ABA/BNA Lawyers' Manual on Professional Conduct
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Formal Opinion 03-431
August 8, 2003

Lawyer's Duty to Report Rule Violations by Another Lawyer Who May Suffer from Disability or Impairment

A lawyer who believes that another lawyer's known violations of disciplinary rules raise substantial questions about her fitness to practice must report those violations to the appropriate professional authority. A lawyer who believes that another lawyer's mental condition materially impairs her ability to represent clients, and who knows that that lawyer continues to do so, must report that lawyer's consequent violation of Rule 1.16(b)(2), which requires that she withdraw from the representation of clients.

In this opinion, we examine the obligation of a lawyer who acquires knowledge that another lawyer, not in his firm, suffers from a mental condition that materially impairs the subject lawyer's ability to represent a client.[1] Under Rule 1.16(a)(2) of the Model Rules of Professional Conduct,[2] a lawyer must not undertake or continue representation of a client when that lawyer suffers from a mental condition that "materially impairs the lawyer's ability to represent the client."[3] That requirement reflects the conclusion that allowing persons who do not possess the capacity to make the professional judgments and perform the services expected of a lawyer is not only harmful to the interests of clients, but also undermines the integrity of the legal system and the profession.

Under Rule 8.3(a), a lawyer with knowledge[4] that another lawyer's conduct has violated the Model Rules in a way that "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects"must inform the appropriate professional authority.[5] Although not all violations of the Model Rules are reportable events under Rule 8.3, as they may not raise a substantial question about a lawyer's fitness to practice law, a lawyer's failure to withdraw from representation while suffering from a condition materially impairing her ability to practice, as required by Rule 1.16(a)(2), ordinarily would raise a substantial question requiring reporting under Rule 8.3[6].

When considering his obligation under Rule 8.3(a), a lawyer should recognize that, in most cases, lack of fitness will evidence itself through a pattern of conduct that makes clear that the lawyer is not meeting her obligations under the Model Rules, for example, Rule 1.1 (Competence) or Rule 1.3 (Diligence). A lawyer suffering from an impairment may, among other things, repeatedly miss court deadlines, fail to make filings required to complete a transaction, fail to perform tasks agreed to be performed, or fail to raise issues that competent counsel would be expected to raise. On occasion, however, a single act by a lawyer may evidence her lack of fitness.[7]

A lawyer may be impaired by senility or dementia due to age or illness or because of alcoholism, drug addiction,[8] substance abuse, chemical dependency, or mental illness.[9] Because lawyers are not health care professionals, they cannot be expected to discern when another lawyer suffers from mental impairment with the precision of, for example, a psychiatrist, clinical psychologist, or therapist.[10] Nonetheless, a lawyer may not shut his eyes to conduct reflecting generally recognized symptoms of impairment (*e.g.*, patterns of memory lapse or inexplicable behavior not typical of the subject lawyer, such as repeated missed deadlines).

Each situation, therefore, must be addressed based on the particular facts presented. A lawyer need not act on rumors or conflicting reports about a lawyer. Moreover, knowing that another lawyer is drinking heavily or is evidencing impairment in social settings is not itself enough to trigger a duty to report under

Rule 8.3. A lawyer must know that the condition is materially impairing the affected lawyer's representation of clients[11].

In deciding whether an apparently impaired lawyer's conduct raises a substantial question of her fitness to practice, a lawyer might consider consulting with a psychiatrist, clinical psychologist, or other mental health care professional about the significance of the conduct observed or of information the lawyer has learned from third parties.[12] He might consider contacting an established lawyer assistance program.[13] In addition, the lawyer also might consider speaking to the affected lawyer herself about his concerns. In some circumstances, that may help a lawyer understand the conduct and why it occurred, either confirming or alleviating his concerns. In such a situation, however, the affected lawyer may deny that any problem exists or maintain that although it did exist, it no longer does. This places the lawyer in the position of assessing the affected lawyer's response, rather than the affected lawyer's conduct itself. Care must be taken when acting on the affected lawyer's denials or assertions that the problem has been resolved. It is the knowledge of the impaired conduct that provides the basis for the lawyer's obligations under Rule 8.3;the affected lawyer's denials alone do not make the lawyer's knowledge non-reportable under Rule 8.3.

If the affected lawyer is practicing within a firm, the lawyer should consider speaking with the firm's partners or supervising lawyers.[14] If the affected lawyer's partners or supervising lawyers take steps to assure that the affected lawyer is not representing clients while materially impaired, there is no obligation to report the affected lawyer's past failure to withdraw from representing clients. If, on the other hand, the affected lawyer's firm is not responsive to the concerns brought to their attention, the lawyer must make a report under Rule 8.3. We note that there is no affirmative obligation to speak with either the affected lawyer or her firm about her conduct or condition before reporting to the appropriate authority.

If a lawyer concludes there is material impairment that raises a substantial question about another lawyer's fitness to practice, his obligation ordinarily is to report to the appropriate professional authority.[15] As we said in ABA Formal Opinion 03-429, however, if information relating to the representation of one's own client would be disclosed in the course of making the report to the appropriate authority, that client's informed consent to the disclosure is required. In the usual case, information gained by a lawyer about another lawyer is unlikely to be information protected by Rule 1.6, for example, observation of or information about the affected lawyer's conduct in litigation or in the completion of transactions. Given the breadth of information protected by Rule 1.6,[16] however, the reporting lawyer should obtain the client's informed consent to the disclosure in cases involving information learned in the course of representation through interaction with the affected lawyer.

Whether the lawyer is obligated under Model Rule 8.3 to make a report or not, he may report the conduct in question to an approved lawyers assistance program, which may be able to provide the impaired lawyer with confidential education, referrals, and other assistance. Indeed, that may well be in the best interests of the affected lawyer, her family, her clients. and the profession. Nevertheless, such a report is not a substitute for reporting to a disciplinary authority with responsibility for assessing the fitness of lawyers licensed to practice in the jurisdiction.

In conclusion, a lawyer should review the situation and determine his responsibilities under Rule 8.3 when he has information that another lawyer has failed to meet her obligation to withdraw from the representation of client when suffering from a mental condition materially impairing her ability to represent her clients.

[1] In ABA Standing Committee on Professional Responsibility Formal Opinion 03-429 (Obligations With Respect to Mentally Impaired Lawyer in the Firm) (June 11, 2003), we addressed the obligations of lawyers within a firm when another lawyer within that firm violates the Model Rules of Professional Conduct due to mental impairment. Like that opinion, this opinion deals only with mental impairment, which may be either temporary or permanent. Physical impairments are beyond the scope of this opinion unless they also result in the impairment of mental faculties. In addition to Alzheimer's disease and other mental

conditions that are age-related and affect the entire population, lawyers have been found to suffer from alcoholism and substance abuse at a rate at least twice as high as the general population. *See* George Edward Bailly, *Impairment, The Profession and Your Law Partner*, 11 No. 1 *Prof. Law.* 2 (1999).

[2] This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates in February 2002 and, to the extent indicated, the predecessor Model Code of Professional Responsibility of the American Bar Association. The laws, court rules, regulations, rules of professional responsibility, and opinions promulgated in the individual jurisdictions are controlling.

[3] Rule 1.16(a)(2) states that a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if "the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client." *See, e.g.*, In re Morris, 541 S.E.2d 844 (S.C. 2001) (lawyer failed to notify clients that he would be unavailable while being treated at in-patient drug and alcohol rehabilitation program);State ex rel. Oklahoma Bar Ass'n v. Southern, 15 P.3d 1 (Okla. 2000)(lawyer had been suffering severe, untreated vitamin B-12 illness that essentially destroyed his short-term memory and exacerbated his depression; lawyer neglected five clients and their cases); In re Francis, 4 P.3d 579 (Kan. 2000) (lawyer's depression resulted in misconduct, including failure to comply with discovery requests, to prosecute civil suit, to return telephone calls, and to withdraw from representing client); People v. Heilbrunn, 814 P.2d 819 (Colo. 1991)(lawyer who neglected, deceived, and abandoned clients due to drugs, alcohol, and depression failed to withdraw); State v. Ledvina, 237 N.W.2d 683 (Wis. 1976) (lawyer with compulsive personality disorder with paranoid trends engaged in hostile and aggressive conduct).

[4] "Knows" denotes actual knowledge, which may be inferred from the circumstances. Rule 1.0(f). Thus, the duty to report the violation caused by the mental impairment of another lawyer will likely arise only in very limited situations.

[5] Note that the disclosure obligation does not apply to information protected by Rule 1.6 or acquired by the lawyer from his participation in an approved lawyers assistance program. Rule 8.3(c).

[6] As noted in Comment [3] to Rule 8.3, the rule "limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule."

[7] A single act of aberrant behavior may be part of a pattern of conduct affecting the lawyer while under the influence of drugs or alcohol or while displaying the symptoms of a mental illness that manifest themselves only on occasion. As noted in Comment [1] to Rule 8.3, "[a]n apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover."

[8] In certain cases, the conduct of the lawyer may involve violation of applicable criminal law. In such cases, Rule 8.4(b) is implicated. That rule provides that it is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."

