Ethics for the Bankruptcy Lawyer

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Western District of Louisiana
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“Why me?”

FACT: Nearly 3,200 complaints are filed annually with the ODC against attorneys.

The majority of the complaints are filed by disgruntled clients.

COMPETENCE:

Rule 1.1 (a) of the Rules of Professional Conduct provides:

"A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

Stay within your area of competence!

CONFIRM YOUR FEE ARRANGEMENT:

Rule 1.5 (b) of the Rules of Professional Conduct provides:

"The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, *preferably in writing*, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client."

Money issues are often at the root of many disciplinary complaints.

HANDLING FEES AND BILLING:

It is **not permissible** to provide for a *non-refundable fee* in any fee agreement with clients. The Rules of Professional Conduct and the Supreme Court jurisprudence make it abundantly clear what lawyers are permitted to charge, collect and/or retain fees only if they are earned. **Provisions in a fee agreement which provide for a so-called 'non-refundable fee' are not only unenforceable, but are violations of the Rules.**

Rule 1.5 of the Rules of Professional Conduct sets out the types of fee arrangements which are ethically permissible, including the following:

- **Retainers**
- **Fixed Fee or Minimum Fee**
- **Advance Deposits For Future Fees/Costs**
- **Contingency Fee Agreements**

CONFLICTS OF INTEREST:
You are THEIR LAWYER.

Under Rules 1.7, 1.8, 1.9 and 1.10 of the Rules of Professional Conduct, a lawyer has an obligation to avoid conflicts of interest.

- It is **NEVER** permissible to represent opposing sides in the same litigation or legal matter;
- nor is it permissible to take on a representation against a current client, even when the matters are distinct except where there exists a 'waivable conflict' and the waiver is obtained in writing after securing informed consent.

COMMUNICATION:

You work FOR THE CLIENT.

Rule 1.4 of the Rules of Professional Conduct provides:

- A lawyer shall promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required;
- Reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- Keep the client reasonably informed about the status of the matter;
- Promptly comply with reasonable requests for information; and
- Consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the RPC or other law."

The alleged failure by attorneys to communicate with their client is the single most frequent complaint filed against lawyers.

DILIGENCE:

Rule 1.3 of the Rules

of Professional Conduct provides:

“A lawyer shall act with reasonable diligence and promptness in representing a client.”

Complaints alleging neglect and lack of diligence can be effectively minimized by implementing the following helpful tips:

- Monitor your caseload to avoid an overload.
- From the outset, develop a reasonable timeline to complete the representation.
- Avoid procrastination! Watch for the early warning signs of 'procrastination' and confront them head on.
- Touch every file in your office periodically.
- Delegate to staff those support efforts that will assist you.

HONESTY:

In the eyes of the client, even an unintended misleading statement can damage the faith and confidence so important to the relationship. **Trust lost is not easily regained.**

Some statements may seem demonstrably false or misleading to the client, such as:

- *"I filed the petition last week."*
- *"I'm waiting on the judge to give us a trial date."*
- *"I'm afraid she isn't in. Can I have her call you back?"*

COMPLETING OR ENDING THE REPRESENTATION:

The termination of the attorney-client relationship can occur because the subject matter of the representation has come to an end, or because before its completion the attorney or client decides to cease the relationship. In both instances, certain duties exist and extend beyond the final date of active engagement.

Rule 1.16 of the Rules of Professional Conduct speaks to the ethical duties associated with declining or terminating representation of a client.

Rule 1.16 lists reasons available to the lawyer to terminate the representation of a client. The key is to avoid a disciplinary complaint in the process.

Bankruptcy Cases

In re: Carreras

2000-1094 (La. 6/20/00); 765 So.2d 321

- Plaintiff paid Respondent to initiate bankruptcy proceedings on his behalf. However, the attorney did not perform any legal services relating to the representation, failed to communicate with the client, and did not provide the client with a refund of the unearned fee.

- The Office of Disciplinary Counsel filed formal charges against the Respondent, alleging her conduct violated Rules 1.3 (failure to act with diligence and promptness in representing a client), 1.4 (failure to communicate with a client), and 1.5 (fee arrangements) of the Rules of Professional Conduct. The attorney did not respond to the charges and the factual allegations were deemed admitted and proven by clear and convincing evidence.

- The Disciplinary Board concluded that the Respondent should be suspended from the practice of law for one year and one day.

- In addition, the Board recommended the Respondent be ordered to pay restitution to the plaintiff, and be assessed with all costs and expenses of the disciplinary proceedings. The Louisiana Supreme Court affirmed.

- The Disciplinary Board reasoned that the Respondent's conduct was at least knowing, if not intentional. Moreover, the Board suggested the Respondent knew, or should have known, that she was obligated to file the bankruptcy petition or return the unearned fee.

- In aggravation, the Board found the attorney had a dishonest or selfish motive.

