied communication. And the committee thought that countenancing the practice would undermine the role of a lawyer as a spokesperson and intermediary for the client.

2. “Unprofessional” Conduct

In re Greenburg

9 So. 3d 802 (La. 2009) (per curiam)

Attorneys Greenburg and Lewis were representing opposing parties in a succession matter in Terrebonne Parish. On one occasion, while they were in court for a motion hearing, Greenburg, who had once been a district attorney, said that some “hanky-panky” on the part of Lewis might justify an attorney’s fee award. This exchange followed:

Mr. Lewis: Here we go again, Your Honor, the former D.A. is always suspect -
Mr. Greenburg: Your Honor, I'm going to object right now -
Mr. Lewis: - or somebody ... the law -
The Court: Gentlemen, quiet.
Mr. Greenburg: - and ask that this jackass -
The Court: Gentlemen, quiet. Quiet, gentlemen.
Mr. Greenburg: - quit bringing up anything -
Mr. Lewis: Jackass?
Mr. Greenburg: Jackass.
Mr. Lewis: Your mother is a jackass.
The Court: Hey, hey, hey. All right, y'all are both in contempt.

Following the exchange, Greenburg grabbed Lewis's jacket, and both men fell to the floor. Greenburg and Lewis were charged with contempt, which resulted in jail sentences of 24 and 12 hours, respectively, fines of $100 and $50, respectively, and, in the case of Lewis, an order to perform eight hours of community service. In separate proceedings, Greenburg was also convicted of simple battery.

The ODC filed charges against both lawyers, claiming that Greenburg had violated Rules 3.5(d) (engaging in conduct intended to disrupt a tribunal), 8.4(b) (commission of a criminal act, especially one that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects), and 8.4(d) (engaging in conduct prejudicial to the administration of justice); and that Lewis had violated Rules 3.5(d) and 8.4(d).

The Louisiana Supreme Court had this to say of the lawyers' conduct:

The underlying facts of this matter are not seriously in dispute. Mr. Lewis and Mr. Greenburg exchanged vulgarities with each other
during a hearing in open court. This behavior is unprofessional on the part of both respondents and rises to the level of a violation of Rules 3.5(d) and 8.4(d) of the Rules of Professional Conduct. Mr. Greenburg then escalated the exchange into physical violence by committing a battery upon Mr. Lewis, in violation of Rule 8.4(b). This stunning lack of decorum and civility occurred in open court, in front of lawyers, court personnel, and ordinary citizens of Terrebonne Parish. Such conduct undermines public confidence in and respect for the legal system, and it cannot be condoned by this court.

9 So. 3d at 808. It ordered a public reprimand of Lewis. Because Greenburg’s “conduct in physically assaulting opposing counsel” was more “egregious,” the court ordered a six-month suspension, all but 30 days of which were deferred on condition that he successfully complete an anger management program. Justice Traylor dissented. He was of the view that Greenburg should have been suspended for a year and a day.

3. Lawyer as Witness

Franklin Credit Management Corp. v. Gray
2 So. 3d 598 (La. Ct. App. 4 Cir. 2009)

This was a case in which a mortgagee sued a mortgagor for failure to pay. When the creditor filed a motion for summary judgment, the defendant countered with two opposing affidavits, once of which was from the defendant’s attorney. The attorney’s affidavit set forth the lawyer’s analysis and interpretation of the defendant’s loan payment history. The court entered summary judgment for the creditor.

On appeal, one of the issues was the legal sufficiency of the affidavit tendered by the defendant’s attorney. This was a significant issue because the only countervailing evidence submitted by the defendant in opposition to the creditor’s summary judgment motion was the affidavit of the lawyer, which dealt with the alleged inaccuracy of the creditor’s loan payment information.

The court of appeal concluded that the affidavit did not constitute “competent evidence” that was sufficient to defeat the creditor’s motion for summary judgment. The reason was because of an ethics rule. The court explained:

Rule 3.7 of the Louisiana Supreme Court Rules of Professional Conduct prohibits a lawyer from acting as an advocate at a trial in which the lawyer is likely to be a necessary witness except under certain circumstances. It provides, in pertinent part:

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) the testimony relates to an uncontested issue;

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(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

Thus, part of the general “advocate-witness rule” is that counsel should avoid appearing as both advocate and witness except under extraordinary circumstances.

2 So. 3d at 603.

In this instance, there had been no showing that the defendant had been unavailable or unable to provide an affidavit concerning his payments on the loan, or that the defendant had been unable to provide records or cancelled checks evidencing loan payments. Accordingly, the court concluded that no showing of “extraordinary circumstances” had been made to justify the submission of the affidavit by the lawyer. Moreover, no showing had been made that refusing to allow the affidavit would have been manifestly unfair to the defendant or would have worked a substantial hardship on him. So the court concluded that the affidavit did not constitute competent evidence, and it affirmed the entry of summary judgment in favor of the creditor.

4. Confidentiality and the Attorney-Client Privilege

In re Grand Jury Investigation

902 N.E.2d 929 (Mass. 2009)

Sometimes there can be collisions between the duty of confidentiality and the attorney client privilege. This case provides a good example.

An attorney was representing the father in a juvenile court proceeding. The father became angry over an adverse decision, and, one night, between 1:08 a.m. and 1:24 a.m., left six messages on the attorney’s answering machine. The father indicated that he knew where the judge lived and that she had two children. In one message, the father said that “some people need to be exterminated with prejudice.” 902 N.E.2d at 930. The attorney erased the messages. Thereafter, noticing that his client was becoming increasingly angry, the attorney withdrew from representation. Concerned about the safety of the judge and her family, the lawyer also informed the judge about the messages.

Later on, the lawyer was summoned to provide grand jury testimony about the answering machine messages. He resisted, claiming that the messages were protected by the attorney client privilege.

There was no doubt that the lawyer was free to disclose information about the answering machine messages to the judge, without running afoul of the duty of confidentiality. That is because of the exception to Rule 1.6 that permits disclosure to “prevent the commission of a criminal or fraudulent act that the lawyer reasonably believes is likely to result in
death or substantial bodily harm.” But the exception to confidentiality did not, in the view of the court, resolve the question about whether the messages were subject to the attorney-client privilege.

The court said that

[a] party asserting the privilege must show that (1) the communications were received from the client in furtherance of the rendition of legal services; (2) the communications were made in confidence; and (3) the privilege has not been waived.

Id. at 932. In this case, the Commonwealth of Massachusetts argued that the phone communications had not been made “for the purpose of facilitating the rendition of legal services.” Id.

The court looked to its decision in an earlier case for guidance, and it discussed it as follows:

In Purcell, supra, [Purcell v. District Attorney for Suffolk Dist., 676 N.E.2d 436 (Mass. 1997)] the client was discharged as a maintenance man at the apartment building in which his apartment was located and had received an order to vacate his apartment. During consultation with an attorney, the client stated an intent to burn the apartment building. The attorney disclosed these communications to police and criminal charges were brought against the client. When the prosecutor subpoenaed the attorney to testify at trial, the attorney filed a motion to quash, which was denied. The central issue in that case was whether the crime-fraud exception to the attorney-client privilege applied. We concluded that the communications would not fall within the crime-fraud exception unless the district attorney could establish facts by a preponderance of the evidence showing that the client's communication sought assistance in or furtherance of future criminal conduct.

Recognizing that whether the attorney-client privilege applied at all was open on remand, we also considered whether a communication of an intention to commit a crime, if not within the crime-fraud exception, could be considered a communication for the purposes of facilitating the rendition of legal services. We held that a “statement of an intention to commit a crime made in the course of seeking legal advice is protected by the privilege, unless the crime-fraud exception applies.” We reasoned that a gap between the crime-fraud exception and the applicability of the privilege “would make no sense,” because the attorney-client privilege was premised on the benefits of unimpeded communication between attorney and client, and noted that “an informed lawyer may be able to dissuade the client from improper future conduct and, if not, under the ethical rules may elect in the public interest to make a limited disclosure of the client's threatened conduct” (emphasis added).
In the current case, the attorney had made a limited disclosure of information for the benefit of the judge and her family. The court held that the answering machine messages were protected by the privilege. And it provided some policy justifications:

Warning clients that communications deemed irrelevant to the matter for which they have retained counsel will not be protected not only may discourage clients from disclosing germane information, but also may disincline clients to share their intentions to engage in criminal behavior. In the latter circumstance, a lawyer's ability to aid in the administration of justice by dissuading a client from engaging in such behavior is impaired. ... The lawyer also may never receive the very information necessary for him or her to determine whether to make a limited disclosure to prevent the harm contemplated by the client.

Id. at 934. So the communications in this case were protected unless the crime-fraud exception applied, and no showing had been made that it did.

5. Dishonesty
   a. Lunch

   In re Ellis
   204 P.3d 1161 (Kan. 2009) (per curiam)

   Troy Ellis worked as in-house counsel in the Wichita, Kansas, office of Invista, a company that makes Lycra and Coolmax clothing. Workers at a independently operated cafeteria located in the Invista facility noticed Ellis putting food on his tray and leaving the cafeteria without paying for the food. They noticed him doing this on a number of occasions over a several week period. Security employees installed a camera in the cafeteria. It filmed Ellis taking food without paying.

   The general counsel for Invista’s parent company and the Invista vice president for compliance and ethics confronted Ellis about his thieving. He initially denied that he had stolen food. However, when he was shown the video, he admitted that he had taken food without paying for it.

   Ellis was forced to resign from the company. He reported his misconduct to disciplinary counsel. In his letter to disciplinary counsel, Ellis said that his nonpayment for the food was an oversight, and that he had intended to pay for the food in the future. He also said that he had offered to reimburse the cafeteria and the company for what he had taken. But the hearing committee found that he had not made that offer directly to the cafeteria and had yet paid for the stolen food.

   Ellis was censured and ordered to make restitution for the stolen food.
b. Boyfriend

_In Re Balliro_
899 N.E.2d 794 (Mass. 2009)

Fawn Balliro was an assistant district attorney in Massachusetts. She went to Tennessee to visit Greg Knox, a person with whom she was romantically involved. Knox became angry while they were at a bar. When she went outside, he knocked her to the ground. She got a ride to Knox’s apartment from a police officer. He punched her repeatedly, giving her some facial injuries.

The police came to check out reports of a screaming woman. Balliro told them she had been assaulted while walking home. But the police officer who had given Balliro a ride had also appeared at the apartment, and he said that she had appeared to be uninjured when he had dropped her off at the apartment. Knox was arrested and charged with domestic assault.

Knox later told Balliro that he was on probation for some drug charges and that he would have to go to jail for a probation violation. He also told her that he did not know who would support his two minor daughters if he had to go to jail. Balliro told the prosecutor that she did not want to testify against Knox. She claimed that her injuries had resulted from a fall. The prosecutor called her as a witness anyway. While she was under oath, she testified that she had been injured when she had fallen on a piece of furniture.