[9] *See* ABA Formal Opinion 03-429 for discussion of mental impairments that affect a lawyer only on occasion.

[10] There is a wealth of information about impairments available for the general reader. For an initial overview, *see* such sources as David R. Goldmann, *American College of Physicians Complete Home Medical Guide with Interactive Human Anatomy CD-ROM* (DK Publishing 1999); Charles R. Clayman, *The American Medical Association Family Medical Guide* (3rd ed. Random House 1994); and Anthony L. Komaroff, *The Harvard Medical School Family Health Guide* (Simon & Schuster 1999). Websites for various organizations also can be a good starting point for information. The American Medical Association's website at http://www.ama-assn.org has links to various sites, as does the website of the National Institutes of Health, http://www.nih.gov. For Alzheimer's disease and related conditions, *see* the websites of the Alzheimer's Disease Education and Referral Center, http://www.alzheimers.org, and the American Association of Geriatric Psychiatry, http://www.aagpgpa.org.

[11] *See* Rule 1.16(a)(2).

[12] The reporting lawyer may become aware of the impaired lawyer's conduct either from personal observation or from a third party, such as a client of the lawyer who complains of the impaired lawyer's conduct.

[13] In most states, lawyer assistance programs are operated through the state or major metropolitan bar associations. Information about these systems is available from the staff of the ABA Commission on Lawyer Assistance Programs. *See* http://www.abanet.org/legalservices/colap/home.html.

[14] Such contact is solely discretionary. Although partners and supervising lawyers have a responsibility to ensure that lawyers in their own firms comply with the rules of professional conduct, *see* ABA Formal Opinion 03-429, no lawyer is obligated under the Model Rules to take any action to ensure compliance with the rules by lawyers in other firms.

[15] Rule 8.3 cmt. 3. There is no duty to report information learned from participation in an approved lawyers assistance program.

[16] Rule 1.6 cmts. 3 and 4.

ABA Formal Opinions

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ABA/BNA Lawyers' Manual on Professional Conduct
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Formal Opinion 03-429
June 11, 2003

Obligations With Respect to Mentally Impaired Lawyer in the Firm

If a lawyer's mental impairment is known to partners in a law firm or a lawyer having direct supervisory authority over the impaired lawyer, steps must be taken that are designed to give reasonable assurance that such impairment will not result in breaches of the Model Rules. If the mental impairment of a lawyer has resulted in a violation of the Model Rules, an obligation may exist to report the violation to the appropriate professional authority. If the firm removes the impaired lawyer in a matter, it may have an obligation to discuss with the client the circumstances surrounding the change of responsibility. If the impaired lawyer resigns or is removed from the firm, the firm may have disclosure obligations to clients who are considering whether to continue to use the firm or shift their relationship to the departed lawyer, but must be careful to limit any statements made to ones for which there is a factual foundation. The obligation to report a violation of the Model Rules by an impaired lawyer is not eliminated by departure of the impaired lawyer.

This opinion addresses three sets of obligations arising under the Model Rules of Professional Conduct[1] with respect to mentally impaired lawyers.[2] First, it considers the obligations of partners in a law firm[3] or a lawyer supervising another lawyer to take steps designed to prevent lawyers in the firm who may be impaired from violating the Rules of Professional Conduct. Second, it addresses the duty of a lawyer who knows[4] that another lawyer in the same firm has, due to mental impairment, failed to represent a client in the manner required by the Model Rules to inform the appropriate professional authority or to communicate knowledge of such violation to clients or prospective clients of the impaired lawyer.[5] Third, it considers the obligations of lawyers in the firm when an impaired lawyer leaves the firm.[6]

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[1] This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates in February 2002 and, to the extent indicated, the predecessor Model Code of Professional Responsibility of the American Bar Association. The laws, court rules, regulations, rules of professional responsibility, and opinions promulgated in the individual jurisdictions are controlling.

[2] This opinion deals only with mental impairment, which may be either temporary or permanent. Physical impairments are beyond the scope of this opinion unless they also result in the impairment of mental facilities. In addition to Alzheimer's Disease and other mental conditions that are age-related and can affect anyone, mental impairment can result from alcoholism and substance abuse, which lawyers have been found to suffer from at a rate at least twice as high as the general population. George Edward Bailly, *Impairment, The Profession and Your Law Partner,* 11 No. 1 *Prof. Law.* 2 (1999).

[3] The term "partners in the firm" includes every partner of a legal partnership and every shareholder of a law firm organized as a professional corporation, not just members of the firm's executive or management committee. Rule 5.1 cmt. 1.

[4] "Knows"denotes actual knowledge, which may be inferred from the circumstances. Rule 1.0(f).

[5] This opinion does not deal with the issues that could arise for the firm vis-a-vis its responsibilities to accommodate an impaired lawyer under the Americans with Disabilities Act of 1990, 42 U.S.C. § § 12101 *et seq.* (2003)(the "ADA"), or a state law equivalent, which protects disabled employees. Such statutes, although generally not applicable to equity partners in law firms, *see, e.g., Simpson v. Ernst & Young*, 100 F.3d 436, 443-44 (6th Cir. 1996), *cert. denied*, 520 U.S. 1248 (1997) (partners not protected as employees under federal antidiscrimination laws), may apply to non-equity partners, associates, in-house counsel,

and of counsel. Thus, if a lawyer/employee is able to provide competent representation to a client if the firm provides the lawyer with a reasonable accommodation, the firm may have an obligation to maintain that lawyer's employment. For a discussion of an employer's obligations under the ADA, *see Henry H. Perritt Jr., Employer Obligations, in Americans with Disabilities Act Handbook* § 4 (3rd ed. 1997). A number of documents discussing employers'obligations under the ADA are available on the Equal Employment Opportunity Commission's website, http://www.eeoc.gov/publications.html.

[6] This opinion does not deal with the potential fiduciary obligations or civil liability to clients of a firm with which the impaired lawyer is associated or with the issues that arise under a firm's partnership agreement if a lawyer is impaired. For a discussion of these issues, *see* Bailly, *supra*, note 2.

Impaired lawyers have the same obligations under the Model Rules as other lawyers. Simply stated, mental impairment does not lessen a lawyer's obligation to provide clients with competent representation. Thus, for example, the lawyer who has failed to act with diligence and promptness in representing a client,[7] or has failed to communicate with the client in an appropriate manner,[8] has violated the Model Rules even if that failure is the result of mental impairment.[9] The matter of a lawyer's impairment is most directly addressed under the Model Rules of Professional Conduct under Rule 1.16, which specifically prohibits a lawyer from undertaking or continuing to represent a client if the lawyer's mental impairment materially impairs the ability to represent the client.[10] Unfortunately, the lawyer who suffers from an impairment may be unaware of, or in denial of, the fact that the impairment has affected his ability to represent clients.[11] When the impaired lawyer is unable or unwilling to deal with the consequences of his impairment, the firm's partners and the impaired lawyer's supervisors have an obligation to take steps to assure the impaired lawyer's compliance with the Model Rules.

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[7] Rule 1.3 states: "A lawyer shall act with reasonable diligence and promptness in representing a client."

[8] Rule 1.4, which requires a lawyer to reasonably consult with the client and keep the client reasonably informed about the status of the matter, contains numerous obligations that the impaired lawyer may have difficulty satisfying.

[9] Although mental impairment is most likely to cause Rules 1.1, 1.3, and 1.4 to be violated, it also may result in violations of other Model Rules. This opinion assumes that, but for his mental impairment, the lawyer would be able to comply with the requirements of all of the Model Rules.

[10] Rule 1.16(a)(2).

[11] Bailly, *supra* note 2 at 12.

An impaired lawyer's mental condition may fluctuate over time. Certain dementias or psychoses may impair a lawyer's performance on "bad days,"but not on "good days" during which the lawyer behaves normally. Substance abusers may be able to provide competent and diligent representation during sober or clean interludes, but may be unable to do so during short or extended periods in which the abuse recurs. If such episodes of impairment have an appreciable likelihood of recurring, lawyers who manage or supervise the impaired lawyer may have to conclude that the lawyer's ability to represent clients is materially impaired.

It also is important to understand that some disorders that may appear to be mental impairment (for example, Tourette's Syndrome), while causing overt conduct that appears highly erratic, may not interfere

with competent, diligent legal representation such that they "materially impair" a lawyer's ability to represent his clients.

When considering what must be done when confronted with evidence of a lawyer's apparent mental disorder or substance abuse, it may be helpful for partners or supervising lawyers to consult with an experienced psychiatrist, psychologist, or other appropriately trained mental health professional.[12]

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[12] The extent to which information concerning the impaired lawyer may be communicated without his consent may be limited by the Americans with Disabilities Act, *supra* note 5.

