March 18, 2015 Inn of Court Meeting – Difficult Clients CLE

Outline of Activities for the Evening

1. A member of the pupilage team will be seated at each of your tables.

2. Each dinner table will select a spokesperson

3. Each dinner table will be given two fact patterns to discuss:

   a. The first fact pattern will be discussed at every table ("Issue 1")

   b. The second fact pattern will be one of three different fact patterns. ("Issue 2(a)"; "Issue 2(b)" or Issue 2(c)") as selected by the pupilage team member at your table.

   *The pupilage team member will help facilitate discussion, help spot issues, etc.

3. After your table has finished its discussion, we will have the spokesperson from each table present a brief version of the fact pattern it was presented with and the issues that they discussed related to the fact pattern. We will then open the conversation up to the Inn at large to see if anyone spotted any other issues or had something further to contribute to the conversation [insert good "war story" here].

Issue 1: Overarching Fact Pattern to be discussed by all tables

Law Firm has 5 partners and 10 associates and is the leading foreclosure defense firm in the city. The attorneys in the Firm are diverse, and include men, women, African Americans, Latinos, Christians, Jews and Muslims. A member of the Aryan Brotherhood (AB) asks Law Firm to represent him in the threatened foreclosure of his residence. The Aryan Brotherhood uses the residence as its local office and will be paying the Firm's bills.

Round 1: Should the Firm take the representation? What issues are presented? Legal, moral, ethical, practical?

Round 2: What about if a member of the firm is against taking the case? Does it matter if it is a partner or associate? If they threaten to quit if the business comes in for moral reasons? If the person who threatens to quit has the firm's largest book of business?

Supporting Materials for Overarching Fact Pattern

DePaul Journal for Social Justice
Fall, 2012

Article

*1 THE ETHICS OF CLIENT SELECTION: A MORAL JUSTIFICATION FOR REPRESENTING UNPOPULAR CLIENTS

Tchia (Tia) Shachar [FNa1]

Introduction

Lawyers fulfill a unique and indispensable role in a democratic society. Albeit the obvious consensus in this matter, lawyers who take on the task of representing **unpopular** or unorthodox **clients** and causes are frequently the subject of heated debates and controversies. [FN1] At one end of the spectrum, are those who vigorously assert that representing the 'man-in-trouble' at his worst time is the highlight of the legal profession, and its source of pride. On the other end, are those who preach for moral accountability and vigorously maintain that there is nothing noble in dedicating one's knowledge, skills and scarce resources for the sake of helping reprehensible people or advancing harmful or immoral goals. [FN2]

*2 Such debates and controversies usually produce a destructive 'chilling effect' on the availability of counsel. [FN3] **Unpopular** or unorthodox **clients**, which are often already situated at the oppressed and neglected margins of society, are thus prone to experience much greater difficulties in implementing the constitutional right to representation and finding a lawyer who will agree to represent them.

Notwithstanding the core principle of democracy, which provides that every person has an equal opportunity to competent representation, most lawyers, at some point in their careers, find themselves being forced to publicly justify their decision to represent certain clients. Common examples include the criminal-defense lawyer, who so (too) often confronts the question how can he sleeps at night after representing notorious criminals - murderers, rapists, child molesters and the like; the civil-case attorney, who often confronts the question how can he look himself in the mirror after zealously representing evil-doers who use the law in order to advance goals which harm society; or the civil-rights attorney, who frequently confronts the question how can he silence his conscience after enlisting to his aid the Constitution or other fundamental norms so as to promote morally wrong causes and ideologies while society is overwhelmed with 'real' and pressing injustices.

*3 From a philosophical point of view, criticism or praise of those lawyers who undertake the task of representing

unpopular clients or causes stems from the unique nature of the lawyer-**client** relationship. [FN4] At the core of a lawyer's role lies the action of representation. [FN5] In essence, this means that a lawyer's consent to represent a certain individual supposedly obligates the lawyer to enter the client's shoes, adopt the client's problem as if it was his own; and from that inside and intimate stance, do his best in order to provide an optimal solution for the client, within the boundaries of law and **ethics**.

Hence, the conception of the lawyer's role differs from the conception of the roles society assigns to all other professionals. For example, a physician neither enters his patient's shoes at any stage of the treatment, nor takes upon himself the patient's illness as if it was his own; and it is from that outside and remote stance that he aspires to implement his medical skills to aid the patient. A lawyer, unlike a physician or other professionals, has a distinct and unique role in a way that only he 'becomes one' with the client, as a direct result of the action of representation. Hence, it is the lawyer - and not the physician or any other professional - who is prone to attract public attention due to decisions regarding the choice of clients.

The unique nature of the lawyer-client relationship raises the question whether the action of representation, which distinguishes the lawyer's role from the roles of all other professionals, necessarily creates an unbreakable correlation between the personal morality of the lawyer, and the moral identity of the individuals or causes he chooses to represent. Presented in another way, the question is whether a good lawyer, who zealously ***4** adheres to the ethical standards of professional responsibility regarding representation of **unpopular clients** or causes, can also be a good person, worthy of respect and approbation. Essentially, at the center of our inquiry stands the age-old universal controversy, regarding the nature of the moral clash between the norms of professional morality ('role morality') on the one hand, and the norms of personal and common morality, on the other hand.

This article will present the three prominent moral theories, which aspire to provide a solution to the controversy. Though profound and ingenious theories, I shall argue that they are nonetheless incapable of providing an adequate solution, because they all possess two identical logical impediments. The first impediment results from the theories' aspiration to produce an ultimate analytical explanation, regarding the moral essence of the lawyer as a role agent [FN6] within the legal system; [FN7] however, producing such a unified explanation in pluralist-democratic societies is neither possible nor desired, in light of the highly complex nature of the action of representation. Secondly, in a futile effort to decode the ultimate moral essence of lawyering, all theories destroy - either deliberately or inadvertently - the essential analytical dichotomy between the lawyer's professional and private spheres of life; [FN8] thus, they all eventually rely on such analytical***5** frameworks which de-facto prevent a real possibility to create a clear-cut dichotomy between the lawyer as a professional and the lawyer as a private person.

As I shall argue, due to these interconnected impediments, none of the available moral theories has ever been able to capture the public's heart or gain extensive support within the legal community. This has resulted in a dangerously growing trend to avoid an informed and tolerant debate regarding the moral essence of lawyering, and instead place judgment on lawyers (either favorably or unfavorably) on the basis of haphazard impulses and demagogic assertions.

Against this background, the purpose of this essay is not to offer yet another distinctive theory regarding the moral essence of the lawyer's role, but rather to develop a consensual macro theory; one that acknowledges diversity but nevertheless provides a preliminary neutral, pragmatic and coherent analytical infrastructure upon which each indi-

vidual can build his own ideological sub-theory in a thoughtful, calculated, and tolerant manner. Since the common denominator of all available theories is the presupposition of the lawyer as an agent whose function is to enhance the client's autonomy, Part III of this essay ***6** asserts that the focal point of such a consensual macro theory should be the conception of the lawyer as a mere representative of the client's rights and liberties under the law, rather than of the client as a person - that is, the conception that although the action of representation essentially compels the lawyer to 'become one' with the client, it is in fact not unification with the client as a person, but rather with the client's rights and liberties under the law. Only such publically accepted macro theory, which does not aspire to impose a singular explanation for performing the action of representation, and has an analytical framework that explicitly supports a dichotomy between professional morality and personal and common morality, can provide adequate solution to many of the ethical dilemmas that occupy the profession nowadays; prominent of which is the problem of uninformed criticism and vilification of lawyers who carry out the complex task of representing **unpopular clients** or causes.

II. Prominent Theories of Legal **Ethics** Regarding the Essence of the Action of Representation

A. Advocacy in an Adversary System

The philosophical premise of the adversarial theory of representation is both client-centered and process-oriented. [FN9] The lawyer is perceived as an agent whose function is to keenly maximize the client's autonomy under the law and consequently, guarantee the revelation of legal truth. To the extent the roles of both parties to the conflict - through their lawyers - ***7** are not fully played, the court's ability to reveal the truth respectively decreases. [FN10]

In order to fully play out this role, a lawyer must exhibit a categorical readiness to act on an absolute moral belief that his role mandates keen partisanship and an unconditional commitment to an aggressive and zealous pursuit of the client's objectives, within the boundaries of law and **ethics**. [FN11] It is based on this analytical presupposition that the lawyer is exempt from moral responsibility for the societal consequences of his professional activities. [FN12]

The adversarial theory of representation promotes the notion of equal and skilled representation across the board and assigns special importance to the representation of those who are unpopular and indigent. It urges lawyers to not lightly seek to decline representation of **unpopular clients**; and once the lawyer-**client** relationship has been contracted, to vigorously (but in a legal and ethical manner) pursue the **client's** objectives with no regard to personal or communal moral values. Despite the adversarial theory's decisive ideological narrative, it ultimately fails to create a moral dichotomy between the lawyer as a professional and the lawyer as a private person. Its practical failure is evident in everyday life, as illustrated when lawyers representing **unpopular clients** or causes are often subjected to harsh criticism, even by the most ardent adherents to the adversarial model, who perceive the moral distinction between actor and principal as artificial and unreal. [FN13] This perception greatly hinders***8** the de-facto implementation of the notion of equal representation for all. In certain countries which generally adhere to the adversarial theory of representation, such as the State of Israel, the rules of legal **ethics** simply award lawyers with full normative discretion to choose between prospective clients with no instructional guidance whatsoever as to its proper implementation. [FN14] In contrast, other countries possess more comprehensive codes of conduct, which do take great pains (at least in the narrative aspect) in order to emphasize the special importance of representing **unpopular clients** and causes as a means of ensuring equal access to legal services. In the United States, for example, the ABA Model Rules of Professional Conduct as well as the ABA Model Code of Professional Responsibility state that while the lawyer is

ordinarily at liberty to choose between prospective **clients**, he is nonetheless expected to exercise thoughtful discretion and not lightly decline proffered employment from **unpopular** people who are prone to experience significant difficulties in attaining competent representation. [FN15] Similarly, in England the Solicitors Code of Conduct (2007) granted solicitors the liberty to choose clients but nonetheless stated that it is impermissible to decline proffered employment on the grounds that the nature of the case or the conduct and beliefs of the prospective clients are unacceptable to the solicitor or to any section of the public. However, the 2011 revised Code of Conduct has adopted an 'outcomes-focused' approach which stripped out a lot of the detail of the previous Code. The new Code now grants solicitors the liberty to choose their clients with no significant instructional guidance. [FN16] The Barristers' ***9** Code of Conduct is significantly more extreme in that regard, since it actually imposes obligation on Barristers to represent all comers. [FN17]

At the end of the day, the inconsistent implementation of the adversarial theory of representation leads us to the inevitable conclusion that it ultimately fails to create a viable and realistic moral dichotomy between the lawyer as a professional and the lawyer as a private person. This failure stems from an analytical inconsistency, which involves two of the underlying arguments of the theory: the argument in favor of moral nonaccountability [FN18] is supposed to somehow co-exist with the argument that lawyers ought to be free to pick and choose their clients as they please, given the intimacy accorded to the action of legal representation. The latter argument, however, stands in direct logical contradiction to the former, and hence undermines the formation of a compelling dichotomy between the lawyer's professional and private spheres of life.

***10** Discretion to choose between prospective clients - i.e., to choose with whom to enter into an intimate relationship - inherently expresses personal moral choice, which indicates the values of the choosing lawyer, and thus cannot co-exist with the presumption of moral nonaccountability. [FN19] A professional who truly perceives himself as an agent, whose function is to maximize client's autonomy within the adversary system, ought to possess an intrinsic moral obligation to accept every prospective client who is in need for his services, unless objective limitations (time, resources, conflict of interest, etc.) prevent him from doing so. [FN20] He may not decline one potential client and accept another merely due to personal preferences, since this creates a de-facto hierarchy between people whose rights are more or less important to the lawyer; and thus imposes moral accountability.

Indeed, for this reason some common law countries do impose on lawyers a disciplinary duty of representation, known as the 'Cab-Rank Rule'. In England, for example, Barristers are obligated to represent every prospective client in any legal field in which they profess to practice. [FN21] The duty of representation, however, has a number of broad exceptions which either mandate or allow the Barrister to deny proffered employment for various reasons, such as insufficient time, improper fee, etc. [FN22] In practice, the 'Cab-Rank Rule' has been proven ineffective due to its broad exceptions, which can be used in an excessive and ***11** manipulative manner by Barristers who uphold the lawyer's freedom to choose which clients to represent. This, of course, creates in England a de-facto dilemma of moral accountability, which is similar in its essence to the dilemma which de-jure exists in the United States and Israel. [FN23]

Both the Model Rules and Model Code also provide a striking example to the above-mentioned analytical failure, when on the one hand they explicitly adopt the conception of moral nonaccountability [FN24] and encourage lawyers to demonstrate professional responsibility by representing **unpopular clients** or causes; [FN25] but also concurrently

acknowledge the fact that lawyers may find the **client** or the cause so repugnant as to be likely to impair their ability to competently represent the **client**. [FN26] This normative connection between the professional and private spheres proves once again that even adherence to the adversarial theory of representation cannot realistically result in complete isolation of the intimate action of representation from the private moral spheres of the lawyer.

***12** B. A Lawyer's 'Mind-Set, Heart-Set, Soul-Set'

As one can understand from its name, the philosophical stance of this theory - which was offered by Professor Barbara Allen Babcock - is one of personality. At its core stands the notion that representation of **unpopular clients** or causes is a task not meant for everybody. Only a special class of lawyers, with a peculiar 'mind-set, heart-set, soul-set,' is capable of reaching such a high degree of devotion and selflessness, that enables reconciliation of role with self. [FN27]

While a lawyer's choice to represent popular or normative **clients** or causes is not morally questionable, his decision to represent **unpopular clients** is bound to spur a powerful moral clash between professional norms on the one hand, and individual and societal norms on the other hand. It is a moral clash that imposes on the lawyer substantial difficulties in both a professional and personal [FN28] mode; and thus not everyone is equipped to deal with it. Under this theory, only lawyers whose mind, ***13** heart, and soul are unconditionally and selflessly devoted to the ultimate goal of the legal profession - that is, enhancement of **client's** autonomy - are apt to take on the unrewarding task of representing the **reprehensible**. [FN29]

The 'lawyer's personality' theory, like the 'adversarial theory of representation', is founded on an analytical framework that impedes the possibility of creating moral dichotomy between the lawyer as a professional and the lawyer as a private person. Its underlying assumption, that the choice of clients testifies on the lawyer's personality, utterly destroys the possibility of creating moral detachment between the professional and the personal. Endorsement of the conception of the lawyer-client relationship as one, which involves interaction between the sphere of duty and the private spheres of life, inherently suggests an intense involvement of personal moral values in the professional process of client selection. Thus, instead of reinforcing the desired notion of the choice of clients as a moral-***14** neutral decision, the 'lawyer's personality' theory establishes an opposite notion of client selection as an expression of one's personality. The latter imposes on the lawyer moral and public accountability for his choice of clients, and hence exposes him to public criticism; albeit the fact that the theory's stated goal is to prevent, or at least mitigate, such criticism.

C. The Lawyer as Friend

Over thirty years ago Professor Charles Fried offered a somewhat subversive, but incisive theory, which equated the moral foundations of the lawyer-client relationship to that of friendship. [FN30] Professor Fried suggested that the lawyer is to be perceived as a professional who, by virtue of the lawyer-client relationship, fulfills the role of the client's friend. Professor Fried further explained that this friendship is a limited-purpose friendship, applicable solely to the legal sphere. His theory rests on the premise that the lawyer, as a 'legal friend', enters into a personal relation with the client, adopts his interests as if they were his own, and thus expresses an intense identification with the client's goals; similar to that of a natural friend. [FN31]

Professor Fried openly acknowledged the inherent difficulties of his theory, [FN32] but strongly maintained that the true moral foundations*15 of the lawyer's role lie in the analogy to natural friendship. Hence follows the conclusion that the lawyer has moral liberty to choose his clients - i.e., his friends - as he pleases, and not according to the utilitarian-communitarian approach, which focuses on where the greatest need for his particular legal talent lies. [FN33] Similarly, follows the conclusion that within the boundaries of law and **ethics**, the lawyer is morally entitled (though not always obligated) to further the interests of the client even through means which are not consonant with the public interest. [FN34]

At the core of Professor Fried's theory is the assumption that the lawyer's role is designed to enhance client's autonomy. [FN35] However, it does so through an analytical framework that not only impedes the possibility of creating moral dichotomy between the lawyer as a professional and the lawyer as a private person, but in fact firmly and explicitly establishes the lawyer-client relationship as one which relies on a personal relation of friendship. [FN36] Perceiving the action of representation as a form of friendship indicates the existence of an inherent correlation between the moral choices of the lawyer as a professional and his moral choices as a private person. Specifically, it indicates that the choice of clients parallels the choice of friends, and that the choice of means parallels the manner one chooses to treat his friends. The fact that the lawyer-client friendship is limited in scope to the purview of the legal sphere cannot by itself suffice to create a genuine moral detachment between the professional and the personal since all of Professor Fried's moral-operative conclusions with regard to legal friendship are directly and unequivocally*16 derived from natural friendship. [FN37] The 'lawyer as friend' theory firmly reinforces the notion that the lawyer (as a role agent) favors his chosen clients, just like he favors his chosen friends (as a private person). This notion of selective favoring undermines the possibility to establish a viable separation between the lawyer's professional and private spheres of life. [FN38] The failure to establish a genuine analytical moral detachment not only thwarts the theory's core-purpose of immunizing the lawyer from public scrutiny due to choices of clients and means; but ironically, exposes the lawyer to such scrutiny even more.

III. The Essence of Representation: Forming a Consensual Macro Conception of the Lawyer's Role in Society

A consensual agreement regarding the exact moral essence of the lawyer's role in a pluralistic-democratic society can, and perhaps should, never be achieved. In the context of client selection, as well as in various contexts throughout the lawyer-client relationship, the action of representation often spurs a triple-layered moral clash, [FN39] which ultimately prevents the formation of such a consensus: the first layer - role morality - comprises of the lawyer's responsibility toward the client to provide diligent and zealous representation within the bounds of the law; the second layer - personal morality - comprises of the lawyer's responsibility toward himself, since enhancement of client's autonomy surely cannot come at the expense of the denial of it to the lawyer; and the third layer - common morality - comprises of the lawyer's responsibility toward society and the court, since many of the decisions in his professional capacity may well affect*17 collective good, as well as the manner society perceives his designated role as an officer of the court.

Within the framework of this triple-layered clash, the organized bar as well as the individual lawyer are often required to provide feasible solutions to hardly solvable moral dilemmas. Additionally, because the canons of professional responsibility usually provide only minimal guidance, the individual lawyer possesses an overwhelmingly

broad discretion to deal with the dilemmas. [FN40] It is not surprising, then, that every legal theory of moral philosophy has aspired to fulfill the normative void by producing the one ultimate analytical explanation of the essence of the lawyer's role.

Though profound and ingenious, none of these theories has ever gained wide public support because they are perceived as portraying the lawyer-client relationship in implausible concepts. Indeed, all theories share an identical common denominator, which ironically is also their common infirmity: an uncompromised aspiration to form an ultimate conception of the moral essence of the lawyer's role. However, reaching a consensus as to the morality of the lawyer as a role agent is neither possible nor desired in multi-cultural societies, in light of the exceptional nature of the action of representation, which puts the lawyer in a unique and intimate stance and essentially compels him to 'become one' with the chosen client.

***18** Lawyering, by its nature, often entails making complex moral decisions. While certain professionals may use the 'lawyer as friend' theory as a guide, others may adhere to the 'lawyer's personality' theory, or the 'adversarial theory of representation', or any other moral theory for that matter. One way or another, role agents are first and foremost autonomous and minded human beings, and hence every professional decision they make is subjectively and ideologically motivated. Even an informed resolution to deny all principled theories and base every decision on earthy ad hoc considerations of self-interest (money, publicity, reputation, etc.) is an equally ideological-motivated decision (though generally not highly acclaimed).

It is therefore evident that the prevalent aspiration to form a consensual conception of role morality is objectively impractical. [FN41] Plurality of opinions shall always exist in the field of legal **ethics**. [FN42] How can it not, when accommodation between competing moral values of role, self, and community is so frequently required within the framework of such an intimate relationship?

Nevertheless, the absence of a consensual moral theory of lawyering is not to be construed as leaving the decisions concerning the dilemmas arising from the triple-layered moral clash solely to the realm of haphazard individual discretion. Although the theories vary from one another to a lesser or greater degree, ***19** they are all founded on the elementary perception that the function of the lawyer as an agent is to enhance client's autonomy.

Relying on that basic characteristic, each theory attempts to decode the ultimate moral justification (legal friendship, peculiar personality, adversary advocacy, etc.) for performing that exceptional function. However, as noted above, by doing so it inevitably destroys - either deliberately or inadvertently - the analytical dichotomy between the lawyer's professional and private spheres of life, and thus critically impairs its ability to provide publically acceptable solutions to the many ethical dilemmas encountered by the lawyer.

The consensus around the fundamental perception that the lawyer is an agent who enhances the client's autonomy should therefore be the focal point of a macro theory of lawyering. This would shift the focus from debating the merits of various sub-theories whose goal is to promote particular justifications for performing the action of legal representation, to the action of representation itself.

Under such a macro theory, it would be well established that enhancement of client's autonomy means that the

lawyer is, in effect, an extension of the legal personality of the client. [FN43] Additionally, though the action of representation essentially compels the lawyer to 'become one' with the client, it is not unification with the client as a person, but rather with the client's rights and liberties under the law. Hence, for example, a lawyer's choice to represent the unpopular 'citizen x', who is accused of a heinous murder, expresses endorsement of x's rights and liberties (x's legal personality), but not of x as a person (x's moral personality). So is the lawyer's decision to represent the well-liked 'citizen y', who has fallen victim to an outrageous injustice; or any other individual-in-need for that matter.

The lawyer's decision to represent a certain client would always be perceived as a decision which is based on his capacity as ***20** a legal practitioner, and hence the endorsement entailed in the selection process only extends to the chosen client's legal personality: that is, endorsement of the client's rights to due process and lawful treatment by law-enforcement authorities, and acknowledgement of the importance of aiding all individuals to overcome procedural and bureaucratic obstacles in order to be able to effectively realize their privileges under the law.