The charges against Knox were dismissed. But a Tennessee prosecutor notified the office where Balliro worked about her apparently false testimony. Disciplinary proceedings followed. A majority of the hearing committee concluded that she had given false testimony. The committee also concluded that her conduct had violated several of the applicable Rules of Professional Conduct, including 3.3(a)(1), which prohibits a lawyer from knowingly making a false statement of material fact or law to a tribunal; 3.3(a)(4), which prohibits a lawyer from knowingly offering evidence that the lawyer knows to be false; and 8.4 (c), which says that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

There were some mitigating circumstances. The hearing committee found that Balliro had been in a dysfunctional psychological state at the time of the trial. The Massachusetts Supreme Court agreed that there were mitigating circumstances. But it also regarded the false testimony as a serious problem. It stated:

Contrary to the respondent's contention, even though she may not have made her false statement while she, herself, was engaged in the practice of law, the respondent made such statement while participating in a formal legal proceeding at which she was involved.
obligated to give truthful testimony. Moreover, the seriousness of that misconduct cannot be downplayed simply by saying that the matter about which she testified falsely was a private one that arose in the context of a purely personal relationship.

N.E.2d at 804.

In the end, Balliro was suspended for six months.

6. Sex

State ex rel. Oklahoma Bar Association v. Gassaway
196 P.3d 495 (Okla. 2008)

Attorney Gassaway was charged with several violations of the Oklahoma Rules of Professional Conduct, including a violation involving sex for fees.

Gassaway was hired by C.D. to help her boyfriend in a criminal case. When she was herself arrested for drug possession, she told the police that she thought that Gassaway would agree to trade legal services for sex. She had allegedly obtained that information from a person named Marquita, who had apparently had some experience with the trading. In any event, C.D. agreed to wear a wire to her next meeting with Gassaway.

At the next meeting, C.D. told Gassaway that she and her boyfriend were short on money. She told him that she worked with Marquita and inquired whether there was something they could work out on payment. Gassaway agreed and invited C.D. to return to his office the next afternoon around 5:00 p.m. She did so. On this occasion, Gassaway agreed to give C.D. a $300 credit toward the legal fee for each act of oral sex she would perform. Shortly after this deal was struck, and in response to a “trigger phrase” that C.D. used during the (monitored) conversation, law enforcement officers knocked on Gassaway’s door and placed him under arrest.

In the disciplinary proceeding, Gassaway denied that he intended to actually engage in any sex act with C.D. He testified that he ultimately planned to let C.D. do something else, such as “wash his windows.” He claimed that when OCPD knocked on the door, C.D. unzipped his pants and pulled them down.

196 P.3d at 503.

The Oklahoma Supreme Court observed that a lawyer is a fiduciary with a duty of loyalty, care, and obedience to the client. The relationship is, and must be, one of utmost trust. This Court has previously recognized that sexual advances in the attorney-client relationship are contrary to the prescribed standards of conduct.

...
In the instant matter, Respondent placed his personal, prurient interests above the interests of his client and C.D. Respondent knew of their financial plight and sought to take advantage of them by furthering his sexual desires. Certainly, the public should not be subjected to such offensive behavior conducted under the authority of a license to practice law.

*Id.* at 503-04.

For this, and for other misconduct, Gassaway was disbarred.

7. Conflicts of Interest

a. Business Transactions

**The Florida Bar v. Herman**
8 So. 3d 1100 (Fla. 2009)

Lawyer Jeffrey Herman was a member of a law firm that represented Aero Controls, a company that was in the business of selling and repairing aircraft parts, and Triple J Leasing, which was involved in aircraft leasing. He decided to start an aircraft leasing business, and he started a new company called Nation Aviation. Later, the person who had been Aero’s top salesman approached Herman about working for Nation Aviation. Herman took him on. Nation began selling parts to Aero customers. Herman was still representing Aero during these developments. He also represented his own company.

When Aero learned that Herman owned Nation Aviation and that its former salesman worked for Nation, Aero successfully sued Herman for breach of fiduciary duty. It also filed a complaint with disciplinary authorities.

There were two problems. The first related to the basic Florida conflict of interest rule, which, at the time relevant to this matter stated:

(a) Representing Adverse Interests. A lawyer shall not represent a client if the representation of that client will be directly adverse to the interests of another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the lawyer's responsibilities to and relationship with the other client; and

(2) each client consents after consultation.

Rule 4-1.7(a), Florida Rules of Professional Conduct.

In this case, Herman represented Aero at the same time that he represented Nation. Both companies performed the same services and had the same potential customers and suppliers. The Florida Supreme Court stated:

In the “overpopulated” aircraft parts business, the loss of a contract or the failure of a negotiation for one client would have created additional opportunities for the other. The inherent, direct conflict
was exacerbated by the fact that Herman owned one of the companies; his loyalties were not only divided, but unequal. Accordingly, we approve the recommendation of guilt as to rule 4-1.7(a).

8 So. 3d at 1105.

The second problem related to Rule 4-1.8(a) of the Florida Rules of Professional Conduct, which, at the relevant time, provided:

(a) Business Transactions With or Acquiring Interest Adverse to Client. 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, except a lien granted by law to secure a lawyer's fee or expenses, 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 that 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.

In this instance, once Herman changed the nature of Nation's business, bringing it into direct competition with Aero, Herman had an obligation to comply with the provisions of the rule. He did not.

The Florida Supreme Court also concluded that Herman had engaged in conduct involving deceit and dishonesty by failing to contact the principal of Aero and inform him of Herman's activities, in violation of the basic misconduct rule.

The result was a suspension for at least 18 months.

b. Taking an Interest in the Subject Matter of Litigation

In re Humphrey
15 So. 3d 960 (La. 2009) (per curiam)

Attorney Bonnie Humphrey got into trouble for several acts of misconduct. One was making a false representation concerning a residential address in a domestic relations matter. Another was continuing to file pleadings in a case after she had been discharged as an attorney. In that same matter, when another lawyer moved for sanctions against her, Humphrey filed a motion in which she claimed, among other things, that she was in possession of evidence that defendant's attorney and his counsel had committed perjury and blackmail; that opposing counsel was complicit in child molestation; and that the trial court judge had violated the Code of Judicial Conduct. The court of appeal struck the
inappropriate comments from the pleadings, held Humphrey in contempt of court, and transferred the motion for sanctions to the trial court.¹

In a separate matter, Humphrey engaged in inappropriate conduct with respect to a piece of art. New Orleans attorney Kyle Schonekas represented artist George Rodrigue in a lawsuit alleging that some pieces of artwork he had created had been stolen by a former employee and placed on consignment with an art gallery. The defendants, who were represented by Humphrey, denied these claims and asserted that they were legally in possession of the artwork in question. Upon agreement of counsel, Humphrey was designated to hold the artwork in trust until resolution of the litigation. Humphrey was eventually disqualified from the litigation because she asserted an ownership interest in one of the pieces of artwork (“Blue Dog”) she held in trust. She claimed that the defendants had given her Blue Dog as payment for her legal services. The trial court found that the artwork was the basis of the dispute between Rodrigue and the defendants, and that under Rule 1.8 of the Rules of Professional Conduct, Humphrey could not acquire a proprietary interest in the cause of action she was handling for her clients.²

Rodrigue settled his dispute with the defendants, who relinquished their claims to the artwork in question. Humphrey, however, refused to return Blue Dog, despite repeated demands and a court order. She was held to be in contempt of court for her failure to obey the court order. Humphrey filed suit against Rodrigue and Schonekas, alleging professional misconduct on the part of the Schonekas.

In a disciplinary hearing, Humphrey stipulated that she violated the Rules of Professional Conduct ... relating to the George Rodrigue matter. Respondent also testified at length in mitigation that the misconduct subject of the formal

¹ The trial court imposed sanctions against Humphrey in the amount of $13,171. The appellate court relied, in part on Rule 2-12.4 of the Uniform Rules of the Courts of Appeal provides, in pertinent part:

The language used in the brief shall be courteous, free from vile, obscene, obnoxious, or offensive expressions, and free from insulting, abusive, discourteous, or irrelevant matter or criticism of any person, class of persons or association of persons, or any court, or judge or other officer thereof, or of any institution. Any violation of this Rule shall subject the author, or authors, of the brief to punishment for contempt of court, and to having such brief returned.

² The pertinent provision is found in Rule 1.8(I). It states:

A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer’s fee or expenses; and
(2) contract with a client for a reasonable contingent fee in a civil case.
charges was the result of impaired judgment stemming from personal and emotional difficulties and depression that she suffered during the breakup of her marriage, culminating in a nervous breakdown in 2003 and a suicide attempt in the fall of 2004. Respondent also testified that she was "numbing the pain" with alcohol, cocaine, prescription diet pills, and amphetamines. Respondent testified that she stopped using alcohol and drugs following a psychiatric hospitalization in February 2005 and has been sober since that time.

15 So. 3d at 964.

The disciplinary board determined that Humphrey's conduct had been knowing and intentional.

The Louisiana Supreme Court found support in the record for nearly all of the factual findings that were approved by the disciplinary board. And it summarized Humphrey's misconduct in this way:

Respondent's misconduct involves making false representations in a judicial proceeding, attempting to represent a client after being discharged, converting client property, engaging in a conflict of interest, and being held in contempt for filing pleadings containing offensive language and unsubstantiated allegations.

Id. at 971.

The court concluded that there were some mitigating factors, but that they were insufficient to justify a deviation from the baseline sanction, which was disbarment.

c. "Gifts" from Clients

Disciplinary Counsel v. Tomlan
885 N.E.2d 895 (Ohio 2008) (per curiam)

Attorney Tomlan befriended Katherine Rice, a 90-year-old nursing home resident. He also did some legal work for her. He did a couple of real estate transactions. He drafted a will for her. He also started to help her pay her bills.

In 1999, Rice apparently told Tomlan that she wanted to revise her will to leave him a monetary bequest. He advised her that he could not ethically prepare a will that named himself as a beneficiary and that she would have to hire another attorney. She apparently did not want another lawyer, and she never revised her will.

However, Tomlan began transferring Rice's assets, purportedly at her direction, into joint and survivorship accounts that they shared. Over a period of time, he arranged for the transfer of over $1.4 million of her funds into such accounts.

Rice died. Tomlan became the executor of her estate. He delayed the commencement of probate, and he resisted efforts to learn what
property belonging to the estate was under his control. He was ultimately removed as executor and was sued for his handling of Rice’s affairs.

In the disciplinary proceedings, the Supreme Court of Ohio noted that Tomlan had

violated his duty to his client by (1) failing to insist that she obtain independent counsel, (2) facilitating transfers of her assets to himself by himself, and (3) saying virtually nothing of the ramifications to her estate.