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1. Obligations to Adopt Measures to Prevent Impaired Lawyers in the Firm from Violating the Model Rules

Although there is no explicit requirement under the Model Rules that a lawyer prevent another lawyer who is impaired from violating the Model Rules, Rule 5.1(a)requires that all partners in the firm and lawyers with comparable managerial authority in professional corporations, legal departments, and other organizations deemed to be a law firm[13] make "reasonable efforts"to establish internal policies and procedures[14] designed to provide "reasonable assurance" that all lawyers in the firm, not just lawyers known to be impaired, fulfill the requirements of the Model Rules. The measures required depend on the firm's size and structure and the nature of its practice.[15]

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[13] Rule 1.0(c).

[14] Rule 5.1, cmt. 2.

[15] The black letter of Rule 5.1(a) does not identify what constitutes a reasonable effort or reasonable assurance, but some examples of appropriate measures appear in Comment [3] of the Rule.

In addition to the requirement that the firm establish appropriate preventive policies and procedures, Rule 5.1(b) requires a lawyer having direct supervisory authority over another lawyer to make reasonable efforts to ensure that the supervised lawyer conforms to the Model Rules. When a supervising lawyer knows that a supervised lawyer is impaired, close scrutiny is warranted because of the risk that the impairment will result in violations.

The firm's paramount obligation is to take steps to protect the interests of its clients. The first step may be to confront the impaired lawyer with the facts of his impairment and insist upon steps to assure that clients are represented appropriately notwithstanding the lawyer's impairment. Other steps may include forcefully urging the impaired lawyer to accept assistance to prevent future violations or limiting the ability of the impaired lawyer to handle legal matters or deal with clients.[16]

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[16] Rule 1.16(a)(2).

Some impairments may be accommodated. A lawyer who, because of his mental impairment is unable to perform tasks under strict deadlines or other pressures, might be able to function in compliance with the Model Rules if he can work in an unpressured environment. In addition, the type of work involved, as opposed to the circumstances under which the work occurs, might need to be examined when considering the effect that an impairment might have on a lawyer's performance. For example, an impairment may make it impossible for a lawyer to handle a jury trial or hostile takeover competently, but not interfere at all with his performing legal research or drafting transaction documents. Depending on the nature, severity, and permanence (or likelihood of periodic recurrence) of the lawyer's impairment, management of the firm has an obligation to supervise the legal services performed by the lawyer and, in an appropriate case, prevent the lawyer from rendering legal services to clients of the firm.

If reasonable efforts have been made to institute procedures designed to assure compliance with the Model Rules, neither the partners in the firm nor the lawyer with direct supervisory authority are responsible for the impaired lawyer's violation of the rules unless they knew of the conduct at a time when its consequences could have been avoided or mitigated and failed to take reasonable remedial action.[17]

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[17] Rule 5.1(c). Failure to intervene to prevent avoidable consequences of a violation also may violate Rule 8.4(a), which provides that it is professional misconduct for a lawyer to knowingly assist another to violate the Model Rules.

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2. Obligations When an Impaired Lawyer in the Firm has Violated the Model Rules

The partners in the firm or supervising lawyer may have an obligation under Rule 8.3(a) to report violations of the ethics rules by an impaired lawyer to the appropriate professional authority.[18] Only violations of the Model Rules that raise a substantial question as to the violator's honesty, trustworthiness, or fitness as a lawyer must be reported.[19] If the mental condition that caused the violation has ended, no report is required. Thus, if partners in the firm and the supervising lawyer reasonably believe that the previously impaired lawyer has resolved a short-term psychiatric problem that made the lawyer unable to represent clients competently and diligently, there is nothing to report.[20] Similarly, if the firm is able to eliminate the risk of future violations of the duties of competence and diligence under the Model Rules through close supervision of the lawyer's work, it would not be required to report the impaired lawyer's violation.[21] If, on the other hand, a lawyer's mental impairment renders the lawyer unable to represent clients competently, diligently, and otherwise as required by the Model Rules and he nevertheless continues to practice, partners in the firm or the supervising lawyer must report that violation.

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[18] Rule 8.3(a) requires a lawyer who knows that another lawyer has committed a violation of the Model Rules that raises a substantial question as to that lawyer's fitness as a lawyer to inform the appropriate professional authority. Although a lawyer may satisfy her obligation under Rule 8.3 by disclosing the violation without identifying the impairment that caused the violation, in most cases, disclosure of the impairment will be appropriate. However, in doing so, the lawyer must be careful to avoid potential violations of the Americans with Disabilities Act.

[19] Not every violation must be reported. Only those violations "that a self-regulatory profession must vigorously endeavor to prevent" must be reported, and judgment must be exercised in deciding whether prior violations fall into this category. Rule 8.3, cmt. 3.

[20] N.Y.C. Opinion 1995-5 (April 5, 1995), *in ABA/BNA Lawyers'Manual on Professional Conduct* § 1001:6404 (ABA/BNA 1998).

[21] If such supervision exceeds that which would be required in the case of a lawyer who is not impaired, it

would not be proper for the firm to charge the client for the additional level of supervision. Although it is appropriate to charge a client for normal supervisory activities related to the quality of the client work product, fees for additional steps taken by the supervising lawyer because of the firm's fear that an impaired lawyer's work would not be competent would not be reasonable under Rule 1.5(a) unless the necessity for supervision and the fact that the client would be charged for it is communicated to, and agreed to by, the client. Rule 1.5(b).

If the matter in which the impaired lawyer violated his duty to act competently or with reasonable diligence and promptness still is pending, the firm may not simply remove the impaired lawyer and select a new lawyer to handle the matter. Under Rule 1.4(b), there may be a responsibility to discuss with the client the circumstances surrounding the change of responsibility. In discussions with the client, the lawyer must act with candor and avoid material omissions, but to the extent possible, should be conscious of the privacy rights of the impaired lawyer. Even if the matter in which the impaired lawyer violated the Model Rules no longer is pending, partners and lawyers in the firm with comparable managerial authority and lawyers with direct supervisory authority over the impaired lawyer may have obligations to mitigate any adverse consequences of the violation.[22]

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[22] Rule 5.1(c)(2).

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3. Obligations When an Impaired Lawyer No Longer is in the Firm

The responsibility of the firm to the client does not end with the resignation from the firm, or the firm's termination of, the impaired lawyer. If the impaired lawyer resigns or is removed from the firm, clients of the firm may be faced with the decision whether to continue to use the firm or shift their relationship to the departed lawyer. Rule 1.4 requires the firm to advise existing clients of the facts surrounding the withdrawal to the extent disclosure is reasonably necessary for those clients to make an informed decision about the selection of counsel. In doing so, the firm must be careful to limit any statements made to ones for which there is a reasonable factual foundation.[23]

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[23] If such a communication also is designed to convince the client to remain with the firm rather than follow the impaired lawyer who continues to practice, it must be drafted in such a manner that it does not violate either the prohibition of false and misleading communications about the firm's services under Rule 7.1 or the prohibition of deceit or misrepresentation under Rule 8.4(c). In addition, the potential for claims of tortious interference with contractual relationships and unfair competition should be considered.

The firm has no obligation under the Model Rules to inform former clients who already have shifted their relationship to the departed lawyer that it believes the departed lawyer is impaired and consequently is unable to personally handle their matters competently.[24] However, the firm should avoid any communication with former clients who have transferred their representation to the departed lawyer that can be interpreted as an endorsement of the ability of the departed lawyer to handle the matter. For example, a joint letter from the firm and the departed lawyer regarding the transition could be seen as an implicit endorsement by the firm of the departed lawyer's competence.

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[24] *See* Philadelphia Bar Ass'n Prof. Guidance Committee Op. 00-12, 2000 WL 33173008 (Dec. 2000).

In addition to considering what the firm may or must communicate to clients who are considering whether to take their representation to the departed lawyer, the firm must consider whether it has an obligation to report the impaired lawyer's condition to the appropriate disciplinary authority.[25]

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[25] The "appropriate professional authority" need not be the state disciplinary authority. If available in the jurisdiction, a peer review agency may be more appropriate under the circumstances. Rule 8.3, cmt. 3.

No obligation to report exists under Rule 8.3(a) if the impairment has not resulted in a violation of the Model Rules. Thus, if the firm reasonably believes that it has succeeded in preventing the lawyer's impairment from causing a violation of a duty to the client by supplying the necessary support and supervision,[26] there would be no duty to report under Rule 8.3(a).[27]

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[26] An obligation exists under Rule 5.1 to take reasonable efforts to prevent violations of the Model Rules by the impaired lawyer if firm management or a direct supervisor of the impaired lawyer is aware of the risk of violation posed by the impairment.

[27] As noted in Bailly, *supra*, note 2 at 15: "It would be the ultimate irony if a partner were suspended for not reporting his impaired partner, while the impaired partner was able to use mitigating circumstances in any disciplinary hearing against him."

Subject to the prohibition against disclosure of information protected by Rule 1.6, however, partners in the firm may voluntarily report to the appropriate authority its concern that the withdrawing lawyer will not be able to function without the ongoing supervision and support the firm has been providing.[28]

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[28] Pennsylvania Bar Ass'n Committee on Legal Eth. Op. 98-124, 1998 WL 988111 (Dec. 7, 1988).