Endorsement of the client's moral personality may well exist also, but it cannot be logically deduced from the selection process in any way since the personal spheres of life lie outside the purview of the lawyer's designated role. Both a lawyer who endorses the client's moral personality and a lawyer who resents or is apathetic to the client's moral personality fulfill an identical professional function as role agents; however, while the latter limits his involvement with the client solely to the professional sphere, the former also becomes the client's personal friend (not a legal friend) in a way that is entirely disconnected from his professional role. In other words, in those cases where the choice of clients is also accompanied by the lawyer's endorsement of the client's moral personality, then the lawyer crosses the professional boundary into the personal spheres of life. And though this cross of boundaries does not constitute a breach of the ethical code of conduct, it illuminates the clear-cut separation between the professional and private spheres.

Therefore, according to the macro theory of representation, there is no valid logical basis for criticizing the lawyer due to his choice of clients; rather, public criticism may only be aimed at the person (who so happens to be a legal practitioner) due to his personal choice of friends. And the validity of such criticism is, of course, not derived from the professional sphere but rather solely from the personal and societal ones, since it is in no way different from criticism that any of us may be exposed to from family members or friends who do not approve of our personal choices in life. Drawing such a clear-cut distinction between the lawyer's professional and private capacities ensures a pragmatic ***21** public conception of neutrality; and more importantly, it ensures public understanding of the need to demonstrate civic responsibility, tolerance, and restraint similar to those that we have become accustomed to grant one another in everyday life.

Conclusion

This essay has sought to advance a consensual moral conception of lawyering as representation of rights and liberties, rather than of people. Forming such a consensual macro conception has vital importance both institutionally and practically.

From an institutional level, it is consonant with all sub-theories because it avoids the futile effort to find one ultimate justification for performing the action of representation, and instead concentrates on developing a basic

ethical infrastructure, which directly ensues from the moral essence of the action of representation itself.

From a practical standpoint, this conception guarantees a coherent and clear-cut analytical dichotomy between the lawyer as a professional and the lawyer as a private person, and thus provides a workable ethical framework for resolving the various ethical dilemmas that are constantly entailed in lawyering.

The general starting point in each case is, therefore, the advancement of a neutral conception of the moral essence of lawyering; a conception that acknowledges multi-cultural diversity and accordingly does not aspire to impose one particular justification for performing the action of representation. It is a conception that allows infusion of individual-tailored justifications, but nonetheless ensures that the incorporation of such justifications will be done thoughtfully and after careful consideration of the lawyer's role as a representative of rights and liberties, rather than of people. The advantage of developing a simplified and pragmatic macro theory of lawyering lies in its ability to provide a neutral, fundamental infrastructure upon which each individual will be then able to build his own ideological conception***22** in a thoughtful, calculated, and tolerant manner; rather than as a result of haphazard impulses or ephemeral demagogic trends.

I argue that an important aspect missing from the public discourse on legal **ethics** nowadays is not profound theories or incisive moral observations; those are found in abundance. Rather, what is missing is a widespread willingness of professionals and laymen alike to be comparatively acquainted with prevalent theories, assimilate their principles, and being able to draw thoughtful insights and conclusions.

A publically accepted macro theory could certainly facilitate the development of an informed discussion, and thus encourage all those who wish to take part in the dialogue to demonstrate civic responsibility and thoughtfully decide whether or not to adopt sub-theories that support criticism of lawyers due to the personal (rather than legal) identity of their chosen clients. The responsibility to act on calculated reason, as is well known, weakens the power of the demagogue and strengthens the communal respect toward the professional choices that each of us makes.

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[FN1]. The concept of ' **unpopular**' or 'unorthodox' **client** cannot be exhaustively defined, since it is an amorphous amalgam of individual as well as collective cultural values. For the purposes of this essay, this concept will be roughly defined as to include all cases which attract negative public reaction (in contrast to public sympathy or indifference) either due to the client's deeds or ideology. See Charles W. Wolfram, A Lawyer's Duty to Represent Clients, Repugnant and Otherwise, in The Good Lawyer: Lawyers' Roles and Lawyers' **Ethics** 214, 225-226 (David J. Luban ed., 1983).

[FN2]. For a comprehensive introduction of the moral debate regarding client selection see, e.g., Monroe H. Freedman, Must You Be the Devil's Advocate? Legal Times (August 23, 1993) in Nathan M. Crystal, Professional Responsibility - Problems of Practice and the Profession 630 (1996); Michael E. Tigar, Defending 74 Tex. L. Rev. 101 (1995); Abe Fortas, Thurman Arnold and the Theatre of the Law, 79 Yale L.J. 988 (1970); Murray L. Schwartz, The

Professionalism and Accountability of Lawyers, 66 Cal. L. Rev. 669, 693-695 (1978); W. Bradley Wendel, Institutional and Individual Justification in Legal **Ethics**: The Problem of Client Selection, 34 Hofstra L. Rev. 987 (2006).

[FN3]. The cold war period provides us a striking example to that effect. Lawyers who agreed to represent suspected communists were vigorously persecuted by both the general public and the American Bar Association. The subsequent reluctance of most lawyers to represent such clients was, thus, an inevitable result. See: Jerold S. Auerbach, Unequal Justice: Lawyers and Social Change in Modern America 231-262 (1977).

[FN4]. Id. See also David Luban, Reason and Passion in Legal **Ethics**, 51 Stan. L. Rev. 873 (1999).

[FN5]. Gerald J. Postema, Moral Responsibility in Professional **Ethics**, 55 N.Y.U. L. Rev. 63, 76-77 (1980); William H. Simon, The Ideology of Advocacy: Procedural Justice and Professional **Ethics**, 1978 Wis. L. Rev. 29, 37; Charles P. Curtis, The **Ethics** of Advocacy, 4 Stan. L. Rev. 3, 6 (1951).

[FN6]. The phrase 'role agent' refers to the function assigned to the lawyer within the legal system, by virtue of his professional occupation. See e.g., David Luban, Lawyers and Justice: An Ethical Study 138 (1988). The moral essence of the lawyer as a role agent stands at the heart of this essay, and will be discussed in length hereinafter.

[FN7]. Though it would be noted that each theory is not designed to stand in and of itself, but rather has to be fitted into a larger moral theory of professional conduct. A larger theory would determine the precise relations between the lawyer's professional, private and communal spheres of life. But the focus of the present inquiry is only of theories regarding the essence of the action of representation and the manner they ought to reflect on the larger theory.

[FN8]. It shall be noted that the notion of a dichotomy between the lawyer's professional and private spheres of life may be opposed on grounds of the freedom to choose between prospective clients. Those who oppose the said dichotomy may argue that the freedom given to the lawyer, to pick and choose his clients, inevitably reflects on his private morals and assigns moral responsibility to the societal outcomes of the representation. See, e.g., Freedman, Must You Be the Devil's Advocate?, supra note 2, at 632; Note, The New Public Interest Lawyer, 79 Yale L.J. 1069, 1120, 1144 (1970).

As I shall argue in the following chapters, this essay upholds the notion of a dichotomy between the lawyer's professional and private spheres of life. It contends that the choice of clients ought to be perceived as a morally-neutral professional decision which cannot reflect on the lawyer's private morals. The lawyer, as a professional, does not (and cannot) represent the client's deeds or beliefs; he only represents the client's rights and liberties under the law. Hence, the choice of clients may symbolize nothing more than the lawyer's commitment to ensure access to legal services to all the people in need, regardless of the nature of their personality or individual characteristics and causes. See, e.g., Fortas, supra note 2, at 1002; Michael E. Tigar, Setting the Record Straight on the Defense of John Demjanjuk, Legal Times, (September 6, 1993) in Nathan M. Crystal, Professional Responsibility - Problems of Practice and the Profession 634, 636-637 (1996).

[FN9]. See,e.g., Lon L. Fuller & John D. Randall, Professional Responsibility: Report of the Joint Conference, 44 A.B.A. J. 1159 (1958); Richard Wasserstrom, Lawyers as Professionals: Some Moral Issues, 5 Hum. Rts. 1, 9-10 (1975); Deborah L. Rhode, Ethical Perspectives on Legal Practice, 37 Stan. L. Rev. 589, 595-596 (1985); Monroe H.

Freedman, Understanding Lawyers' **Ethics** 13-42 (1990); Leslie Griffin, A Client's Theory of Professionalism, 52 Emory L. Rev. 1087, 1087-1088 (2003).

[FN10]. Id.

[FN11]. Id.

[FN12]. Id.

[FN13]. See, for example, Professor Monroe Freedman's position regarding the moral accountability entailed in the clients selection process: Freedman, Must You Be the Devil's Advocate?, supra note 2; Monroe H. Freedman, The Morality of Lawyering, Legal Times (September 20, 1993) in Nathan M. Crystal, - Problems of Practice and the Profession 637 (1996). Professor Freedman, as noted, is a strong proponent of the adversarial model. See supra note 9.

[FN14]. See Regulations of the Israel Bar Association (Professional **Ethics**) art. 12 (1986).

[FN15]. See Model Rules of Prof'l Conduct R. 1.2 (2012), cmt. 5; and R. 6.2 cmt.1; Model Code of Professional Responsibility EC 2-26- EC 2-29 (1980).

[FN16]. Solicitors Regulation Authority Code of Conduct, Rules 2.01(1) and 11.04(1) (2007); Solicitors Regulation Authority Code of Conduct, ch. 1, Solicitors Regulation Authority Handbook (2011), available at www.sra.org.uk/solicitors/handbook/pdfcentre.page. For a detailed description of the different approach of the 2011 Code, in contrast to the 2007 Code, see the SRA explanatory note 'Outcomes-focused Regulation At a Glance', available at: www.sra.org.uk/solicitors/freedom-in-practice/OFR/ofr-quick-guide.page#ofr-4-2.

[FN17]. See Code of Conduct of the Bar of England and Wales, rules 601-602 (2004), available at: www.barstandardsboard.org.uk/standardsandguidance/codeofconduct; see also infra notes 21-23.

[FN18]. The principle of 'moral nonaccountability' relieves the lawyer from responsibility to the negative outcomes that may ensue from his decision to represent an **unpopular client** or cause. According to this principle, the public has no valid ground to criticize the lawyer or demand that he attempts to justify his choice of clients or causes. This principle has been eloquently described by Professor Murray Schwartz: see Schwartz, supra note 2, at 673-674 ('The advocate might well reply to the 'how-can-you-defend-him' question: I represent him because the system demands that I do so... You may not hold me substantively, professionally, or morally accountable for that behavior... the concept of moral nonaccountability is equivalent to the filing of a demurrer, rather than an answer, to the charge of immorality. In effect, as long as the charge does not allege a violation of the established constraints upon professional behavior, the lawyer is beyond reproof for acting on behalf of the client.').

[FN19]. Freedman, supra note 2, at 632; Freedman, supra note 13, at 638; David Pannick, Advocates 136-140 (1992); David Mellinkoff, The Conscience of a Lawyer 270-271 (1973).

[FN20]. When objective limitations exist, the process of client selection ought to be conducted either chronologically ('first come, first served' basis) or strategically (accepting only clients whose cases bring about fundamental issues with a wide potential effect). See Pannick, supra note 19; Madeleine C. Petrara, Dangerous Identification: Confusing Lawyers with Their Clients, 19 J. Legal Prof. 179, 185-190 (1995).

[FN21]. See Code of Conduct of the Bar of England and Wales, supra note 17, Rules 601-602.

[FN22]. See Code of Conduct of the Bar of England and Wales, id, Rules 603-607.

[FN23]. See Charles W. Wolfram, Modern Legal **Ethics** 572 (1986); John A. Flood, Barristers' Clerks - The Law's Middlemen 80 (1983).

[FN24]. Model Rules of Prof'l Conduct, supra note 15, R. 1.2(b); ABA Model Code of Prof'l Responsibility, supra note 15, EC 7-17.

[FN25]. Model Rules of Prof'l Conduct, supra note 15, R. 6.2; ABA Model Code of Prof'l Responsibility, supra note 15, EC 2-26- EC 2-29.

[FN26]. Model Rules of Prof'l Conduct, supra note 15, R. 6.2 cmt. 2 ('For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if... representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship.'); ABA Model Code of Prof'l Responsibility, supra note 15, EC 2-30 ('[a] lawyer should decline employment if the intensity of his personal feeling, as distinguished from a community attitude, may impair his effective representation of a prospective client.').

[FN27]. Barbara Allen Babcock, Defending the Guilty, 32 Clev. St. L. Rev. 175 (1983); Barbara Allen Babcock, Symposium: On Democratic Ground: New Perspectives on John Hart Ely: On Constitutional Ground: The Duty to Defend, 114 Yale L.J. 1489, 1515-20 (2005). Although Professor Babcock's theory focuses on representation of **unpopular clients** in criminal matters, its logical-analytical foundations may well be extended so as to cover representation of **unpopular clients** and causes in general.

[FN28]. Professionally, representation of **unpopular clients** might result, inter alia, in injury to the lawyer's reputation and abandonment of existing **clients** as well as difficulty to attract potential new **clients**. Personally, representation of **unpopular clients** might result in pressure from family and friends, adverse community publicity, public denunciation, and in extreme cases even illegitimate threats or physical assaults. For a detailed discussion of the broad array of difficulties which loom lawyers who represent **unpopular clients** see, e.g., Norman W. Spaulding, The Prophet and the Bureaucrat: Positional Conflicts in Service Pro Bono Publico, 50 Stan. L. Rev. 1395, 1418-20 (1998); Mary Sue Backus & Paul Marcus, The Right to Counsel in Criminal Cases, A National Crisis, 57 Hastings L.J. 1031, 1063-65 (2006); Daniel H. Pollitt, Counsel for the **Unpopular** Cause: The 'Hazard of Being Undone', 43 N.C. L. Rev. 9, 20 (1964); Terry Carter, Sins of the **Client**, 87 A.B.A. J., March 2001 at 21 (2001).

[FN29]. Professor Babcock identifies five major reasons that generally motivate lawyers who have been endowed with such a peculiar 'mind-set, heart-set, soul set': (1) the garbage collector's reason (someone must do the dirty work in order to secure the proper functioning of the legal system); (2) the legalistic or positivist's reason (neither the lawyer or the judge or jury can know the factual truth; they can only know the legal truth, which is best revealed after the roles of the lawyers from both sides have been fully played); (3) the political activist's reason (many evil-doers are themselves victims of grave injustices, and therefore there is poetic justice in awarding them adequate representation once they stand on the other side of the barricade); (4) the social worker's reason (the man-in-trouble, who often belongs to a disadvantaged underclass, perceives the lawyer as a savior who comes to his rescue, and thus displays greater willingness to overcome feelings of anger and alienation towards society); (5) the egotist's reason (although representing the abhorrent people of society does not produce the most good, it nonetheless proves most challenging and provides the most excitement). It would be noted that these reasons are neither exhaustive nor accumulative or alternative in nature. Rather, they are an eclectic array of possible ideological motivations for representing **unpopular clients** and causes. Each individual may choose the reason or the amalgam of reasons which best describe his ideological perception. See Babcock, Defending the Guilty, supra note 27, at 177-79; Babcock, The Duty to Defend, supra note 27, at 1518.

[FN30]. Charles Fried, The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation, 85 Yale L.J. 1060 (1976). Following Professor Fried, several other scholars have also offered distinct analytical versions of the legal friendship analogy. See mainly Thomas L. Shaffer & Robert F. Cochran, Jr., Lawyers, Clients and Moral Responsibility (1994); Robert F. Cochran, Jr. et al., The Counselor-At-Law: A Collaborative Approach to Client Interviewing and Counseling (1st ed. 1999). My analysis of Professor Fried's theory is equally applicable to these analytical versions as well.

[FN31]. Fried, supra note 30, at 1071-1072.

[FN32]. For example, the difficulty of describing as 'friendship' a relationship which has to be bought and which has a known expiration date, the oddness of a friendship whose main characteristic is lack of reciprocity (only the lawyer devotes himself to the client's interests, not the other way around), etc. The specific difficulties of Professor Fried's theory are irrelevant to our discussion, which focuses on the ideological macro-framework, rather than on the particular micro-complexities within it.

[FN33]. Fried, supra note 30, at 1078.

[FN34]. Id. at 1080-1087.

[FN35]. Id. at 1077.

[FN36]. See also Postema, supra note 5, at 81 (indicating the fact that the impersonalism and moral detachment characteristic of the lawyer's role are not found in relations between friends).

[FN37]. For a similar criticism, see Postema, Id.; Edward A. Dauer & Arthur Allen Leff, Correspondence - The Lawyer as a Friend, 86 Yale L.J. 573, 576 (1977).

[FN38]. Id.

[FN39]. For a general discussion of this clash, see Luban, supra note 4; see also Wasserstrom, supra note 9.

[FN40]. William H. Simon, Ethical Discretion in Lawyering, 101 Harv. L. Rev. 1083, 1131-1133 (1988); Nathan M. Crystal, Developing a Philosophy of Lawyering, 14 Notre Dame J. L. **Ethics** & Pub. Pol'y 75 (2000). In Israel, the problem of minimal ethical guidance is particularly remarkable, since the rules of professional responsibility are not based on a coherent and organized philosophical infrastructure. Hence, the code of professional **ethics** either completely disregards certain vital issues or regulates them in a flawed manner. For example, in a sharp contrast to the American and English codes, the Israeli code does not even include comments or rules of instructional guidance, but is only comprised of brief disciplinary rules. As a result, the Israeli lawyer is particularly prone to experience great difficulties when faced with the need to thoughtfully handle with complicated ethical dilemmas.

[FN41]. See also Crystal, supra note 40 (arguing that there is no one correct philosophy of lawyering. Therefore, instead of wrongly trying to mandate a choice among different philosophies, the Bar ought to allow lawyers to either adopt an existing philosophy or craft their own methodical philosophy of lawyering).

[FN42]. See also W. Bradley Wendel, Value Pluralism in Legal **Ethics**, 78 Wash. U. L.Q. 113 (2000) (contending that monism in legal **ethics** analysis is unwarranted and noting the beneficial nature of pluralism); Robert J. Condlin, 'What's Love Got to Do With It?' - 'It's Not Like They're Your Friends for Christ's Sake': The Complicated Relationship Between Lawyer and Client, 82 Neb. L. Rev. 211, 306 (2003) (arguing that it is difficult, if not impossible, to understand lawyer-client relations, in all of their complexity, within the boundaries of a single, all-encompassing, theory).

[FN43]. Postema, supra note 5, at 77; Simon, supra note 5, at 42.

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Posted September 14, 2011

Legal View: Representing unpopular clients: What are the ethics?

By Thomas Spahn

The Daily Record Newswire

The U.S. House of Representatives isn't what most lawyers would usually think of as an "unpopular client," but recently the law firm of King & Spalding was pressured into dropping its representation of that body in a lawsuit over the Defense of Marriage Act.

Just six days later, the American Bar Association celebrated Law Day, with the chair of the program stating that a key focus of the observance was "defending the unpopular client."

Most lawyers believe that defending the social outcast is a badge of honor for the profession -- think of John Adams representing British soldiers in cases arising from the Boston Massacre.

But few lawyers actually know the ethical rules when it comes to clients who are unpopular or with whom the lawyer has deep disagreements.

ABA Model Rule 1.2 states that legal representation should not be denied to those "whose cause is controversial or the subject of popular disapproval." ABA Model Rule 1.2(b) itself assures lawyers (although they probably already know it) that representation of a client "does not constitute an endorsement of the client's political, economic, social or moral view or activities." Although the Model Rules do not force lawyers to take on unpopular clients, ABA Model Rule 6.2(c) states that lawyers should not turn down court appointments unless "the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship."

Apart from these statements, the ABA Model Rules contain a logical approach to an individual lawyer's disagreement with a client's character or conduct. Under ABA Rule 1.7(a)(2), a lawyer faces a conflict if there is a "significant risk" that the lawyer's representation of a client will be "materially limited" by the "personal interest of the lawyer."

One wise lawyer called this a "rheostat" conflict, as compared to the strict on-off "light switch" conflict of ABA Model Rule 1.7(a)(1), which either exists or does not exist, depending on whether the lawyer is adverse to a client.

A "rheostat" conflict under Rule 1.7(a)(2), on the other hand, arises only if the conflict

has a sufficiently intense effect on the lawyer's judgment -- much like turning up a "rheostat" light switch to increase the brightness of a dining room chandelier. For instance, a mildly pro-life lawyer presumably could adequately represent an abortion clinic, and provide the required diligence and loyalty despite the lawyer's personal beliefs.

On the other hand, a stridently pro-life lawyer who strongly believes that abortion is murder would almost surely face a "significant risk" that the representation of the abortion clinic would be "materially limited" by his or her strong beliefs. That lawyer might find himself or herself "pulling punches" when representing such a client. In that case, it seems unlikely that the individual lawyer would be able to continue representing the abortion clinic.

Although ABA Model Rule 1.7(b) provides for a way to clear most conflicts, even the client's consent does not cure a "rheostat" conflict unless the lawyer reasonably believes that he or she can "provide competent and diligent representation" to the client.

The ABA Model Rules also deal with an issue that presumably would rarely have arisen in John Adams's time -- imputation of an individual lawyer's disqualification under a "rheostat" conflict to the entire firm.

Under ABA Model Rule 1.10(a)(1), such an individual lawyer's disqualification is not imputed to the entire firm, unless it presents "a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm." ABA Model Rule 1.10 explains that one lawyer's "strong political beliefs" would not disqualify the entire firm, as long as the lawyer did not work on the case and his personal beliefs "will not materially limit the representation by others in the firm." That seems unlikely in the case of a personal conviction such as a pro-life stance.

However, one can imagine an example where the firm might face imputed disqualification. For instance, if the vehemently pro-life lawyer was the managing partner with the sole power to set everyone's salary, the entire firm might be disqualified.

So the ABA Model Rules assure lawyers that they can represent unpopular clients, disqualify an individual lawyer from such a representation only in fairly unusual situations, and impute that disqualification to the entire law firm only in very extreme situations.

Most lawyers do not find themselves facing these issues, because they can diligently and loyally represent clients with whom they disagree. No one can force a lawyer to take on a client of that sort, but on Law Day and most other days our profession congratulates itself when lawyers represent unpopular clients -- at least some unpopular clients.