885 N.E.2d at 902. It also said:

Respondent does not deny now that he failed to obtain his client's valid consent to these gifts, which required him to disclose attendant risks such as the tax consequences of the gifts and how the gifts might deplete her testamentary bequests. Respondent thereby violated DR 1-102(A)(6) and 5-101(A)(1). 3

Id. at 898.

Tomlan nonetheless contended, with respect to the transfers, that he had been

“like family” to Rice and genuinely believed that, given their long, close friendship and discussions about her affairs, the transfers to joint and survivorship accounts fulfilled her ambitions for her fortune.

Id. at 902. But the court had a different impression:

3 These were the rules in effect at the time of the conduct in question. Ohio later adopted the Rules of Professional Conduct. Here are some provisions from the Louisiana Rules of Professional Conduct that could be potentially relevant to a case like this one:

Rule 1.8(a)

(a) 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 in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer’s role in the transaction, including whether the lawyer is representing the client in the transaction.

Rule 1.8(c)

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift, is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, or grandparent.
We share the board's skepticism and suspect that respondent used the joint and survivorship accounts to accomplish what he knew he could not ethically do through a will. He then did not insist upon independent counsel because the interference could derail the transfer of Rice's considerable assets to him. Moreover, we infer from respondent's delay in administering the Rice estate that he fully realized the threat that admitting the estate to probate might expose undue influence and overreaching. We thus do not accept respondent's assertion that his misconduct was a mere technical violation of DR 5-101(A)(1).

Id. at 903. Tomlan was indefinitely suspended from the practice of law.

8. Fees

a. "Accounting Services"

Attorney Grievance Commission of Maryland v. Kreamer
946 A.2d 500 (Md. 2008)

Attorney Barbara Kreamer was charged with several violations of the Maryland Rules of Professional Conduct, based on occurrences involving multiple clients. One of the issues that arose in the disciplinary proceedings concerned Kreamer's practice of billing clients for "accounting services." As explained by the court, this was a practice of "billing clients for time spent completing her time sheets." 946 A.2d at 532.

The hearing judge had concluded that "[t]hese are matters of overhead in any law office." Id. at 532-33. But Kreamer argued that there is "substantial authority to the effect that a lawyer is entitled (and in some instances even required) to include in his or her billings time spent in determining the amount of the fee involved and in preparing his or her request for payment."

Id. at 533.

The court said that this is was a matter of first impression:

The issue of whether an attorney may charge a client for "accounting services" is of first impression in this State. Indeed, our research indicates that no other court in this country has published an opinion dealing with this very issue. Moreover, the American Bar Association's Model Rules of Professional Conduct provide no specific guidance concerning attorneys' ability to charge clients separately for this service.

Id.

The court concluded that this was a bad practice. It reasoned:

MRPC 1.5(a) requires that an attorney charge a client reasonable fees and sets forth various factors to be considered in determining reasonableness. The Rule deals not only with the determination of a
reasonable hourly rate but also with the reasonableness of costs and the total charge billed to the client. While the Rule clearly allows attorneys to charge for work performed during the representation and to seek reimbursement for costs of services or expenses undertaken during the representation, we do not find it reasonable, under the circumstances presented, for Respondent to separately charge her clients for “accounting services.” We view “accounting services” as an overhead expense incidental to the practice of law....

Id.

The court added: “Clients hire attorneys to represent them in legal matters and to solve their legal problems. Clients do not hire attorneys with the expectation that they will be charged for the attorney's time in preparing a bill for the services rendered.” Id. at 534.

Moreover,

should a lawyer wish to charge clients for overhead costs and expenses, such a charge, including its method of calculation, ought to be explained to the client prior to the start of representation, and expressly stated in the written retainer agreement. Most importantly, the client must consent in advance to the additional fees and their method of calculation.

Id. at 534. In the absence of such an agreement, and in the absence of extenuating circumstances in support of the practice, the court concluded that the billing practice violated Rule 1.5.

b. Fees and the Business Transaction Rule

In re Curry

16 So. 3d 1139 (La. 2009) (per curiam)

In the 1980s, Stanley Palowsky and some other individuals formed Gulf States Land and Development, Inc. to develop a tract of land located north of Monroe. The business venture was financed by Ouachita National Bank, which later became Premier Bank and then Bank One. The development encountered difficulties, and various lawsuits resulted.

In 1985, the Theus firm assumed the representation of Palowsky and Gulf States. In 1992, a jury returned a $12.9 million verdict in favor of Palowsky. Thereafter, he consented to convert the existing hourly fee arrangement into one for a contingency fee. The agreement contemplated a one-third contingency fee on the net recovery in the litigation. Later, the amount awarded was reduced to $2.4 million, and the trial court ruled that, after taking various awards and offsets into account, Gulf States owed the bank more than $500,000.

While the trial court ruling was on appeal, Palowsky asked the law firm to act as guarantor on a $950,000 loan that would allow Gulf States to pay off the bank and to develop the land. The firm agreed to do so, conditioned upon a renegotiation of the fee agreement. Initially, the firm
proposed to guarantee the loan in exchange for a percentage of the profits from the sale of lots in the development. Before that arrangement was finalized, however, an alternative was proposed that would permit the firm to take, at its option, a contingency fee in any award in favor of Gulf States from the litigation pending on appeal. Palowsky agreed to this. The final agreement, reached in 1996, provided that the firm would guarantee a $950,000 bank loan to Gulf States, and also provided that the firm had two options in calculating its fee. The first would be a percentage of the net profits from the sale of lots in the development. The second would be one-third of the award in favor of Gulf States in the litigation on appeal. The agreement provided that, if this second option were taken, the amount of the award would be added to another amount ($300,000) that was being held in the court registry, and the contingency fee would be based on the total. There were other provisions dealing with expenses and what would happen if the firm elected the second option and the Louisiana Supreme Court were to reverse the amount of the award.

In 1997, the Second Circuit issued a judgment favorable to Gulf States, and the firm gave Palowsky notice that it intended to exercise the second option with respect to its fee. The firm calculated the amount of the judgment in favor of Gulf States to $1.8 million, and determined that the legal fee would be $600,000. After the Bank paid $1,049,000 of the judgment to Gulf States, Gulf States paid 1/3 of that (approximately $349,000) to the firm. Gulf States also reimbursed the firm for expenses. Neither Gulf States nor Palowsky paid any further amount in fees to the firm.

Later, after Palowsky had asked for an accounting, one of the firm’s lawyers reported that “it appears that we have overcharged” Palowsky by $38,000. Other lawyers in the firm disputed this, on the ground that Palowsky still owed the firm some $250,000. This issue was not resolved, but the firm did provide Palowsky with over 900 pages of documents itemizing expenses, advances, and payments credited to the firm’s files in the Palowsky-related litigation.

In 2003, there were further communications between the firm and a lawyer representing Palowsky, in which the firm claimed that Palowsky owed it $128,000 in costs and expenses, $22,000 for a 1997 invoice, and approximately $250,000 for unpaid fees under the 1996 agreement.

Palowsky filed a complaint with the ODC. The ODC filed formal charges against three firm lawyers. In its opinion in the disciplinary case, the Louisiana Supreme Court said that the allegations against the attorneys could be divided into two categories: 1) allegations involving business transactions and conflicts of interest; and 2) allegations involving accounting violations.
The first category of allegations related to the 1996 fee agreement, which the court characterized as "highly unusual." It said, concerning the agreement:

Much discussion in the parties' briefs and the brief of the amici centers on whether Louisiana law recognizes a so-called "hybrid" or "mixed" fee agreement which allows a lawyer to seek recovery from sources other than a traditional contingency fee. However, we need not resolve that question in order to decide the case at bar. Rather, we find that to the extent respondents attempted to enter into a business arrangement with their client, they did not follow the appropriate ethical strictures.

16 So. 3d at 1153.

At the time relevant to the conduct in question, Rule 1.8 provided, among other things:

(a) 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; 4

(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. 5

In this instance, the court thought that the terms of the 1996 fee agreement were not fair and reasonable. It stated:

[U]nder the 1992 fee agreement, the firm's recovery of a contingent fee was limited to a recovery of a one-third contingent fee plus expenses. By contrast, the 1996 fee agreement provided a means for the firm to collect a fee even if no recovery was made in the Gulf

4 The current version of Rule 1.8(a) includes a requirement that "the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction." The court acknowledged the change, but said: "[W]e do not believe the addition of the requirement that the client be given notice in writing of the desirability of seeking independent counsel suggests that the attorney had no duty under the prior version of the rule to encourage his client to seek independent counsel." Id. at 1154 n. 18.

5 Subpart (j) of the rule provided:

A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) Acquire a lien granted by law to secure the lawyer's fee or expenses; and

(2) Contract with a client for a reasonable contingent fee in a civil case.
States litigation. Thus, it is clear the firm used the guaranty of the $950,000 loan as leverage to insert terms into the fee agreement which it perceived to be more favorable.

Moreover, even assuming for sake of argument that the 1996 fee agreement was fair and reasonable, the undisputed evidence establishes that respondents did not give their client an opportunity to seek the advice of independent counsel regarding the transaction. Although respondents suggest that Mr. Palowsky is a sophisticated businessman and experienced developer, the unusual nature of the 1996 fee agreement should have prompted respondents to urge him to have independent counsel review the arrangement. Under these circumstances, we find respondents violated Rule 1.8.

_Id._ at 1154.

The court also concluded that the lawyers had been involved in a conflict of interest:

"[T]he 1996 fee agreement had the effect of placing respondents in a better position than they had been in under the 1992 fee agreement. Additionally, the firm's decision to guarantee the $950,000 loan made to Gulf States impacted the representation by causing the firm to consider its own interests as well as those of its client. Under these circumstances, we conclude respondents' representation of their client was materially limited by their own interests, thereby violating Rule 1.7(b)."  

_Id._ at 1154-55.

On a separate issue, the court decided that the lawyers had failed to provide a proper accounting to Palowsky:

At the outset, we note the "accounting" to which the committee and board referred consisted of nine hundred and twenty pages of documents, consisting primarily of hourly billing and cost invoices generated from the firm's computer records. To suggest that this mass of paper may be called an accounting in compliance with Rule 1.15(b) is to make an utter mockery of that rule.

_Id._ at 1155.  

__6__ At the relevant time, that rule provided, in part:

A lawyer shall not represent a client if the representation of that client may be materially limited ... by the lawyer's own interests, unless:

1. The lawyer reasonably believes the representation will not be adversely affected; and

2. The client consents after consultation.

__7__ At the relevant time, Rule 1.15(b) provided, in part, that:

A lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such
In summarizing the misconduct, the court stated:

In summary, we find the record establishes respondents violated Rule 1.7(b) because their representation of their client was materially limited by their own interests. We further find respondents violated Rule 1.8 by entering into an unfair business transaction with their client and failing to advise their client to seek the advice of independent counsel before entering into the agreement. Finally, we find respondents violated Rules 1.15(b) and 1.16(d) by failing to render a proper accounting to their client.