ABA Formal Opinions

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136 N.H. 559; Whelan's Case; 619 A.2d 571

WHELAN'S CASE

[Cite as Whelan's Case, 136 N.H. 559]

Original

No. LD-90-027

December 31, 1992

1. Appeal and Error---Findings---Referee's Findings

Standard of review for findings made by judicial referee in attorney discipline proceedings is whether a reasonable person could reach same conclusion as referee based upon evidence presented at hearing.

2. Attorney and Client---Disciplinary Proceedings---Particular Cases

Respondent attorney did not violate professional conduct rules governing conflicts of interest and imputed disqualification, where respondent's law partner drafted codicil for client which made respondent a gift of property; respondent did not himself prepare codicil, and there was no language in imputed disqualification rule providing that partner's violation be imputed to another member of firm; rather, rule provided that respondent's disqualification be imputed to his partner. Professional Conduct Rules 1.8(c), 1.10(a).

3. Attorney and Client---Professional Conduct Rules---Generally

Upon admission to the bar, lawyers are deemed to know the rules of professional conduct.

4. Attorney and Client---Professional Conduct Rules---Generally

Attorneys in New Hampshire have the obligation to act at all times in conformity with standards imposed upon members of bar as conditions for right to practice law. Supreme Ct. R. 37(1)(b).

5. Attorney and Client---Disciplinary Proceedings---Particular Cases

As member of bar, respondent was charged with knowledge of rules of professional conduct, and he violated rules governing responsibility for a partner's violation and assisting or inducing another to violate rules when he suggested that client see his law partner to have codicil drafted which made respondent a gift of property. Professional Conduct Rules 5.1(c)(2), 8.4(a).

6. Attorney and Client---Disciplinary Proceedings---Particular Cases

It was incumbent upon respondent and his law partner to obtain informed waiver of conflict of interest from client in order to have partner draft codicil benefiting respondent; in the alternative, attorneys should have declined to prepare codicil and suggested to client that she engage other counsel.

7. Attorney and Client---Disciplinary Proceedings---Generally

Supreme court must exercise its authority to impose disciplinary sanctions against attorneys for protection of public, maintenance of public confidence in the bar as a whole, and prevention of recurrence of similar conduct.

8. Attorney and Client---Disciplinary Proceedings---Particular Cases

Sanction of suspension from practicing law was not warranted for respondent attorney who suggested that client see his law partner to have codicil

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drafted which made respondent a gift of property, and respondent was instead publicly censured and assessed costs, where respondent had a reasonable, good faith belief that in order to violate professional conduct rules an attorney would have to be aware his conduct was prohibited by rules, respondent paid pecuniary legacies contained in client's will, and respondent would still have received client's property even if another attorney had drafted codicil.

Bell, Falk & Norton, P.A., of Keene (Arnold R. Falk on the brief and orally), for the committee on professional conduct.

Sulloway Hollis & Soden, of Concord (Warren C. Nighswander on the brief and orally), for the respondent.

THAYER, J. On November 15, 1990, the Supreme Court Committee on Professional Conduct (committee) filed a petition to impose a thirty-day suspension from the practice of law on the respondent, Dennis J. **Whelan**. The petition and the respondent's answer were referred to a Judicial Referee (*Maher*, J.) pursuant to Supreme Court Rule 37(13)(e). The referee held a hearing and filed a report containing findings of fact and rulings of law. While the committee alleged that the respondent violated four Rules of Professional Conduct (Rules), the referee determined that there were only two violations. The committee did not accept the referee's report, and we heard oral argument.

The facts are not disputed. Attorney K. William Clauson represented Mr. and Mrs. DesRosiers of Greensborough Road in Hanover in 1981. After Mr. DesRosiers' death, Clauson continued to represent Mrs. DesRosiers until 1983, when he transferred responsibility for her legal affairs to his partner, Daniel G. Smith. Smith handled all of Mrs. DesRosiers' financial affairs, including balancing her checkbook, and drafted her original will in 1984, a revision in 1986, and a codicil in 1987.

At the time of the events underlying this action, Mrs. DesRosiers was over ninety years old and in poor health. The respondent and his wife, Heide, had lived on Greensborough Road, next door to Mrs. DesRosiers, since 1974. Heide **Whelan** visited her almost daily and provided emotional support and physical care. When Mrs. **Whelan** was unable to visit Mrs. DesRosiers, the respondent would do so. In 1983, the respondent was admitted to the New Hampshire bar and became a partner with Smith and Clauson in 1985, practicing under the name of Clauson, Smith & **Whelan**.

In 1987, Mrs. DesRosiers asked the respondent to draft a codicil to her will because she wanted to leave her real estate to the respond-

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ent and his wife. The respondent informed Mrs. DesRosiers that it would be improper for him to draft such a codicil and that she should see her own attorney, Daniel Smith, the respondent's partner. Attorney Smith drafted the codicil in which Mrs. DesRosiers left her house and property on Greensborough Road to the respondent and his wife. The codicil provided that "Heide has done innumerable kindnesses for me and has cared for me when I have needed care." Mrs. DesRosiers died in 1989.

This court has held that by drafting the 1987 codicil benefitting his partner, Attorney Smith violated Rule 1.8(c), prohibiting a lawyer from preparing an instrument giving the lawyer or the lawyer's spouse any substantial gift from a client, and Rule 1.10(a), providing that while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so. *In the Matter of Daniel G. Smith, Esq.*, LD-90-026 (December 10, 1991).

The committee requested that the respondent be suspended from the practice of law for violating the Rules cited above, and Rules 5.1(c)(2) and 8.4(a), which provide, respectively, that a lawyer shall be responsible for another lawyer's violation if the lawyer is a partner in the law firm in which the other practices, and that it is professional misconduct for a lawyer to knowingly assist or induce another to violate or attempt to violate the Rules of Professional Conduct, or to do so through the acts of another.

[1] The referee ruled that the respondent violated Rules 1.8(c) and 1.10(a), but determined that there were no violations of Rules 5.1(c)(2) or 8.4(a). The respondent appeals the finding that he violated Rules 1.8(c) and 1.10(a), and the Committee appeals the finding that the respondent did not violate Rules 5.1 (c)(2) or 8.4(a). The standard of review for findings made by a judicial referee in attorney discipline proceedings is "whether a reasonable person could reach the same conclusion as the referee based upon the evidence presented at the hearing." *Drucker's* Case, 133 N.H. 326, 329, 577 A.2d 1198, 1199 (1990).

Rule 1.8, which governs conflicts of interest, provides:

> "(c) A lawyer shall not prepare an instrument giving the lawyer or person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee."

Rule 1.10, the Rule governing imputed disqualification, provides:

> "(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 (c), 1.9 or 2.2."

In finding violations of both Rules 1.8(c) and 1.10(a), the referee noted that the respondent never represented Mrs. DesRosiers and did not prepare any part of her will or codicil, so that

> "[o]n it[]s face, therefore, Mr. **Whelan** does not appear to have violated Rule 1.8(c). It is only when 1.8(c) is read together with 1.10(a) that it becomes evident to this referee that Rule 1.8(c) has been violated. In this Referee's opinion, both have to be read together and interchangeably to find the conflict which exists."

We disagree with the referee's interpretation of Rule 1.10(a), the imputed disqualification rule, as imposing vicarious liability for violations committed by another attorney. The respondent did not violate Rule 1.8(c) because the respondent did not prepare the codicil that made him a gift of property; Attorney

Smith prepared the codicil. Under the referee's analysis, *any* member of a firm could be found to have violated Rule 1.8(c) when another member represents a client whom no attorney in the firm should represent because of the imputed disqualification rule.

[2] The purpose of the imputed disqualification rule was to disqualify Attorney Smith from representing Mrs. DesRosiers in matters in which the respondent would be prohibited from representing Mrs. DesRosiers. There is no language in Rule 1.10(a) providing that Attorney Smith's violation of Rule 1.8(c) be imputed to another member of the firm. Rather, the Rule provides that the disqualification of any member of the firm, here, the respondent's disqualification under Rule 1.8(c), be imputed to Attorney Smith. We hold that the respondent did not violate Rule 1.8(c) or 1.10(a).

The referee determined that there were no violations under Rules 5.1(c)(2) or 8.4(a) because

> "[t]he key element that must be present for a violation to occur is knowledge that something was being done improperly. ... The knowledge that is necessary is ... not only knowing an act was being done but also knowing that the act would constitute a violation of the rules. Mr. **Whelan** knew

> that Attorney Smith would be drafting the codicil but did not have the knowledge that it was a violation of the rule."

The committee contests the referee's legal requirement that an attorney have actual knowledge that he or she is violating a Rule in order to be found guilty of misconduct. The respondent contends that he did not violate any Rule and has maintained the position that mere knowledge that a course of conduct has taken place is not enough to support a finding that an attorney violated the Rules; rather, the attorney must know that the course of conduct is prohibited by the Rules.

[3, 4] The respondent's defense is basically one of ignorance of the Rules of Professional Conduct, which is no defense. We hold that lawyers, upon admission to the bar, are deemed to know the Rules of Professional Conduct. "Attorneys in this State have the obligation to act at all times in conformity with the standards imposed upon members of the bar as conditions for the right to practice law." *Flint's Case*, 133 N.H. 685, 689, 582 A.2d 291, 293 (1990) (quotations omitted); SUP. CT. R. 37(1)(b).