In re: Mendy

2011-2275 (La. 2/17/12); 81 So.3d 650

- **Married couple hired Respondent to represent them in pending Chapter 13 bankruptcy proceeding. They paid the Respondent $500 and agreed to tender an additional $1,000 at the completion of the bankruptcy.**
- **Subsequently, the couple received notice that their mortgagor had instituted foreclosure proceedings on their home and that a sheriff's sale was scheduled.**
- **The couple contacted the Respondent regarding the status of the case, and the Respondent, for the first time, disclosed that the bankruptcy petition had not been filed and that he could not assist them going forward because he was enjoined by the Bankruptcy Court from appearing before it.**
- **A complaint was filed with the Office of Disciplinary Counsel.**

- Meanwhile, in a separate action, the Respondent had been retained to handle a foreclosure proceeding brought against his client. The Respondent advised the client that he would arrest the proceeding and/or file a Chapter 13 Bankruptcy to save her home from foreclosure.

- The client paid the Respondent $1,500 for the representation, a sum the Respondent represented would be refunded if he was unable to arrest the sale or obtain a Bankruptcy Stay of the foreclosure. However, the Respondent never filed the Bankruptcy petition and the client's home was sold at a Sheriff's sale. A complaint was filed with the Office of Disciplinary Counsel.

- In addition to these two matters, the Respondent had allegedly committed acts of misconduct in violation of the Rules of Professional Conduct in two other matters.

In the first matter, the Office of Disciplinary Counsel alleged that the Respondent violated Rules 1.3 (failure to act with reasonable diligence and promptness in representing a client), 1.4 (failure to communicate with a client), and 8.4 (a) (d) (engaging in conduct prejudicial to the administration of justice) of the Rules of Professional Conduct.

In the second matter, the same rules were implicated with the additions of Rule 1.1 (a)(failure to provide a competent representation to a client), and 8.4 (c) (conduct involving dishonesty, fraud, deceit, or misrepresentation).

- In the first matter, the Committee found Respondent had violated Rules 1.3 and 8.4 (d), in spite of the fact the Respondent's secretary helped the clients prepare filings to be filed pro se in Bankruptcy Court.
- The clients faced "desperate circumstances" because the Respondent failed to timely take the appropriate action.

In the second matter, the Committee found that the Respondent had filed a petition to enjoin the foreclosure of the client's home. Subsequently, the lender's attorney contacted the attorney and informed him that, instead of going forward with the foreclosure, they would work with the client to reinstate the loan. The Respondent forwarded the reinstatement information to the client, but the client could not raise sufficient funds to reinstate the loan. Ultimately, the client's home was seized and sold.

- The Office of Disciplinary Counsel took the position that upon the client's inability to reinstate the loan, the Respondent should have filed a bankruptcy petition on her behalf, or at the least, should have notified the client that the petition to enjoin the foreclosure of the home had been set for hearing.

Sanction: Based on the Respondent's neglect of four legal matters, the Louisiana Supreme Court affirmed a three-year suspension as suggested by the Disciplinary Board. In addition, the Respondent was required to make full restitution to his clients.

In re: Hebert

2012-2102 (La. 11/16/12); 125 So.3d 1074

- **Attorney, while suspended from the practice of law, was paid $700 to file a Chapter 7 Bankruptcy on his client's behalf. The attorney filed the necessary pleadings in the U.S. Bankruptcy Court for the Eastern District of Louisiana.**
- **After being displaced out-of-state for eight months by Hurricane Katrina, the client returned to Louisiana and discovered the bankruptcy had been dismissed. She contacted the attorney and he advised that a new bankruptcy petition needed to be filed and that because of a change in the law, he would require an additional payment of $1,800.**

- The attorney did not disclose the circumstances surrounding the bankruptcy petition's dismissal. The client tendered the fee and the attorney filed a new bankruptcy petition.
- Subsequently, the plaintiff was advised that this second bankruptcy was dismissed because it was not filed before the applicable deadline. The Respondent never filed an objection to the Trustee's motion to dismiss and did not return the unearned portion of the fee tendered by the plaintiff. The Respondent's client filed a complaint with the Office of Disciplinary Counsel.
- In addition, a second count was pending before the ODC in an unrelated matter.

The Office of Disciplinary Counsel alleged that the Respondent's conduct violated Rules

- 1.2 (scope of representation);
- 1.3 (failure to act with reasonable diligence and promptness in representing a client);
- 1.4 (failure to communicate with a client);
- 1.5 (f)(5) (failure to refund an unearned fee);
- 1.16 (d) (obligations upon termination of the representation); 3.2 (failure to make reasonable efforts to expedite litigation); 8.1 (c) (failure to cooperate with the ODC in its investigation); and
- 8.4 (c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation).

The Respondent generally denied any misconduct.

Hearing Committee

- The Hearing Committee determined that the Respondent had violated the Rules of Professional Conduct as alleged in the formal charges.
- The Disciplinary Board upheld this determination, and concluded that the Respondent violated duties owed to his clients, the public, the legal system, and the legal profession.
- Moreover, the Board found that in most instances the attorney's conduct was intentional, and that the baseline sanction was suspension. The acts of misconduct described above were considered in conjunction with the attorney's misconduct in the other matter, because they involved nearly identical acts of misconduct.
- Consequently, the Board recommended the court impose an eighteen-month suspension.

Louisiana Supreme Court

- The Louisiana Supreme Court found that the record supported a finding that the Respondent neglected legal matters, failed to communicate with his clients, failed to refund unearned fees, failed to properly withdraw from the representation of his clients, and failed to cooperate with the Office of Disciplinary Counsel's investigation.
- Consequently, the Court adopted the Disciplinary Board's recommendation and suspended the Respondent from the practice of law for eighteen months.