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Comments

No comments

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ISSUE 2(A) DISCOVERY DISPUTE

David Phillips has engaged your firm to defend him in a foreclosure proceeding brought by Common Bank. Common Bank holds a $500,000 Promissory Note given by Aryan Nation and secured by a mortgage on a small commercial store in on 1234 Main Street, in King County (the "Property"). Phillips is the owner of the Property in fee simple absolute. In addition to the Common Bank mortgage, the Property is subject to a mortgage held by National Finance in the amount of $500,000. The National Finance Mortgage was given in connection with a $500,000 promissory note made by Phillips in favor of National Finance about two years before the Common Bank Financing.

Round 1: Common Bank has named all lien-holders as defendants, including National Finance. Common Bank has served document requests, seeking copies of all documents in Phillips's possession "made in connection with" any of the other liens. The only document Phillips has relating to the National Finance indebtedness is a copy of the filed mortgage, which is a one page document, not in the form of a traditional format used by lenders. When you ask him for a copy of the promissory note secured by the National Finance Mortgage, he informs you that there wasn't one. When you press him on the matter, he tells you he will check his records, again. The next day, he returns with a demand promissory note given by him in the face amount of $500,000, with a 2% interest rate, all amounts due on demand. The National Finance note is dated "as of" the date of the mortgage, but the date next to the signature line has the year "~~2015~~" and "2012" written in instead. Phillips swears that he signed the Note in 2012 and says he thinks he has "another" copy without the cross out. The next day he brings another copy of the Note, which is identical except that the year says "2012," without the crossing-out, and tells you that the first version was only a "draft" and asks you to return it to him without making a copy.

Issues: May you return the first version of the Note to Phillips without making a copy and must you produce it in discovery? From your conversation with Phillips, when he told you that there was not a promissory note, may you produce either copy?

Round 2: As a defense to the mortgage foreclosure action, Phillips asserts that Common Bank agreed to modify his Note and Mortgage, and gives you copies of letters and e-mails between Phillips and a Common Bank representative that seem to support that position. When Common Bank moves for summary judgment, you tender the affidavit of Phillips asserting the terms of the modification as a defense to the motion for summary judgment.

Issues: After filing the affidavit, but before the Court rules on the motion for summary judgment, you discover that the letters and e-mails are fabrications. What should you do? Suppose you advise Phillips that you need to withdraw the affidavit, and he instructs you in no uncertain terms not to, what actions should you take? Let's say the Court has ruled on the motion, denying summary judgment, and you discover that the letters and e-mails are fabrications, what should you do? Does your answer change if the Court's denial was not specifically tied to the alleged modification, but was instead based upon the bank's alleged "robo-signing" of the foreclosure documents?

Supporting Materials for Fact Pattern 2(a)

Discovery Issues

Rule 1.6: Confidentiality of Information

Client-Lawyer Relationship
Rule 1.6 Confidentiality Of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

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Comment on Rule 1.6

Client-Lawyer Relationship
Rule 1.6 Confidentiality Of Information - Comment

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from

the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5)

to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

Detection of Conflicts of Interest

[13] Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

[14] Any information disclosed pursuant to paragraph (b)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(7) does not restrict the use of information acquired by means independent of any

disclosure pursuant to paragraph (b)(7). Paragraph (b)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

[15] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

[16] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[17] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Acting Competently to Preserve Confidentiality

[18] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4]. _

[19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that

govern data privacy, is beyond the scope of these Rules.

Former Client

[20] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

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RULE 3.3: CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Adopted July 1, 2009, effective January 1, 2010.

Comment

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4 (b).

Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false

evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

Remedial Measures

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to

remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done–making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any *ex parte* proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an *ex parte* proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

[15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

Adopted July 1, 2009, effective January 1, 2010.

Rule 3.4: Fairness to Opposing Party & Counsel

Advocate

Rule 3.4 Fairness To Opposing Party And Counsel

A lawyer shall not:

(a) unlawfully obstruct another party' s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

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Comment on Rule 3.4

Advocate
Rule 3.4 Fairness To Opposing Party And Counsel - Comment

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

[3] With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

[4] Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

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Rule 4.1: Truthfulness in Statements to Others

Transactions With Persons Other Than Clients
Rule 4.1 Truthfulness In Statements To Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

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Comment on Rule 4.1

Transactions With Persons Other Than Clients
Rule 4.1 Truthfulness In Statements To Others - Comment

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Statements of Fact

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Crime or Fraud by Client

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or

fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.

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Rule 8.4: Misconduct

Maintaining The Integrity Of The Profession
Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

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Comment on Rule 8.4

Maintaining The Integrity Of The Profession
Rule 8.4 Misconduct - Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public

office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

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United States Bankruptcy Court,
N.D. Illinois,
Eastern Division.

In re Joseph Stanley VARAN, Debtor.

No. 11 B 44072. | Signed June 24, 2014.

Attorneys and Law Firms

Joseph Stanley Varan, Hinsdale, IL, pro se.

MEMORANDUM OPINION

DONALD R. CASSLING, United States Bankruptcy Judge.

***1** Patrick S. Layng, the United States Trustee (the "U.S. Trustee") has filed this motion against attorneys Adam B. Goodman and Jessica Tovrov ("Goodman and Tovrov") seeking sanctions under 11 U.S.C. §§ 105 and 329 (the "Motion for Sanctions"). For the reasons stated below, the Court grants the Motion for Sanctions.

I. *JURISDICTION AND PROCEDURE*

The Court has jurisdiction to entertain this matter pursuant to 28 U.S.C. § 1334 and Internal Operating Procedure 15(a) of the United States District Court for the Northern District of Illinois. It is a core proceeding under 28 U.S.C. § 157(b)(2)(A).

II. *BACKGROUND*

The material facts are not in dispute. Joseph Stanley Varan (the "Debtor") filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code on October 30, 2011 (the "Petition Date"). During the time the Debtor was represented by his first counsel in this case, Erica Crohn Minchella of the law firm Minchella & Associates, Ltd., the Debtor filed and twice amended his Schedule B as follows:

> 1. On November 10, 2011, the Debtor filed his original Schedule B (the "Original Schedule B"). In that Schedule, the Debtor represented that as of the Petition Date, he did not have any interests in: (i) financial accounts; (ii) insurance policies; (iii) incorporated or unincorporated businesses; or (iv) partnerships. (Docket No. 11, Schedule B at lines 2, 9, 13, & 14.)
>
> 2. On December 13, 2011, he filed an amended Schedule B (the "First Amended Schedule B"), repeating his original representations that he did not have such interests. (Docket No. 29, Schedule B at lines 2, 9, 13, & 14.)
>
> 3. On March 20, 2012, the Debtor filed yet another amended Schedule B (the "Second Amended Schedule B"), this time disclosing that he had an interest in a checking account at Hinsdale Bank with a value of $500. (Docket No. 61, Schedule B at line 2.) However, the Second Amended Schedule B otherwise repeated the Debtor's representation made in the earlier schedules that he did not have interests in: (i) any other financial accounts; (ii) insurance policies; (iii) incorporated or unincorporated businesses; or (iv) partnerships. (*Id.* at lines 2, 9, 13, & 14.).

The multiple amendments caused the U.S. Trustee to question the accuracy and completeness of the Debtor's Petition, Schedules, and Statement of Financial Affairs. (Docket No. 52.) In February 2012, the Court granted the U.S. Trustee's motion seeking authorization of discovery from the Debtor pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure in connection with its investigation. (Docket No. 57.) The U.S. Trustee served the Debtor with a subpoena on April 26, 2012, under Bankruptcy Rule 2004. (Mot. for Sanctions at ¶ 14) (Docket No. 211.)

Subsequently, on November 19, 2012, the Debtor replaced Minchella as his counsel, engaging, in Minchella's stead, Goodman and Tovrov of the law firm Goodman Tovrov Hardy & Johnson LLC. (*See* Response to Mot. for Sanctions at p. 9) (Docket No. 227.) Also on November 19, 2012, the Debtor appeared for his Bankruptcy Rule 2004 examination, represented by Tovrov. (Mot. for Sanctions at ¶ 11.)

***2** On November 27, 2012, the U.S. Trustee initiated an adversary proceeding against the Debtor (the "Adversary

Proceeding"), objecting to his discharge under 11 U.S.C. § 727(a)(2)(A), (a)(3), (a)(4), (a)(5), and (a)(6), alleging that he had made false oaths concerning his interests in financial accounts and business entities. Specifically, the U.S. Trustee alleged that:

> The [Debtor's] sworn representations in his [Original Schedule B, First Amended Schedule B, and Second Amended Schedule B], that he holds no stock in any incorporated entity, no interest in any unincorporated entity, and no interest in any partnership or joint venture, are false.
>
> The [Debtor's] sworn representations in his [Original Schedule B, First Amended Schedule B, and Second Amended Schedule B], wherein he omits his interests in certain financial accounts, including accounts at Chase, Fifth/Third Bank, and Bank of America, are false.

(Adv. No. 12–01823, Docket No. 1. at ¶¶ 108 & 109.)

After filing this Adversary Proceeding, the U.S. Trustee obtained the following additional discovery from the Debtor, which revealed the existence of the Debtor's interests in personal property that were not disclosed in his Schedules:

> 1. In January and February 2013, the Debtor, through Goodman, produced insurance documents and certain bank records responsive to the U.S. Trustee's subpoena dated April 26, 2012. (Mot. for Sanctions at ¶¶ 14–17.) The bank records that were produced include the Debtor's individual bank accounts and those held jointly with his wife, Rebecca Varan, at several banks. (*Id.* at ¶ ¶ 15–17.)
>
> 2. In April 2013, the Debtor, through Goodman, produced records pertaining to sixty-two (62) entities with which the Debtor was directly or indirectly involved as a member, manager or otherwise. (*Id.* at ¶ 18.)
>
> 3. In May 2013, the Debtor, through Goodman, provided the U.S. Trustee with Defendant's Response to Plaintiff's First Set of Interrogatories. (*Id.* at ¶ 19.) In response to Interrogatories 5 and 6, the Debtor identified LLC 1 Plus 1 as an entity in which he held a legal or equitable interest from October 2005 to the present, and named LLC 1 Plus 1's account at Chase Bank as a financial account in which he had a legal or equitable interest between October 2009 and the present. (Ex. A to Mot. for Sanctions at ¶¶ 5 & 6.)

On June 20, 2013, the Debtor appeared for his deposition, represented by Goodman. (Mot. for Sanctions at ¶ 20.) During the deposition, the Debtor gave the following responses to the U.S. Trustee's questions regarding his interest in LLC 1 Plus 1:

> Q: What is your interest in this entity?
>
> A: I'm a member.
>
> Q: Are you the only member?
>
> A: Yes.
>
> Q. Does anyone else have any interest in the entity?
>
> A: No.

(Ex. B to Mot. for Sanctions at pp. 59–60.)

Upon being presented with a certificate of designation for LLC 1 Plus 1, which named the Debtor as a member, the Debtor was further questioned as follows:

> ***3** Q: Do you know who signed your signature?
>
> A: I do not.
>
> Q: Does that handwriting look at all familiar to you?
>
> A: It does not.
>
> Q: So how did you first learn that you had an interest in this entity?
>
> A: When I had to do some research, when you had asked to get all the LLC documents, and I started getting all these other documents, I identified that this is my name. That's when—the first time I had learned about it.
>
> Q: You didn't previously know that LLC 1 Plus 1 was yours?
>
> A: No. I thought I was a manager of the company, not a member.
>
> Q: So only in the year 2013 did you learn that you were a member?
>
> A: I believe so.

(*Id.* at pp. 70–72.)

After this deposition, the Debtor produced copies of checks drawn on an account held in the name of LLC 1 Plus 1 at Chase Bank. (Mot. for Sanctions at ¶ 21.)

Among the payments evidenced in those records were five payments made to "Goodman Law Offices" and "Adam Goodman" from March 6, 2013 through June 18, 2013, totaling $19,807.34. (*Id.*)

Following the U.S. Trustee's pursuit of discovery of the Debtor's assets, the Debtor, through his counsel, Goodman and Tovrov, amended his Schedule B two final times as follows:

> 1. On September 30, 2013, the Debtor filed an amended Schedule B (the "Third Amended Schedule B"). (Docket No. 189.) The Third Amended Schedule B indicates that, as of the Petition Date, the Debtor had no personal property other than 25% interests in two LLCs, neither of which is LLC 1 Plus 1. (*See* Third Amended Schedule B at line 13.)
>
> 2. On October 1, 2013, the Debtor filed a further amended Schedule B (the "Fourth Amended Schedule B"). (Docket No. 191.) The Fourth Amended Schedule B is a compilation of page 1 from the Third Amended Schedule B and the Original Schedule B. It indicates that, as of the Petition Date, the Debtor had no interests in any: (i) financial accounts; (ii) insurance policies; (iii) partnerships; or (iv) stock in any incorporated entity or unincorporated entity (except for the 25% interests in two LLCs as disclosed in the Third Amended Schedule B). (*Id.* at lines 2, 9, 13, & 14.)

Ultimately, the Debtor voluntarily waived his discharge under § 727(a)(10) and the Adversary Proceeding was closed on November 12, 2013. (Docket Nos. 194, 195, & 196.)[1]

On December 10, 2013, more than a year after Goodman and Tovrov had been retained to represent the Debtor, Goodman filed a Disclosure of Compensation of Attorney for Debtor (the "Compensation Disclosure Statement") indicating that his law firm had received $29,601.09 for legal fees and expenses related to the Debtor's bankruptcy case. (Docket No. 204.) Significantly, the Compensation Disclosure Statement was filed only after the U.S. Trustee provided Goodman and Tovrov with a prepared draft of the Motion for Sanctions that admonished them for failing to file a fee disclosure statement as required by § 329(a). (Mot. for Sanctions at ¶ 39.)

***4** On January 2, 2014, the U.S. Trustee filed his Motion for Sanctions. The Motion focuses on Goodman and Tovrov's failures to make two types of disclosures: (1) accurate disclosures of the Debtor's property interests in his Schedule B and (2) timely disclosure of their fee arrangements with the Debtor. As sanctions, the Motion seeks (a) disgorgement of their fees, (b) payment of the U.S. Trustee's fees incurred in bringing this Motion, and (c) mandatory attendance by both Goodman and Tovrov at an ethics course taught at an ABA-approved law school. Goodman and Tovrov filed their Response to the Motion for Sanctions on February 18, 2014, and the U.S. Trustee filed his Reply on March 3, 2014.

The parties have waived the opportunity for an evidentiary hearing. *See In re Rimsat, Ltd.*, 212 F.3d 1039, 1046 (7th Cir.2000). Thus, the Court will decide the matter based on the pleadings filed by the parties. *See In re Vokac*, 273 B.R. 553, 555 (Bankr.N.D.Ill.2002). The Court will also take judicial notice of all pleadings filed by the parties and of the case docket. *See In re Kowalski*, 402 B.R. 843, 846 (Bankr.N.D.Ill.2009).

III. *APPLICABLE STANDARDS*

A. Standard for Sanctions Under § 105(a)

Section 105(a) of the Code gives bankruptcy courts the power to impose sanctions. *In re McNichols*, 258 B.R. 892, 903 (Bankr.N.D.Ill.2001) (citing *Rimsat*, 212 F.3d at 1049); *see also In re Collins*, 250 B.R. 645, 656 (Bankr.N.D.Ill.2000). Section 105(a) provides:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105(a).

"Section 105 grants broad powers to bankruptcy courts to implement the provisions of Title 11 and to prevent an abuse of the bankruptcy process." *In re Volpert*, 110 F.3d 494, 500 (7th Cir.1997). This section empowers bankruptcy courts to sanction conduct that abuses the judicial process. *Id.; see also McNichols*, 258 B.R. at 903 (citing *Collins*, 250 B.R. at 656–57).

Despite the broad language of § 105(a), courts must

exercise caution to limit the circumstances under which the statute is used. *Disch v. Rasmussen,* 417 F.3d 769, 777 (7th Cir.2005). Thus, in imposing sanctions, a "court should ordinarily rely on available authority conferred by statutes and procedural rules, rather than its inherent power, if the available sources of authority would be adequate to serve the court's purposes." *Rimsat,* 212 F.3d at 1048 (citing *Chambers v. NASCO, Inc.,* 501 U.S. 32, 50, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991)). However, "a sanctioning court is not required to apply available statutes and procedural rules in a piecemeal fashion where only a broader source of authority is adequate to justify all the necessary sanctions." *Id.* at 1049 (citing *Chambers,* 501 U.S. at 50–51). Thus, a court may resort to § 105(a) and its inherent powers "to ensure that all the culpable parties receive[ ] an appropriate sanction[.]" *Id.*

B. Standard for Disgorgement of Fees

***5** Section 329(a) requires a debtor's attorney to "file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation." 11 U.S.C. § 329(a). Rule 2016(b) of the Federal Rules of Bankruptcy Procedure requires debtor's counsel to file this disclosure statement within fourteen days after the order for relief or at such other time as the court may direct. In addition, the Rule further provides that a supplemental statement of compensation must be filed within fourteen days after any payment or agreement not previously disclosed. Fed. R. Bankr.P.2016(b). All compensation received during the applicable period must be disclosed, regardless of whether the attorney will be compensated from the estate or from some other source. *In re Jackson,* 401 B.R. 333, 339 (Bankr.N.D.Ill.2009) (citing *In re Redding,* 263 B.R. 874, 878 (8th Cir.BAP2001)).

Fee disclosure obligations of debtor's counsel are mandatory, not permissive. *In re Gluth Bros. Constr., Inc.,* 459 B.R. 351, 361 (Bankr.N.D.Ill.2011) (citing *In re Mortakis,* 405 B.R. 293, 297 (Bankr.N.D.Ill.2009)); *see also In re Griffin,* 313 B.R. 757, 764–65 (Bankr.N.D.Ill.2004). "Because disclosure under section 329(a) and Rule 2016(b) is 'central to the integrity of the bankruptcy process,' failure to disclose is sanctionable." *Jackson,* 401 B.R. at 340 (quoting *In re Andreas,* 373 B.R. 864, 872 (Bankr.N.D.Ill.2007)).

Courts enjoy broad discretion in determining appropriate remedies for violations of the fee disclosure requirements. *White v. Coyne, Schultz, Becker & Bauer, S.C. (In re Pawlak),* 483 B.R. 169, 180 (Bankr.W.D.Wis.2012). The sanctions can consist of a variety of penalties, including partial or total denial of compensation, as well as partial or complete disgorgement of fees already paid. *Jackson,* 401 B.R. at 340–41; *see also Mortakis,* 405 B.R. at 297. "The extent to which compensation should be denied rests with the Court's sound discretion." *Kowalski,* 402 B.R. at 848; *Gluth Bros. Constr.,* 459 B.R. at 361; *In re Prod. Assocs., Ltd. .,* 264 B.R. 180, 186 (Bankr.N.D.Ill.2001) ("Failure to timely file the disclosure could result in the loss of the attorney's fee or other such sanctions the court may decide to impose, whether or not the estate is harmed by the delay."). "[M]any courts have held that '[f]ailure to meet the disclosure requirements alone is grounds for disgorgement.' " *In re Waldo,* 417 B.R. 854, 893–94 (Bankr.E.D.Tenn.2009) (quoting *Griffin,* 313 B.R. at 765); *see also Jackson,* 401 B.R. 340 (citing *Andreas,* 373 B.R. at 872); *Turner v. Davis, Gillenwater & Lynch (In re Inv. Bankers, Inc.),* 4 F.3d 1556, 1565 (10th Cir.1993), *cert. denied,* 510 U.S. 1114, 114 S.Ct. 1061, 127 L.Ed.2d 381 (1994) (stating that "an attorney who fails to comply with the requirements of § 329 forfeits any right to receive compensation for services").

C. Burden of Proof

***6** The U.S. Trustee bears the burden of proof on its Motion for Sanctions. However, the standard of proof required for the U.S. Trustee to prevail on its motion does not appear to be decided in this Circuit, and other Circuits are split on the issue.

Were this matter to involve sanctions for civil contempt,[2] it is well-established in this Circuit that proof by clear and convincing evidence would be required of the complaining party.[3] *Stotler & Co. v. Able,* 870 F.2d 1158, 1163 (7th Cir.1989). The clear and convincing evidence standard is also employed where the sanctions at issue involve suspension from practice. *See In re Liou,* 503 B.R. 56, 78 (Bankr.N.D.Ill.2013); *see also In re Cochener,* 360 B.R. 542, 572–73 (Bankr.S.D.Tex.2007), *aff'd in part, rev'd in part,* 382 B.R. 311 (S.D.Tex.2007), *rev'd,* 297 Fed. Appx. 382 (5th Cir.2008).

Here, the U.S. Trustee seeks sanctions under the Court's inherent powers granted by § 105(a), and courts in other Circuits are split on the standard of proof required for the issuance of sanctions under a court's inherent powers. Some courts hold that when a court uses its inherent powers to sanction an attorney, the standard is a preponderance of the evidence, unless the sanction is disbarment or suspension. Where the sanction is disbarment or suspension, those courts hold the standard

is clear and convincing evidence. *See, e.g., Cochener,* 360 B.R. at 573–74. Other courts, reasoning that most inherent power sanctions are fundamentally punitive, require a heightened standard of proof by clear and convincing evidence before imposing any types of sanctions. *See, e.g., Shepherd v. Am. Broad. Cos.,* 62 F.3d 1469, 1476–77 (D.C.Cir.1995).

The sanctions sought by the U.S. Trustee here are not as severe as others on the spectrum of those available to the Court. Rather, they are of the type commonly imposed by bankruptcy courts when warranted. Further, while the sanctions sought in this case are in many ways similar to those imposed for civil contempt, Goodman and Tovrov have not violated a court order, and therefore this matter will not be treated as a motion for contempt. Given that there is no applicable binding standard of proof in this Circuit, the Court will apply the more conservative clear-and-convincing-evidence standard.

IV. *DISCUSSION*

The U.S. Trustee seeks sanctions against Goodman and Tovrov under §§ 105 and 329 for their alleged failure to (1) file a materially accurate Schedule B on behalf of the Debtor, and (2) timely file a fee disclosure statement required under § 329(a) and Bankruptcy Rule 2016(b). Specifically, the U.S. Trustee asks the Court to require Goodman and Tovrov to (1) complete a Professional Responsibility course at an ABA-approved law school, (2) disgorge all sums they received in this case to the Chapter 7 Trustee, and (3) reimburse the U.S. Trustee for its attorney's fees and costs relating to the Motion for Sanctions.