[5, 6] We conclude that as a member of the New Hampshire bar, the respondent is charged with knowledge of the Rules of Professional Conduct; therefore, he violated Rules 5.1(c)(2) and 8.4(a). It was incumbent upon the respondent and Attorney Smith to obtain an informed waiver of the conflict of interest from Mrs. DesRosiers in order to have one partner draft a codicil benefitting another partner. *See Boyle's Case*, 136 N.H. 21, 23, 611 A.2d 618, 619 (1992) (Rule 1.7 permits attorney to represent client despite possible conflict when client is informed of conflict and consents to representation). In the alternative, the attorneys should have declined to prepare the codicil and suggested to Mrs. DesRosiers that she engage other counsel.

[7] This court must exercise its authority to impose disciplinary sanctions "for the protection of the public, the maintenance of public confidence in the bar as a whole, and the prevention of the recurrence of similar conduct." *Mussman's Case*, 111 N.H. 402, 412, 286 A.2d 614, 620 (1971). The committee has requested that the respondent be suspended from the practice of law for thirty days. As we noted previously, Attorney Smith was publicly censured for drafting a codicil which benefitted his partner. The committee seeks a more severe sanction for the respondent because: 1) during the course of the

disciplinary action, the respondent maintained that he did not

violate the Rules, in contrast to Attorney Smith's admission that he was wrong in drafting the codicil; and 2) the respondent received a monetary benefit by violating the Rules.

The respondent argues that there are mitigating factors that should preclude the imposition of a more severe sanction. The respondent points to the change in the governing ethical standards in 1986 with the switch to the Rules of Professional Conduct, and contends that the Code of Professional Responsibility, previously in effect in New Hampshire, would not have prevented Attorney Smith from representing Mrs. DesRosiers in preparing a codicil that included a gift to his partner. He notes that he had been practicing law for only a few years, concentrating in litigation matters, when the codicil was executed. Finally, he and his wife voluntarily paid $48,087 to satisfy all the pecuniary legacies contained in Mrs. DesRosiers' will because, before the codicil was executed, the will provided that the property be sold in order to fund the bequests.

[8] We disagree with the argument that the more severe sanction of suspension is warranted in this case based on the fact that the respondent litigated this matter. Although he was mistaken as to the standard which applies when determining if disciplinary action against an attorney is necessary, the respondent had a reasonable, good faith belief that in order to violate the Rules of Professional Conduct, an attorney would have to be aware that his or her conduct was prohibited by the Rules. In addition, we look favorably upon the respondent's actions in paying the pecuniary legacies, and we note that if another attorney had drafted the codicil, the respondent would still have received Mrs. DesRosiers' property. Dennis J. **Whelan** is hereby publicly censured and assessed costs incurred by the committee and bar counsel in the investigation and enforcement of discipline in this matter.

So ordered.

JOHNSON, J., did not sit; the others concurred.

Rule 5.1. Responsibilities Of Partners, Managers, And Supervisory Lawyers

(a) Each partner in a law firm, and each lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) Each lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

New Hampshire Comment

The New Hampshire version of the rule differs from the ABA Model Rule only in the substitution of "each" for "a" in sections (a) and (b). The change is intended to emphasize that the obligations created by the rule are shared by all of the managers of a law firm and cannot be delegated to one manager by the others.

2004 ABA Model Code Comment
RULE 5.1 RESPONSIBILITIES OF PARTNERS, MANAGERS, AND SUPERVISORY LAWYERS

[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. See Rule 1.0(c). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

[2] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest,

identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.4(a).

[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

[7] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.2(a).

Rule 5.3. Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) Each partner, and each lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) Each lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

New Hampshire Comment

The New Hampshire version of the rule differs from the ABA Model Rule only in the substitution of "each" for "a" in sections (a) and (b). The change is intended to emphasize that the obligations created by the rule are shared by all of the managers of a law firm and cannot be delegated to one manager by the others.

2004 ABA Model Code Comment
RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

[2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment [1] to Rule 5.1. Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

Rule 8.3. Reporting Professional Misconduct

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

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information received by lawyers during the course of their work on behalf of the New Hampshire Bar Association Ethics or Lawyers Assistance Committees.

New Hampshire Comment

Subsection (c) has been changed to permit members of the Lawyers Assistance Committee and the Ethics Committee of the New Hampshire Bar Association to refrain from disclosing information received by them during the course of their committee work. Lawyers are encouraged to seek assistance from these bodies.

2004 ABA Model Code Comment
RULE 8.3 REPORTING PROFESSIONAL MISCONDUCT

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of

paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.

137 N.H. 314; Kelley's Case; 627 A.2d 597

KELLEY'S CASE CAHALIN'S CASE

[Cite as **Kelley's Case**, 137 N.H. 314]

Original

No. LD-90-023

June 30, 1993

1. Appeal and Error---Findings---Master's Findings

In reviewing findings of judicial referee in attorney disciplinary actions, standard of review is whether a reasonable person could reach same conclusion as referee based on evidence presented at hearing.

2. Attorneys---Conflict of Interest---Waiver of Objections

When disinterested lawyer would conclude that client should not agree to representation involving potential conflict of interest, lawyer involved cannot properly ask for such agreement or provide representation on basis of client's consent. Professional Conduct Rule 1.7(b).

3. Attorneys---Conflict of Interest---Particular Cases

Attorneys' representation of trust beneficiaries violated disciplinary rule, where beneficiaries had substantially different interests in estate, presenting fundamental conflict which could not properly be waived by clients in accordance with rule. Professional Conduct Rules 1.7(b), 8.4(a).

4. Attorneys---Conflict of Interest---Particular Cases

Subordinate lawyer could not rely on professional conduct rule providing exception for actions in accordance with supervisory lawyer's reasonable resolution of arguable question of professional duty; potential conflict in joint rep-

resentation of trust beneficiaries would have been so clearly fundamental to a disinterested attorney that undertaking the representation was per se unreasonable. Professional Conduct Rule 5.2(b).

5. Attorneys---Fees---Particular Cases

Since trust beneficiary involved in will contest fired her attorneys, they could not claim contingent fee for services performed on her behalf, though they were entitled to recover reasonable value of services under claim of quantum meruit.

6. Attorneys---Fees---Reasonable Fees

When professional conduct committee alleges that an attorney has violated disciplinary rule regarding illegal or excessive fees, it must present evidence establishing a generally accepted, reasonable fee for services in question; once reasonable fee has been determined, judicial referee and supreme court upon review of referee's findings will be able to measure allegedly excessive fee against reasonable fee to determine whether fee has violated rule. Professional Conduct Rule 1.5(a).

7. Attorneys---Fees---Particular Cases

Fees charged by attorneys in will contest were not, as a matter of law, clearly excessive or in violation of disciplinary rule, where record did not present facts sufficient to allow court to establish what a reasonable fee would be for services provided. Professional Conduct Rule 1.5(a).

8. Attorneys---Reprimand, Suspension and Disbarment---Particular Cases

Attorneys who violated disciplinary rule regarding multiple representation were publicly censured; fundamental conflict existed as to clients who were trust beneficiaries having substantially different interests in estate, and conflict was not properly waived by agreements executed by clients. Professional Conduct Rules 1.7(b), 8.4(a).

William R. Drescher, P.A., of Milford (William R. Drescher on the brief and orally), for the committee on professional conduct.

Sulloway & Hollis, of Concord, and Edgar L. Kelley, pro se, (Warren C. Nighswander on the brief, and Mr. Nighswander and Mr. Kelley orally).

Philip H. Cahalin, by brief and orally, pro se.

THAYER, J. On September 17, 1990, the Supreme Court Committee on Professional Conduct (committee) filed a petition to publicly censure the respondents, Edgar L. Kelley and Philip H. Cahalin for charging a clearly excessive fee, N.H. R. PROF. CONDUCT 1.5(a), maintaining representation that presented a conflict of interests, *id.* 1.7(b), and violating the Rules of Professional Conduct, *id.* 8.4(a). The petition and the respondents' answers were referred to a Judicial Referee (*Bean*, J.) for a hearing. The referee determined that the respondents violated each of the rules. We agree that the respondents violated Rules 1.7(b) and 8.4(a), but hold that a violation of Rule 1.5(a) was not proven by clear and convincing evidence.

This disciplinary action arises out of the respondents' representation of Kendra Stanley and Anna Ham, both beneficiaries of a trust created by Kendal C. Ham and funded through the residuary clause of his will. Kendal Ham died in March 1988 and was survived by his widow, Anna, and his daughter, Kendra Stanley, Anna Ham's stepdaughter. Under the will, Anna Ham was left certain real estate and intangible property. Anna Ham and Kendra Stanley were both named as beneficiaries of the trust. The trust was divided into parts A and B. The corpus of part A was limited to the lesser of two million dollars or thirty percent of the residue. The balance of the residue not needed to fund part A of the trust would be the corpus of part B. Both women could take from part A; only Anna Ham could take from part B. Kendra Stanley's only interest in her father's estate was in part A of the trust.