In re: Lagrone

2002-2974 (La. 3/28/03); 843 So.2d 1057

- **After incurring burdensome medical expenses a married couple hired Respondent to institute bankruptcy proceeding on their behalf. The Respondent filed a Chapter 13 petition on their behalf.**
- **Moreover, the Respondent filed bankruptcy schedules attesting that his clients' assets totaled $10,220.00 and their liabilities totaled $73, 623.92. The bulk of their liabilities derived from an unsecured debt totaling $57,272.56 in medical expenses owed to the hospital where the wife gave birth.**
- **There was no insurance claim disclosed in the bankruptcy schedules as an asset owned by the clients, in spite of the fact that at the time of his wife's treatment, the husband had medical insurance through his employer.**
- **The hospital filed claims with the husband's insurer for those medical expenses.**

- **The insurer paid the claims in a series of four checks directly to the married couple, with payments totally $70,000, because the hospital had not perfected an assignment of the insurance proceeds.**

- **The couple's attorney erroneously believed that the insurance proceeds were assigned to the hospital. However, after receiving a call from the hospital, the Respondent was informed that the hospital had not perfected an assignment and the checks were sent directly to the couple. Unsurprisingly, by that time, the married couple had already spent several thousand dollars of the money sent to them by the insurer.**

- **The Respondent directed the couple to deliver the remainder of the insurance proceeds, totaling $61,242.56 -- to the Respondent . Immediately, the Respondent had the checks locked away until the Respondent settled with the hospital.**

- Later in the action, the Respondent's associate appeared with the married couple at a meeting of creditors. The associate made no reference to the insurance proceeds that had been received by the married couple. However, two days after the meeting, the Respondent sent a letter to the hospital offering to compromise the medical bills owed by the couple.

- A creditor objected to the Chapter 13 plan the couple had proposed at hearing regarding this objection, the Respondent's associate disclosed to the court that they were holding the funds. However, the amended Chapter 13 plan made no mention of the proceeds.

- After the hearing, the husband had a heart attack, and without notice to the creditors, the attorney dispersed $1,000 to the couple for living expenses from the insurance funds. The attorney then filed a motion to dismiss the couples' bankruptcy which was granted.

- Thereafter, the Respondent disbursed the remaining sums of the insurance proceeds from the trust account accordingly: $850 to the couple to pay an unspecified creditor; $1,627 to a medical clinic; $2,500 to the Respondent in attorney's fees; and $55, 265.56 to the married couple.

- Naturally, by the time the hospital learned of the underlying events, the married couple had spent nearly all of the money the Respondent had returned to them.

- Subsequently, a United States Bankruptcy Judge filed a complaint against the Respondent with the Office of Disciplinary Counsel.

The ODC filed a single count of formal charges, alleging the attorney's conduct in this matter violated Rules of Professional Conduct:

1.1 (failure to provide competent representation to a client),

1.3 (failure to act with diligence and promptness in representing a client),

1.4 (b) failure to give the client sufficient information to participate intelligently in the representation),

1.5 (a) charging an unreasonable legal fee),

1.15 (safekeeping property of clients or third persons),

34 (c) (knowing disobedience of an obligation under the rules of a tribunal),

8.4 (a) (violation of the Rules of Professional Conduct), and

8.4 (d) (engaging in conduct prejudicial to the administration of justice).

The Respondent answered the formal charges and denied any misconduct. Specifically, he alleged he had not intentionally concealed the existence of the insurance funds, and that in either case, the insurance proceeds did not form a part of the Bankruptcy Estate because the proceeds had been assigned to the hospital.

Based upon the testimony of a bankruptcy judge, the committee found that the attorney had

- failed to provide competent representation to his clients in violation of Rule 1.1;
- failed to act with reasonable diligence and promptness in violation of Rule 1.3;
- knowingly disobeyed an obligation under the rules of the bankruptcy court, in violation of Rule 3.4 (c); and
- engaged in conduct prejudicial to the administration of justice, in violation of Rule 8.4 (d).

However, the Committee found there was not enough evidence produced to conclude that there was violation of Rule 1.5 (a) (fees), and made no findings as to the alleged violations of Rules 1.4 (b), 1.15, and 8.4 (a).

- **The Committee recommended that the Respondent be suspended from the practice of law for a period of six months.**
- **The Disciplinary Board affirmed the Hearing Committee's findings and found that the Respondent knowingly, if not intentionally, violated duties owed to his clients, the public, and the legal system. Moreover, the injury was substantial as the insurance proceeds were not properly administered in accordance with the Bankruptcy Code and as a result, the hospital was paid only $100 of the amount it was owed.**

The Board recommended the Respondent be suspended from the practice of law for six months.

The Louisiana Supreme Court affirmed the Disciplinary Board's holding.

In re: Lightfoot
2011-1950 (La. 3/13/12)
85 So. 3d 56

Respondent was retained by United States District Judge Porteous to discuss financial difficulties that he and his wife had.

After attempting a non-bankruptcy "workout," which proved unsuccessful, Respondent recommended that his clients file bankruptcy.

To avoid embarrassment, Respondent recommended that his clients allow him to misspell their names on the bankruptcy petition and that they obtain a temporary post office box which could be used on their bankruptcy petition instead of their home address.