A. Filing of Inaccurate Schedules

***7** While both failures of Goodman and Tovrov are serious, the U.S. Trustee has placed special emphasis on his allegation that Goodman and Tovrov filed the Third Amended Schedule B and Fourth Amended Schedule B knowing that they were materially inaccurate. (Reply to Mot. for Sanctions at ¶ 1.) This emphasis is warranted, given the central importance to the bankruptcy process of full and complete disclosure by debtors of their debts and assets.

1. Duty to Disclose Assets

"[T]he disclosure obligations of consumer debtors are at the very core of the bankruptcy process and meeting these obligations is part of the price debtors pay for receiving the bankruptcy discharge ." *In re Colvin,* 288 B.R. 477, 481 (Bankr.E.D.Mich.2003). Complete financial disclosure is necessary to ensure the right of the trustee and the creditors to evaluate the case. *Grochocinski v. Morgan (In re Morgan),* Bankr.No. 09–42248, Adv. No. 11–00580, 2013 WL 4067591, at *9 (Bankr.N.D.Ill. Aug.12, 2013); *Fiala v. Lindemann (In re Lindemann),* 375 B.R. 450, 469 (Bankr.N.D.Ill.2007). Filing schedules that omit a debtor's material interests in property provides grounds for denial of a debtor's discharge. *Morgan,* 2013 WL 4067591, at *9.

"Debtors have an absolute duty to report whatever interests they hold in property[.]" *In re Yonikus,* 974 F.2d 901, 904 (7th Cir.1992). These interests must be fully disclosed in debtors' bankruptcy schedules. *See Browning v. Levy,* 283 F.3d 761, 775 (6th Cir.2002). Disclosure is mandatory even if a debtor believes an asset to be worthless or unavailable to the bankruptcy estate. *Yonikus,* 974 F.2d at 904; *see also In re Gonzalez,* Bankr No. 99–80751, 2001 WL 34076427, at *2 (Bankr.C.D.Ill. Aug.22, 2001) ("A debtor has no discretion to exclude exempt or worthless property."). Thus, a debtor must "accurately and completely list all ownership interests he or she holds in property, and it is not for the debtor 'to decide which assets are to be disclosed to creditors.' " *In re Mosher,* 417 B.R. 772 (Bankr.N.D.Ill.2009) (quoting *Neary v. Stamat (In re Stamat),* 395 B.R. 59, 73 (Bankr.N.D.Ill.2008)).

A debtor's duty to ensure the accuracy and completeness of his schedules is one which continues throughout the bankruptcy case. *Searles v. Riley (In re Searles),* 317 B.R. 368, 377–78 (9th Cir.BAP2004), *aff'd,* 212 Fed. Appx. 589 (9th Cir.2006). Thus, errors in previously filed schedules must be corrected. *See U.S. Trustee v. Bresset (In re Engel),* 246 B.R. 784, 794 (Bankr.M.D.Pa., 2000) (citing *Torgenrud v. Benson (In re Wolcott),* 194 B.R. 477, 486 (Bankr.D.Mont.1996)). "The continuing nature of the duty to assure accurate schedules of assets is fundamental because the viability of the system of voluntary bankruptcy depends upon full, candid, and complete disclosure by debtors of their financial affairs." *Searles,* 317 B.R. at 378.

Nor does the duty of disclosure fall on the debtor alone. The debtor's attorney has an independent obligation to "review [the schedules] with his client before they become a part of the public record." *See Acclaim Legal Serv., PLLC v. Allard (In re Shannon),* No. 09–CV–12710, Bankr.No. 09–40867, 2010 WL 1246691, at *4 (E.D.Mich. Mar.25, 2010) (affirming a bankruptcy

court's decision sanctioning debtor's attorneys for filing inaccurate schedules). This includes an "obligation to reasonably and expeditiously investigate [the schedules'] accuracy and tender amendments, if necessary." *Engel,* 246 B.R. at 793. Moreover, "attorneys must take emphatic care to encourage their clients to comply with the requirements of the Bankruptcy Code and the Bankruptcy Rules." *Cochener,* 360 B.R. at 598.

***8** Congress emphasized its concern with full and complete disclosure by debtors and their counsel when it enacted the 2005 BAPCPA amendments. Those amendments added provisions which impose new duties on debtors' attorneys in connection with the filing of the bankruptcy petition and schedules. *See* 11 U.S.C. § 707(b)(4)(C) and (D); *see also In re Moffett,* No. 10–71920, 2012 WL 693362, at *2 (Bankr.C.D.Ill. Mar.2, 2012); *In re Robertson,* 370 B.R. 804, 809 (Bankr.D.Minn.2007) (noting that BAPCPA has imposed "newly-heightened duties of verification as to accuracy" of documents filed by the debtor in bankruptcy). Specifically, § 707(b)(4)(D) provides that "[t]he signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect."[4] 11 U.S.C. § 707(b)(4)(D).

Courts have taken notice of these amendments and reiterated their commitment to enforcing them:

> [D]ebtors' counsel are to exercise significant care as to the completeness and accuracy of *all* recitations on their client[']s schedules, after they have made a factual investigation and legal evaluation that conforms to the standards applicable to any attorney filing a pleading, motion, or other document in a federal court. The content of a debtor's petition and schedules is relied on, and should have the quality to merit that reliance.

Triepke, 2012 WL 1229524, at *5 (quoting *Robertson,* 370 B.R. at 809, n. 8) (emphasis in original).

2. The Third Amended Schedule B and the Fourth Amended Schedule B Were Inaccurate

The U.S. Trustee argues that documents produced during discovery and the Debtor's deposition testimony prove that Goodman and Tovrov knew or should have known that the Third Amended Schedule B and the Fourth Amended Schedule B were materially inaccurate as filed. (Mot. for Sanctions at ¶¶ 32–36.) Specifically, the Third Amended Schedule B and the Fourth Amended Schedule B omitted the following material assets in which the Debtor had an interest: (1) the Debtor's 100% membership interest in LLC 1 Plus 1; (2) the Debtor's interests in several financial accounts; (3) the Debtor's interests in numerous business entities; and (4) the Debtor's interests in certain life insurance policies. (*Id.* at ¶ 37.) The Court agrees that these omissions were material and also agrees that the evidence shows that Goodman and Tovrov were either aware of these assets or should have been aware of them at the time the Third Amended Schedule B and the Fourth Amended Schedule B were filed.

Goodman and Tovrov do not dispute that the Third Amended Schedule B and the Fourth Amended Schedule B they filed on behalf of the Debtor were false. Rather, they contend that the falsity was "harmless" because the unlisted assets had been disclosed to the U .S. Trustee through discovery in the Adversary Proceeding, and that many of the financial accounts and interests in life insurance policies were of *de minimis* value. (Response to Mot. for Sanctions at pp. 3–4.) This argument misses the point. A debtor has an absolute duty to disclose his assets in his Schedules, regardless of the value of such assets. *Yonikus,* 974 F.2d at 904. Further, the Court finds the disclosure of assets to the U.S. Trustee is not sufficient to comply with the Bankruptcy Code's requirement of the filing of accurate Schedules with the Court.

***9** Nor can Goodman and Tovrov credibly argue that they were unaware at the time of the filings that the Third Amended Schedule B and the Fourth Amended Schedule B were false. For example, on the very day they were retained, November 19, 2012, they represented the Debtor at a Rule 2004 examination conducted by the U.S. Trustee. The primary focus of that examination was whether the Debtor's Schedules were complete and accurate. If that alone was not enough to alert them that this Debtor had a problem with accurately and completely disclosing his assets in his Schedules, the U.S. Trustee's commencement of an Adversary Proceeding a little more than a week later, on November 27, 2012, could not have failed to command their attention. Once again, the central focus of the complaint in the Adversary Proceeding was the Debtor's lack of disclosure of his assets.

The Court therefore finds that Goodman and Tovrov became aware of the specifics of the Debtor's failure to disclose at least as early as November 27, 2012. From

January through April 2013, the Debtor produced numerous records pertaining to his assets that had not been disclosed in the Schedules, and in May 2013, in response to the U.S. Trustee's Interrogatories, he identified LLC 1 Plus 1 as an entity in which he held an interest. Further, in June 2013, Goodman and Tovrov represented the Debtor at a deposition in the Adversary Proceeding, during which he was questioned about his numerous personal property interests, particularly his ownership of LLC 1 Plus 1.

Despite the persistent and overwhelming testimony and documents indicating that the Debtor's Schedules were materially inaccurate, Goodman and Tovrov failed to completely disclose the Debtor's property interests when they filed the Third Amended Schedule B and the Fourth Amended Schedule B. These documents, like their predecessors, indicated that the Debtor did not have interests in any financial accounts or insurance policies, and that he held interests in only two business entities, none of which is LLC 1 Plus 1. The Court finds these representations were false, and that the Debtor held interests in numerous financial accounts and entities, as well as certain life insurance policies.

Goodman and Tovrov's failure to disclose the Debtor's interest in LLC 1 Plus 1 is especially troubling. They dispute the U.S. Trustee's assertion that the Debtor had an ownership interest in LLC 1 Plus 1, arguing that the Debtor "never accepted the [U.S. Trustee's] conclusion about his ownership." (Response to Mot. for Sanctions at p. 3.) The Court finds this contention to be disingenuous. The Debtor's response to Interrogatories and his June 20, 2013 deposition testimony demonstrate that at least by the time of the deposition, the Debtor and his counsel, Goodman and Tovrov, were made aware that he was the sole owner of LLC 1 Plus 1. Moreover, a debtor's unsubstantiated and self-serving beliefs do not control whether or not he has an interest in a particular asset. Accordingly, the Court finds that Goodman and Tovrov were aware or should have been aware that the Third Amended Schedule B and the Fourth Amended Schedule B were materially false at the time they were filed.

3. Goodman and Tovrov's Violation of Ethical Duties

***10** In addition to arguing that their failures to disclose material assets in the Debtor's Third Amended Schedule B and Fourth Amended Schedule B were "harmless" and *de minimis,* Goodman and Tovrov argue that their ethical duties to zealously represent their client in the Adversary Proceeding brought by the U.S. Trustee prevented them from filing accurate Schedules. Had they done so, they argue, the accurate filing "would have been tantamount to endorsing the legal theory presented in the [U.S. Trustee's] [A]dversary [P]roceeding that there were material omissions in the earlier iterations of the Debtor's schedules." (Response to Mot. for Sanctions at p. 7.) The Court rejects this excuse for the following reasons.

Goodman and Tovrov represented the Debtor generally in his bankruptcy case as well as in the Adversary Proceeding in which the U.S. Trustee objected to his discharge. This dual representation gave rise to at least two duties: (1) a duty to ensure that they zealously represented the Debtor in the Adversary Proceeding and (2) a duty of candor to the Court with respect to satisfying the disclosure requirements in the Debtor's bankruptcy case.

First, lawyers have a duty to " 'zealously (but within the bounds of the law and ethical conduct) advance the client's interest .' " *O'Malley v. Novoselsky,* Nos. 10 C 8200, 11 C 110, 2011 WL 2470325, at *3 (N.D.Ill. June 14, 2011) (quoting *Midfirst Bank v. Curtis,* No. 3 C 4975, 2006 WL 2787485, at *2 (N.D.Ill. Sept.22, 2006)). Second, lawyers have a duty of candor to the tribunal. *See* ABA Model Rules of Professional Conduct, Rule 3.3.[5]

Significantly, for purposes of this motion, "a lawyer's duty of candor to the court must always prevail in any conflict with the duty of zealous advocacy." *United States Dep't of Hous. & Urban Dev. v. Cost Control Mktg. & Sales Mgmt. of Va., Inc.,* 64 F.3d 920, 925 (4th Cir.1995); *see also Cleveland Hair Clinic, Inc. v. Puig,* 200 F.3d 1063, 1067 (7th Cir.2000) (noting that the comment to Rule 3.3 of the Rules of Professional Conduct for the Northern District of Illinois states that a lawyer's task of maintaining client confidence "is qualified by the advocate's duty of candor to the tribunal"). This interpretation does not denigrate a lawyer's duty to zealously represent his or her clients, for that duty is always understood to mean zealous representation *within the bounds of the law and ethical conduct:*[6]

> In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation

> zealously to protect and pursue a client's legitimate interests, *within the bounds of the law,* while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.
>
> ***11** Illinois Rules of Professional Conduct, Preamble: A Lawyer's Responsibilities, no. 9 (emphasis added.)

By statute and rule, attorneys representing debtors in bankruptcy cases have additional obligations of candor that go far beyond what is expected of counsel in the ordinary civil lawsuit. A debtor's counsel in a bankruptcy case is "obligated both ethically and as an officer of the court not to file schedules and other disclosure documents that the counsel believes inaccurate." *Engel,* 246 B.R. at 793. In addition, "[t]he obligation to file accurate schedules includes a continuing duty to correct errors in filed documents." *Id.* at 794.

Goodman and Tovrov have argued that their simultaneous representation of the Debtor in both his bankruptcy case and in the Adversary Proceeding created a potential conflict, between their duty of candor to the bankruptcy court in the former and their duty to zealously represent their client in the latter.[7] While the Court recognizes the apparent dilemma this may have presented to counsel, it nevertheless holds them responsible for their failure to follow the clear guidance laid out in the case law, statutes, and rules cited above for resolving the very situation in which they found themselves. As those sources unequivocally state, counsel's duty of zealous advocacy is circumscribed by "the bounds of the law and ethical conduct." Here, the disclosure requirements of the Bankruptcy Code defined "the bounds of the law" within which Goodman and Tovrov were compelled to constrain their zealousness as advocates. The ethical duty of candor before the bankruptcy court, which is part and parcel to a debtor's duty of disclosure, trumps (or at least defines the boundaries of) the duty of zealous advocacy. Goodman and Tovrov inverted that hierarchy and elevated their duty to zealously represent their client above their duty of candor to the Ccourt. They did so by knowingly filing an inaccurate and incomplete Schedule B in the bankruptcy case for the admitted purpose of avoiding an adverse inference in the Adversary Proceeding. In doing so, they violated Rule 3.3 of the Model Rules.

The Court therefore finds that Goodman and Tovrov knowingly and willfully caused the Debtor to file a materially false Third Amended Schedule B and Fourth Amended Schedule B. The Third Amended Schedule B and the Fourth Amended Schedule B failed to disclose numerous property interests of the Debtor of which Goodman and Tovrov were aware. The Court finds that their conduct amounts to bad faith and is an abuse of the judicial process. Moreover, their failures to ensure the filing of complete and accurate Schedules disrupted the bankruptcy process in this case by misleading the Court, the U.S. Trustee, the Chapter 7 trustee, and the creditors with respect to numerous assets owned by the Debtor for months after the case was filed.

Goodman and Tovrov's conduct in this case is sufficiently egregious to warrant the imposition of both monetary and non-monetary sanctions, as discussed below in part C of this Memorandum Opinion.[8]

B. Compensation Disclosure Requirements

***12** The U.S. Trustee contends that Goodman and Tovrov failed to comply with the attorney compensation disclosure requirements of § 329(a) and Bankruptcy Rule 2016(b) by failing to timely file a statement of compensation. As a result, the U.S. Trustee argues that they should be required to disgorge all fees received from the Debtor in this case to the Chapter 7 Trustee.

Timely disclosure of the fee statement is mandatory and central to the integrity of the bankruptcy process: "a belated disclosure is insufficient to cure the failure to timely disclose fees received ." *In re Valladares,* 415 B.R. 617, 623 (Bankr.S.D.Fla.2009). "If every attorney waited until he or she is caught to file a statement of disclosure, the entire concept of mandatory disclosure would become a farce." *Id.* Although case law supports a denial of all compensation for violations of fee disclosure requirements, courts may use their discretion to fashion a less drastic sanction where full disgorgement would be viewed as unduly harsh. *See Andreas,* 373 B.R. at 873 (stating that denial of all compensation to attorney would be unduly harsh where attorney achieved successful results for debtors); *see also In re Dental Profile, Inc.,* 446 B.R. 885, 909 (Bankr.N.D.Ill.2011) (finding that disgorgement of attorney's fees would be unduly harsh in light of the work performed in the case). Thus, this Court has the discretion to "balanc[e] the need[ ] for sanctions with the inequity which would otherwise result from a complete denial of all fees and disbursements." *In re Tomczak,* 283 B.R. 730, 736 (Bankr.E.D.Wis.2002).

Goodman and Tovrov Failed to Comply with Fee Disclosure Requirements

It is undisputed that Goodman and Tovrov failed to file their Compensation Disclosure Statement in a timely fashion. Their law firm was retained by the Debtor on November 19, 2012. (Response to Mot. for Sanctions at p.

9). Under Bankruptcy Rule 2016(b), their disclosure statement was due fourteen days thereafter. Goodman filed the Compensation Disclosure Statement on December 10, 2013, more than a year after his firm was retained. Moreover, the Compensation Disclosure Statement was not filed until *after* the U.S. Trustee provided Goodman and Tovrov with a draft of the Motion for Sanctions. (*See* Mot. for Sanctions at ¶ 39.) The Court therefore finds that Goodman and Tovrov knowingly and willfully failed to comply with the § 329 and Bankruptcy Rule 2016(b) disclosure requirements.

Goodman and Tovrov, while not contesting that they failed to comply with the disclosure requirements prescribed by § 329(a) and Bankruptcy Rule 2016(b), argue that disgorgement of fees would be "grossly excessive" in light of the amount of work that they performed for the Debtor in this case.[9] (Response to Mot. for Sanctions at p. 9.)

The Court rejects this argument for three reasons. First, the length of time Goodman and Tovrov waited to file their Compensation Disclosure Statement (over a year) was grossly excessive. Second, they only filed their Compensation Disclosure Statement after being prodded to do so by the U.S. Trustee when he gave them a courtesy copy of the Motion for Sanctions he intended to file against them. Finally, the severity of the sanctions imposed must be measured against the totality of Goodman and Tovrov's conduct, which includes multiple failures to ensure that the Debtor's Schedules were complete and accurate. This is not a case in which there was a single, isolated failure to disclose. This was a case where counsel failed to make mandatory disclosures over and over again. Indeed, Goodman and Tovrov's failure to timely file the Compensation Disclosure Statement is particularly egregious because the Statement reveals that they received compensation from LLC 1 Plus 1—an asset of the Debtor that was not disclosed in the original or any amended Schedule B.

***13** Thus, the Court finds that Goodman and Tovrov knowingly and wilfully violated the disclosure requirements of § 329(a) and Bankruptcy Rule 2016(b). The Court therefore finds that the U.S. Trustee has produced clear and convincing evidence establishing that sanctions are warranted against Goodman and Tovrov. The Court will impose sanctions as follows.

C. Imposition of Sanctions

Goodman and Tovrov's actions, although constituting misconduct, are not morally reprehensible. However, that is not the threshold that must be met in deciding whether to award sanctions. Given the circumstances described above, the Court finds that monetary and nonmonetary sanctions are warranted against Goodman and Tovrov. The bankruptcy system relies on attorneys following disclosure rules as well as meeting required ethical standards. In view of Goodman and Tovrov's repeated violations of these duties in this case, sanctions are necessary and appropriate. These sanctions are not intended to be punitive. Rather, they are intended to deter such conduct in the future and to maintain the integrity of the legal profession.

1. Fees Must Be Disgorged

Given the particular facts of this case, the Court finds that total disgorgement of fees is appropriate and is not unduly harsh. While there could be a situation in which failure to timely file the compensation disclosure statement would not necessitate total disgorgement of fees, under the circumstances of this case, the Court finds that the appropriate sanction is full disgorgement of the fee. The Court is particularly troubled by the following: (1) the length of time it took for Goodman and Tovrov to file the Compensation Disclosure Statement; (2) the fact that they did not do so until the U.S. Trustee advised them of the Motion for Sanctions prior to filing it; (3) the fact that a portion of the fees was paid from a non-disclosed LLC; and (4) the fact that they failed to seek an extension of the filing deadline from the Court.

In short, this case does not involve only one or two failures to disclose by Goodman and Tovrov. Rather, it is so riddled with their failures to disclose that such failures constitute a consistent course of, at best, extremely poor judgment by counsel and a willful disregard of their various disclosure obligations. As experienced practitioners, Goodman and Tovrov knew or should have known the extent of their disclosure obligations. Their failure to timely file the mandatory fee disclosure statement is part of a larger course of conduct in which they in effect aided and abetted their client's failure to disclose his assets. The Court finds that the concealment of the Debtor's assets was the result of a willful decision by Goodman and Tovrov, as evidenced at least in part by their rationale that filing complete Schedules could have been construed as an admission in the Adversary Proceeding.

Although the Court finds that Goodman and Tovrov's conduct warrants the sanction of full disgorgement of their compensation, it is not clear from the record whether the fees to be disgorged were property of the estate to be administered by the Chapter 7 trustee or post-petition property belonging to the Debtor. Because the Court

cannot determine from the record who is entitled to receive the fees, the Court finds that all fees received by Goodman and Tovrov's law firm in this case must be disgorged to the Chapter 7 trustee, who will review the source of the payments and distribute the funds accordingly.

2. The U.S. Trustee Is Entitled to Fees and Costs

***14** The Court finds that in addition to disgorgement, further sanctions are warranted for Goodman and Tovrov's filing of a materially false Third Amended Schedule B and Fourth Amended Schedule B. *See Shannon,* 2010 WL 1246691, at *5–6 (affirming bankruptcy court's imposition of sanctions under § 105(a) for attorney's failure to disclose tax refund); *Engel,* 246 B.R. at 787 (imposing sanctions on attorney pursuant to the court's inherent authority for filing inaccurate schedules).

The Court finds that the U.S. Trustee is entitled to his reasonable attorney's fees and costs incurred in pursuing the Motion for Sanctions. The Court is satisfied that this monetary sanction is necessary to discourage future incomplete and inaccurate filings by Goodman and Tovrov. *See Engel,* 246 B.R. at 795.

The U.S. Trustee shall submit an itemization of such fees and costs within thirty (30) days of the entry of this decision or by July 24, 2014. Goodman and Tovrov shall have fourteen (14) days thereafter or until August 7, 2014 to file any objections to that itemization. The Court will hold a hearing on the requested fees and costs on August 19, 2014 at 11:00 a.m.