Kendra Stanley met with Edgar Kelley to discuss the estate. She was concerned about possible overreaching and undue influence exercised by a long-time employee of her father's who was a

beneficiary under the will, and a trustee of the trust established for the benefit of the two women. Kelley recommended a will contest and suggested that such a contest would be strengthened if Anna Ham joined. Anna Ham met with Kelley and his associate, Philip Cahalin, and was informed that she had a right to waive the will and take her statutory share of the estate. Both women retained Kelley to represent their interests in the estate.

When the executors were appointed in May 1988, the value of Kendal Ham's estate was estimated at $6,763,000, based on the value of the two bottling plants that constituted the bulk of the estate's assets. All of the stock of the New Hampshire bottling company was bequeathed to the individual whom the women suspected of exercising undue influence over Kendal Ham. The largest item in the residue of the estate, which was to fund the trust, was a seventy-six percent interest in a Massachusetts bottling company. In January 1989, however, the executors filed an inventory showing a total estate value of almost $17.7 million. The estate's interest in the Massachusetts bottling company was valued at $10,778,000.

Cahalin is a member of the New Hampshire bar; Kelley is not. They filed a joint appearance in the Carroll County Probate Court on August 4, 1988. On August 15, 1988, Anna Ham signed a fee agreement with Kelley. Although not a model of clarity, the fee agreement provided for an hourly fee for legal services related to exercising her right to take under the trust and her right to waive the will, and a contingent fee as to those additional interests she received from the

estate including "any additional sums to be gained by contesting the Will or by uncovering or successfully asserting the right of the estate to sums not included by the Executors in their inventory." Kendra Stanley later signed the same agreement, which had similar provisions regarding an hourly fee for certain services and a contingent fee for "sums recovered as an heir ... by virtue of the contest of [the] Will." The fee agreement signed by both women provided that "Kendra and Mrs. Ham understand and agree that each retains Kelley in her respective individual capacity, that their interests are coincidental but not identical." Anna Ham exercised her right to waive the will on September 9, 1988.

It was not until January 10, 1989, that Cahalin moved to permit Kelley to appear *pro hac vice*. In response to a discovery request seeking financial records of the Massachusetts bottling company which funded the trust, the executors objected to the respondents' joint representation of Anna Ham and Kendra Stanley. On January 26, 1989, the executors of Kendal Ham's estate moved to disqualify the respondents because Anna Ham's election to take her statutory share could have a "substantial negative impact upon a pourover trust which is the only source of benefits for Kendra Stanley." In early February 1989, Kendra Stanley and Anna Ham each signed a memorandum stating: "Attorney Kelley has shown me a copy of Rule 1.7 of the New Hampshire Rules of Professional Conduct and within the provisions of Rule 1.7(b)(2) I do desire Attorneys Kelley and Cahalin to continue representing my interests in the will contest."

On April 25, 1989, the Probate Court (*Shea*, J.) disqualified the respondents from representing Kendra Stanley because

> "Kendra's share in the Estate of Kendal Ham may be diminished because of Anna'[s] election against the will. ... Notwithstanding the fact that Kendra Stanley signed a consent for Attorneys Kelley and Cahalin to represent her after consultation and with knowledge of the consequences, the Court finds that a disinterested lawyer would conclude that K[e]ndra Stanley should not agree to the representation by Attorneys Kelley and Cahalin under the

circumstances."

The respondents continued to represent Anna Ham until July 11, 1989, when she informed them that she had retained other counsel.

Both Kendra Stanley and Anna Ham requested an invoice for services rendered. Kelley delegated the responsibility of preparing the invoices to Cahalin. Cahalin testified that he had to cull through notes and documents to reconstruct a schedule of the dates and serv-

ices performed. This exercise in reconstruction resulted in the generation of three invoices based on hourly rates and expenses under the fee agreement. An invoice showing a total of $11,715 for approximately one year of legal services was sent to Kendra Stanley's attorney. An invoice of $94,756, for approximately eleven months of legal services, was sent to both Kendra Stanley and Anna Ham. Kelley testified that this invoice was for the "joint endeavor" of representing both women in the will contest and that he expected to negotiate how the cost of services would be apportioned between them. A final invoice with a balance of $3,553, after crediting a retainer of $7,500, was submitted to Anna Ham for approximately eleven months of legal services.

After the invoices were sent to the women, Kelley submitted a claim to Anna Ham on July 17, 1989, based on the contingent fee agreement. In his letter, Kelley explained that based in part on the pressure he applied on the executor to accurately value the estate, Mrs. Ham's share of the estate increased from $2 million to over $7 million. Noting that under their contingent fee agreement, the fee for legal services would be $1.5---$2.0 million dollars, Kelley concluded by stating "[w]e submit for your approval this charge of $750,000 for services rendered."

[1] We will first address the judicial referee's finding that the respondents violated Rule of Professional Conduct 1.7(b), which provides: "A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person. ..." The standard of review is "whether a reasonable person could reach the same conclusion as the referee based upon the evidence presented at the hearing." *Drucker's **Case***, 133 N.H. 326, 329, 577 A.2d 1198, 1199 (1990). The respondents argue vigorously that although they were always aware of a potential conflict between Kendra Stanley and Anna Ham with respect to Kendal Ham's estate, they reasonably believed that there would be no actual conflict. As they viewed the dual representation, Anna Ham could only benefit by waiving the will, and her waiver would harm Kendra only in the event that there was not enough property in the residue to fully fund part A of the trust.

The respondents maintain that, throughout their representation, they did not foresee any detrimental effect to Kendra's position because they had reason to believe that the estate was undervalued, and because Anna Ham represented that she would make up any deficit to Kendra that resulted from her election against the will. The respondents also relied on their clients' affidavits and other docu-

ments indicating that both women were aware of the potential effects of the respondents' legal strategy. The referee, however, found that neither of the women "were sufficiently informed so as to understand the actual or potential conflicts."

[2--3] Although Rule 1.7(b)(2) provides that clients can waive a potential conflict after consultation

and with knowledge of the consequences, there are situations in which, even if the client consents to representation, a lawyer should decline to represent that client. "'[W]hen a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent.'" *Boyle's Case*, 136 N.H. 21, 24, 611 A.2d 618, 619--20 (1992) (quoting comments to ABA Model Rule 1.7(b)). The respondents' representation of the two women, who had substantially different interests in the estate, presented a fundamental conflict and violated Rule 1.7(b).

[4] In his defense, Cahalin relies on Rule 5.2(b), which states: "A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty." Under the facts of this **case**, however, even if Cahalin was subordinate to Kelley, there could have been no "reasonable" resolution of an "arguable" question of duty. The potential conflict in this **case** would be so clearly fundamental to a disinterested attorney that undertaking the joint representation was *per se* unreasonable.

[5] We next turn to the issue of whether the respondents violated Rule 1.5(a), which provides: "A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee." As noted above, the respondents did not keep accurate records of time and effort expended on representing each client. When their former clients requested invoices, it was necessary for Cahalin to go back over notes and letters to put together a billing record. "[I]t is apparent that the respondent[s] [were] ignorant of the necessity for keeping detailed daily records in order to accurately bill the client in accordance with the contract." *Kalled's Case*, 135 N.H. 557, 561, 607 A.2d 613, 616 (1992). The record also contains a bill in the form of a letter from Kelley to Anna Ham. Because Anna Ham fired the respondents, they had no claim for a contingent fee for services performed on her behalf. They were, however, entitled to recover the reasonable value of their services under a claim of quantum meruit. *Adkin Plumbing v. Harwell*, 135 N.H. 465, 467, 606 A.2d 802, 804

(1992). The $750,000 bill to Anna Ham represents such a quantum meruit claim.

[6] The referee concluded that the respondents violated Rule 1.5(a). The basis for that conclusion is not apparent to us. We announce, for the first time, that whenever the committee alleges that an attorney has violated Rule 1.5(a), it must present evidence establishing a generally accepted, reasonable fee for the services in question. Once a reasonable fee has been determined, the referee, and this court upon review of the referee's findings, will be able to measure the allegedly excessive fee against the reasonable fee to determine whether the fee charged violated Rule 1.5(a). *Cf. Kalled's Case*, 135 N.H. at 560, 607 A.2d at 615--16 (value of legal services based solely on billed hours was $150,313, but attorney charged $223,290); *People v. Nutt*, 696 P.2d 242, 248 (Colo. 1984) (assuming that attorney's bill for legal services was accurate, he would have accepted up to $200,000 for services he valued at $18,273); *Thomton, Sperry & Jensen, Ltd. v. Anderson*, 352 N.W.2d 467, 468--69 (Minn. Ct. App. 1984) (trial court determined reasonable fee was $29,350 although attorney charged fee of $92,855); *Myers v. Virginia State Bar*, 226 Va. 630, 636--38, 312 S.E.2d 286, 290 (1984) (attorney submitted bill for $184.59 for non-estate matters then claimed such services were worth $4,910).