Id. at 1157. The court ordered that the attorneys be suspended for six months, with three months deferred.

Justice Victory dissented. He did not believe that the alleged violations had been proved by clear and convincing evidence.

property.

8 At the relevant time, Rule 1.16(b) provided, in part, as follows:

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned.

9 In his reasons for dissenting, Justice Victory stated, among other things:

To support its finding that the business transaction in question was not a "fair and reasonable" one, the majority relies solely on the observation that the 1996 fee agreement provided a means for the firm to collect a fee even if no recovery was made in the Gulf States litigation. The majority states, "it is clear the firm used the guaranty of the $950,000 loan as leverage to insert terms into the fee agreement which it perceived to be more favorable." ... It seems that the majority has concluded that the respondents should have either allowed Mr. Palowsky and or his partners to go bankrupt or should have elected to bear the risk of default on a loan of nearly one-million dollars for no additional remuneration. The notion that the firm should have allowed Mr. Palowsky to go bankrupt seems callous, and the implicit argument that the firm should have accepted the risk of default at no additional costs disregards one of the most ancient and well established maxims of human commerce, that the chance of profit must go with the risk of disaster.... It was not unreasonable or unfair for respondents to seek additional security in return for accepting a greater risk.

The majority's conclusion that respondents did not given Mr. Palowsky a "reasonable opportunity to seek the advice of independent counsel" in violation of Rule 1.8(a)(2) is also in error. To support this conclusion the majority relies solely on an extraordinary interpretation of the version of Rule 1.8(a)(2) which was in effect during the relevant time period. The majority finds that Rule 1.8(a)(2), as it existed at the time of the alleged misconduct, imposed an affirmative duty upon the respondents to urge Mr. Palowsky to have independent counsel review the 1996 fee agreement. This interpretation finds no support in a plain reading of the pertinent text. During the time period at issue, Rule 1.8(a)(2), on its face, simply established a temporal requirement. Under the rule, a client could not be forced to render an immediate, rash decision regarding a transaction with their lawyer.

16 So. 3d at 1159.
c. Reducing the Fee

In re Dalton
18 So. 3d 743 (La. 2009) (per curiam)

In November 2005, Tyrone Barrow hired attorney Dalton to represent him in a claim against Ford Motor Company. Barrow signed a fee agreement that provided for attorney fees of $250 per hour and paralegal fees of $75 per hour. The agreement also said, among other things, that Dalton’s employment was on a contingency fee basis; that the attorney fees would be an additional element of damages to be paid by the defendant; that if there were a recovery Dalton could deduct all costs and expenses; and that if no recovery were to be obtained, Barrow would not pay attorney fees or expenses.

Barrow eventually signed an authorization to settle his claim against Ford for $5,400, attorney fees of $4,000, and court costs of $600, for a total settlement of $10,000. Dalton disbursed $5,400 to Barrow as his portion of the settlement, and the lawsuit was dismissed.

In December 2006, Barrow filed a complaint with the ODC, alleging that he should have received the entire $10,000. He claimed that Dalton had misled him by failing to inform him that Ford had offered to settle with him for $10,000 and not $5,400.

In response to the complaint, Dalton advised the ODC that it was customary for redhibition defendants to send one settlement check in an amount that includes the attorney fees and costs. He also provided the ODC with an accounting of his time and expenses, indicating that he had worked 30.75 hours on Barrow's case, which amounted to $6,900 in attorney fees, and that he had incurred expenses totaling $670.

The ODC filed formal charges. The hearing committee concluded that the ODC had not met its burden to prove unethical conduct. The Disciplinary Board agreed with the hearing committee that the fee agreement did not violate the Rules of Professional Conduct. However, it concluded that Dalton’s conduct had violated the rules:

The board found that respondent kept no contemporaneous time records while he was working. Therefore, at no time did respondent inform Mr. Barrow of the amount of hours he had worked on the case. Thus, Mr. Barrow's consent to a settlement of $5,400 for himself and $4,000 for respondent's fee was not fully informed. Neither did respondent provide Mr. Barrow with a full accounting once the case settled. Furthermore, respondent testified that he did not negotiate his fee settlement based on the actual hours he worked, which was the method specified in the fee agreement. Instead, he negotiated his fee settlement based on 1) his own sense of what was fair and 2) his experiences in negotiating fees in other cases. Neither of these factors was disclosed to Mr. Barrow. Thus,
respondent made unilateral changes to the fee agreement and failed to fully and accurately disclose those changes to Mr. Barrow.

18 So. 3d at 745-46. The board opted for a public reprimand.

The Louisiana Supreme Court did not see a problem with the fee agreement. It stated, on that point:

While this court has never addressed the appropriateness of this unusual type of contingency fee arrangement (i.e., where an attorney charges an hourly rate, but collection of the fee is contingent on the client's recovery), the issue was discussed in an advisory opinion rendered by the South Carolina Bar's Ethics Advisory Committee. In opinion no. 87-07, the Committee stated that “[i]f the attorneys fee is reasonable and the client has full knowledge of the fee arrangement, it is generally deemed appropriate.”

Similarly, Rule 1.5(c) of Louisiana's Rules of Professional Conduct, which governs contingency fee arrangements, provides that “[t]he contingency fee agreement shall state the method by which the fee is to be determined.” Although the rule goes on to imply that the fee is a percentage of the client's recovery, a fee based on an hourly rate is not expressly prohibited. Accordingly, we do not find the fee agreement between respondent and Mr. Barrow clearly violated any provisions of the Rules of Professional Conduct.

Id. at 746-47.

But the court did see a problem with Dalton’s conduct regarding the fee:

While we find nothing improper in the fee agreement itself, we recognize that under a strict reading of Rules 1.4 and 1.5(b), respondent should have obtained his client's informed consent when he reduced his fees from $6,900 to $4,000. However, we conclude that any harm resulting from these rule violations was de minimis in nature, as the reduction of fees was actually to the client's benefit.

Id. at 747.

The court then said some things about sanctions and the ODC:

Not every violation of the Rules of Professional Conduct warrants the imposition of formal discipline.... Given the limited resources of the disciplinary system, the ODC should act wisely to ensure that the charges it chooses to file will satisfy the overarching goals of the disciplinary process, namely, maintaining high standards of conduct, protecting the public, preserving the integrity of the profession, and deterring future misconduct.

Under the totality of the circumstances in this case, we do not find respondent's actions rise to the level of sanctionable misconduct.

Id.
d. Fee Sharing

In re Garrett
12 So. 3d 332 (La. 2009) (per curiam)

Garrett was a solo practitioner who worked primarily on personal injury cases. He hired Marcia Jordan to work with him as a legal assistant. He knew that she had graduated from law school but had not been admitted to the practice of law. The Louisiana Supreme Court had denied her application for admission, finding that she had not satisfied her burden of proving good moral character.

After he hired Ms. Jordan, Garrett separated his files into ones for which he planned to maintain primary responsibility (Garrett files) and ones for which Ms. Jordan would maintain primary responsibility on a day to day basis (Jordan files). They entered into an agreement under which Jordan would receive a hourly payment, each week, for work on the Garrett files and would receive, upon settlement of the Jordan files, compensation for her time by payment of up to one third of the contingency fee Garrett received on the case. In 2005, Jordan received compensation of $168,000 from this arrangement. Garrett was charged with facilitating the unauthorized practice of law and improperly sharing legal fees with a nonlawyer.

The Louisiana Supreme Court concluded that the record, taken as a whole, “supports the conclusion that respondent facilitated Ms. Jordan’s unauthorized practice of law by allowing her to negotiate personal injury settlements on behalf of his clients and in representing clients during recorded statements taken by insurance companies.” 12 So. 3d at 344. It also concluded that Garrett had violated the rule against fee sharing with nonlawyers. ‘Under their agreement, “it said, “respondent and Ms. Jordan share a predetermined percentage of his legal fees as compensation for her work on the ‘J files.’”’ Id.

Garrett was disbarred. In a separate opinion, the court denied Jordan’s application to be admitted to the bar. See In re Jordan, 12 So. 3d 346 (La. 2009) (per curiam)

9. The Disciplinary Process

a. Non-Cooperation and Falsehoods

In re Parks
9 So. 3d 106 (La. 2009) (per curiam)

Attorney Parks rear-ended a vehicle driven by Dawn Wedge. She gave Ms. Wedge a business card indicating that she was a licensed attorney and containing her cell phone number and e-mail address. She included her home address and work telephone number. She also provided Ms. Wedge with the name of her automobile insurance company and her policy number, and she requested that the police not be
contacted about the accident. Ms. Wedge agreed, apparently because Parks told her that she was a lawyer.

After the accident, Ms. Wedge repeatedly attempted to contact Parks at her work and cell phone numbers. Although she left several messages, Parks never returned Ms. Wedge's calls. Ms. Wedge then attempted to initiate a claim using the insurance information Parks had provided. However, Safeco Insurance Company, the purported insurer, told Ms. Wedge that Parks did not have insurance coverage on the date the accident occurred.

Ms. Wedge complained to the ODC. The ODC mailed four copies of the complaint to Parks and, when she did not respond, it personally served her with another copy of the complaint. When she still failed to respond, the ODC subpoenaed her to take a sworn statement. Parks did not appear for the statement. However, she eventually submitted an affidavit to the ODC, which stated:

"I hereby certify that I was not involved in a car accident with Dawn Wedge on September 19, 2006. In fact, at the time of alleged accident I was at 2700 Tulane Avenue in the Criminal District Court of Orleans Parish Section D with Judge Frank Marullo."

9 So. 3d at 108.

In later communications with the ODC, however, Parks acknowledged that the business card in Ms. Wedge's possession was hers and that the handwriting on the card was hers as well. But she could offer no explanation regarding how Ms. Wedge had come to be in possession of the card. In a sworn statement, Parks indicated that she was licensed to practice law in Georgia. However, when the ODC contacted the Georgia Bar to check this out, it was informed that Parks was not admitted there and had not applied for admission. Parks told the ODC that she had current insurance with GEICO. But that insurance company told the ODC that her policy had been cancelled for non-payment of the premium.

The ODC filed formal charges, alleging that Parks' conduct had violated several of the Rules of Professional Conduct, including Rules 8.1(a) (a lawyer shall not knowingly make a false statement of material fact in connection with a disciplinary matter); 8.1(c) (failure to cooperate with the ODC in its investigation); 8.4(b) (commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer), and 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation).