3. Remedial Coursework Is Required

Finally, the Court finds that remedial legal education is an additional sanction that is appropriate in this case. Other courts have employed this sanction. *See, e.g., Moffett,* 2012 WL 693362, at *4 (requiring attorney to take continuing legal education for violation of § 707(b)(4)(C)); *In re Burghoff,* 374 B.R. 681, 686–87 (Bankr.N.D.Iowa 2007) (requiring attorney to complete a law school or equivalent course in professional responsibility for violation of the Iowa Rules of Professional Conduct); *In re Maurice,* 167 B.R. 114, 128 (Bankr.N.D.Ill.1994) (requiring attorney to complete continuing legal education in the areas of bankruptcy and legal ethics for violation of Rule 9011).

This strikes the Court as a particularly relevant sanction because Goodman and Tovrov's conduct in this case concerning their inability to comply with the Bankruptcy Code's disclosure requirements convinces the Court that counsel did not appreciate the fact that their conduct was inappropriate and fell outside the bounds of ethical conduct. Their actions in this case also reveal a serious professional deficiency: a lack of knowledge about their professional obligations when representing debtors in bankruptcy.

Goodman and Tovrov argue that continuing legal education courses would be more useful to practicing attorneys than the courses offered in law school, pointing out that the Illinois Supreme Court already requires all Illinois licensed attorneys to take six hours of ethics courses in each two year period. (Response to Mot. for Sanctions at p. 11.) However, their experience as practitioners and their apparent participation in the Illinois mandatory continuing legal education classes did not deter the serious misconduct that occurred in this case.

***15** The Court finds that Goodman and Tovrov's ethical lapses call for the more rigorous method of instruction offered in a law school course on professional responsibility. Such remedial coursework strikes the Court as more meaningful than the continuing legal education already required in Illinois. An understanding of and compliance with requirements of the Bankruptcy Code and Rules is essential to the practice of bankruptcy law. This sanction is necessary to ensure that they have the requisite knowledge and ability to represent debtors within the bounds of ethics and the Bankruptcy Code.

Accordingly, Goodman and Tovrov are ordered to complete a course on professional responsibility at an ABA-approved law school. They must complete the course within one year of the date of this Opinion. Upon completing the course, they are required to file a certificate with the Court certifying which course they have attended, as well as proof of completion. Should they fail to timely comply with this sanction, the Court will recommend further actions to the disciplinary authorities as may be appropriate.

V. *CONCLUSION*

For the foregoing reasons, the Court grants the U.S. Trustee's Motion for Sanctions and finds that sanctions against Goodman and Tovrov are warranted. The following sanctions shall be imposed: (1) disgorgement of all fees received in this bankruptcy case and the related Adversary Proceeding to the Chapter 7 trustee within fourteen (14) days; (2) the reimbursement to the U.S.

Trustee for his attorney's fees and costs relating to this Motion for Sanctions; and (3) completion of a professional responsibility course at an ABA-approved law school within one year of this ruling.

The U.S. Trustee shall submit an itemization of his fees and costs within thirty (30) days of the entry of this decision or by July 24, 2014. Goodman and Tovrov shall have fourteen (14) days thereafter or until August 7, 2014 to file any objections to that itemization. The Court will hold a hearing on the requested fees and costs on August 19, 2014 at 11:00 a.m.

A separate order shall be entered pursuant to Federal Rule of Bankruptcy Procedure 9021.

Footnotes

1 The Debtor filed a Motion to Vacate Voluntary Waiver of Discharge on November 27, 2013. (Docket No. 198.) The motion was denied by the Court on February 4, 2014. (Docket No. 222.)

2 This matter is not to be treated as a matter of civil contempt because "[i]n order to prevail on a contempt petition, the complaining party must demonstrate ... that the respondent has violated the express and unequivocal command of a *court order*." *Andreas,* 373 B.R. at 874 (quoting *D. Patrick, Inc. v. Ford Motor Co.,* 8 F.3d 455, 460 (7th Cir.1993)) (emphasis in original). "Without a court order specifying what must be done there can be no civil contempt. *Id.* (citing *In re Rimsat, Ltd.,* 208 B.R. 910, 913 (Bankr.N.D.Ind.1997)); *see also U.S. v. Dowell,* 257 F.3d 694, 699 (7th Cir.2001).

3 "The clear and convincing standard requires proof falling between standards of preponderance of the evidence and beyond a reasonable doubt." *Fidelity Nat'l Title Ins. Co. of N.Y. v. Intercounty Nat'l Title Ins. Co.,* No. 00 C 5658, 2002 WL 1433717, at *6 (N.D.Ill. July 2, 2002) (citing *Brown v. Bowen,* 847 F.2d 342, 345–46 (7th Cir.1988)).

4 Here, the Third Amended Schedule B and Fourth Amended Schedule B were not filed with the Petition, and therefore, are arguably not within the reach of § 707(b)(4)(D). The Court will not decide the applicability of § 707(b)(4)(D) to the facts of this case, as this issue is not before it. However, these provisions are noteworthy, as they are further illustrations of the "policy that a debtor's attorney exercise independent diligence and care in ensuring that there is evidentiary support for the information contained in his client's bankruptcy schedules." *In re Triepke,* No. 09–21855, 2012 WL 1229524, at *5 (Bankr.W.D.Mo. Apr. 12, 2012). Moreover, as previously stated above, the duty to ensure the accuracy and completeness of the Debtor's Schedules is one which continues throughout the bankruptcy case. *See Searles,* 317 B.R. at 377–78. Thus, errors in previously filed Schedules must be corrected. *See Engel,* 246 B.R. at 794 (citing *Wolcott,* 194 B.R. at 486).

5 The Northern District of Illinois has generally adopted the American Bar Association's Model Rules of Professional Conduct as its rules of professional conduct. *See* Northern District of Illinois, Local Rule 83.50, "Rules of Professional Conduct"; *see also United States v. Williams,* 698 F.3d 374, 387, n. 1 (7th Cir.2012). ABA Model Rule 3.3, titled "Candor Toward the Tribunal," is identical to Rule 3.3 of the Illinois Rules of Professional Conduct. *Compare* ABA Model Rules of Professional Conduct, Rule 3.3, *with* Illinois Rules of Professional Conduct, Rule 3.3.

6 Courts recognize that a client's demands sometimes threaten to interfere with an attorney's duty of candor. Under such circumstances, the attorney may withdraw from the case. *See Engel,* 246 B.R. at 793 (stating that if a client refuses to cooperate with his attorney in filing accurate schedules, the attorney has cause to withdraw from the case).

7 As stated above, Goodman and Tovrov argue in their response to the Motion for Sanctions that filing an amended Schedule B that disclosed all of the assets identified in the Motion for Sanctions "would have been tantamount to endorsing the legal theory presented in the [U.S. Trustee's] [A]dversary [P]roceeding that there were material omissions in the earlier iterations of the Debtor's schedules." (Response to Mot. for Sanctions at p. 7.)

8 As observed by the Seventh Circuit, violations of the duty of candor to the court "can lead to sanctions even more severe than payment of an opponent's fees and costs." *Cleveland,* 200 F.3d at 1067.

9 In support of this argument, Goodman and Tovrov list the alleged successes they achieved for this Debtor. (Response to Mot. for Sanctions at p. 10.) The Court is not convinced that they achieved any significant successes for the Debtor, particularly because the Debtor did not receive a discharge of his debts. Moreover, the billing records they submitted demonstrate that the overwhelming majority of time billed to the Debtor is related to representation of the Debtor in the Adversary Proceeding. (*See* Private Ex. 1 to Response to Mot. for Sanctions.)

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IL Adv. Op. 13-05 (Ill.St.Bar.Assn.), 2013 WL 3185023

Illinois State Bar Association

SUBJECT: CLIENT FRAUD; COURT OBLIGATIONS; WITHDRAWAL FROM REPRESENTATION

***1 ISBA Advisory Opinion on Professional Conduct**

Opinion No. 13-05
May 2013

Professional Conduct Advisory Opinions are provided by the ISBA as an educational service to the public and the legal profession and are not intended as legal advice. The opinions are not binding on the courts or disciplinary agencies, but they are often considered by them in assessing lawyer conduct.

Digest: When a lawyer discovers that his or her client in an administrative hearing has previously submitted false material evidence to the tribunal, the lawyer must attempt to persuade the client to correct or withdraw the false evidence, but if that fails and if the effect of the false evidence cannot otherwise be undone, the lawyer must disclose the false evidence.
References: Illinois Rules of Professional Conduct 1.0, 1.2, 1.7, 1.16, 3.3 and 4.1
In re Rantis, 09-CH-65 (Review Board, November 14, 2011) *Administrator's petition for leave to file exceptions denied*, M.R. 25098 (March 19, 2012)
In re Winthrop, 219 Ill. 2d 526, 848 N.E.2d 961 (2006)
ISBA Opinion 95-14 (May 1996)
Restatement Third, The Law Governing Lawyers § 120 cmt. h (2000)
ABA Comm. on Professional Responsibility, Formal Opinions 92-366 (1992), 93-376 (1993), and 98-412 (1998)
New York State Bar Assoc. Ethics Opinion 837 (March 16, 2010)

FACTS

Lawyer represents an applicant for supplemental security income ("SSI") benefits before a Social Security Administration ("SSA") administrative law judge. The Client is contesting the denial of SSI benefits. The initial SSI application is in the form of a sworn affidavit, submitted by Client prior to retaining Lawyer. The application purports to state all the financial resources of Client. Lawyer discovers during the representation that Client failed to disclose significant assets, resources and income in the SSI application, which will likely have a significant effect on the disposition of the application. The false application is part of the administrative record upon which the administrative law judge will render a decision.

QUESTIONS

1. Is a SSA hearing considered a "tribunal" under the Rules of Professional Conduct?

2. What are Lawyer's obligations, if any, concerning disclosure of the false application to the SSA administrative law judge?

3. May Lawyer satisfy his or her ethical requirements by advising Client of any ethical or criminal impropriety with respect to the false affidavit and then withdraw as counsel without disclosure?

OPINION

1. SSA Hearing as a Tribunal

The language of Rule 3.3 of the Rules of Professional Conduct ("Candor Toward The Tribunal") specifically references a lawyer's obligations when appearing before "tribunals," "adjudicative proceedings," or "proceedings." The term "tribunal" is defined at Rule 1.0(m) to mean:

> *2 "A court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter."

The SSA is an administrative agency. Further, the proceeding at issue in this inquiry to determine the correctness of an initial benefit decision is adjudicative in that evidence will be presented; legal arguments made; and the rights of a party will be determined by a neutral official. Accordingly, the hearing at issue falls within the definition of a tribunal and therefore, the conduct of Lawyer must conform to the Rules of Professional Conduct.

2. Lawyer's Obligations Regarding a Client's False Material Evidence

The issues posed by this inquiry present one of the most troubling ethical situations with which a lawyer may be confronted. Addressing a client's presentation of false evidence to a tribunal "can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury." Rule 3.3, Comment [11]. In direct contrast to these client-centric concerns is a lawyer's paramount duty to the tribunal to prevent it from being misled by false evidence. Rule 3.3 Comment [5]("This duty [of refusing to offer known false evidence] is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence."); *In re Winthrop*, 219 Ill. 2d 526, 848 N.E.2d 961 (2006)(reminding the bar that "a lawyer's high vocation is to correctly inform the court upon the law and the facts of the case and to aid it in doing justice and arriving at correct conclusions", the Court noted a lawyer's failure to do so demonstrated a "lack of judgment that is quite disturbing."). Notwithstanding the difficulties and consequences of this situation, when confronted with the knowledge of a client's presentation of false information to a tribunal, a lawyer's obligations are clear (this Opinion does not address a lawyer's obligations in a criminal proceeding).

Before fully answering the inquiry, the Committee reasonably assumes two underlying facts. First, Client's failure to disclose certain assets, resources and income in the initial SSI application was done intentionally for the express purpose of obtaining social security benefits, because if the nondisclosure of assets and income was inadvertent, then Client should not object to the filing of an amended application or other method. Second, the false information contained in the SSI application is material evidence in the SSA hearing. Not only is the SSI application the focus of the proceeding, but inasmuch as it is one of the documents comprising the record under review it will be available for consideration by the administrative law judge as evidence.

*3 In general, a lawyer's obligations to ensure truthfulness to a court or tribunal are contained in Rule 3.3. That Rule states in relevant part as follows:
(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

...

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

Rule 3.3(a)(3) prohibits a lawyer from offering material evidence known by the lawyer to be false, even if the information was placed before the tribunal by the client prior to the lawyer's representation of the client. If, such as in the factual scenario presented, a lawyer comes to know a client has offered false material evidence to a tribunal, the lawyer must take "reasonable remedial measures, including, if necessary, disclosure to the tribunal." Rule 3.3(a)(3).

The specific "reasonable remedial measures" a lawyer must take are outlined in Comments 10 and 11 to Rule 3.3. It is important that a lawyer in such a situation understand that the remedial measures might require creative and persistent effort in a series of progressively demanding steps to correct a client's false evidence. The lawyer must first remonstrate with the client in an effort to have the false material evidence withdrawn or corrected. As part of this discussion, the lawyer must advise the client of the lawyer's ethical duties which may include the requirement that the lawyer unilaterally disclose the false information to the tribunal. Ideally, the client will choose to cooperate and will then correct the fraudulent information.

If a client refuses to voluntarily rectify, further remedial measures may be necessary before a lawyer must disclose the fraud to the tribunal. In fact, a lawyer's duties of loyalty and confidentiality to a client "require a lawyer to explore options short of outright disclosure in order to rectify the situation." ABA Comm. on Ethics and Professional Responsibility, Formal Opinion 93-376 (1993). Varying factual scenarios will dictate which, if any, other remedial steps may be taken by the lawyer to correct the false information, however, disclosure to the tribunal may not always be required if other actions short of disclosure will undo the effects of the false evidence. *In re Rantis*, 09-CH-65 (Review Board, November 14, 2011) Administrator's petition for leave to file exceptions denied, M.R. 25098 (March 19, 2012)("disclosure to the court is not required in every instance and should occur when the effect of the false evidence cannot be undone through other measures.").

***4** In *Rantis*, the ARDC Review Board dismissed claims that a lawyer violated his duty to disclose a client's false testimony to the court when the lawyer remonstrated with the client to undo the effect of the improper testimony, the lawyer worked with opposing counsel to remediate its effect, and nothing of significance occurred during the proceedings that might have prejudiced the opposing party based upon the false evidence. The Review Board cited favorably to Restatement Third, The Law Governing Lawyers § 120 (2000), Comment (h), which states "A lawyer has discretion as to which measures to adopt, so long as they are reasonably calculated to correct the false evidence."

The Committee accepts the *Rantis* analysis that whether and when a lawyer is required to disclose a client fraud to the tribunal depends on "when the effect of the false evidence cannot be undone through other measures." Because the parties therein worked out an arrangement to avoid the effect of the client fraud and the matter was dismissed, it was found to be unnecessary that counsel formally disclose the fraud to the court. The key should always be to undo the effect of the fraud on the proceeding. *See also* Rule 3.3, Comment 10 ("If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation.") *See also* New York State Bar Assoc. Ethics Opinion 837 (March 16, 2010)(approving a procedure whereby the false testimony is withdrawn without any statement regarding its truth or falsity.).

Of course, if the client refuses to withdraw or correct the false evidence and the lawyer's own efforts to undo the false evidence are impractical or unsuccessful, the lawyer "must make such disclosure to the tribunal as is reasonably necessary to remedy the situation." Rule 3.3, Comment [10]; *Accord* Restatement Third, The Law Governing Lawyers § 120 cmt. h (2000)("the lawyer must take steps reasonably calculated to remove the false impression that the evidence may have made on the trier of fact.") Importantly, this disclosure must occur even if doing so requires the lawyer to reveal information that is otherwise confidential and would be protected by Rule 1.6, including information obtained by the lawyer from his or her client. Rule 3.3, Comment [10].

This analysis is consistent with prior ISBA Opinions such as 95-14 where the Committee concluded that a lawyer not only may, but might be required to, reveal a client's fraud in completing an assets and liabilities affidavit which was the basis for the appointment of a public defender. The analysis is also consistent with ABA Comm. on Ethics and Professional Responsibility, Formal Opinion 98-412 (1998) ("It is well established that when a client actually has testified falsely or the lawyer otherwise has presented false evidence and the lawyer later learns of the falsity of the evidence or testimony before the conclusion of the proceeding, the lawyer must disclose the client's perjury to the court if the lawyer is unable to convince

the client to rectify the perjury.")

***5** If disclosure to the tribunal is made, a lawyer must be cautious to tailor the disclosure so as to disclose only so much information as is necessary to satisfy the purpose of disclosure (e.g. preventing a trier of fact from being misled). *See* Restatement Third, The Law Governing Lawyers § 120 cmt. h (2000)(when taking reasonable remedial measures the lawyer should ensure that the client is faced with only "minimal adverse effects".); *See also* Rule 1.6, Comment [14] "In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose.").

The lawyer's obligation to act in the face of a client's presentation of false material evidence under Rule 3.3 is consistent with other Rule obligations as well. Rule 1.2(d) prohibits a lawyer from "assisting" a client in conduct that the lawyer knows is criminal or fraudulent. "Assisting" is broadly interpreted by Rule Comments to include "drafting or delivering" documents that the lawyer knows are false. Rule 1.2, Comment [10]. Under this broad interpretation, perpetuating or allowing a client's presentation of false material evidence (by definition both criminal and fraudulent conduct) to the court to remain unaddressed would be improper. In the inquiry presented here, and notwithstanding the fact that Lawyer played no role in the preparation or submittal of the false application to the SSA, knowledge of its falsity cannot be ignored.

Additionally, Rule 4.1 provides that "[i]n the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6." Notably, the requirements of Rule 3.3 for candor to a tribunal are higher than the Rule 4.1 requirement of truthfulness to others as a lawyer is not permitted under Rule 4.1 to disclose a client fraud if the lawyer came to know of the falsity as the result of confidential information received from the client and as protected by Rule 1.6.

3. Withdrawal

If the lawyer has unsuccessfully remonstrated with the client as outlined above, the lawyer should ordinarily seek to withdraw from the representation at the time of his or her disclosure of the false material evidence to the tribunal. Rule 3.3, Comment [10]. Disclosure, particularly if against the client's wishes, would likely damage the professional relationship between the client and lawyer. In addition, although withdrawal under Rule 3.3 is not specifically mandated, withdrawal may be consistent with a lawyer's obligations under other provisions of the Rules of Professional Conduct, and may in fact be mandatory. *See* Rule 1.2, Comment [10](A lawyer cannot continue to assist a client in conduct that the lawyer may have believed was proper but then discovered was fraudulent or criminal and must withdraw); Rule 1.16(a)("a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of the Rules of Professional Conduct or other law..."). Notwithstanding these Rule requirements concerning withdrawal, if the false material evidence is disclosed (and all ill effects remedied) and the client wishes the disclosing lawyer to continue the representation, that would not be prohibited under these Rules. However, the lawyer would likely have to consider whether the situation presented a conflict under Rule 1.7(a)(2). Additionally, the client's actions would be grounds for the lawyer to choose to withdraw, although not mandated, if "the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent" or "the client has used the lawyer's services to perpetrate a crime or fraud." See Rule 1.16(b) as to the requirements for permissive withdrawals.

***6** Turning to the specific question posed above, mere withdrawal without disclosure of a client's presentation of false material evidence to a tribunal would be improper. *See* Restatement Third, The Law Governing Lawyers § 120 cmt. h (2000)("Once the false evidence is before the finder of fact, it is not a reasonable remedial measure for the lawyer simply to withdraw from the representation, even if the presiding officer permits withdrawal."); *See also* Rule 1.2, Comment [10]("In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like."). *See also* ABA Comm. on Ethics and Professional Responsibility, Formal Opinions 92-366 (1992) and 93-376 (1993) for further discussion of a "noisy withdrawal." However, in what would likely be extremely rare circumstances, a lawyer's withdrawal from representing a client without disclosure of the client's presentation of false material evidence to a tribunal might be appropriate. Under Rule 3.3, Comment [10], withdrawal without disclosure of the false evidence would satisfy a lawyer's obligations where the withdrawal would "undo the effect of the false evidence." Notwithstanding this possibility of withdrawal without disclosure,

the Committee finds it difficult to construct any scenario where the act of withdrawal by the lawyer, without more, would undo any false evidence already submitted to the tribunal. In the factual scenario at issue in this opinion, Lawyer's withdrawal would have no effect on ensuring that the false information would not be considered by the administrative law judge and would thus be insufficient.

CONCLUSION

Applied to the inquiry before the Committee, Lawyer must attempt to get Client to correct the false information contained on the SSI application for benefits. This necessarily must be a frank discussion where Lawyer's ethical obligations are explained, including the need for Lawyer to disclose the false material evidence if Client fails to do so. If Client still refuses to rectify the fraud, Lawyer must seek to withdraw from representing Client. Finally, because the Lawyer's withdrawal by itself likely will have no effect on remedying the false evidence before the tribunal, Lawyer must take steps to correct the effects of the fraud. If nothing else can reasonably undo the effects of the fraud, the disclosure to the tribunal will be necessary as a last resort. This course of action, admittedly difficult in execution, is nevertheless justified and appropriate.

IL Adv. Op. 13-05 (Ill.St.Bar.Assn.), 2013 WL 3185023

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IL Adv. Op. 95-14 (Ill.St.Bar.Assn.), 1996 WL 478490

Illinois State Bar Association

SUBJECT: CONFIDENTIALITY--DISCLOSURE TO COURT OF INFORMATION CONFLICTING WITH CLIENT'S INDIGENCY AFFIDAVIT

***1 ISBA Advisory Opinion on Professional Conduct**

Opinion No. 95-14
May 17, 1996

ISBA Advisory Opinions on Professional Conduct are prepared as an educational service to members of the ISBA. While the Opinions express the ISBA interpretation of the Illinois Rules of Professional Conduct and other relevant materials in response to a specific hypothesized fact situation, they do not have the weight of law and should not be relied upon as a substitute for individual legal advice.