[7, 8] The record does not present facts sufficient to allow us to establish what a reasonable fee would be for the services provided by the respondents. Accordingly, we cannot agree with the referee's determination that the respondents charged a clearly excessive fee, and we cannot say that as a matter of law, the fees are clearly excessive and in violation of Rule 1.5(a). The respondents are hereby publicly censured for violating Rules 1.7(b) and 8.4(a). The circumstances of this **case** do not warrant a more

harsh sanction, nor, as the respondents suggest, a more lenient one. The court will determine what costs to assess upon a motion from the professional conduct committee.

So ordered

BATCHELDER, J., did not sit; the others concurred.

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ROBERT **McINTIRE** v. SUSAN H. **LEE** & a.

THE SUPREME COURT OF NEW HAMPSHIRE

Carroll

No. 2001-115

Argued: November 13, 2002

Opinion Issued: February 19, 2003

McKean, Mattson & Latici, P.A., of Gilford (Steven M. Latici on the brief and orally), for the plaintiff.

Nelson, Kinder, Mosseau & Saturley, P.C., of Manchester (William C. Saturley & a. on the brief, and John C. Kissinger orally), for the defendants.

DALIANIS, J.

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The defendants, Susan H. **Lee** and Fay E. Melendy, appeal from a jury verdict finding them liable for legal malpractice in their representation of the plaintiff, Robert **McIntire**. Specifically, they argue that the Superior Court (O'Neill, J.) erred by: 1) allowing the plaintiff's expert witness to render an opinion that was not disclosed prior to trial; 2) allowing the plaintiff to satisfy his burden of proving the trial within a trial through expert testimony; 3) admitting into evidence an affidavit prepared by one of the defendants in the underlying case; and 4) failing to find the defendants immune from malpractice under the doctrine of judgmental immunity. We affirm. Based upon the record, the jury could have found the following facts. The plaintiff is the owner of a machine shop called Hillside Machine, which he started in 1973. In the spring of 1987, Catherine Woodall offered to serve as the plaintiff's sales representative. The plaintiff orally agreed to pay her a ten percent commission for any business she brought him. There was no discussion as to the length of the agreement or under what circumstances it could be terminated. The plaintiff understood at the time of the agreement that, as his representative, Woodall would, among other things, maintain regular contact with customers, deliver parts as needed and seek additional accounts from different companies.

Woodall brought the plaintiff business from a company called Varian Extrion. She told the plaintiff that she was servicing the Varian account and looking for additional accounts. The plaintiff paid Woodall a commission for approximately two years for business received from Varian. In the spring of 1989, however, the plaintiff, having not received any new accounts and being generally unsatisfied with Woodall's performance, threatened to terminate their contract.

Shortly thereafter, the plaintiff met with Attorney Fay Melendy to discuss his rights under the contract. Susan **Lee** was a law student who worked as a law clerk in Melendy's office. **Lee** was admitted to practice as an attorney in New Hampshire in November 1990. After reviewing Lee's research into the plaintiff's case, Melendy concluded that he could lawfully terminate his contract with Woodall. Subsequently, in May 1989, **Lee** sent a letter to Woodall advising her that she had been fairly

compensated and that her agreement with the plaintiff was terminated.

In December 1989, Melendy filed a petition for declaratory judgment on behalf of the plaintiff. In response, Woodall filed a counterclaim arguing that the contract was enforceable and that she was entitled to commissions for as long as the plaintiff continued to do business with Varian. In her answer, Woodall agreed that she was acting as a sales representative for the plaintiff. Contrary to the plaintiff's understanding of the contract,

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however, Woodall argued that she had no obligations except to introduce the plaintiff to Varian.

The defendants sent interrogatories to Woodall in March 1992 and June 1993. Based upon Woodall's answers to those interrogatories, Lee interviewed two machine shop owners in Massachusetts who had prior contractual relationships with Woodall similar to the plaintiff's contract. One of these businesses, Mair-Mac Machine, was involved in a similar contract dispute with Woodall. Lee contacted the attorney for Mair-Mac Machine to discuss the Massachusetts litigation, but did not request the underlying complaint or any discovery in the case. Woodall had answered a set of interrogatories in the Mair-Mac case dated June 30, 1993.

In the summer of 1993, the defendants filed a motion for summary judgment on behalf of the plaintiff, arguing that there was no factual dispute between the plaintiff and Woodall, and that the contract was not enforceable because there was no meeting of the minds and it violated the statute of frauds. The defendants also argued that the parties' relationship was an agency relationship terminable at will. The trial court denied the motion, but acknowledged that the factual issues were "extremely limited, if any remain at all," and scheduled a hearing for September 29, 1993, to address the legal issues.

On the day of the hearing, however, the court indicated that it wanted to hear testimony from the parties. Lee, who was representing the plaintiff at the hearing, was surprised by the court's request, but agreed to go forward with the hearing. She did not object to the lack of notice or move to continue the hearing. Following the hearing, Lee filed a post-trial memorandum with the court addressing the legal issues.

In its order, the trial court credited Woodall's version of the contract and ruled that the parties entered into a unilateral contract in which Woodall fully performed her obligations by bringing the plaintiff the Varian account. It found that under the terms of the contract, the plaintiff had to pay the defendant ten percent of all sales to Varian for the life of the account. The court also ruled that the contract was not within the statute of frauds.

Following an unsuccessful motion for reconsideration, the plaintiff filed a notice of appeal with this court, arguing that he was denied due process under both the State and Federal Constitutions because he did not have notice of the evidentiary hearing. He also argued that the trial court erred in finding the contract outside the statute of frauds. Attorney Ovide Lamontagne was retained to represent the plaintiff on appeal. In response to a show-cause order issued by the court regarding the due process claim, Attorney Lamontagne prepared an affidavit for defendant Lee (Lee affidavit), in which she states, in part, that:

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The Court's handwritten order denying Plaintiff's Motion for Summary Judgment indicated that no evidentiary hearing would be necessary but that a hearing on legal issues would be scheduled. . . . Understanding that no testimony would be offered at the September 29, 1993 hearing, I did not have available

Plaintiff's witnesses, nor did I prepare Mr. **McIntire** for direct or cross examination.

We affirmed the trial court's ruling on the merits and held that the plaintiff failed to prove a due process violation because he did not show actual prejudice. **McIntire v.** Woodall, 140 N.H. 228, 230-32 (1995). Specifically, we noted that "[a]ny alleged prejudice could have been cured by a timely objection, acceptance of the trial court's offer [to present additional evidence], or a request for a continuance." Id. at 230.

In August 1996, the plaintiff sued the defendants for legal malpractice. In count I of his writ of summons, the plaintiff alleged that defendant **Lee** committed malpractice because she negligently failed to conduct adequate discovery, prepare the plaintiff for trial, preserve the plaintiff's rights to an evidentiary hearing or present relevant evidence on his behalf. In count II, he claimed that defendant Melendy was vicariously liable for Lee's negligence.

At trial, Attorney Lamontagne testified regarding his involvement in the plaintiff's appeal and commented on the defendants' representation of the plaintiff in the underlying case. He noted that **Lee** failed to preserve the plaintiff's due process claim during the evidentiary hearing. During Attorney Lamontagne's testimony, the plaintiff introduced the **Lee** affidavit, which was admitted over the defendants' objection that it was inadmissible as a subsequent remedial measure. See N.H. R. Ev. 407.

The plaintiff also introduced, as his standard of care expert, Attorney Daniel Laufer. Attorney Laufer opined, among other things, that the defendants did not conduct adequate research or discovery, and that the decision to go forward with the evidentiary hearing on September 29, 1993, without preserving an objection, was negligent and contributed to the plaintiff losing his case. He also stated that Melendy did not properly supervise **Lee**, and that due to this lack of supervision, some of Lee's actions while still a law student constituted the unauthorized practice of law under Supreme Court Rule 35. The defendants objected to Attorney Laufer rendering this latter opinion on the grounds that it was not contained in the plaintiff's expert disclosure or in Attorney Laufer's deposition, but the trial court overruled the objection.

The plaintiff also introduced evidence that he claimed should have been introduced in the underlying case, which included the testimony of Edward

McDonald, the owner of Mair-Mac Machine, and Woodall's answers to interrogatories in the Mair-Mac case. McDonald, who also had an account with Varian, testified that Woodall previously served as his sales representative and that she was obligated to service his account with Varian by, among other things, visiting the company on a regular basis, delivering parts and serving as a mediator between the companies. He also stated that Woodall was responsible for performing similar duties when she was a sales representative for his former employer, Russard Incorporated. In her answers to interrogatories in the Mair-Mac case, Woodall stated that her agreement with McDonald was that she was to serve as his sales representative and receive a ten percent commission on all work McDonald completed for the companies from which she brought orders. In addition, she stated that she performed duties for McDonald including visiting Varian at least weekly and serving as a mediator between Mair-Mac and Varian if problems arose.

At the close of the plaintiff's case, the defendants moved for a directed verdict, arguing that there was insufficient evidence to support a finding of malpractice. They also argued that they were immune from liability under the doctrine of judgmental immunity because their alleged errors involved strategic or tactical decisions. The trial court denied the motion and the jury returned a verdict for the plaintiff. This appeal followed.