The Louisiana Supreme Court said, about the allegations of misconduct:

Ms. Wedge complained that respondent had failed to address her responsibility for the accident, and had failed to maintain liability
insurance coverage on her vehicle on the date of the accident. While Ms. Wedge was rightfully concerned about respondent's conduct, we do not find that, standing alone, such conduct by an attorney rises to a level warranting discipline by this court. However, respondent's failure to respond to the complaint on several occasions, and her subsequent misrepresentations to the ODC, are a separate issue altogether. Such conduct is a violation of the Rules of Professional Conduct and does warrant serious discipline.

The deemed admitted facts and documentary evidence in this matter support a finding that respondent failed to cooperate with the ODC in its investigation of Ms. Wedge's complaint and made numerous misrepresentations to the ODC, both while under oath and in written and verbal statements.

Id. at 111.

The court suspended Parks for a year and a day.

b. Suing Clients Who File Ethics Complaints

In re Raspanti

8 So. 3d 526 (La. 2009), cert. denied, 130 S. Ct. 495 (2009)

Attorney Raspanti represented his sister in several matters, over several years. She disputed the fees that her brother had charged, and she filed a series of disciplinary complaints against him. The ODC dismissed all of her complaints. Raspanti ultimately sued his sister for defamation and breach of contract. The defamation claim was based on statements that his sister had made in complaints to the ODC. His sister claimed that she was entitled to an immunity defense.

The ODC brought an action against Raspanti, claiming that he had violated Supreme Court Rule XIX, §12(A), which confers immunity on those who communicate with the ODC or other disciplinary personnel about lawyer misconduct; Rule 3.1 of the Rules of Professional Conduct, which prohibits frivolous claims; and Rule 8.4, the basic misconduct rule.

Rule XIX, §9(a) states that it shall be ground for discipline for a lawyer to “violate or attempt to violate the Rules of Professional Conduct, or any other rules of this jurisdiction regarding professional

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10 The rule provides, in part:
[1] Communications to the board, hearing committees, or disciplinary counsel relating to lawyer misconduct or disability and testimony given in the proceedings shall be absolutely privileged,
and
[2] no lawsuit predicated thereon may be instituted against any complainant or witness.

Rule XIX, §12.
conduct of lawyers.” Rule XIX, §12(A), of course, is not part of the Rules of Professional Conduct. Raspanti argued that Rule XIX, §12(A) was not one of the “other rules of this jurisdiction regarding professional conduct of lawyers,” and that he should not have been subject to discipline for its violation.

The Louisiana Supreme Court rejected this argument:

Admittedly, Section 12(A) does not mention lawyers. However, the provisions specify an absolute privilege for communications and a prohibition of the filing of civil suits against complainants and witnesses. Thus, the prohibition of Section 12(A) addresses itself to lawyers, who in most cases are the subjects of the privileged communications and who would be the ones to institute suits against complainants or witnesses. Thus, we conclude Rule XIX, §12(A) is a “rule regarding professional conduct of lawyers” and makes lawyers susceptible to discipline for violation of its provisions.

8 So. 3d at 535 (footnoted omitted).

The court also concluded that the defamation claim violated Rules 3.1 and 8.4 of the Rules of Professional Conduct. It ordered a public reprimand.

See also In re Mordock, 11 So. 3d 484 (La. 2009) (per curiam) (Ex-husband of a former client filed a disciplinary complaint against an attorney. The lawyer who represented the attorney in the disciplinary matter sued the ex-husband for malicious prosecution, abuse of process, and abuse of rights. Citing the Raspanti case, the Louisiana Supreme Court ordered a public reprimand).

10. Troubles With Judges

In re White

996 So. 2d 266 (La. 2008) (per curiam)

Attorney White was employed as Vice President and General Counsel for business entities controlled by New Orleans restaurateur Al Copeland. He also acted as a personal representative (but not attorney of record) for Mr. Copeland in a child custody dispute following Copeland's divorce from Luan Hunter. While the domestic proceeding was going on, White engaged in numerous instances of ex parte communications with Judge Bodenheimer, who was presiding over the child custody matter. These including telephone calls in which litigation strategy and tactics in the Copeland case were discussed, and in which the judge gave advice to White about what Copeland’s counsel might do to advance his interests in the dispute. In one phone call, White called the judge to schedule a hearing for Copeland to voice his complaints about Ms. Hunter. Judge Bodenheimer suggested that Copeland's counsel file a rule for contempt against Ms. Hunter.
While the matter was pending before Judge Bodenheimer, and at the request of the judge, White agreed to make arrangements for the judge's daughter and seven of her friends to celebrate her 21st birthday at one of Mr. Copeland's restaurants. White sent a fax to the restaurant with his authorization to “comp” the drinks and appetizers.

There was a series of telephone calls between White and the judge in which the judge asked White to provide him with information regarding the prices that Copeland's restaurants paid for fresh seafood. The judge apparently desired to use this information to bid on a lucrative contract to supply seafood to the restaurants. White agreed to obtain the information, but he ultimately gave the judge older information, which proved to be largely useless for the judge's purposes.

Judge Bodenheimer and others became targets of an investigation by federal law enforcement officers. White was interviewed by the FBI in connection with the investigation. During the interview, White admitted that he felt “uncomfortable” with Judge Bodenheimer's actions relative to the seafood pricing matter, but he failed to tell the FBI about the full extent of the judge’s corrupt conduct. The judge eventually pleaded guilty to mail fraud arising out of the Copeland matter, was sentenced to prison, and permanently resigned from the practice of law.

In 2003, White was indicted on federal charges. He later pled guilty to misprision of felony, which is a crime of concealing knowledge of a felony by one who has not participated or assisted in it. White admitted that if the case against him were to proceed to trial, the government would be able to prove beyond a reasonable doubt that he had committed the offense of misprision of felony relative to a conspiracy involving Judge Bodenheimer and others “to injure, oppress, threaten and intimidate” Ms. Hunter, “in the free exercise and enjoyment of a right secured to her by the laws and Constitution of the United States; that is, the right to a trial before an impartial tribunal.” 996 So. 2d at 268. He admitted that “he had actual knowledge of the conspiracy by Judge Bodenheimer and others to deprive Ms. Hunter of her civil rights and failed to report it to a judge or someone in civil authority, and in fact, affirmatively concealed the full extent of his knowledge when he was questioned by the FBI.” Id. White was sentenced to prison and ordered to pay a $10,000 fine.

The ODC filed two counts of formal charges against White, alleging that his conduct had violated Rules 3.5(a) (a lawyer shall not seek to influence a judge by means prohibited by law), 3.5(b) (prohibited ex parte communications), 3.5(c) (a lawyer shall not engage in conduct intended to disrupt a tribunal), 8.4(a) (violation of the Rules of Professional Conduct), 8.4(b) (commission of a criminal act reflecting adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer), 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit,
The Louisiana Supreme Court concluded that White’s conduct involved “elements of deceit and dishonesty which adversely reflect on his moral fitness to practice law.” *Id.* at 274. It ordered disbarment. Justice Calogero dissented. He would have imposed a three year suspension.

11. Criminal Activities
   a. Unauthorized Entry

   **In re Sterling**
   2 So. 3d 408 (La. 2009) (per curiam)

   At approximately 11:00 p.m. on Thursday, June 26, 2003, Sterling went to the apartment of Shannon Harrison, his former fiancée, so that he could retrieve her engagement ring and the keys to a Ford Expedition that he had given to her. He called Ms. Harrison's cell phone and her home phone and knocked on the doors and windows of the apartment, but Ms. Harrison would not respond. He then kicked in the door and forced his way inside the apartment. He had brought two friends with him who entered the apartment as well. When he discovered Ms. Harrison in her bedroom with another man, Sterling grabbed her by the arms and pushed her around the apartment. Frightened, Ms. Harrison made a phone call to a friend, who summoned the police. When the sheriff's office arrived, Sterling was taken into custody and charged with unauthorized entry and simple battery. He later pled guilty to unauthorized entry.

   Disciplinary charges were filed against Sterling based on the criminal conduct mentioned above, as well as additional alleged misconduct. He conceded that his criminal conduct had violated the provisions of Rule 8.4(a) (violation of the Rules of Professional Conduct) and Rule 8.4(b) (commission of a criminal act reflecting adversely on the lawyer’s honesty, trustworthiness, or fitness). The Louisiana Supreme Court suspended him for two years.

   b. Stalking

   **In re Katner**
   15 So. 3d 52 (La. 2009) (per curiam)

   Attorney Sri Katner was charged with making repeated telephone calls to Maggie Pernia, with the intent to annoy, abuse, harass, embarrass or offend her; and also with repeatedly following or harassing Ms. Pernia with the intent to place her in fear of death or bodily injury. Katner was sentenced to several months of hard labor followed by probation. Her probation was later revoked.
Katner was later arrested and charged with DWI and careless operation of a motor vehicle. She pleaded guilty to DWI. Katner was suspended from the practice of law for a year and a day.

c. Worthless Check

**In re Coffman**
17 So. 3d 934 (La. 2009) (per curiam)

Attorney Donald Coffman was involved in a bond-trading program in which investors' funds were to be maintained in an offshore account and used as collateral by foreign investors engaged in day-trading. These investments were "guaranteed" to pay out substantial returns in a short period of time. When they failed to pay out as promised, investors sued Coffman. This resulted in a multi-million dollar default judgment against him.

Lafayette businessman Bryant Kountz invested $150,000 in an investment program in which Coffman was involved. On June 15, 2000, Coffman issued Kountz a $150,000 check from his client trust account at Whitney National Bank. Kountz claimed that the check was issued as collateral for his investment and that it was to be negotiated if the investment failed. Coffman claimed that the check was intended only as a receipt. Regardless, when Coffman issued the check, he knew the account did not have sufficient funds to cover it or he was aware that the account was closed.

When Kountz's investment failed to pay out as promised, he negotiated Coffman's check. But the check was later dishonored because the account had been closed. Coffman was investigated for alleged bank fraud and for issuing a worthless check. Criminal charges were dismissed after he reportedly made restitution.

In July 2005, the ODC sent Coffman notice of a disciplinary complaint. At first, Coffman cooperated with the investigation. But later, he did not. He failed to provide the ODC with requested bank account records and failed to sign a bank waiver so the ODC could obtain the account records directly from the bank. In March 2008, Coffman's attorney informed the ODC that he was no longer aware of his whereabouts and had not spoken to him in some time.

The ODC filed formal charges, alleging that Coffman's conduct violated Rules 8.1(c) (failure to cooperate with the ODC), 8.4(a) (violation of the Rules of Professional Conduct), 8.4(b) (commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer), and 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation).