Once the bankruptcy filing had been printed in the newspaper the bankruptcy petition was amended with the correct information.

Respondent violated the following Rules:

1.2(d) (a lawyer shall not counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent);

3.3(a)(1) (a lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer);

3.3(a)(3) (a lawyer shall not offer evidence that the lawyer knows to be false);

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

8.4(a) (violation of the Rules of Professional Conduct);

8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation); and

8.4(d) (engaging in conduct prejudicial to the administration of justice).

Respondent was suspended for six (6) months, with all but 30 days deferred.

A Lawyer's Duty to the Tribunal

As most if not all lawyers are aware, making false statements to the court is a serious breach of a lawyer's duty, but in the context of bankruptcy, compliance with this duty is paramount because of the increased potential for fraud.

In re: Global Energies, LLC

763 F.3d 1341, 59 Bankr.Ct.Dec. 249,

25 Fla. L. Weekly Fed. C 320

- **Three partners, Wortley, Juranitch, and Tarrant shared ownership in Global Energies, LLC ("Global") before its bankruptcy. Tarrant held his stake through Chrispus Venture Capital, LLC ("Chrispus"), an entity in which he had a 93% interest.**
- **In 2010, business disagreements between the partners prompted Tarrant and Juranitch to develop a plan to acquire Wortley's interest in Global by having Chrispus file an involuntary bankruptcy petition against Global.**
- **The particulars of the plan were captured in emails exchanged between Tarrant, Juranitch, and Chrispus's bankruptcy attorney. Subsequently, Chrispus filed an involuntary bankruptcy petition against Global. Wortley did not oppose the petition and even approved the appointment of a Trustee.**
- **Wortley began to suspect collusion between Tarrant and Juranitch after Chrispus showed interest in bidding on Global's assets at the bankruptcy sale.**

- Wortley moved to dismiss the bankruptcy petition pursuant 11 U.S.C. § 1112 (b), alleging the bankruptcy petition was filed in bad faith.
- However, at an emergency evidentiary hearing, Wortley could only produce circumstantial evidence.
- Moreover, Chrispus had not turned over the incriminating emails, despite a document request from Wortley for all documents containing communications about Global between Juranitch, Tarrant, and Chrispus's bankruptcy attorney.

Ethical Violations

- Chrispus's bankruptcy attorney represented to the bankruptcy court that "all responsive documents" had been produced, and failed to assert any privilege that would permit Chrispus to withhold the missing emails or put Wortley on notice that the emails existed.

- **Wortley was forced, due to a lack of direct evidence for his claim, to withdraw his motion to dismiss, and the bankruptcy court granted his request without prejudice.**

- **Wortley's claim was further undermined by the fact that Tarrant and Juranitch gave sworn testimony denying their plan to file an involuntary bankruptcy petition.**

- **Chrispus's bankruptcy attorney supported those statements by attesting to the bankruptcy court that "[t]hroughout the entire process, representatives of Chrispus…[had] the stated purpose of trying to salvage [Global]… all with the goal of saving the monetary investment."**

- **After Wortley's motion to dismiss was withdrawn, the bankruptcy court approved the sale.**

New Evidence

- **A year later, after identifying emails between Tarrant and Juranitch that appeared to show that they had colluded to do business without him before filing bankruptcy, Wortley renewed his motion to dismiss.**
- **However, these emails were not the "smoking gun" emails, because these were still being withheld from Wortley, despite his earlier discovery requests. Because these new emails only provided circumstantial evidence the bankruptcy court dismissed Wortley's motion.**
- **Finally, in related state-court litigation, Wortley obtained the "smoking gun" emails that appeared to show that Juranitch and Tarrant colluded in filing for involuntary bankruptcy and that they had testified falsely about that plan in their earlier depositions.**

- Chrispus's bankruptcy attorney did not produce the emails, rather they were produced by an attorney representing Tarrant and others against Wortley's state-law claims.

- In spite of the production of these emails the bankruptcy court summarily denied Worley's Rule 60 (b) motion for relief premised on these new emails.

- The district court affirmed and reasoned Wortley's new evidence was insufficient to warrant Rule 60 (b) relief.

- Upon review, the appellate court placed significant emphasis on the role of attorney misconduct in the instant dispute.

- The court stated: “All the more troubling is that [Chrispus’s bankruptcy attorney], a sworn officer of the court, actively obstructed Wortley’s efforts to obtain evidence of the plan to file for involuntary bankruptcy.”

- The court went on to identify two principal acts of attorney misconduct.

Acts of Misconduct

Number 1

- Chrispus's bankruptcy attorney and his associate falsely responded to Wortley's discovery request, contending that "all non-privileged documents responsive to [Wortley's requests]" had been produced.
- The Court found that clearly some significant non-privileged and responsive documents had been withheld.

R. Reg. Fla. Bar 4-3.3 (a)(2)

"A lawyer shall not knowingly fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client."

R.Reg Fla. Bar 4-3.3 (a)(4)

"A lawyer shall not knowingly offer evidence that the lawyer knows to be false. A lawyer may not offer testimony that the lawyer knows in the form of a narrative unless so ordered by the tribunal. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence that the lawyer reasonably believes is false. "

Number 2

Chrispus's bankruptcy attorney represented Tarrant at deposition where Tarrant falsely testified that he had no conversations with Juranitch about filing an involuntary bankruptcy petition. The bankruptcy attorney, having participated in the email discussions at issue, knew Tarrant's testimony was false, and did nothing to correct or remedy the earlier failure to produce the email messages.