Digest: Under facts presented by inquiry, lawyer may disclose to court client's fraud upon the court if lawyer's efforts to persuade client to rectify fraud fail.
Ref.: Illinois Rules of Professional Conduct, Rules 1.2(g), 1.6(c)(1), 3.3(a)(2), (a)(6) and (b)
ISBA Advisory Opinion Nos. 94-24, 91-24
ABA Formal Opinion No. 93-376

FACTS

An indigent defendant completes an assets and liabilities affidavit. Based upon the information in the affidavit, the court appoints the public defender. During the course of this representation, the defendant confides to counsel that he has a trust fund with the ability to access up to $3500.

QUESTION

May counsel reveal the information about the concealed asset to the court?

OPINION

This inquiry involves the applicability of three separate and distinct duties imposed by the Rules of Professional Conduct.

Rule 1.2(g) states:

> A lawyer who knows a client has, in the course of representation, perpetrated a fraud upon a person or tribunal shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.

Rule 1.6 provides, in pertinent part, that a lawyer shall not use or reveal a confidence or secret unless the client consents after disclosure except when required by law or court order. Subparagraph (c)(1) of Rule 1.6 states:
A lawyer may use or reveal:

(1) Confidences or secrets when permitted under these Rules or required by law or court order.

Rule 3.3 states, in part, that:

(a) In appearing in a professional capacity before a tribunal, a lawyer shall not:
(2) fail to disclose to a tribunal a material fact known to the lawyer when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(6) counsel or assist the client in conduct the lawyer knows to be illegal or fraudulent;

*2 (b) The duties stated in paragraph (a) are continuing duties and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

The duty imposed by Rule 1.2, requiring a lawyer to reveal the client's fraud to a tribunal if rectification efforts fail except when the information is privileged, is inapplicable here because the fraud upon the tribunal occurred prior to the public defender's appointment and was not "in the course of representation" so as to trigger application of the Rule.

Rule 1.6 imposes the duty of confidentiality as to client confidences and secrets except when the use or revelation of confidences or secrets as permitted under the Rules required by law or court order.

Rule 3.3 specifies a lawyers' duties regarding conduct before a tribunal and states that those duties are continuing and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6

This inquiry presents the conflict faced by lawyers between their private duty of maintaining client confidentiality and their public duty to maintain the integrity of the judicial system by complete candor with the court. Both the ethical opinions and case law agree that limits to zealous representation are necessary to maintain the integrity of the adversary process. Those authorities also conclude that a failure to disclose when required by the Rules to do so is tantamount to affirmative misrepresentation.

To respond to the question posed by this inquiry requires the Committee to determine whether Rule 3.3 applies and permits disclosure of otherwise confidential information protected by Rule 1.6.

The Committee has assumed that the lawyer knows that the court's knowledge of the client's concealed asset of $3500 would preclude the appointment of the public defender. If so, it is a material fact known to the lawyer and disclosure may be necessary if the lawyer is to avoid assisting the client's fraudulent act by the lawyer's silence. Failure to disclose the client's fraud in securing the free legal services of the public defender assists the client in continuing the fraud upon the court. Subsection (a)(2) of Rule 3.3 prohibits failure to disclose a material fact if necessary to avoid assisting a fraudulent act by the client, and subsection (a)(6) restricts a lawyer from assisting a client in conduct the lawyer knows to be fraudulent.

In response to the question posed by the inquiry, the lawyer not only may reveal, but might be required to reveal such information to the court if it is necessary to rectify the fraud if the lawyer's efforts to persuade the client to rectify the fraud are unsuccessful.

*3 Opinion No. 94-24 involved fraudulent conduct by the lawyer's client by concealing marital assets from the court, even though the lawyer represented the client at the hearing when the fraud was perpetrated. That opinion includes a comprehensive discussion of the applicable ethical considerations and concludes, in circumstances similar to those of this inquiry, that it was the lawyer's duty to insist that the client rectify the fraud committed upon the court and, if the client refused to take or authorize remedial action, Rule 3.3(b) required the lawyer to make sufficient disclosure to rectify the fraud.

The facts in Opinion No. 94-24 were that the fraud upon the court occurred outside the lawyer's presence after the client had employed another lawyer, but the original lawyer was still the only lawyer of record. In the present inquiry, the fraud occurred prior to the public defender's appointment. Opinion 94-24 concluded that the lawyer's duties under Rule 3.3(b) were continuing and required disclosure if remedial efforts failed.

Opinion No. 91-24 involved the taking of money by a guardian from an estate under a claim of right which the guardian's lawyer believed to clearly belong to the estate. That opinion found that since the lawyer was not representing the client

"personally" the information about the disputed funds was not a secret or confidence and, in any event, subparagraphs (a)(2) and (a)(6) of Rule 3.3 required the lawyer to take the necessary steps, including a report to the court, to disclose the taking of funds.

ABA Formal Opinion No. 93-376 extended application of Rule 3.3 to client fraud in the pre-trial discovery process. That opinion stated that the lawyer who discovered that a client intentionally misstated a material fact in response to a discovery request must take all reasonable steps to rectify the fraud, including disclosure to the court if the client failed to take appropriate remedial action. Rule 3.3 was applied even though the false answer had not been received in evidence and the lawyer was not appearing before a tribunal when the fraud occurred.

A critical fact in this case is that the fraud was perpetrated directly upon the tribunal by the client concerning a matter outside the underlying criminal case. The confidence involved in this inquiry is distinguishable from confidences disclosed by a criminal defendant concerning the principal criminal case. Under the circumstances presented here, the Rules permit, and may require the public defender to disclose the fraud to the court if efforts to persuade the client to rectify the fraud fail. Continued participation in this case by the lawyer without rectification of the fraud, or disclosure to the court if necessary, would assist the client in continuing to receive free legal assistance of the public defender secured by the client's fraudulent act.

IL Adv. Op. 95-14 (Ill.St.Bar.Assn.), 1996 WL 478490

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IL Adv. Op. 95-14 (Ill.St.Bar.Assn.), 1996 WL 478490

Illinois State Bar Association

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May counsel reveal the information about the concealed asset to the court?

OPINION

This inquiry involves the applicability of three separate and distinct duties imposed by the Rules of Professional Conduct.

Rule 1.2(g) states:

> A lawyer who knows a client has, in the course of representation, perpetrated a fraud upon a person or tribunal shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.

Rule 1.6 provides, in pertinent part, that a lawyer shall not use or reveal a confidence or secret unless the client consents after disclosure except when required by law or court order. Subparagraph (c)(1) of Rule 1.6 states:
A lawyer may use or reveal:

(1) Confidences or secrets when permitted under these Rules or required by law or court order.

Rule 3.3 states, in part, that:

(a) In appearing in a professional capacity before a tribunal, a lawyer shall not:
(2) fail to disclose to a tribunal a material fact known to the lawyer when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(6) counsel or assist the client in conduct the lawyer knows to be illegal or fraudulent;

***2** (b) The duties stated in paragraph (a) are continuing duties and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

The duty imposed by Rule 1.2, requiring a lawyer to reveal the client's fraud to a tribunal if rectification efforts fail except when the information is privileged, is inapplicable here because the fraud upon the tribunal occurred prior to the public defender's appointment and was not "in the course of representation" so as to trigger application of the Rule.

Rule 1.6 imposes the duty of confidentiality as to client confidences and secrets except when the use or revelation of confidences or secrets as permitted under the Rules required by law or court order.

Rule 3.3 specifies a lawyers' duties regarding conduct before a tribunal and states that those duties are continuing and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6

This inquiry presents the conflict faced by lawyers between their private duty of maintaining client confidentiality and their public duty to maintain the integrity of the judicial system by complete candor with the court. Both the ethical opinions and case law agree that limits to zealous representation are necessary to maintain the integrity of the adversary process. Those authorities also conclude that a failure to disclose when required by the Rules to do so is tantamount to affirmative misrepresentation.

To respond to the question posed by this inquiry requires the Committee to determine whether Rule 3.3 applies and permits disclosure of otherwise confidential information protected by Rule 1.6.

The Committee has assumed that the lawyer knows that the court's knowledge of the client's concealed asset of $3500 would preclude the appointment of the public defender. If so, it is a material fact known to the lawyer and disclosure may be necessary if the lawyer is to avoid assisting the client's fraudulent act by the lawyer's silence. Failure to disclose the client's fraud in securing the free legal services of the public defender assists the client in continuing the fraud upon the court. Subsection (a)(2) of Rule 3.3 prohibits failure to disclose a material fact if necessary to avoid assisting a fraudulent act by the client, and subsection (a)(6) restricts a lawyer from assisting a client in conduct the lawyer knows to be fraudulent.

In response to the question posed by the inquiry, the lawyer not only may reveal, but might be required to reveal such information to the court if it is necessary to rectify the fraud if the lawyer's efforts to persuade the client to rectify the fraud are unsuccessful.

***3** Opinion No. 94-24 involved fraudulent conduct by the lawyer's client by concealing marital assets from the court, even though the lawyer represented the client at the hearing when the fraud was perpetrated. That opinion includes a comprehensive discussion of the applicable ethical considerations and concludes, in circumstances similar to those of this inquiry, that it was the lawyer's duty to insist that the client rectify the fraud committed upon the court and, if the client refused to take or authorize remedial action, Rule 3.3(b) required the lawyer to make sufficient disclosure to rectify the fraud.

The facts in Opinion No. 94-24 were that the fraud upon the court occurred outside the lawyer's presence after the client had employed another lawyer, but the original lawyer was still the only lawyer of record. In the present inquiry, the fraud occurred prior to the public defender's appointment. Opinion 94-24 concluded that the lawyer's duties under Rule 3.3(b) were continuing and required disclosure if remedial efforts failed.

Opinion No. 91-24 involved the taking of money by a guardian from an estate under a claim of right which the guardian's lawyer believed to clearly belong to the estate. That opinion found that since the lawyer was not representing the client

"personally" the information about the disputed funds was not a secret or confidence and, in any event, subparagraphs (a)(2) and (a)(6) of Rule 3.3 required the lawyer to take the necessary steps, including a report to the court, to disclose the taking of funds.

ABA Formal Opinion No. 93-376 extended application of Rule 3.3 to client fraud in the pre-trial discovery process. That opinion stated that the lawyer who discovered that a client intentionally misstated a material fact in response to a discovery request must take all reasonable steps to rectify the fraud, including disclosure to the court if the client failed to take appropriate remedial action. Rule 3.3 was applied even though the false answer had not been received in evidence and the lawyer was not appearing before a tribunal when the fraud occurred.

A critical fact in this case is that the fraud was perpetrated directly upon the tribunal by the client concerning a matter outside the underlying criminal case. The confidence involved in this inquiry is distinguishable from confidences disclosed by a criminal defendant concerning the principal criminal case. Under the circumstances presented here, the Rules permit, and may require the public defender to disclose the fraud to the court if efforts to persuade the client to rectify the fraud fail. Continued participation in this case by the lawyer without rectification of the fraud, or disclosure to the court if necessary, would assist the client in continuing to receive free legal assistance of the public defender secured by the client's fraudulent act.

IL Adv. Op. 95-14 (Ill.St.Bar.Assn.), 1996 WL 478490

End of Document

ISSUE 2 B. TRIAL DISPUTE

Before commenting to the media in connection with litigation, a lawyer must consider several ethical rules: not just 3.6 ((Trial Publicity) but, depending on the circumstances, also Rule 1.6 (Confidentiality of Information); Rule 8.4(a) (prohibition against knowingly assisting someone else to violate the Rules); two rules requiring truthfulness: Rule 8.4(c) (prohibition against engaging in conduct involving dishonesty or misrepresentation) and Rule 4.1 (mandating truthfulness while representing a client); and two rules oriented to comments about judges: Rule 8.2 (forbidding false statements about a judge) and Rule 8.4(e) (prohibiting stating or implying an ability to improperly influence a government agency or official).

Also, with all extrajudicial comments, it's not just the Rules of Professional Conduct that are a problem, it's also the possibility of liability in civil litigation. One recent example is the libel suit brought against human rights lawyer Terrence Collingsworth by Drummond Co., a coal producer whom Collingsworth had sued in one of many suits he filed against companies he claimed were mistreating workers and conspiring to kill labor activists. See "Companies Turn Tables on Human Rights Lawyers," http://www.nytimes.com/2015/03/06/business/companies-turn-tables-on-human-rights-lawyers.html. The libel case is *Drummond Co., Inc. v. Terrence P. Collingsworth*, No. 11-cv-3695-RDP (N.D. Ala.)

So here we go.

Round 1: The defense plans to present an expert witness who will opine that the mortgage is not valid. Because the trial is getting hefty media attention, the lawyer considers making the defense expert available to the press before he testifies. Is that a problem? Would it be a problem if the lawyer herself told the press what the expert's testimony would be? What if she talked to the reporter "on background"?

Round 2: Throughout the trial, a group calling itself Citizens For Racial Tranquility demonstrates in front of the courthouse, accusing the Firm and the Firm's client of racial bigotry and claiming that the Firm presented trial witnesses who lied. The client tells our worthy lawyer that he wants to hold a press conference to blast the demonstrators. What issues does this request present for the lawyer? Are there different issues if it's the client who speaks versus the lawyer?

Round 3: During the trial, the lawyer updates her legal blog with rants about her client and about the judge and the foreclosure process. She complains about the speed of foreclosure cases and makes fun of the judge's continual smiles and jokes, commenting "Why's he laughing? There's nothing funny about the outrageous foreclosure docket." Concerning her client, she discloses that when "this Aryan brother" and other members of the Brotherhood met with the firm's partners about whether the firm could represent him, the client said that while he thought that most black people were inferior, he'd "work past that" and consider the partners' assurances that his trial counsel was brilliant. Then, she blogged, when she was alone with the client, he made crude sexual comments and kept asking her to "get it on" with him.

Jean Maclean Snyder
3/17/2015

Supporting Materials for Fact Pattern 2(b)

Trial Issues

RULE 1.6: CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b) or required by paragraph (c).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a crime in circumstances other than those specified in paragraph (c);

(2) to prevent the client from committing fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

(c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm.

(d) Information received by a lawyer participating in a meeting or proceeding with a trained intervener or panel of trained interveners of an approved lawyers' assistance program, or in an intermediary program approved by a circuit court in which nondisciplinary complaints against judges or lawyers can be referred, shall be considered information relating to the representation of a client for purposes of these Rules.

Adopted July 1, 2009, effective January 1, 2010.

Comment

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal

assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (c) recognizes the overriding value of life and physical integrity and requires disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows from information relating to a representation that a client or other person has accidentally discharged toxic waste into a town's water must reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will

contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[6A] Paragraph (b)(1) preserves the policy of the 1980 Illinois Code of Professional Responsibility and the 1990 Illinois Rules of Professional Conduct that permitted a lawyer to reveal the intention of a client to commit a crime. This general provision would permit disclosure where the client's intended conduct is a crime, including a financial crime, and the situation is not covered by paragraph (c).

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Like paragraph (b)(1), paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, but the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding

directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the Rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

[13] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

[14] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[15] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), and 8.1. Rules 3.3 and 8.3, on the other hand, require disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule.

Withdrawal

[15A] If the lawyer's services will be used by a client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1). The lawyer may give notice of the fact of withdrawal regardless of whether the lawyer decides to disclose information relating to a client's representation as permitted by paragraph (b). The

lawyer may also withdraw or disaffirm any opinion or other document that had been prepared for the client or others. Where the client is an organization, the lawyer must also consider the provisions of Rule 1.13.

Acting Competently to Preserve Confidentiality

[16] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Former Client

[18] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

Lawyers' Assistance and Court Intermediary Programs

[19] Information about the fitness or conduct of a law student, lawyer or judge may be received by a lawyer while participating in an approved lawyers' assistance program. Protecting the confidentiality of such information encourages law students, lawyers and judges to seek assistance through such programs. Without such protection, law students, lawyers and judges may hesitate to seek assistance, to the detriment of clients and the public. Similarly, lawyers participating in an approved intermediary program established by a circuit court to resolve nondisciplinary issues among lawyers and judges may receive information about the fitness or conduct of a lawyer or judge. Paragraph (d) therefore provides that any information received by a lawyer participating in an approved lawyers' assistance program or an approved circuit court intermediary program will be protected as confidential client information for purposes of the Rules. See also Comment [5] to Rule 8.3.

Adopted July 1, 2009, effective January 1, 2010.

RULE 4.1: TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Adopted July 1, 2009, effective January 1, 2010.

Comment

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Statements of Fact

[2] This Rule refers to statements of fact as well as law. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Crime or Fraud by Client

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.

Adopted July 1, 2009, effective January 1, 2010.

RULE 4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Adopted July 1, 2009, effective January 1, 2010.

Comment

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person who is represented by counsel, including counsel in a limited scope representation pursuant to Rule 1.2(c), concerning the matter to which the communication relates.

[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[8A] For purposes of this Rule, when a person is being represented on a limited basis under Rule 1.2(c), a lawyer is only deemed to know that the person is represented by another lawyer, and the subject of that representation, upon receipt of (i) a proper Notice of Limited Scope Appearance under Supreme Court Rule 13(c)(6), or (ii) with respect to a matter not involving court proceedings, written notice advising that the client is being represented by specified counsel with respect to an identified subject matter and time frame. A lawyer is permitted to communicate with a person represented under Rule 1.2(c) outside the subject matter or time frame of the limited scope representation.

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

Adopted July 1, 2009, effective January 1, 2010; amended June 14, 2013, eff. July 1, 2013.

RULE 8.2: JUDICIAL AND LEGAL OFFICIALS

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

Adopted July 1, 2009, effective January 1, 2010.

Comment

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

[2] When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

[3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

Adopted July 1, 2009, effective January 1, 2010.

RULE 8.4: MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(d) engage in conduct that is prejudicial to the administration of justice.

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law. Nor shall a lawyer give or lend anything of value to a judge, official, or employee of a tribunal, except those gifts or loans that a judge or a member of the judge's family may receive under Rule 65(C)(4) of the Illinois Code of Judicial Conduct. Permissible campaign contributions to a judge or candidate for judicial office may be made only by check, draft, or other instrument payable to or to the order of an entity that the lawyer reasonably believes to be a political committee supporting such judge or candidate. Provision of volunteer services by a lawyer to a political committee shall not be deemed to violate this paragraph.

(g) present, participate in presenting, or threaten to present criminal or professional disciplinary charges to obtain an advantage in a civil matter.

(h) enter into an agreement with a client or former client limiting or purporting to limit the right of the client or former client to file or pursue any complaint before the Illinois Attorney Registration and Disciplinary Commission.

(i) avoid in bad faith the repayment of an education loan guaranteed by the Illinois Student Assistance Commission or other governmental entity. The lawful discharge of an education loan in a bankruptcy proceeding shall not constitute bad faith under this paragraph, but the discharge shall not preclude a review of the lawyer's conduct to determine if it constitutes bad faith.

(j) violate a federal, state or local statute or ordinance that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status by conduct that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including: the seriousness of the act; whether the lawyer knew that the act was prohibited by statute or ordinance; whether the act was part of a pattern of prohibited conduct; and whether the act was committed in connection with the lawyer's professional activities. No charge of professional misconduct may be brought pursuant to this paragraph until a court or administrative agency of competent jurisdiction has found that the lawyer has engaged in an unlawful discriminatory act, and the finding of the court or administrative agency has become final and enforceable and any right of judicial review has been exhausted.

(k) if the lawyer holds public office:

(1) use that office to obtain, or attempt to obtain, a special advantage in a legislative matter for a client under circumstances where the lawyer knows or reasonably should know that such action is not in the public interest;

(2) use that office to influence, or attempt to influence, a tribunal to act in favor of a client; or

(3) represent any client, including a municipal corporation or other public body, in the promotion or defeat of legislative or other proposals pending before the public body of which such lawyer is a member or by which such lawyer is employed.

Adopted July 1, 2009, effective January 1, 2010.

Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good-faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good-faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

Adopted July 1, 2009, effective January 1, 2010.

Issue 2 C. Fee Dispute/ARDC Issue

Client, a member of the Aryan Brotherhood (AB), comes to law firm and meets with one of the African American female partners and a female associate of Indian descent at a critical time of the case with a motion for summary judgment up for presentment in a week. Client previously hired at least two prior attorneys in the foreclosure case. Based on the clerks docket and the court record, its clear the prior two attorneys neglected the clients' case.

Partner agrees to represent the Client on the condition that client is clear on the scope of representation. Partner's retainer agreement is extremely specific in outlining the scope of how she intends to attack the summary judgment motion, the legal strategies to be applied, what motions they intent to file to counter act the motion for summary judgment. Client agrees and signs on to the strategy. Retainer agreement is signed and initial payment delivered. The female associate begins the work.

Within a few months after a majority of the work is completed with a pending hearing on all motions filed, the Clients' retainer is exhausted as expected. Law firm reaches out to Client for the next series of payments. Client begins a barrage of harassing and long accusatory emails threatening to file ARDC action threats of malpractice, misrepresentation, false advertising (for advertising "Leading Illinois Lawyer" and "Avvo 10.0" ratings) and lying to him about representation. Client states he has been neglected and that the attorney filed motions without Client's authorization, intentionally sabotaging the case based on their objection to his affiliation with the Aryan brotherhood. Accusing the female associate of being incompetent, in addition to personal and gender and race specific offensive comments. That what he really wanted was the attorney to file a "mass tort action" in federal court to battle his foreclosure. The level of emails and phone call reaches a level of seriously disrespecting the female staff, the female associate and female partner working with the client. Client simultaneously states in every email cites Lawyers Duty of Care and the only way to rectify this situation is for the Law firm to continue representing him in the case and that he does not want them to withdraw at all, despite the "extreme incompetence."

Round 1: Can the law firm withdraw on the eve / day of hearing without exposing the individual attorneys and the firm to malpractice and/or ARDC liability?

Round 2: At what point is enough to justify walking away and withdraw from the matter? How much should be tolerated before actually cutting of the client?

Supporting Materials for Fact Pattern 2(c)

Fee Dispute/ARDC Issues

REED YATES FARMS, INC., Plaintiff, v. G. ROBERT YATES, Defendant and Counterplaintiff and Appellant and Third-Party Plaintiff and Counter-Counterdefendant (Don Yates et al., Counterdefendants and Counter-Counterplaintiffs; Mabel Yates, Third-Party Defendant and Counterplaintiff; Jack C. Vieley, Petitioner-Appellee)

No. 4-88-0002

Appellate Court of Illinois, Fourth District

172 Ill. App. 3d 519; 526 N.E.2d 1115; 1988 Ill. App. LEXIS 1017; 122 Ill. Dec. 576

July 14, 1988, Filed

PRIOR HISTORY: [***1] Appeal from the Circuit Court of McLean County; the Hon. Luther H. Dearborn, Judge, presiding.