Coffman did not answer the charges, so their factual allegations were deemed admitted. He was disbarred.
d. A Beer Bottle

In re Willis
8 So. 3d 548 (La. 2009) (per curiam)

Attorney Willis engaged in several acts of misconduct. While ineligible to practice law for failure to pay bar dues and the disciplinary assessment, he accepted representation of a client in a bankruptcy matter. He neglected the matter, failed to communicate with the client, failed to refund the client's unearned fee, and failed to return the client's documents upon termination of the representation. While he and his girlfriend were waiting in a vehicle at the drive-up window of a fast food restaurant, he engaged in an argument with her, struck her, poured beer on her, and hit her over the head with the empty beer bottle.

Willis was charged with several rule violations: 1.1(c) (failure to pay bar dues and the disciplinary assessment); 1.3 (failure to act with reasonable diligence and promptness in representing a client); 1.4(a) (failure to communicate with a client); 1.16(d) (obligations upon termination of the representation); 5.5(a) (engaging in the unauthorized practice of law); 8.1(c) (failure to cooperate with the ODC in its investigation); 8.4(a) (violation of the Rules of Professional Conduct); 8.4(b) (commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer); and 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation).

He was disbarred.

e. Stealing from the Firm

In re Sharp
16 So. 3d 343 (La. 2009) (per curiam)

Attorney Sharp represented Kenneth and Shelley Brady, and their children, in an automobile accident case. The Bradys signed the firm's standard one-third contingency fee agreement. In December 2003, Sharp received settlement checks on behalf of the Bradys' daughters totaling $4,500. He told the Bradys that because Christmas was approaching and in consideration of the family's financial difficulties, he would defer collecting any fees or expenses until the entire case was resolved.

In 2004, Sharp successfully settled Mr. Brady's personal injury claim for $100,000, and settled Mrs. Brady's claim for $50,000. At Mr. Brady's request, Sharp agreed to allow his clients to retain the entirety of the settlement proceeds and to pay the firm its attorney's fees and expenses at a later date.

Within a few weeks of receiving the settlement funds, Mr. Brady began repaying the attorney's fees and expenses due to the firm by bringing cash payments to Sharp's office. By May 2005, Mr. Brady had made cash payments totaling $49,500. As each payment was made, the
cash was placed in a safe in Sharp’s office. Sharp did not inform his firm of these arrangements.

In the summer of 2005, an audit revealed that although the physical Brady file was closed after the case had settled, the file was still reflected as open in the firm’s accounting system. Following an investigation, the partners discovered that the firm’s expenses in the case had never been collected. Suspecting something was amiss, the partners met with Sharp and asked for an explanation. He initially claimed that he had waived attorney’s fees and expenses for the Bradys as a gesture of goodwill. Sharp did not know, however, that the firm had dispatched an investigator to interview the Bradys. Mr. Brady told the investigator that Sharp had charged a fee and expenses, which he had paid cash. When the partners confronted Sharp with the information obtained from Mr. Brady, he admitted that he had lied to them about waiving the fee. He said that he had kept the fee out of “greed and arrogance” because he felt that he was entitled to more compensation from the firm. He agreed to withdraw from the partnership and to pay restitution to the firm.

The ODC filed formal charges, alleging that Sharp’s conduct violated Rules 1.15 (safekeeping property of clients or third persons), 8.4(a) (violation of the Rules of Professional Conduct), and 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation).

In the disciplinary proceedings, Sharp asserted that his medical condition should be considered a mitigating factor in this matter. In 2002, he had been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). A psychiatrist and a psychologist called to testify on Sharp’s behalf agreed that ADHD does not deprive an individual of the ability to know the difference between right and wrong, nor does it excuse Sharp’s behavior. However, they stated that ADHD did affect Sharp’s judgment and may help to explain why he had lied when his partners first confronted him.

The hearing committee found that Sharp had engaged in misconduct. It also declined to give the ADHD any weight in mitigation. It recommended disbarment. The Disciplinary Board also recommended disbarment. The Louisiana Supreme Court concluded that there was clear and convincing evidence that Sharp had violated the Rules of Professional Conduct as alleged in the formal charges. It accepted the recommendation that he be disbarred.

f. Criminal Activity and the Fifth Amendment

In re Holliday
15 So. 3d 82 (La. 2009) (per curiam)

On May 8, 2001, a police officer stopped attorney Stephen Holliday for speeding and driving erratically on Highland Road in Baton Rouge.
Holliday acknowledged that he had consumed too much alcohol, but he declined to take a Breathalyzer test. He was arrested and charged with DWI and moving traffic violations. He eventually pled guilty to speeding and improper lane usage.

On September 8, 2001, Holliday drove to the home of his estranged wife, Amy. His two-year old daughter from his marriage to Ms. Holliday was with him in the car. He did not find Ms. Holliday at home, but he discovered a pickup truck parked in the driveway that belonged to Ms. Holliday's boyfriend. Using a shovel, Holliday smashed the windows of Mr. Schmidt's truck and caused significant damage to its body.

The following day, the police observed Holliday proceeding in his vehicle down Perkins Road. The police followed and activated their lights and sirens, but Holliday refused to stop. The pursuit went through a residential subdivision until Holliday finally stopped in a private driveway, but he then refused to exit his vehicle as instructed. The police approached the vehicle with guns drawn. After Holliday was finally removed from his car by the police, he was arrested and charged with criminal damage to property and violation of a restraining order arising out of the incident involving Mr. Schmidt's truck. He was also cited for refusing to stop when ordered to do so by the police.

On December 3, 2002, Holliday was driving south on LSU Avenue in Baton Rouge at a high rate of speed when he ran a red light and broadsided a vehicle traveling eastbound on Highland Road, injuring the driver. Holliday, who was highly intoxicated at the time, exited his vehicle and attempted to flee the scene by climbing a wooded ridge south of the intersection. After the police searched the wooded area and apprehended Holliday, he claimed that he had been with a stripper from the Gold Club in Baton Rouge and that she had been driving his vehicle at the time of the crash. This story was a fabrication. He eventually pled guilty to failing to report an accident, disobeying a red light, and reckless driving.

In later disciplinary proceedings, the ODC alleged that Holliday’s conduct in these incidents had violated Rules 8.4(a) (violation of the Rules of Professional Conduct) and 8.4(b) (commission of a criminal act, especially one that reflects adversely on the lawyer's honesty, trustworthiness). It also alleged, in connection with the 2002 incident, that Holliday had violated Rule 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation).

Subsequently, in response to the ODC's questions, Holliday asserted his Fifth Amendment privilege against self-incrimination. The ODC insisted that he answer, on the ground that at the time of the statement, all criminal charges arising out of the underlying criminal matters had either been declined or resolved via plea. Nevertheless, upon the advice
of counsel, Holliday maintained his privilege under the Fifth Amendment as well as a "right to privacy" under the Louisiana Constitution.

The Louisiana Supreme Court concluded that Holliday had violated the Rules of Professional Conduct in connection with the above-described incidents.\textsuperscript{11}

The court also considered the Fifth Amendment issue, as follows:

The Self-incrimination Clause of the Fifth Amendment, as incorporated in the Fourteenth Amendment, extends to disciplinary proceedings.... However, there must be a reasonable basis for the assertion of the privilege. As the Court explained in Hoffman v. United States, 341 U.S. 479, 486, 71 S. Ct. 814, 95 L. Ed. 1118 (1951), "[t]he witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself - his say-so does not of itself establish the hazard of incrimination." Rather, the protection of the Fifth Amendment must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer.

In the instant case, the record supports the hearing committee's factual finding that respondent's assertion of the Fifth Amendment privilege was not reasonable under these facts. It is undisputed that at the time of the sworn statement, respondent had reached plea agreements on his two DWI charges. Thus, we fail to see how the ODC's questions regarding how many times he had been arrested could have placed respondent in jeopardy. Likewise, respondent's vague assertion of a "privacy" interest did not justify his refusal to answer the ODC's questions. Under these circumstances, we find no manifest error in the hearing committee's factual finding that respondent failed to cooperate with the ODC

15 So. 3d at 94.

The court ordered a three-year suspension.

12. Assigning Malpractice Claims

\textbf{Taylor v. Babin}

13 So. 3d 633 (La. App. 1 Cir. 2009)

While operating a motorboat, Jesse Foret drove the boat into a rock levee. Foret and his passengers, Eva Taylor and Kevein Ledet, were thrown overboard and injured. Criminal charges were commenced against Ledet. He hired attorney Jerri G. Smitko to represent him in that matter. Taylor and Ledet also sued Foret over their injuries. Ledet lacked

\textsuperscript{11} The court rejected claims that Holliday had submitted false statements to the ODC regarding the truck vandalism, because there had been no factual finding to that effect, and, in any event, that due process would have required such conduct to be addressed through formal charges.
liability insurance that would have compensated the passengers. He retained Camille Babin to file a bankruptcy petition on his behalf. The passengers filed a complaint in bankruptcy court to determine the dischargeability of their claims. The parties later joined in a consent order that the claims were nondischargeable pursuant to Section 523 of the United States Code. A bench trial on liability ensued, and Foret was found to have negligently caused the accident.

The claim of legal practice was based on the assertion that, at the time the consent order was filed in the bankruptcy action, Section 523(a) of the United States Code did not apply to the personal injury claims in question. In light of the trial court's ruling that Foret had not acted in a wanton or reckless manner, Foret claimed that the personal injury claims had been dischargeable. The idea, then, was it was legal malpractice for him to have been counseled to enter into the consent decree.

Foret did not file a malpractice action, but he assigned his legal malpractice claim to the personal injury plaintiffs, who sued. The legal malpractice defendants claimed that legal malpractice actions are not assignable under Louisiana law. The trial court agreed.

On appeal, the First Circuit Court of Appeal stated that "the issue of the assignability of legal malpractice claims is res nova in Louisiana." 13 So. 3d at 637.

The plaintiffs argued, among other things, that legal malpractice claims are assignable under La. C.C. art. 2642, which provides, in part: "All rights may be assigned, with the exception of those pertaining to obligations that are strictly personal." They claimed that the Louisiana Supreme Court has held that actions for recovery of tort damages are not personal. But the First Circuit said that the cases cited by the plaintiffs were distinguishable, because they involved the inheritability, not the assignability, of medical malpractice claims after actions had already commenced. And the plaintiffs in those medical malpractice actions had filed their malpractice claims before they died.

The plaintiffs also claimed that they could also have initiated their claims without an assignment of rights under Civil Code article 2044, which provides, in part: "If an obligor causes or increases his insolvency by failing to exercise a right, the obligee may exercise it himself, unless the right is strictly personal to the obligor." But the First Circuit noted that the plaintiffs had not directed it to case law confirming that this action applied on the facts before it. The court was also unconvinced that Foret had increased his insolvency by failing to file a legal malpractice action.