The 11th U.S. Circuit Court of Appeals reversed the bankruptcy and ordered the bankruptcy court to grant Wortley's Rule 60 (b)(2) motion and vacate its order approving the sale of Global's assets to Chrispus.

In re: Madera Roofing, Inc.

*No. 13-16954-13-11, 2014 WL 4796758, at *1 (Bankr. E.D. Cal. Sept. 25, 2014)*

Facts

- For seven months a law firm served as general counsel for a Chapter 11 Bankruptcy debtor.
- Prior to the bankruptcy, Debtor had paid the law firm a $50,000 retainer for anticipated work in connection with the case.
- Subsequently, the firm's services were terminated when the court appointed a Chapter 11 Trustee and the lead attorney moved to another firm.
- The firm filed an application for approval and payment of its legal fees and costs. However, the firm's billing records indicated that the firm had been a Creditor of the Debtor and was not eligible to be employed as a professional at the commencement of the case and at the time it filed its Employment Application.

- The law firm's creditor status was not disclosed, nor did it become apparent until the U.S. Trustee filed an objection to the firm's fee application.

- After its creditor status was discovered, the court issued an order to show cause directing the firm to appear and show why it should not be compelled to disgorge its retainer.

Holding

- According to the court, due to its creditor status, the law firm was statutorily ineligible for employment pursuant to Bankruptcy Code § 327(a) and accordingly, not eligible for compensation.

- In relation to the $50,000 retainer, the court reasoned: "[a]dvance payments of fees to a professional for legal services in connection with a bankruptcy case are property of the bankruptcy estate no matter how they may be described in some collateral agreement between the parties…[I]f the court does not discover that a professional was ineligible for employment until after the employment is approved, the court may order disgorgement of compensation already paid."

- The court ruled that the law firm was in possession of estate property worth $50,000.00 (in the form of the retainer).

- Consequently, the law firm was ordered to turn over the retainer fee of $50,000.00 to the Chapter 11 Trustee.

Conflicts of Interest

Conflicts of Interest

Bankruptcy attorneys, like all other attorneys, must be vigilant and proactive in identifying potential conflicts of interest as soon as they arise.

Louisiana Rule of Professional Conduct 1.9

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

Louisiana Rule of Professional Conduct 1.9

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

1) Whose interests are materially adverse to that person; and

1) About whom the lawyer had acquired information protected by Rules 1.6 and 1.9 (c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

Rule of Professional Conduct 1.9

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) Use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(1) Reveal information relating to the representation except as these Rules would permit or require with respect to a client.

In re: Muscle Improvement, Inc.

437 B.R. 389, United States Bankruptcy Court, C.D. California, August 31, 2010

Facts

- Debtors brought suit against this principal creditor alleging breach of contract and fraud.

- At the hearing, the creditor appeared through an attorney whom the debtors had consulted on two occasions prior to their bankruptcy filing, in which the debtors discussed retaining the attorney to represent them in these cases.

- The debtors sought to have the attorney disqualified on conflict of interest grounds.

Facts

- At the first meeting between the debtors and the attorney the parties spent two hours discussing the debtors' financial distress. Subsequently, the debtors forwarded documents to the attorney depicting their financial condition.
- A retainer agreement was sent to the debtors, but was never signed or returned.
- The parties' second meeting was designated a "consultation," and at the consultation the attorney advised the debtors a workout would be less costly than filing for bankruptcy, and advised them not to make preferential payments to their creditors. The attorney billed the debtors $350.
- The debtors ultimately did not retain the attorney as counsel, instead hiring their present bankruptcy attorneys to file a Chapter 11 bankruptcy case.

Applicable Rule

- The court in *In re: Muscle Improvement, Inc.*, evaluated the factual circumstances under California Rule of Professional Conduct 3-310 (E), which is not modeled after the Model Rules of Professional conduct promulgated by the American Bar Association on conflicts of interest, to wit:
  - 3-310 (E) A member shall not, without the informed consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.

Holding

- The court found that the attorney's current representation of the creditor, adverse to the debtors, resulted in a conflict of interest.

- According to the court, the attorney had to be disqualified because she met with the debtors under circumstances in which confidential information was disclosed, including documents and testimony regarding the debtors' financial distress, and consequently, the attorney could not represent an adverse client in a substantially related matter, even if the debtors never hired the attorney.

In re: Martinez

393 B.R. 27, Bankruptcy Court D. Nevada, August 1, 2008

Facts

- A husband and wife filed for Chapter 13 Bankruptcy. The couple owned three homes. The couple's plan was to surrender two homes and live in the remaining home.
- Each home had multiple loans against it, and Wells Fargo had liens securing loans on several of the houses, including a lien on the home the couple intended to retain.
- At a meeting regarding the bankruptcy, Wells Fargo's attorney presented the debtors' counsel with a stipulation that lifted the automatic stay on one of the debtors' properties. Debtor's counsel signed this stipulation and the bank's attorney submitted it to the court for an order on the stipulation.