DISPOSITION: Judgment affirmed.

COUNSEL: G. Robert Yates, of Fort Lauderdale, Florida, appellant *pro se*.

Jack C. Vieley, of Peoria, appellee *pro se*.

JUDGES: JUSTICE KNECHT delivered the opinion of the court. GREEN, P.J., and LUND, J., concur.

OPINION BY: KNECHT

OPINION

[*521] [**1117] Defendant G. Robert Yates (G. Robert) appeals an order which enforced a lien for attorney fees. The order was entered following protracted and hotly contested proceedings which resulted in a family-owned horse farm being placed in receivership for the purpose of liquidation.

The initial complaint in this cause was filed on June 19, 1983, by Reed Yates Farms, Inc. (Reed Yates), and named G. Robert as defendant. Among the relief sought in counts I through V was money damages for the boarding of G. Robert's horses and an injunction requiring G. Robert to endorse and return to the court for distribution a check payable jointly to him and Reed Yates, which represented proceeds from the sale of a horse jointly owned by those parties. Count VI was premised on an alleged joint venture agreement between Reed Yates and G. Robert under which the parties owned as [***2] tenants in common certain breeding stock and other horses. Reed Yates requested the court order an accounting of the affairs of the joint venture, order a partition thereof, and determine the equitable portion of the liquidation proceeds to be delivered to G. Robert and Reed Yates. In an additional count filed August 10, 1984, Reed Yates requested dissolution of the joint venture and liquidation of the joint venture assets.

In a counterclaim filed August 16, 1984, G. Robert asserted that since 1972, he and Don Yates (Don) engaged in a joint venture known as Reed Yates Farm Partnership (the partnership) for the purpose of boarding, breeding and selling race horses. The counterclaim further alleged, *inter alia*, Don misappropriated partnership assets and failed to provide G. Robert with adequate reports concerning partnership affairs. G. Robert stated he was informed and believed an independent audit of his, Don's, Mabel Yates', Reed

Yates' and the partnership's assets would establish, *inter alia*, he is the owner of and entitled to all of the Reed Yates assets, and the other parties owe him substantial sums of money.

On the basis of the above allegations, G. Robert requested [***3] (1) the court appoint an independent auditor to audit the books and records [*522] of Don, Reed Yates, and the partnership and determine the balances due by the parties to each other; (2) Don be ordered to turn over to such auditor all books and records of himself, the partnership and Reed Yates; (3) upon completion of the audit, the court determine the interests of G. Robert and Don in the partnership and the balances or assets due to or from the partnership by any party; and (4) after the above determinations, the court dissolve the partnership and distribute its assets to G. Robert and Don on the basis of the results of the audit.

On October 2, 1985, G. Robert filed an amendment to his counterclaim, which added counts II through V. Count II repeated the allegations of Robert's initial counterclaim, and on the basis thereof requested money damages in excess of $ 15,000 for the counterdefendants' alleged unlawful and tortuous conversion of G. Robert's property. Count III alleged that in December 1977, Don and G. Robert entered into a joint venture by terms of which they agreed to purchase a horse named Rorty Hanover, which was to be used for stud purposes and was to be jointly [***4] titled in both of their names. G. Robert stated, however, Don took delivery of Rorty Hanover in his own name without authorization from G. Robert to do so, thereby converting G. Robert's property to his own use. On the basis of the above allegations, Robert requested money damages. Counts IV and V essentially requested punitive damages on the basis of the alleged wilful, wanton and fraudulent character of the acts alleged in the initial counterclaim and in count III, respectively.

G. Robert filed yet another counterclaim on October 2, 1985. The allegations of this counterclaim were, however, basically the same as those of G. Robert's previous counterclaims, except G. Robert also accused Mabel Yates (Mabel) of converting partnership assets to her own use and failing to make proper reports to G. Robert concerning partnership affairs.

[**1118] A bench trial was held on January 8, 9, and 13, 1986.

In an order filed January 22, 1986, the circuit court found that on March 16, 1978, Don, Robert, and Mabel agreed to the issuance of stock in Reed Yates Farms, Inc., in the proportion of 49% to Don, 49% to Robert, and 2% to Mabel. The court found because he signed a document agreeing to distribution [***5] of the corporate stock in this manner, and signed a document in which he applied for insurance as a vice-president of Reed Yates, G. Robert is estopped from denying the corporate existence of Reed Yates. Moreover, the court found G. Robert's allegations of fraud and conversion were not substantiated by the evidence and were not proved. The court also found G. Robert [*523] was obligated to pay all board costs for animals owned in whole or in part by him and boarded at Reed Yates, except for board with respect to two animals which he owned and which Don refused to breed on or about March 8, 1983.

The court further found it appropriate and necessary to appoint a receiver to liquidate the Reed Yates assets. After paying all debts, the receiver was to distribute the assets of the corporation to Robert, Don, and Mabel in proportion to the amount of stock in the corporation which the court found they owned. The receiver was to deduct from Robert's distributions the amount of the accumulated board bill which he owed and was to deduct from Don's distributions an amount representing board for the two horses belonging to G. Robert which Don refused to breed. Also, the receiver was ordered [***6] to pay to G. Robert any unpaid director's fees and was given discretion to pay Don an appropriate amount for work which he did in connection with the sale at auction of horses belonging to Reed Yates at Lexington, Kentucky, in December 1985, in lieu of a $ 5,000 bonus which the corporate directors awarded him in December 1985. Finally, the court held although the receiver was to account for all receipts and disbursements from the date of his appointment and qualification, there was to be no accounting for the past acts of the parties, since G. Robert had already conducted a review of the corporate records through his agents.

G. Robert appealed the circuit court's order, alleging (1) improper denial of his requests for a jury trial; (2) Reed Yates Farm, Inc., is not a valid corporation, or, alternatively, payments to Don for his services as a corporate director and president were illegal because his affirmative vote was necessary to carry the motions authorizing those payments; (3) the circuit court's denial of G. Robert's requests for actual and punitive damages

(apparently on the basis of G. Robert's counter-claims) was against the manifest weight of the evidence; and (4) the circuit [***7] court erred in not ordering an accounting. In a *Rule 23* order filed September 8, 1986 (*Reed Yates Farms, Inc. v. Yates (1986), 145 Ill. App. 3d 1171, 511 N.E.2d 282* (order under *Supreme Court Rule 23*)), this court rejected all of G. Roberts' arguments and affirmed the circuit court's order *in toto*. This court held G. Robert waived his argument that the denial of his request for actual and punitive damages was contrary to the manifest weight of the evidence, by failing to include in his opening brief references to the portions of the record which allegedly supported this argument. The supreme court denied a petition for leave to appeal from this order on February 6, 1987. *Reed Yates Farms, Inc. v. Yates (1987), 113 Ill. 2d 584.*

[*524] In the meantime, G. Robert on September 26, 1986, filed with the Attorney Registration and Disciplinary Commission (ARDC) a complaint against attorney Jack C. Vieley, who had represented G. Robert in this cause since November 15, 1985. Among the charges stated in the complaint were incompetent representation in this cause; refusal to allow G. Robert input into the appellant's brief in the [***8] previous appeal in this cause; failure to advise G. Robert of the filing of this court's opinion in the previous appeal; misinformation in an effort to dissuade G. Robert from appealing; and violation of the attorney-client privilege "in sending a copy of our contract to the opposing law firm." On March 19, 1987, the ARDC advised Vieley it had concluded [**1119] its investigation into G. Robert's charges and determined to proceed no further in the matter.

On October 21, 1986, attorney Vieley filed a motion to withdraw as G. Robert's counsel, which the court allowed on November 19, 1986. Also on October 21, 1986, attorney Vieley filed a petition for adjudication of a lien for attorney fees with respect to services which he rendered on behalf of G. Robert in this cause. On February 20, 1987, attorney Vieley filed a second petition to adjudicate attorney's lien. Count I of this petition requested judgment against G. Robert in the amount of $ 44,607.20 and payment of this amount, plus 40% of all future payments due G. Robert as a result of the liquidation of Reed Yates, from money payable to G. Robert by the Reed Yates receiver. This claim was premised on a contract for legal services entered [***9] into by G. Robert and attorney Vieley on November 13, 1985, which provides in pertinent part:

"CONTRACT TO HIRE ATTORNEY JACK C. VIELEY

* * *

1. Client hereby retains and employs Attorney to represent Client in the prosecution and recovery or settlement, including bringing suit, of Client's claim for damages against DON YATES, DON YATES d/b/a REED YATES FARM PARTNERSHIP, and REED YATES FARMS, INC. and MERRICK HAYES et al.

2. In consideration for legal services rendered and to be rendered in the prosecution and defense of a certain case entitled REED YATES FARMS, INC., YATES d/b/a REED YATES FARM PARTNERSHIP, and REED YATES FARMS, INC., No. 83 -- CH -- 58 now pending in the Circuit Court of McLean County, Illinois, Client agrees to pay Attorney and his Associates an initial non-refundable retainer in the sum of $ 10,000.00 in order to pay Attorney for his time in research, review of the [*525] record, and investigation of the facts of the case. In addition to the $ 10,000.00 retainer, Client agrees to pay Attorney the sum of 33 1/3% of all sums recovered and of the fair market value of all property recovered from said claims whether recovery be made by suit, settlement, [***10] or in any other manner (Client to receive full credit for the initial $ 10,000.00 retainer paid to Attorney against the 33 1/3% contingent fee). However, in the event that there is an appeal, second trial, or retrial of REED YATES FARMS, INC., Plaintiff v. G. ROBERT YATES, Defendant/Counterplaintiff, and DON YATES, DON YATES d/b/a REED YATES FARM PARTNERSHIP, and REED YATES FARMS, INC., No. 83 -- CH -- 58, then Client agrees to pay Attorney a contingent fee of 40% with

> Client receiving full credit for the $ 10,000.00 retainer against the 40% contingent fee."

Count II of attorney Vieley's petition to adjudicate attorney's lien requested under a *quantum meruit* theory payment of fees in the amount of $ 12,420.81 from funds which the Reed Yates receiver owed to G. Robert. In support of this count, attorney Vieley filed a detailed affidavit of services which he performed on behalf of G. Robert in this cause. Among the services rendered was representation of G. Robert in the bench trial and preparation of briefs and presentation of oral argument with respect to the previous appeal in this cause.

In an order entered December 1, 1987, the circuit court found, *inter alia*: (1) [***11] G. Robert's allegations of fraud and conversion resulted in no recovery of damages; (2) the pleadings of all of the parties sought, *inter alia*, a dissolution of a business enterprise and liquidation, as well as other relief; (3) G. Robert and other parties were awarded their proportionate shares of the proceeds of the dissolved and liquidated business, together with other relief; (4) by reason of the nature of the litigation, it was not possible to determine what efforts of what attorneys produced particular results, and the work of the attorneys for all of the parties contributed to and produced the final results at trial; (5) since attorney Vieley's efforts partially, but not wholly, [**1120] produced the recovery for G. Robert, Vieley was entitled to compensation for his services on a *quantum meruit* basis and not on a contingent fee basis; (6) attorney Vieley was entitled to total compensation on a *quantum meruit* basis of $ 22,075, representing 220.75 hours of work at $ 100 per hour, less the $ 10,000 retainer which G. Robert had already paid him; and (7) the amount of $ 12,075 constitutes a lien on funds in the hands of the Reed Yates receiver which would otherwise be distributable [***12] to G. Robert. On the basis of [*526] these findings, the court ordered the Reed Yates receiver to pay to attorney Vieley the sum of $ 12,075 from funds which would otherwise be distributable to G. Robert as part of his share of the proceeds of the liquidation of Reed Yates.

G. Robert's *pro se* appellate brief is rather poorly organized. So far as we can discern, his principal arguments on appeal are: (1) the circuit court erred in awarding attorney Vieley fees because (a) an attorney who voluntarily withdraws from or abandons representation of a client is not entitled to compensation for services rendered on a *quantum meruit* basis, (b) there was no recovery on the basis of G. Robert's counterclaims for damages, (c) Vieley committed acts of professional misconduct in his representation of G. Robert, and (d) attorney Vieley failed to fulfill his contract with G. Robert; (2) the circuit court improperly denied G. Robert leave to file a counterclaim against attorney Vieley requesting a refund of the $ 10,000 retainer; and (3) the circuit court should have awarded G. Robert a refund of the $ 10,000 retainer which he paid attorney Vieley because a provision for a nonrefundable [***13] retainer fee is inconsistent with other provisions of an attorney employment contract providing for payment of additional amounts on a contingency basis.

Attorney Vieley argues the contract for attorney fees here at issue was by neither its title nor its terms exclusively a contingent fee contract, and in any event he is entitled to compensation on a *quantum meruit* basis for services which he performed on G. Robert's behalf. Vieley asserts by the plain language of the employment contract which he and G. Robert executed, the $ 10,000 retainer was not a contingent payment. He states G. Robert's ownership interests in the property at issue in this case were denied or disputed, and $ 136,518 was ultimately distributed to G. Robert as a result of the Reed Yates liquidation. Vieley further argues he properly withdrew from his representation of G. Robert in this cause after G. Robert filed a complaint against him with the ARDC, since G. Robert's filing of a complaint with the ARDC made his continued representation of G. Robert impossible. Vieley also observes Judge Dearborn, who presided over the circuit court proceedings in this cause for 4 1/2 years, was well qualified to assess [***14] the results produced by Vieley's efforts on G. Robert's behalf. Vieley contends under these circumstances, the circuit court properly awarded him attorney fees on a *quantum meruit* basis.

In his reply brief, G. Robert points out in his motion for leave to withdraw as G. Robert's attorney, Vieley stated his reason for wishing to withdraw was G. Robert's refusal to pay attorney fees pursuant to [*527] the employment contract between he and G. Robert, and Vieley did not mention G. Robert's filing of charges with the ARDC in his motion for leave to withdraw.

We first consider G. Robert's contention attorney

Vieley is not entitled to an award of attorney fees because of his withdrawal as G. Robert's attorney in this cause. The record supports G. Robert's statement Vieley asserted only G. Robert's refusal to pay attorney fees as a basis for his motion for leave to withdraw. Vieley contends for the first time on appeal G. Robert's filing of a complaint with the ARDC necessitated his withdrawal as G. Robert's attorney. It is not, however, necessary for us to determine whether Vieley has waived the latter contention, since both of these matters entitled Vieley to withdraw as G. Robert's [***15] attorney, and we may affirm a circuit court judgment on any basis appearing of record. *Cuthbert v. Stempin (1979), 78 Ill. App. 3d 562, 396 N.E.2d 1197.*

[**1121] If during the course of litigation attorney fees are not paid when due, an attorney may demand payment of accrued fees and withdraw from the case if the fees are not paid within a reasonable time. (*Cairo & St. Louis R.R. Co. v. Koerner (1878), 3 Ill. App. 248.*) After his or her withdrawal, the attorney may recover for services rendered in the cause. (Annot., *88 A.L.R.3d 246, 264 (1978)* (§ 10 (b)).) In the present case, the record reflects Vieley demanded G. Robert pay past-due attorney fees at least as early as June 28, 1986. The period elapsed between this demand and Vieley's October 21, 1986, motion for leave to withdraw was a reasonable time in which G. Robert could have paid the fees demanded. Absent such a payment, Vieley was justified in proceeding with his motion for leave to withdraw from representation of G. Robert in this cause.

Our research has revealed no cases involving the question of whether an attorney who withdraws from representation of a [***16] client because of the client filing a complaint against the attorney with an attorney disciplinary agency is entitled to fees for services performed in the cause up to the date of his or her withdrawal. Previous decisions have, however, considered the question of an attorney's entitlement to fees in situations involving a breakdown in the attorney-client relationship, such as where a client degrading or humiliating an attorney forces the attorney to withdraw from representation of the client. In such cases, attorneys have been held entitled to compensation for services rendered up to the time of withdrawal. (See generally Annot., *88 A.L.R.3d 246, 261 (1978)* (§ 9).) The rule generally applicable to entitlement to a lien for attorney fees in situations where there is a breakdown in the attorney-client relationship was stated in the recent [*528] case of *Phelps Steel, Inc. v. Von Deak (1987), 24 Mass. App. 592, 594, 511 N.E.2d 42, 44*:

> "Breakdown of the lawyer-client relationship serves as good cause for withdrawal, without waiver of the attorney's lien. [Citations.] The lawyer-client relationship is founded on trust and confidentiality. [***17] When those foundations deteriorate, it is not only impractical to persist in the relationship, it diminishes the integrity of the bar to do so."

A client filing a complaint against his attorney with the ARDC -- especially a complaint which impugns the attorney's integrity by alleging the attorney deliberately misinformed the client -- undermines the mutual trust and confidence essential to the attorney-client relationship to the extent it constitutes good cause for the attorney's withdrawal from representation of the client. Therefore, attorney Vieley acted properly in seeking to withdraw as G. Robert's attorney in this cause following the filing of G. Robert's complaint against Vieley with the ARDC, and attorney Vieley's withdrawal under these circumstances does not bar him from receiving compensation or enforcing a lien for attorney fees with respect to services rendered in this cause up to the date of his withdrawal.

The question of whether G. Robert's failure to obtain a recovery on his counterclaims prevents attorney Vieley from asserting a lien for attorney fees involves interpretation of the statute governing liens for attorney fees. That statute provides in pertinent [***18] part:

> "Attorneys at law shall have a lien upon all claims, demands and causes of action, including all claims for unliquidated damages, which may be placed in their hands by their clients for suit or collection, or upon which suit or action has been instituted, for the amount of any fee which may have been agreed upon by and between such attorneys and their clients, or, in the absence of such agreement, for a reasonable fee, for the services of such

> attorneys rendered or to be rendered for their clients on account of such suits, claims, demands or causes of action. * * * Such lien shall attach to any verdict, judgment or order entered and to any money or property which may be recovered, on account of such suits, claims, demands or causes of action, from and after the time of service of the notice." (Ill. Rev. Stat. 1985, ch. 13, par. 14.)

[**1122] No Illinois cases have addressed the question of whether payments pursuant to an order in an equitable proceeding which essentially divides the assets of a liquidated business among the business' owners are a recovery of money or property to which a lien for attorney fees [*529] may attach. However, in *T. Harlan & Co. v. Bennett, Robbins & Thomas (1907), 127 Ky. 572, 106 S.W. 287*, [***19] the court considered this question in the context of an attorney lien statute substantially similar to the Illinois statute. In that case, the plaintiffs sought settlement of a copartnership existing between them and the defendant. The plaintiffs sought to charge the defendant with large sums of money, while the defendant filed counterclaims against the plaintiffs and requested judgment for such sum as might be found due him. The defendant was ultimately awarded a certain sum of money as his share of the partnership assets.

The court held a lien for attorney fees does not attach if the defendant's attorney merely succeeds in defeating a recovery by the plaintiff. The court concluded, though, a lien for attorney fees does attach where a judgment is obtained establishing a defendant's positive right to a share of partnership property, title to which was in the partnership up to the time of judgment. The court stated such a judgment constitutes a recovery within the meaning of the statute and held the defendant's attorneys were entitled to a lien for their services on a portion of the judgment entered in defendant's favor.

In the present case, G. Robert's entire interest in the [***20] Reed Yates assets was potentially at risk, and attorney Vieley's services made a substantial contribution to the amount which G. Robert ultimately obtained as a result of the liquidation proceedings. For instance, on November 21, 1985, Don Yates filed a petition for authority to sell a standardbred stallion named Rorty Hanover for $ 61,225. On December 3, 1985, during the time period G. Robert was represented by attorney Vieley, the circuit court entered an order which had the practical effect of blocking this proposed private sale of Rorty Hanover. The horse was ultimately sold at public auction for $ 120,000. Moreover, total cash payments to G. Robert resulting from the liquidation of Reed Yates amounted to at least $ 134,000. On the basis of the amount which G. Robert ultimately received from the liquidation of Reed Yates and the enhancement of the amount of assets available for distribution through attorney Vieley's efforts, we conclude attorney Vieley obtained a recovery on G. Robert's behalf within the meaning of the statute governing liens for attorney fees.

We next consider the effect of alleged professional misconduct by attorney Vieley on his entitlement to attorney [***21] fees. In earlier times, denial of attorney fees for legal work which was tainted by unprofessional conduct was in at least some jurisdictions deemed an appropriate sanction for unethical conduct which was not so serious as to require disbarment. (See, *e.g., Ingersoll v. Coal Creek Coal Co.* [*530] *(1906), 117 Tenn. 263, 98 S.W. 178.*) This is not, however, the law in Illinois today.

The supreme court has exclusive and plenary jurisdiction over attorney disciplinary matters. (*In re Harris (1982), 93 Ill. 2d 285, 443 N.E.2d 557*; *Schnack v. Crumley (1982), 103 Ill. App. 3d 1000, 431 N.E.2d 1364.*) Courts other than the supreme court may adjudicate matters touching on attorney discipline only when acting as agents of the supreme court upon direct order of that court. (*Ettinger v. Rolewick (1986), 140 Ill. App. 3d 295, 488 N.E.2d 598*; see *In re Zisook (1981), 88 Ill. 2d 321, 430 N.E.2d 1037, cert. denied* (1982), *457 U.S. 1134, 73 L. Ed. 2d 1352, 102 S. Ct. 2962.*) Attorney disciplinary [***22] proceedings are conducted by the ARDC completely separate and apart from the judicial proceedings in which the alleged attorney misconduct occurred. (See 107 Ill. 2d Rules 752, 753, 755; 113 Ill. 2d Rules 751, 754.) A reduction of attorney Vieley's fees imposed solely as a sanction for unprofessional conduct on his part would constitute an impermissible infringement on the exclusive power of the supreme court, acting [**1123] through the ARDC, to adjudicate attorney disciplinary matters.