On the other side, the defendants contended that legal malpractice actions should not be assignable because of public policy considerations. The First Circuit agreed. It stated:
Having thoroughly reviewed the cases from other jurisdictions, we are persuaded by the reasoning of the federal courts and the majority of our sister states and hold that legal malpractice claims may not be assigned. The mere threat of a malpractice claim being assigned would be detrimental to an attorney's duty of loyalty and confidentiality to his client, would promote collusion, and would increase a lawyer's reluctance to represent an underinsured or insolvent client. Therefore, also as a matter of public policy, we conclude it is not prudent to permit enforcement of a legal malpractice claim that has been transferred by assignment, but never pursued by the original client.

Id. at 641.

The court also concluded that Foret's own claim of legal malpractice had prescribed.

13. Misconduct By Other Lawyers

Estate of Spencer v. Gavin

946 A.2d 1051 (N.J. Super. 2008)

Attorney Daniel Gavin acted as an executor and administrator of three Spencer family estates. He stole $400,000 or more from those estates, dissipated the funds, and died of cancer. A substitute administrator for one of the estates found out about the thieving, and all three estates sued Gavin's estate and several other defendants, including attorney Dean Averna.

Averna was one of several lawyers who rented office space from Gavin. He had done a limited amount of work for one of the estates. The plaintiffs claimed that he had been Gavin's de facto partner.

The lower court granted summary judgment for Averna, concluding that the plaintiffs could not show any breach of a duty by Averna, because there had been no attorney-client relationship between the estates and Averna. The appellate court reversed.

During the relevant time frame, Gavin had often turned to Averna for assistance with his client matters. Sometimes Gavin had referred matters to him. Sometimes he had asked Averna to perform discrete tasks on client files. According to the opinion in the case,

[o]ther attorneys in the building perceived a close working relationship between Averna and Gavin. In her deposition, Plinio [one of the attorneys] recalled that Gavin spent “substantially more” time with Averna than with anyone else in the building. Plinio testified “[i]t was open knowledge ... of all the attorneys [in the building] ... that most of the work was given [by Gavin] to [Averna] and that [Gavin] was in [Averna's] office most of the time and working on most of the files with [Averna] on a regular basis.”
Plinio recalled Averna often going to court on behalf of clients who had originally been represented by Gavin.

According to Plinio, Averna regularly used legal forms that had Gavin's name on them....

It was common knowledge in the building, according to Plinio, that Averna was “slowly taking over [Gavin's] practice.”

946 A.2d at 1056.

There were also rumors in the building that Gavin had been stealing money from the three estates. There was some evidence that Averna had been aware of at least some of the thieving.

However, in entering summary judgment in favor of Averna, the lower court had determined that “Averna, as an attorney, had no duty to report Gavin's misappropriations of client property, even if it were proven that Averna knew about those thefts.” Id. at 1063.

In reversing, the court of appeals concluded, first, that Averna had had an attorney-client relationship with one of the three Spencer estates. This involved work on the establishment of a foundation in accordance with one of the testator’s wills. Averna had argued that he had been representing the foundation itself when he did the work, but the court of appeals observed that, when he had commenced the work, the foundation did not even exist. It also said:

Even if the other two Spencer estates, or for that matter, all three estates, were classified as “non-clients,” our law recognizes that a lawyer may at times owe duties to a third party who is not his or her client....

Here, the Spencer estates all implicitly relied upon Averna to be faithful to their best interests, and to not turn a blind eye if he learned that the executor was plundering estate funds. We have no difficulty, conceptually or otherwise, in finding that Averna had a duty to report such circumstances of wrongdoing if he indeed knew about it.

Id. at 1067. The court went on to state that its conclusion was supported by the close working relationship between Gavin and Averna. And that it was also supported by Rule 8.3 of New Jersey’s Rules of Professional Conduct, part of which the court quoted as follows:

[A] lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

Id. at 1069. The court said:
Applying the precepts of R.P.C. 8.3(a) here, we are satisfied that if Averna had actual knowledge that Gavin was repeatedly siphoning money and property from the plaintiff estates, such an awareness would amount to a serious professional breach that raises “a substantial question as to [Gavin’s] honesty, trustworthiness or fitness as a lawyer.” Ibid. Accordingly, Averna would have had a professional obligation, owed not only to his clients but to the public at large, to bring Gavin’s thefts to light.

... In sum, we hold that an attorney such as Averna who has a close and interdependent business relationship with another lawyer, and who is performing legal work for a common client at that lawyer’s request, has a duty to report that lawyer if he or she develops actual knowledge that the lawyer has been stealing funds from their common client. The motion judge erred, as a matter of law, in rejecting that principle.

Id.

The court remanded for further proceedings related to whether Averna had actual knowledge of the stealing, proximate cause, and damages.

14. Property

a. Funds in Dispute

In re Meisner
11 So. 3d 1096 (La. 2009) (per curiam)

Attorney Meisner was charged with various acts of misconduct. These included making false statements in moving to have a dismissed case reinstated, and failing to segregate settlement funds until a dispute with a finance company was resolved.

The problem with settlement funds took place in connection with the representation of the Irvings in a personal injury lawsuit. While represented by another attorney in the same matter, the Irvings had borrowed money for living expenses from Oceanside Finance, and they had signed an assignment agreement that granted Oceanside a lien in proceeds of the case. Meisner later took on the representation of the Irvings, filed suit in the personal injury matter, and obtained a settlement. Oceanside informed Meisner of their interest in the case proceeds, and sued to intervene in the case, but Meisner distributed the settlement proceeds to the Irvings without protecting Oceanside’s interests.

The hearing committee concluded that Oceanside did not have an interest in the funds “based on prior case law,” and the Disciplinary Board did not find this conclusion to be manifestly erroneous. Nonetheless, the Board found that Meisner had violated the rules with respect to the settlement funds. In the words of the opinion:
Rule 1.15(c) requires that when a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. The board found there was a violation of this rule in Count II because a third party, Oceanside, claimed an interest in the Irvings' settlement funds, but respondent failed to segregate the funds until the dispute was resolved. Regardless of whether Oceanside had an interest in the funds or not, respondent failed to properly handle the situation as Rule 1.15(c) requires. Oceanside filed an intervention and sent letters to respondent, asserting its right in the settlement funds, but respondent failed to acknowledge Oceanside's claim. Instead of segregating the funds pending resolution of Oceanside's alleged interest, as Rule 1.15(c) requires, respondent simply made his own determination and distributed the funds to his clients. Respondent should have deposited the funds in his trust account or the court registry, pending the determination of Oceanside's interest. Based on this reasoning, the board found respondent violated Rule 1.15(c) in Count II.

Id. at 1109. The Louisiana Supreme Court concluded that the factual findings of the hearing committees supported the Disciplinary Board's determinations of rule violation. It ordered a three-year suspension, but deferred two of those years during a probationary period, on account of some mitigating circumstances.

b. Trust Administration

In re Demoruelle

9 So. 3d 94 (La. 2009) (per curiam)

Charles Manuel was injured in an automobile accident that left him a quadriplegic and brain damaged. His mother was appointed curatrix of his estate. She sued the party responsible for the accident. A $1,295,000 structured settlement resulted. Mrs. Manual established a trust to receive the proceeds of the settlement.

Attorney Demoruelle eventually became trustee of the trust. There were problems.

Respondent received ... the final $100,000 settlement payment in January 1996. Instead of depositing the payment into the trust account, he purchased a certificate of deposit in the trust's name. He then used a portion of these funds to repay three loans he had obtained on behalf of the trust. However, the proceeds of one of the

12 The rule is currently set forth in Rule 1.15(e).
loans in the amount of $8,030 ... cannot be accounted for because there is no evidence that this amount was ever deposited into the trust account. Nonetheless, respondent withdrew $8,181.43 from the certificate of deposit in January 1997 to repay the loan. On numerous occasions, respondent also withdrew funds from the certificate of deposit, incurring early withdrawal penalties, and deposited same into the trust account, thus closing out the certificate of deposit in April 1999.

On August 27, 1996, respondent wrote a check from the trust account to the “John E. Demoruelle Campaign” in the amount of $700. This check was issued without Mrs. Manuel's authorization. An independent audit of the trust's bank records also revealed that respondent wrote numerous checks, totaling thousands of dollars, for unknown expenditures between December 1993 and April 2000, the time period for which the auditor was able to obtain records of the trust.

9 So. 3d at 96-97.

The ODC charged Demoruelle with violations of several of the Rules of Professional Conduct, including 1.7 (conflict of interest) and 1.15 (safekeeping property of clients or third parties).

The Louisiana Supreme Court had this to say about Demoruelle’s administration of the trust:

[We] find respondent failed to maintain adequate accounting records for the trust, failed to keep Mrs. Manuel informed about the financial status of the trust, failed to obtain approval of the fee he charged as compensation for his duties as trustee, and allowed his professional judgment to be compromised by the requests of other parties. While each of these conclusions is clearly supported by the record, a few points warrant particular mention. First, this matter is more than a routine case of inadequate accounting and poor trust management. Rather, we are presented with a situation in which respondent's utter failure to maintain records, coupled with his mismanagement of his client's trust, resulted in the unaccountable loss of $8,030 in trust funds. Second, respondent's failure to obtain approval of his fee as trustee was not his only failure with regard to his duties in that capacity. We note that the trust instrument clearly provided that the property of the trust was not to be mortgaged, but nonetheless, respondent did so.

Id. at 105. For misconduct involving the trust, and other misconduct, the court suspended Demoruelle for two years.
15. Bad Supervision

In re Guirard
11 So. 3d 1017 (La. 2009) (per curiam)

Attorneys Guirard and Pittenger were partners in E. Eric Guirard and Associates, a firm with offices in Baton Rouge and New Orleans. The firm’s primary work was in the personal injury area. In 2000, the ODC began investigating the firm’s employment of five “case managers,” all nonlawyers, who assisted in the processing of personal injury claims.

One concern was compensation. The case managers were paid commissions computed as a percentage of the firm’s gross legal fees collected on the cases that the case managers settled. During the investigation, Guirard and Pittenger were advised that the compensation plan appeared to violate the Rules of Professional Conduct. They terminated the compensation plan as of January 2001.

Another concern related to the unauthorized practice of law. According to the opinion of the Louisiana Supreme Court in this case

At respondents' firm, the receptionist typically transferred telephone calls from new prospective clients to the case manager on duty to receive such calls. If the phone call came in after business hours, an answering service paged the duty case manager. The duty case manager spoke to the new prospective client, and decided if the case was one that the firm would be interested in handling. The duty case manager gathered certain information and gave it to one of the law firm's investigators, who in turn met with the prospective client at his or her home and had the prospective client sign an attorney-client contingency fee contract. The investigator also obtained other signed forms from the client, including releases for medical records and employment and wage information, and took photographs, if needed. The investigator returned the signed contract and other information to the law firm's office, and was thereupon paid $50 for the visit. The investigator also received additional compensation if he obtained signed contracts for additional clients while visiting the initial client.