Facts

- At the time the stipulation was entered both attorneys believed the stipulation related to the property the debtors intended to surrender. However, in fact, the stipulation contained a legal description of the home the debtors intended to keep.
- When the bank's counsel became aware of the mistake, he acknowledged it. However, Wells Fargo's counsel refused to sign a stipulation vacating the order on the mistaken stipulation, claiming that the bank would not consent to vacating the stipulation.
- At hearing, Wells Fargo's attorney appeared and stated that the bank would not allow him to consent to vacate the stipulation.

Facts

- The court then ordered the bank's attorney, his law firm, and Wells Fargo to appear and show cause why they should not be sanctioned for their individual and collective conduct in refusing to aid the debtors in rectifying the admitted mistake.

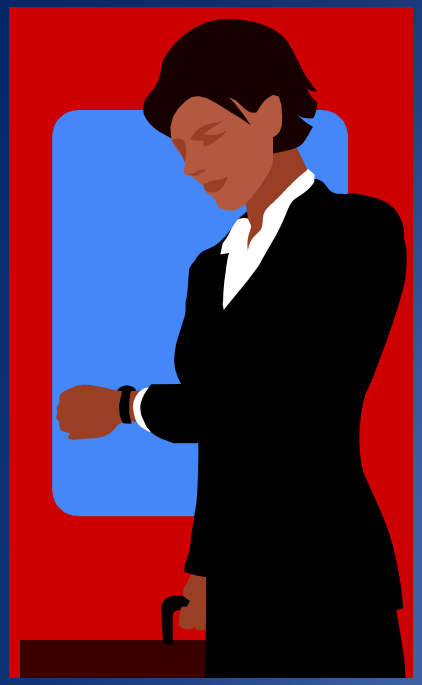
Rule

- In evaluating the lawyer and his firm's actions, the court cited Rule 9011 which regulates an attorney's representations to the Bankruptcy Court, the relevant provision stated:

> (b) By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances…(1) it is not being presented for any improper purpose, such as to harass, or to cause unnecessary delay or needless increase in the cost of litigation; (2) the claims, defenses, and other legal contentions therein are warranted by existing law…

Holdings

- The court found that the lawyer and his firm violated Rule 9011, as well as Rules 1.2, 1.4, and 1.16 of Nevada's Rules of Professional conduct (Modeled like our own Rules of Professional Conduct on the Model Rules of Professional Conduct promulgated by the ABA).
- The court reasoned that lawyers and law firms have an obligation to consult with their client under Rule 1.4 when the lawyer or law firm knows the client expects assistance not permitted by the Rules of Professional Conduct.
- According to the court, the attorney should have counseled Wells Fargo to agree to vacate the mistaken stipulation and informed them that any other course was unreasonable and one which they could not participate.
- Based on the violations the court found sanctions were warranted to deter future similar conduct by the parties and others. The law firm received a public reprimand and the lawyer received a private reprimand. Also, Wells Fargo was sanctioned for its bad faith conduct by ordering it to pay the debtors their attorneys' fees incurred in scheduling and appearing at the hearing to vacate the mistaken stipulation.



Recent Professional Conduct Cases

Disbarment

In re: Shaw
2014-0751 (La. 6/20/14); 141 So.3d 795

- Counsel brought personal injury suit after prescription had already run. Client filed disciplinary complaint that alleged: (1) the lawyer failed to keep her informed on the progress of the representation; (2) the lawyer filed suit after prescription had run; (3) the lawyer settled the matter without advising the client; and (4) the lawyer failed to pay the client any of the settlement proceeds or provide her with an accounting of the settlement.
- In the lawyer's responses to the disciplinary complaint she claimed the matter was settled for $10,000. However, defense counsel later advised the matter settled for $12,500.
- The disciplinary committee determined the formal charges were proven by clear and convincing evidence and found that the lawyer had violated the Rules of Professional Conduct. The committee recommended the lawyer be suspended from the practice of law for one year and a day, and attend the Louisiana Bar Association's Ethics School prior to reinstatement.

- In addition, the committee recommended the lawyer make restitution to her client in the amount of $5,722, the amount of her former client's medical bills, plus legal interest.

Criminal Prosecution

- In a separate criminal matter, a grand jury in East Baton Rouge Parish determined that the lawyer in *Shaw* should be indicted on two counts of felony theft and two counts of filing false public records.

- The lawyer pled guilty to the first count. This offense related to the lawyer's conduct in knowingly submitting false information for the purpose of obtaining greater compensation than the lawyer was legally entitled for furnishing services, when the lawyer falsified a Medicaid "provider agreement."

- The lawyer was sentenced to serve five years at hard labor, suspended, and placed on five years active supervised probation.

ODC Response in *Shaw*

- In response, the ODC alleged that the lawyer's conduct violated Rules 8.4(a), 8.4(b), and (8.4)(c).
  - Rule 8.4: "It is professional misconduct for a lawyer to…"
    - (a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another
    - (b) Commit a criminal act especially one that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects
    - (c) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation

- At hearing, the Respondent failed to answer the formal charges. Consequently, the factual allegations were deemed admitted.
- The Hearing Committee determined the baseline sanction for the Respondent's conduct was disbarment, but because of aggravating circumstances, recommended the lawyer be permanently disbarred.
- The Hearing Committee acknowledged the lawyer's dishonest and selfish motives in aggravation.
- Louisiana Supreme Court: The Court accepted the Disciplinary Board's recommendation and permanently disbarred the lawyer for her egregious actions.