In support of his argument as to his argument as to this issue, G. Robert relies on *Talley v. Alton Box Board Co. (1962), 37 Ill. App. 2d 137, 185 N.E.2d 349. Talley*

was a libel action. The sole issue decided on appeal was whether various statements made in the course of judicial proceedings, which accused an attorney of unprofessional conduct, were absolutely privileged. The court held they were. In the course of its opinion, the court stated:

> "While unethical conduct may not always bar attorney fees, it is hardly accurate to say it cannot affect them, because there are cases where it certainly did. In a New York case, the attorney seeking to recover fees was [***23] charged with 'improperly disclosing confidential communications.' The statement was held sufficiently relevant to the issue to be clothed with privilege. *Garr v. Seldon, 4 NY 91.* Another case denied recovery of attorney fees on the ground the attorney's conduct was contrary to the character of the profession. *Ingersoll v. Coal Creek Coal Co., 117 Tenn. 263, 98 S.W. 178.*" (*Talley, 37 Ill. App. 2d at 145, 185 N.E.2d at 353.*)

In view of the exclusive jurisdiction of the supreme court to adjudicate charges of attorney misconduct, the above statement, if of any relevance at all to the determination of the amount of attorney fees, must mean an attorney's alleged unethical conduct is a matter relevant to determining whether the attorney fulfilled his contractual obligations [*531] to his or her client.

G. Robert includes in his brief a separate argument to the effect attorney Vieley failed to fulfill his contractual obligations to G. Robert. This argument reads in its entirety:

> "5. SHOULD THE TRIAL COURT HAVE CONSIDERED THE FACT THAT ATTORNEY VIELEY FAILED TO FULFILL HIS CONTRACT?
>
> Attorney [***24] Vieley was told that naming Attorney Merrick Hayes, et al, was absolutely critical to obtain a semblance of a recovery especially with grossly inadequate discovery.
>
> Attorney Vieley refused to name Attorney Hayes, et al, although the contract was not signed until he agreed it was proper, indicated, and agreed to name him. [Citations to record omitted.]"

It is also apparent an additional source of G. Robert's dissatisfaction with attorney Vieley's services is attorney Vieley's failure to include references to the record in support of his argument contained in the appellant's opening brief filed in the initial appeal in this cause to the effect the circuit court's failure to award G. Robert actual and punitive damages was contrary to the manifest weight of the evidence. This omission resulted in this court holding G. Robert waived this issue for purposes of review. Finally, in his argument premised on attorney Vieley's alleged unprofessional conduct, G. Robert states, "Attorney Vieley also charged me for putting a lien on $ 50,000 plus mortgage totally unassociated with the case and which he received in error."

Considering the latter contention first, the record reflects no order [***25] enforcing a lien for attorney fees arising out of an action concerning a mortgage unrelated to this case. Attorney Vieley's failure to associate with attorney Hayes in his representation of G. Robert in this cause also does not represent a breach of attorney Vieley's contractual duty requiring a reduction in Vieley's fee award. G. Robert does not state why attorney Hayes' participation was essential in order to obtain "a semblance of a recovery," other than to state the discovery was grossly inadequate. He does not, however, point out the manner in which the discovery was so inadequate as to require Vieley to associate with Hayes in his representation of G. Robert. Absent evidence this alleged omission on the part of Vieley prejudiced G. Robert, the circuit court could properly have concluded Vieley's failure to associate with Hayes represented a merely legitimate exercise of Vieley's judgment as to how to best conduct the litigation. An attorney's exercising his or her judgment as to litigation strategy [**1124] contrary to a client's [*532] wishes does not in itself amount to the incompetent performance of legal services. (See *People v. Haywood (1980), 82 Ill. 2d 540, 413 N.E.2d 410.*) [***26] For these reasons, we cannot say the circuit court clearly erred in refusing to reduce Vieley's fee award on the basis of Vieley's alleged failure to associate with attorney Hayes in his representation of G. Robert in this cause.

Attorney Vieley's failure to include citations to the record in the portion of G. Robert's brief filed in the prior

appeal of this cause concerning the circuit court's denial of G. Robert's requests for actual and punitive damages does represent a rather serious breach of Vieley's contractual obligations to G. Robert. However, in order for the circuit court to determine the value of attorney Vieley's services in properly presenting G. Robert's other three arguments in the first appeal, it was essential G. Robert present expert testimony, in the form of the opinions of other attorneys, concerning the degree to which Vieley's malfeasance in preparing G. Robert's opening brief reduced the value of Vieley's services in conducting that phase of the litigation. (See *Louisville, New Albany & Chicago Ry. Co. v. Wallace (1891), 136 Ill. 87, 26 N.E. 493* (where there are no usual and customary charges for legal services, fair and reasonable [***27] compensation therefor cannot usually be ascertained other than through opinions of attorneys).) In the absence of such evidence, we cannot say the circuit court clearly erred in awarding attorney Vieley the entire amount of fees which he claimed for the preparation of G. Robert's opening brief in the initial appeal of this cause.

We finally consider G. Robert's contention he is entitled to a refund of the $ 10,000 retainer which he paid attorney Vieley. The circuit court allowed G. Robert a credit for the amount of this retainer toward the amount of attorney fees which it found G. Robert owed Vieley on the basis of the *quantum meruit* theory. Except for the reasons previously discussed, G. Robert does not contend the amount of Vieley's fee award is unreasonable. For this reason alone, we would be justified in holding the circuit court properly refused to award G. Robert a refund of the $ 10,000 retainer.

Even if the circuit court had not awarded attorney Vieley additional fees on a *quantum meruit* basis, we would nevertheless be compelled to hold G. Robert is not entitled to a refund of the $ 10,000 retainer. Where there is no ambiguity in the words of a contract, the intent [***28] of the parties must be determined solely from the contract's language. (*Lenzi v. Morkin (1984), 103 Ill. 2d 290, 469 N.E.2d 178*; *Schek v. Chicago Transit Authority (1969), 42 Ill. 2d 362, 247 N.E.2d 886*.) In this case, the contract between G. Robert and Vieley explicitly [*533] provides the $ 10,000 retainer is nonrefundable. The fact the contract provides for additional fees on a contingency basis does not render the contract ambiguous to the extent we may look beyond its plain language to determine its meaning. Nor does the inclusion in a contract for legal services of both a provision for a nonrefundable retainer fee and a provision for additional fees on a contingency basis constitute an obvious injustice. For these reasons, cases such as *Robinson v. Stow (1864), 39 Ill. 568*, and *United States Trust Co. v. Jones (1953), 414 Ill. 265, 111 N.E.2d 144*, on which G. Robert relies are distinguishable from the case at bar. Because we conclude G. Robert is not, as a matter of law, entitled to a refund of the $ 10,000 retainer which he paid to attorney Vieley, we [***29] need not determine whether the circuit court erred when it on April 28, 1987, denied G. Robert leave to file a counterclaim against Vieley requesting a refund of the amount of this retainer.

An attorney initially retained on a contingent fee basis who is discharged without cause is entitled to compensation on a *quantum meruit* basis for services rendered up to the date of his or her discharge. (*Rhoades v. Norfolk & Western Ry. Co. (1979), 78 Ill. 2d 217, 399 N.E.2d 969*.) We perceive no reason why the *quantum meruit* standard should not also apply in situations where an attorney [**1125] withdraws from representation of a client for good cause.

Judge Dearborn, who presided over this litigation for approximately 4 1/2 years, was in a superior position to determine the results obtained as a result of attorney Vieley's services and the *quantum meruit* value of those services. Judge Dearborn's decision as to these matters was not erroneous.

We have considered all of the authorities cited by G. Robert and have found those which we have not specifically discussed to be of little or no relevance to the issues presented by this appeal.

The judgment of the [***30] circuit court is affirmed.

Affirmed.

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LEORIS and COHEN, P.C., Plaintiff-Appellant, v. ROBERT L. McNIECE and MARY McNIECE, Defendants-Appellees.

No. 2-91-0651

APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

226 Ill. App. 3d 591*; *589 N.E.2d 1060*; *1992 Ill. App. LEXIS 414*; *168 Ill. Dec. 660

February 10, 1992, Submitted
March 24, 1992, Filed

SUBSEQUENT HISTORY: [***1] Released for Publication April 28, 1992.

PRIOR HISTORY: Appeal from the Circuit Court of Lake County. No. 91-LM-62. Honorable Emilio B. Santi, Judge, Presiding.

DISPOSITION: Reversed and remanded.

COUNSEL: APPELLANT ATTORNEYS: Leoris & Cohen, P.C., Attorneys at Law, 622 Laurel Avenue, Highland Park, IL 60035-3510, (708) 433-6063, David Drenk, Leoris & Cohen, P.C., 622 Lauren Avenue, Highland Park, IL 60035, (708) 433-6063.

APPELLEE ATTORNEY: G. Douglas Grimes, Law Offices of G. Douglas Grimes, 221 Washington St., Waukegan, IL 60085, (708) 249-4100.

JUDGES: WOODWARD, BOWMAN, McLAREN

OPINION BY: WOODWARD

OPINION

[**1061] [*592] JUSTICE WOODWARD delivered the opinion of the court:

The plaintiff, Leoris and Cohen, P.C., filed a one-count complaint in the circuit court of Lake County seeking attorney fees and costs from the defendants, Robert L. McNiece and Mary McNiece, arising out of the plaintiff's representation of defendants in a medical malpractice action. The trial court granted the defendants' motion for summary judgment as to the claim for attorney fees and awarded the plaintiff, pursuant to an agreed order, $ 1,523 on its claim for costs.

The sole issue raised by the plaintiff on appeal is whether the trial court erred in granting summary judgment [***2] in favor of the defendants.

The following facts are relevant to this appeal and are gleaned from the various pleadings and exhibits on file. On September 20, 1986, the defendant, Robert McNiece, executed a contingent fee agreement which provided that the plaintiff would represent the defendants in a claim arising out of blood transfusions received at Victory Memorial Hospital on or about July 12, 1986. It also provided that "no attorney fee shall be due unless a recovery is effected for the client."

On October 28, 1986, the plaintiff filed suit as a "complaint for discovery" on behalf of defendant, Robert McNiece. According to the plaintiff's affirmative defense to the defendants' counterclaim, it "further prosecuted" this action on behalf of Robert McNiece. There is no evidence in the record as to what the plaintiff did by way of "further prosecution" of the case.

The affirmative defense further alleges that on June

5, 1987, Richard Friedman, an associate of the plaintiff, terminated his association with the plaintiff except as to pending matters. Thereafter, on June 8, 1987, Robert McNiece retained Richard [**1062] Friedman to represent him in an unrelated criminal matter. Robert [***3] McNiece paid a $ 2,500 retainer to Richard Friedman in three installments beginning June 8, 1987.

On December 21, 1987, Richard Friedman was substituted as the attorney for defendants in their medical malpractice action. On January 20, 1988, an appeal was filed in the medical malpractice action, and in March 1988 Richard Friedman died. On May 6, 1988, the plaintiff filed a separate action for medical malpractice on behalf of defendants and essentially based on the same facts underlying the original malpractice suit. The appeal in the original medical malpractice case was rendered moot due to the filing of the second suit.

On February 16, 1989, Robert McNiece executed a second contingent fee contract wherein he retained the plaintiff to represent him for claims arising out of his receiving blood transfusions at Victory [*593] Memorial Hospital on or about July 11, 1986, and thereafter. According to the affirmative defense to the defendants' counterclaim, the plaintiff successfully defended several motions to dismiss the second malpractice suit, as well as a motion for summary judgment.

On October 16, 1989, the plaintiff received a handwritten letter from Robert McNiece. The letter reads:

[***4] "Mr. Leoris,

Regarding your bill of $ 1400 as far as we were aware the only thing your firm was to do was file the proper papers to keep the law suit *[sic]* alive. The only expenses we knew of and authorized were the ones that Richard incurred and he was paid for them in cash while he was alive.

We discussed this with Nancy Moore, at which time we also told her we did not know we had hired your firm to represent us.

Richard was our attorney and we do understand there was some confusion after his death.

Thank you

[signed] Robert McNiece"

The plaintiff subsequently filed, pursuant to *Supreme Court Rule 13* (134 Ill. 2d R. 13), a motion to withdraw, a copy of which is not included with the record, and on November 16, 1989, the court entered an order granting the plaintiff's motion to withdraw. The order does not specify the reason or basis for allowing the plaintiff to withdraw. Nor does the record include a transcript of any hearing regarding the motion to withdraw. The plaintiff admits, however, in its answer to the defendants' affirmative defense that "it withdrew * * * after a complete breakdown of the attorney-client relationship occurred and non-payment by Defendants of costs [***5] advanced by Plaintiff." There is no other evidence in the record as to the basis of the plaintiff's motion to withdraw. The second suit against Victory Memorial Hospital was dismissed on February 22, 1990, for want of prosecution.

On January 8, 1991, the plaintiff filed its one-count complaint against the defendants seeking to recover certain costs advanced by the plaintiff on behalf of the defendants. The complaint further sought attorney fees based on the reasonable value of legal services performed by the plaintiff on behalf of the defendants. The reasonable value of the fees sought was for $ 9,375 and covered a period of time "after February of 1988 through November 16, 1989." The complaint seeks no costs or fees for any representation of the defendants prior to February 1988.

[*594] On February 19, 1991, Robert McNiece filed a counterclaim wherein he alleged that $ 2,500 paid by McNiece to Richard Friedman was not accounted for by the plaintiff. The counterclaim sought an accounting and a determination as to the parties' rights regarding the $ 2,500. The plaintiff answered the counterclaim and filed an affirmative defense wherein it alleged that the $ 2,500 paid by Robert McNiece was [***6] a retainer fee for Richard Friedman's representation of McNiece in a criminal matter. The affirmative defense further sought sanctions pursuant to *Supreme Court Rule 137* (134 Ill. 2d R. 137).

The defendants subsequently filed a combined motion for judgment on the pleadings and for summary judgment. In that combined [**1063] motion they essentially argue that the plaintiff is entitled to no attorney fees because under either the September 20, 1986, contingency fee contract or the February 16, 1989, contingency fee contract the plaintiff is not entitled to a

fee unless "a recovery is effectuated for the client." The motion further maintains that the plaintiff is not entitled to a recovery based on *quantum meruit* because there exists a contract between the parties concerning the same subject matter upon which the *quantum meruit* claim rests.

On May 2, 1991, the trial court, pursuant to oral motion of the defendants, dismissed with prejudice the defendants' counterclaim. On May 7, 1991, the trial court granted the defendants' motion for summary judgment and included in that order language making the order appealable under *Supreme Court Rule 304(a)* (134 Ill. 2d R. 304(a)). The [***7] order does not indicate the basis for granting the defendants' summary judgment motion. The court further ordered that the plaintiff's remaining claim for costs be set for trial.

On May 21, 1991, the plaintiff filed a written motion for sanctions pursuant to *Supreme Court Rule 137* (134 Ill. 2d R. 137) based upon the counterclaim filed by the defendants and later dismissed with prejudice by agreed order. On May 28, 1991, the trial court entered an order awarding the plaintiff attorney fees pursuant to its *Rule 137* motion. Also on May 28, an agreed order was entered wherein judgment was entered in favor of the plaintiff and against the defendants in the amount of $ 1,523. Although the order does not specify such, we may presume that the $ 1,523 judgment was for the plaintiff's claim for costs as that was the only issue then remaining before the trial court. On June 6, 1991, the plaintiff filed its notice of appeal from the May 7, 1991, order granting summary judgment in favor of the defendants.

We begin by clarifying our jurisdiction to hear this appeal. The plaintiff states in its jurisdictional statement that it appeals pursuant [*595] to *Supreme Court Rule 304(a)*. While it is true that [***8] the order appealed from contains the language necessary to make it appealable under *Rule 304(a)*, that language was rendered superfluous when the trial court disposed of the remaining claims in the case on May 28, 1991. At that point, the May 7 order became appealable pursuant to Rule 301. While such a distinction does not affect our jurisdiction in this case, we point it out as a matter of elucidation.

We also note that the defendants have not filed an appellate brief in this case. We will, however, consider the merits of the appeal pursuant to *First Capitol Mortgage Corp. v. Talandis Construction Corp. (1976), 63 Ill. 2d 128.*

We turn then to the issue of whether the trial court properly granted summary judgment in favor of the defendants. The purpose of a summary judgment proceeding is to determine whether there are any genuine issues of triable fact, and a motion for summary judgment should be granted only when the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. (Ill. Rev. Stat. 1989, ch. 110, par. 2-1005(c); [***9] *Purtill v. Hess (1986), 111 Ill. 2d 229, 240.*) While the use of summary judgment is to be encouraged as an aid in the expeditious disposition of a lawsuit, it is a drastic means of disposing of litigation and should be allowed only when the right of the moving party is clear and free from doubt. *Purtill, 111 Ill. 2d at 240.*

The plaintiff argues that the trial court erred in granting summary judgment in favor of the defendants because it is entitled to recover, under a *quantum meruit* theory, the reasonable value of its services rendered to the defendants prior to its being discharged. It further asserts that the trial court erred as a matter of law when it held the plaintiff's cause of action was barred by the contingency fee agreement.

Our supreme court has held that a discharged attorney may recover on a *quantum meruit* basis a reasonable fee [**1064] for services rendered before discharge. *(Rhoades v. Norfolk & Western Ry. Co. (1979), 78 Ill. 2d 217, 230*; see *In re Estate of Callahan (1991), 144 Ill. 2d 32, 38.*) In *Callahan,* in addressing the issue of whether the discharged attorney's right [***10] to a *quantum meruit* recovery accrues at the time of discharge, the court stated that even though a contingency fee is generally paid out of the recovery for the client, when a client terminates the contract, the contract ceases to exist between the parties. (*144 Ill. 2d at 40.*) Therefore, the contingency term, whether the attorney wins, is no longer operative. *(Callahan, 144 Ill. 2d at 40.*) A [*596] client cannot terminate the agreement and then resurrect the contingency term when the discharged attorney files a fee claim. *(Callahan, 144 Ill. 2d at 40.*) The contract either wholly stands or totally falls. *(Callahan, 144 Ill. 2d at 40.*) Furthermore, because *quantum meruit* is based on the implied promise of a recipient of services to pay for those services of value to

him, the recipient would be unjustly enriched if he were able to retain the services without paying for them. *Callahan, 144 Ill. 2d at 40.*

In this case, while the order is silent, the trial court apparently granted summary judgment on the basis that the fee contract expressly stated that no fee would be due absent a recovery [***11] by the defendants, as that was the theory asserted by the defendants. Such a ruling is contrary to the holding in *Rhoades* and the language of *Callahan.* A contingency fee contract like the one in this case does not bar, as a matter of law, a discharged attorney from recovering the reasonable value of services rendered prior to discharge. To that extent, the trial court's ruling is erroneous.

That does not, however, entirely dispose of this appeal. The plaintiff, in its appellate brief, and the parties below, appear to treat the plaintiff's discontinued representation of the defendants as synonymous with being discharged. Such is not the case, however, as the plaintiff clearly moved to withdraw. Thus, we must decide what effect, if any, the plaintiff's motion to withdraw had on its right to a *quantum meruit* recovery for services provided prior to its withdrawal.

Our research has found one Illinois case in which an attorney sought, under a *quantum meruit* theory, compensation for services rendered after having withdrawn from representation of his client. In *Reed Yates Farms, Inc. v. Yates (1988), 172 Ill. App. 3d 519,* the attorney, who represented the [***12] client pursuant to a contingency fee agreement, withdrew from representation because the client refused to pay certain retainer fees under the contract. *(Yates, 172 Ill. App. 3d at 521-26.)* The court held that an attorney may, during the course of litigation, withdraw from the case if accrued fees are demanded and not paid within a reasonable time. *(Yates, 172 Ill. App. 3d at 527.)* After such withdrawal, the attorney may recover for services rendered in the cause. *(Yates, 172 Ill. App. 3d at 527.)* The court concluded that the fees were not paid within a reasonable time and therefore the attorney was justified in moving to withdraw and was entitled to recover for services rendered up to his withdrawal. *Yates, 172 Ill. App. 3d at 527.*

[*597] In the present case, we are able to ascertain, from the undisputed allegations in the plaintiff's answer to the defendant's counterclaim, that the basis for the motion to withdraw was "a complete breakdown of the attorney-client relationship" and "non-payment by Plaintiffs of costs advanced by Defendant." There is, however, no copy of the motion to withdraw in the record, no [***13] transcript of the hearing on the plaintiff's motion to withdraw, nor any other evidence of the circumstances surrounding any breakdown of the attorney-client relationship or any nonpayment of fees by the defendants. While the letter from Robert [**1065] McNiece to the plaintiff suggests a dispute over fees and raises a question regarding the nature of the attorney-client relationship, it is insufficient, by itself, to establish whether the attorney-client relationship had in fact suffered a complete breakdown or whether the plaintiff had demanded payment of fees and such fees were not paid within a reasonable time. We note that even though we are ruling in favor of the plaintiff to the extent we are reversing the summary judgment the party seeking relief in this court nevertheless has a responsibility to provide an adequate record on appeal to facilitate our review.

While either circumstance, if proved, would justify withdrawal from representation, and, while such withdrawal would not prohibit the plaintiff from seeking a *quantum meruit* recovery, there remain questions of material fact as to either situation. Thus, we are unable to affirm the trial court's granting of summary [***14] judgment in favor of the defendants on this separate basis. We must, therefore, reverse the order granting summary judgment in favor of the defendants and remand for a determination of whether the plaintiff's withdrawal from its representation of the defendants was justified. If the court finds that the plaintiff justifiably withdrew from the case, then the plaintiff will be allowed to proceed on its claim for fees on a *quantum meruit* basis.

For the foregoing reasons, the order of the circuit court of Lake County granting the defendants summary judgment is reversed, and this cause is remanded for further proceedings.

Reversed and remanded.

BOWMAN and McLAREN, JJ., concur.

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Article VIII. Illinois Rules of Professional Conduct of 2010 (Refs & Annos)

ILCS S Ct Rules of Prof.Conduct Rule 1.16
Formerly cited as IL ST CH Rule 1.16; IL ST S CT RPC Rule 1.16

Rule 1.16. Declining or Terminating Representation

Currentness

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) 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 or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Credits

Adopted July 1, 2009, eff. Jan. 1, 2010.

COMMENT

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both

clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client Upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15.

Refund of Unearned Fees

[10] See Comments [3B] through [3D] to Rule 1.15 and Rule 1.16(d).

Notes of Decisions (52)

I.L.C.S. S Ct Rules of Prof.Conduct Rule 1.16, IL R S CT RPC Rule 1.16
Current with amendments received through 10/1/14

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