After the signed contract and other information was returned to the law firm, the material was reviewed by either Mr. Guirard or Mr. Pittenger. In most cases the file was then assigned to a case manager, who processed the file pursuant to instructions contained in the law firm's Case Manager Manual. After the client completed medical treatment, the case manager prepared an evaluation of the case on a form used by the firm. The completed form and the case file were forwarded to either Mr. Guirard or Mr. Pittenger, who would approve a high dollar value and a low dollar value on the case for purposes of making a settlement demand. The file was then
returned to the case manager, who would send a demand letter signed by a lawyer. The case manager was responsible for contacting the insurance adjuster and negotiating a settlement. When a settlement was reached, the case manager notified the client, arranged for the client to come to the office to pick up the settlement check, and prepared the settlement disbursement statement. Mr. Guirard typically met with the client to disburse the settlement funds.

11 So. 3d at 1019-1020.

During the ODC's investigation, the attorneys were informed that the case manager system appeared to violate the Rules of Professional Conduct. In 2001, each lawyer in the firm was assigned to supervise one case manager. Later, in early 2004, a single lawyer assumed primary responsibility for supervising all of the case managers. The case manager system was completely abolished in November 2004.

The ODC filed two counts of formal charges against Guirard and Pittenger, claiming that the percentage commissions paid to case managers amounted to improper fee sharing with nonlawyers, in violation of Rules 5.4(a) and 8.4(a) of the Rules of Professional Conduct. It also claimed that the fee sharing created a conflict between the interests of the law firm (especially the case managers) and the clients, in violation of Rule 1.7(b). In the second count, the ODC alleged that the attorneys had employed a “business first” model of law firm operation that resulted in nonlawyer involvement in the unauthorized practice of law, in violation of, among other things, the rules regarding supervision, unauthorized practice of law, and the misconduct.

The lawyers admitted that they had violated the Rules of Professional Conduct, as alleged in the formal charges. In ordering disbarment, the court said:

Respondents delegated the handling of their clients' cases to their nonlawyer staff. This was a systematic practice as part of the “business first” model knowingly employed by respondents. By structuring their law firm in the manner in which they did, respondents harmed their clients, who, as we noted in Sledge, "were deprived of the benefit of a thoughtful, individualized and professional legal analysis of their cases." Respondents then motivated the nonlawyers to settle the clients' claims as quickly as possible in order to collect a paycheck. Of course, these egregious practices profited respondents as well.

Id. at 1030.

16. Covert Tactics

Virginia State Bar Standing Committee on Legal Ethics
Opinion 1845 (2009)
It is standard legal ethics doctrine that lawyers cannot engage in fraud, deceit, or misrepresentation. See Rule 8.4. But questions sometimes arise about whether lawyers can use covert action to catch wrongdoers. In this case, the Virginia ethics committee was asked, hypothetically, whether the Committee on Unauthorized Practice could set up a sting operation to catch a former paralegal who was alleged to have established a business to draft wills and prepare power of attorney documents. The ethics committee said that this would be permissible.

The committee was of the view that unauthorized practice was a criminal offense and that the Committee on Unauthorized Practice is charged with the investigation of unlawful or criminal conduct. Since, in the hypothetical, the only “advertising” that was being done by the former paralegal was by word of mouth, the committee thought that the only viable way to expose the misconduct was to have an investigator pose as a prospective client. It drew support from previous opinions permitting lawyers who do undercover work for intelligence agencies to engage in covert activities, as well as cases in which lawyers use “testers” to discover housing discrimination problems.

17. Client Capacity

In re Eugster
209 P.3d 435 (Wash. 2009)

At age 87, Marion Stead hired attorney Stephen Eugster in June 2004 when she became convinced that her son Roger was mishandling her funds. She asked Eugster to “short circuit” her son’s control over her affairs and to retrieve some items of property.

Eugster had Mrs. Stead revise her estate planning scheme by creating a revocable living trust and recommending that she be her own trustee. Mrs. Stead was named the trustee with Eugster serving as successor trustee. To protect Mrs. Stead, consistent with the existing testamentary trust and consistent with her desire that Roger not control her finances, Eugster was given power of attorney.

Eugster made preparations to sell the Stead family home. He located the items of property that Mrs. Stead had been concerned about, but he assured her by letter that Roger was keeping them safe. He also wrote Mrs. Stead to assure her of Roger’s good intentions toward her and recommended Roger resume control over her affairs.

In September 2004, Mrs. Stead received another letter from Eugster, suggesting that they meet and include Roger in the meeting. Mrs. Stead was not happy with this, and she sought the advice of another attorney, Andrew Braff, who later testified that Mrs. Stead wanted to know whether Eugster was representing her or Roger. Braff wrote Eugster, notifying him that Braff now represented Mrs. Stead and explicitly revoking Eugster’s power of attorney. Eugster responded on September 13, 2004, in a letter that stated:
I do not believe that Marion R. Stead is competent. A guardianship should be established for her person and her estate or at least her estate. Please be advised that I do not recognize that you have been retained to represent her or that the revocation of power of attorney is effective.

209 P.3d at 440.

Braff sent a letter to Eugster informing him that his "services as Marion Stead's attorney are terminated, and Mrs. Stead wants her files forwarded to this office." *Id.* Braff also asked Eugster to inform him of any changes in Mrs. Stead’s competence since the execution of her trust, where witnesses testified she was of sound mind.

Eugster petitioned the court to appoint a guardian for Mrs. Stead. He filed the guardianship action pursuant to former Rule 1.13, which provided, in part, that “[w]hen the lawyer reasonably believes that the client cannot adequately act in the client's own interest, a lawyer may seek the appointment of a guardian or take other protective action with respect to a client.”

The petition for guardianship listed Mrs. Stead's personal and financial information; it characterized Mrs. Stead as unable to manage her person and estate; and stated that she had difficulty monitoring her medications, investments, and expenses. It also described Mrs. Stead as "delusional" because she believed "her son Roger Samuels is somehow out to take advantage of her when this is certainly not the case." *Id.*

Eugster had not conducted any formal investigation into Mrs. Stead's medical or psychological state prior to filing the petition. There was no evidence that had had consulted with Mrs. Stead's healthcare providers. Three months before he filed the petition for appointment of a guardian for Mrs. Stead, Eugster had had Mrs. Stead sign a new trust, powers of attorney, and a will. The last time that either Eugster or Roger had personally talked to Mrs. Stead was on August 3, 2004, nearly two months before filing the petition.

On October 19, 2004, Eugster appeared before a judge seeking appointment of a guardian. He assured the court that he had reviewed the ethical issues involved with seeking to appoint a guardian. The court asked him to provide a brief on the ethics issues. Eugster did not supply a brief. Instead, he declined his power of attorney. On October 26, 2004, a guardian ad litem appointed to evaluate Mrs. Stead concluded that she was not suffering from any incapacity and was capable of handling her own affairs. Eugster withdrew his signature from the guardianship petition.

Braff filed a complaint against Eugster with the Washington disciplinary authorities. A hearing officer concluded, among other things, that Eugster had acted contrary to his client's instructions; had failed to
return his client’s file; had improperly revealed her confidences; had used confidential information to his client’s disadvantage; had filed the petition for guardianship without making a reasonable inquiry about his client’s mental condition; and had forced his client to incur $13,500 to contest the guardianship. The hearing officer recommended disbarment. The disciplinary board concurred.

Eugster challenged the conclusions of the hearing officer and the board, but the Washington Supreme Court said that they were supported by substantial evidence. It said that

Eugster acted knowingly and with intent with respect to the consequences when he refused to turn over his client’s files and important papers as requested and when he filed a guardianship petition to have his client or former client declared incompetent. In so doing he violated seven ethical duties causing actual and potential harm to his client and the profession.

*Id.* at 452. The court also observed that “Eugster fails to explain why his epiphany that his client was incompetent seems to have occurred on the very day he discovered that she had retained new counsel and wanted to discharge him.” *Id.* It ordered an 18 month suspension. It also ordered Eugster to pay restitution of $13,500. Several justices dissented, on the ground that Eugster should have been disbarred.

18. Law Professor Misconduct

**Iowa Supreme Court Attorney Disciplinary Board v. Kress**

747 N.W.2d 530 (Iowa 2008)

A law professor at the University of Iowa College of Law ran into trouble in connection with his student evaluations. Professor Kress believed that he had been unfairly denied a faculty chair. He knew that student evaluations were a factor in the making of chair appointments. There were some irregularities in connection with the evaluations in his health law seminar. An investigation revealed that three neutral or unfavorable evaluations had been discarded and replaced with favorable ones. Two other evaluations forms had been altered to raise the scores. Because there were only ten students in the seminar, the changes significantly altered the actual results. The composite score went from a 2.86 to a 4.86. This was a very high score. Kress resigned, after he irregularities had come to light.

Disciplinary proceedings followed. Professor Kress was charged with violations of DR1-102(A)(4) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation) and DR 1-102(A)(6) (a lawyer shall not engage in any other conduct that

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13 So in the Westlaw version of the case. Perhaps the court meant to use the word “several” here.
adversely reflects on the fitness to practice law) of the Iowa Code of Professional Responsibility for Lawyers.

In the disciplinary hearing, there was considerable evidence that Kress had been suffering from some serious physical and psychological problems. For example,

> [a]t the hearing, Kress admitted in light of the evidence that he must have tampered with the evaluations. Kress asserted, however, that at the time he suffered from mental and physical illnesses that excused or mitigated his conduct.

He told the Commission that he believed that conspirators had succeeded in sending rays into the students' minds, changing their neurons, and altering their answers on the evaluations. Kress further testified that in light of the mind-changing rays, he believed that it was only fair for him to change the evaluations back, so they would be correct.

Kress believed he was confronted with a matter of life or death. He hallucinated about being in prison, where a medieval jury was laughing at him for failing to save the world from the parade of horribles that was coming. Changing the evaluations thus was transformed from a personal matter to a universal struggle between good and evil.

After recounting this delusionary experience, Kress maintained that he had no recollection of actually altering the evaluations. He did recall checking his blood sugar in his office at some time, which he asserts yielded a score of 565, the highest level Kress had ever personally recorded.

747 N.W.2d 530 at 535. There was also contrary testimony. For example, the Board submitted a report by Dr. Anna Lembke, a psychiatrist in the Department of Psychiatry and Behavioral Sciences at the Stanford University School of Medicine. While conceding that delirium was plausible, Lembke opined that it was “not probable that the incident in question was due to delirium.” [Id.]

The court was of the view that the professor’s conduct had been intentional, though not criminal. It thought that Kress had experienced “an episode of mental health instability, along with poorly controlled diabetes,” and that “[t]hese conditions undoubtedly clouded his judgment.” Id. at 541. It decided to sanction Kress with an indefinite suspension, with no possibility of reinstatement to the practice of law for three months. And, as a condition to reinstatement, he had to undergo a mental and physical examination.