In re: Avery

12-0598 (La. 4/5/13); 110 So.3d 563

– Respondent wrote checks for personal expenses drawn on his client trust account and improperly handled the account. Also committed the following violations, to wit: failed to communicate with his clients; failed to refund the unearned portion of legal fees; practiced law while ineligible; and failed to cooperate with the Office of Disciplinary Counsel's investigation.

Sanction: Permanent disbarment and ordered to make restitution to all victims.

Unauthorized Practice of Law

In re: Cortigene and Schwartz, Sr.

2013-2022 (La. 2/19/14); 144 So.3d 915 (La. 2014)

Facts

- Attorney, admitted to practice in Texas but not in Louisiana, attended and participated in the deposition of his client, the plaintiff, in Louisiana.
- The attorney was listed as counsel of record on the court docket and his name appeared on the plaintiff's pleadings; however, he did not seek pro hac vice admission or notify the court he was not admitted in Louisiana.
- The Office of Disciplinary Counsel charged the attorney with violations of the rules of professional conduct for the unauthorized practice of law.

- The attorney contended that Louisiana had no jurisdiction over him because he was not licensed in the state.

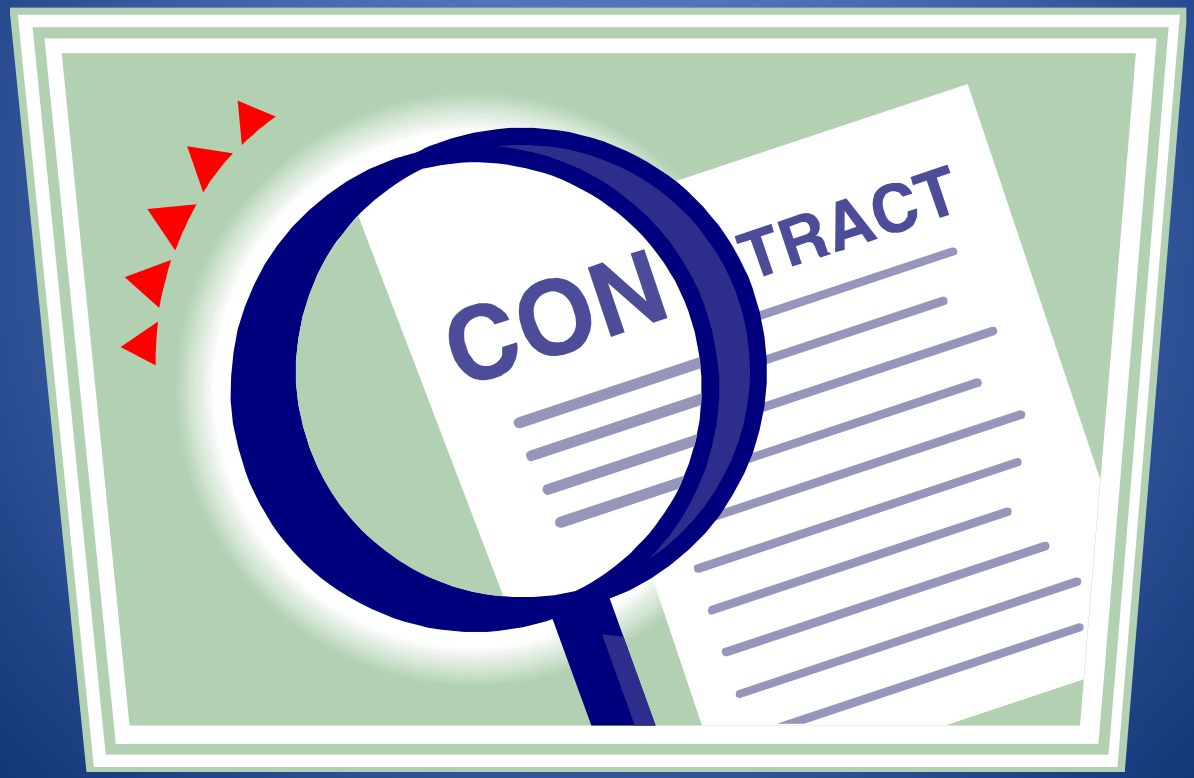
Holding

The attorney engaged in the practice of law in this state by appearing at and participating in a deposition. The Court reasoned that participation in out-of-court proceedings including depositions constitutes the practice of law.

Jurisdiction

Moreover, the Court repudiated the Respondent's contention that he was beyond the jurisdiction of Louisiana authorities. The Court enjoined the Respondent from seeking full admission to the Louisiana bar or seeking admission to practice in Louisiana on a temporary or limited basis, including seeking pro hac vice admission in the state for a period of three years.

Contingency Fees



Skannal v. Jones Odom Davis & Politz, L.L.P.