I

We begin by addressing the defendants' argument that the trial court erred by permitting the plaintiff to satisfy his burden of proving the trial within a trial with expert testimony.

In a legal malpractice case, a plaintiff must prove: (1) that an attorney-client relationship existed, which placed a duty upon the attorney to exercise reasonable professional care, skill and knowledge in providing legal services to that client; (2) a breach of that duty; and (3) resultant harm legally caused by that breach. Mahoney v. Shaheen, Cappiello, Stein & Gordon, P.A., 143 N.H. 491, 495-96 (1999). "A plaintiff who alleges that an attorney's negligence caused the loss of a legal action or a legal defense can succeed only by proving that the action or defense would have been successful but for the attorney's misconduct." Fairhaven Textile v. Sheehan, Phinney, et al., 695 F. Supp. 71, 75 (D.N.H. 1988). The jury will therefore substitute itself as the trier of fact and determine the factual issues presented on the same evidence that should have been presented to the original trier of fact. Witte v. Desmarais, 136 N.H. 178, 189 (1992). This phase of the malpractice case is known as the "trial within a trial."

Id.; 5 R. Mallen & J. Smith, Legal Malpractice § 33.8, at 69 (5th ed. 2000).

The defendants contend that the plaintiff, rather than introducing actual evidence that should have been presented in the underlying case, relied upon expert testimony to explain what evidence should have been introduced. We disagree.

As is evident from the record, the plaintiff did not simply rely upon expert testimony to prove his case. In addition to introducing the underlying trial transcript, the plaintiff introduced evidence he claimed should have been introduced at the underlying trial. Specifically, he introduced the testimony of Edward McDonald, who had a contractual relationship with Woodall similar to the plaintiff's contract and who testified that Woodall, as a sales representative, had various obligations under his contract. He also stated she had performed similar duties when she served as a sales representative for Russard, Incorporated.

The plaintiff also introduced Woodall's answers to interrogatories from the Mair-Mac case. Her answers revealed not only that her contract with McDonald was similar to her contract with the plaintiff, but also that she performed various services for McDonald as his sales representative similar to those that the plaintiff claims were elements of his contract. As the trial court explained when denying the defendants' post-trial motions, a jury could reasonably find that such answers undermined her testimony that she had no performance obligations under her contract with the plaintiff.

While Attorneys Lamontagne and Laufer offered their opinions on the potential impact additional evidence would have had on the underlying trial, their testimony was not used in lieu of presenting the actual evidence to the jury. Further, we disagree with the defendants that McDonald's testimony and Woodall's answers to interrogatories did not provide any basis for the jury to conclude that the underlying case should have been decided differently. Thus, we find no error in the plaintiff's presentation of his case.

II

The defendants next argue that Attorney Laufer should not have been permitted to testify that **Lee** engaged in the unauthorized practice of law. They assert that the trial court should have prohibited the admission of this testimony because this particular opinion was not disclosed prior to trial in either the plaintiff's expert disclosure statement or Laufer's deposition. Consequently, they argue that the verdict should be reversed

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because the testimony was so inflammatory that it may have affected the verdict.

Assuming without deciding that the trial court erred in allowing Laufer to testify that **Lee** engaged in the unauthorized practice of law, we find this error to be harmless. An error is considered harmless if it is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party asserting it. Welch v. Gonic Realty Trust Co., 128 N.H. 532, 536 (1986). Thus,

[w]here it appears that an error did not affect the outcome below, or where the court can see from the entire record that no injury has been done, the judgment will not be disturbed. But where the case is a close one on the facts, and the jury might have decided either way, any substantial error which might have tipped the scales in favor of the successful party calls for reversal.

Id. at 537-38 (quotations and ellipsis omitted).

The plaintiff introduced the opinion that **Lee** engaged in the unauthorized practice of law for the limited purpose of establishing that Melendy did not properly supervise **Lee** during the representation of the plaintiff. Even without this testimony, however, there was significant evidence that could lead a reasonable jury to find that Melendy did not properly supervise **Lee** when she was either a law student or a new associate. This evidence included, but was not limited to, a lack of billing records from Melendy's office showing time she spent working with **Lee** on the plaintiff's case, a memorandum from **Lee** to Melendy explaining a prior correspondence **Lee** sent to Woodall's counsel regarding the underlying case, and delays in conducting discovery and in the overall prosecution of the plaintiff's case. Nor do we conclude, given the evidence introduced regarding Lee's alleged negligent representation of the plaintiff, that Laufer's opinion affected the jury's decision as to that claim.

Thus, while the accusation that **Lee** engaged in the unauthorized practice of law may be inflammatory, this case is not so close on the facts that the trial court's admission of the testimony constitutes a substantial error which calls for reversal. Having considered the record in this case, we disagree that the introduction of this evidence affected the outcome below, and hold that any error in admitting it was harmless.

III

The defendants next argue that the trial court erred in admitting the **Lee** affidavit at trial because it constituted a subsequent remedial measure under New Hampshire Rule of Evidence 407.

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We will not reverse a trial court's ruling on the admissibility of evidence absent an unsustainable exercise of discretion. In re Antonio W., 147 N.H. 408, 414 (2002). To show an unsustainable exercise

of discretion, the defendants must demonstrate that the court's ruling was clearly untenable or unreasonable to the prejudice of their case. See State v. Lambert, 147 N.H. 295, 296 (2001).

New Hampshire Rule of Evidence 407 provides: "When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event." The controlling justification for excluding evidence of subsequent remedial measures is a public policy concern that people may not repair their property after an accident if such measures could be used against them in a lawsuit. Cyr v. J.I. Case Co., 139 N.H. 193, 203-04 (1994). The defendants argue that this rationale supports excluding the Lee affidavit under Rule 407. We disagree. Unlike a property owner remedying a hazardous condition that had resulted in an injury, the filing of the Lee affidavit and the statements made therein do not constitute corrective measures that, if taken previously, would have made the event (the choice to go forward with the evidentiary hearing without objecting or moving to continue) less likely to occur. Cf. N.H. R. Ev. 407. Thus, we do not find that this evidence falls within the purview of Rule 407 and is, therefore, not a subsequent remedial measure.

Accordingly, we hold that the trial court did not commit an unsustainable exercise of discretion by allowing the plaintiff to introduce the Lee affidavit at trial.

IV

Finally, the defendants argue that they are immune from liability pursuant to the doctrine of judgmental immunity because the alleged errors in the underlying case constituted strategic or tactical decisions that were within their discretion.

An attorney owes his or her client a duty to exercise reasonable skill and care in representing the client. See North Bay Council, Inc. v. Bruckner, 131 N.H. 538, 543 (1989). "Whether the attorney has breached the applicable standard of care in representing the client is a question of fact to be determined through expert testimony and usually cannot be decided as a matter of law." Cook v. Continental Cas. Co., 509 N.W.2d 100, 103 (Wis. Ct. App. 1993) (quotation omitted). The judgmental immunity doctrine provides, however, that an attorney will generally be immune from liability, as a matter of law, for acts or omissions during the conduct

of litigation, which are the result of an honest exercise of professional judgment. See Woodruff v. Tomlin, 616 F.2d 924, 930 (6th Cir. 1980); Sun Valley v. Rosholt, Robertson & Tucker, 981 P.2d 236, 239-40 (Idaho 1999); Mallen, supra § 30.8, at 428-31. While we have not formally adopted the judgmental immunity doctrine, we provide the same protection in professional liability cases. See Morrill v. Tilney, 128 N.H. 773, 779 (1986) (stating that a professional is not liable for errors in judgment).

As one court has noted, "[r]ather than being a rule which grants some type of immunity to attorneys, [the judgmental immunity doctrine] appears to be nothing more than a recognition that if an attorney's actions could under no circumstances be held to be negligent, then a court may rule as a matter of law that there is no liability." Sun Valley, 981 P.2d at 240 (quotation omitted). As with any negligence case, however, it is axiomatic that if there is a genuine issue of material fact about the reasonableness and care exercised by an attorney, then the issue must be submitted to the jury. Id.; see also Morrill, 128 N.H. at 780 (rejecting defendant's argument that he was immune from medical malpractice liability since a reasonable jury could find that his conduct fell below the requisite standard of care).

There was evidence introduced here that could lead a reasonable jury to conclude that the defendants failed to exercise a reasonable degree of skill and care in representing the plaintiff. The plaintiff's expert witness, Attorney Laufer, testified extensively to this effect, pointing out numerous deficiencies in the defendants' representation of the plaintiff. "While his testimony was not uncontroverted, the jury was free to accept or reject the testimony of all the witnesses, in whole or in part." Morrill, 128 N.H. at 780. Thus, we cannot hold that the defendants' actions in representing the plaintiff did not breach the standard of care as a matter of law. The trial court, therefore, did not err in denying the defendants' claim that they were immune from malpractice liability.

Affirmed.

NADEAU, J., concurred; BARRY, J., superior court justice, specially assigned under RSA 490:3, concurred.