48, 016 (La.App. 2 Cir. 4/25/13)

Facts

- Plaintiff sought legal advice from attorney and attorney's law firm regarding the validity of nine business transactions entered into by his former business partners.
- Thereafter, the plaintiff's son, individually and as agent for his father, entered into a fee agreement with the law firm. After its execution the plaintiffs paid the firm a $150,000 retainer in accordance with the fee agreement.
- Four of the nine transactions at issue were rescinded in the underlying litigation carried out by the law firm.
- Across approximately three years, pursuant to the fee agreement, the plaintiffs paid the law firm hourly fees totaling approximately $900,000.

Facts

- Nearly three years into the litigation the firm submitted a fee disbursement agreement stating for the first time that the firm claimed a contingency fee pursuant to the terms of an additional option extended to the plaintiffs in the fee contract.

- The plaintiffs sued the law firm asserting as a matter of law that the fee arrangement affording the attorneys an optional contingency fee violated the Louisiana Rules of Professional Conduct.

Holding

The law firm's fee arrangement, providing the firm with a unilateral option to abandon the fixed fee arrangement and claim a contingency fee, violated public policy by effectively eliminating the risk of the "outcome of the matter" under Rule 1.5 (c).

Suspension

In re: Harvin

13-0685 (La. 5/24/13); 117 So. 3d 907

- Respondent obtained an improper default judgment in City Court- Judgment was improper for lack of personal service and improper jurisdictional amount. Respondent refused to dismiss the judgment and the debtor's counsel filed a petition to annul the judgment.

- Subsequently, after suit was filed, the Respondent agreed to dismiss the city court judgment. However, without the debtor's knowledge, the respondent had filed a notice of lis pendens against all of the debtor's property. The debtor's counsel demanded the lis pendens to be lifted, but the Respondent refused to do so.

Sanction: Three month suspension with all but 30 days deferred; unsupervised probation for one year; required to attend LSBA's Ethics School; cast with costs.

In re: Moeller

12-2460 (La. 3/19/13); 111 So.3d 325

- Respondent practice law while certified as ineligible because of his failure to comply with mandatory continuing education requirements and failure to pay bar dues and the disciplinary assessment.
- Respondent had violated Rule 1.1 (b) and (c) of the Louisiana Rules of Professional conduct requiring a lawyer to comply with the minimum requirements of continuing education and which requires lawyer's to comply with Louisiana Supreme Court rules requiring the payment of bar dues and annual fees. Also violated Rule 5.5 (a) by engaging in the unauthorized practice of law and Rule 8.4 by knowingly violating the Rules of Professional Conduct.

Sanction: Respondent suspended for one year and one day with all but 90 days deferred; two year period of unsupervised probation post-suspension; required to remain current on bar dues, disciplinary assessment, and continuing education requirements.

In re: Ransome

2012-1823 (La. 1/11/13); 106 So.3d 98

- In an effort to obtain leverage in her negotiations to settle underlying litigation with a mortgagee, the Respondent failed to provide a collateral mortgage note to the mortgagee and then falsely marked the note as paid and obtained the cancellation of the mortgage.
- Respondent's actions implicated Louisiana Rule of Professional Conduct 8.4 (c) which provides, in pertinent part, it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

- Respondent was sole owner of a ALDAR Investments, Inc., a Plaintiff in an antitrust suit.
- Respondent retained a Washington, D.C. law firm, Foley & Lardner, L.L.P., as co-counsel.
- Respondent agreed to give Foley a second mortgage on property owned by the company to secure past due and future legal fees.

- The parties entered into a fee agreement. Among other provisions, the agreement specified that a collateral mortgage evidenced by a collateral mortgage note would secure Aldar's promissory note to Foley in the amount of $534,329.48.
- Aldar executed the collateral mortgage document in November 2002 and in December 2002, Aldar settled the case for $550,000.00

- The Collateral Mortgage was recorded with the clerk of Livingston Parish.

- However, Respondent retained the original promissory note and collateral mortgage note, and thus, Foley did have a perfected lien.

- Respondent and Foley could not agree on the distribution of the settlement proceeds.

- Without the knowledge and approval of Foley, Respondent had her paralegal mark the note “paid” and the collateral mortgage cancelled.
- Suit was filed by Foley against Respondent and following a bench trial the Judge determined that Respondent had committed civil fraud.
- Respondent’s actions implicated Louisiana Rule of Professional Conduct 8.4 (c) which provides, in pertinent part, it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

Sanction: Respondent was suspended for eighteen months, all but six months of which was deferred. Respondent was placed on probation for two years and required to attend Ethics School.

In re: Loughlin
2014-0923 (La/26/14)

• Respondent constructed a website to promote his law firm. The "home page" and "firm profile" page of the website provided:

> "Loughlin & Loughlin is a plaintiff-oriented pure litigation firm *specializing in maritime personal injury and death cases*."

- Subsequently, the attorney had the website taken down for unrelated revisions.

ODC Prosecution

- In connection with an unrelated matter, the Office of Disciplinary Counsel ("ODC") accessed a copy of the "firm profile" page of respondent's former website through a Google search.

- After investigation, the ODC filed formal charges, alleging the attorney violated Rules 7.2 (c)(1)(B) and 7.2 (C)(5) as well as former Rule 7.4 (as existed prior to 2009) by claiming on his former website that he "specialized" in maritime personal injury and death cases.

Formal Hearing

- At a formal hearing on the matter, the hearing committee determined that the language on the attorney's website stated or implied that his firm was a "specialist" in maritime personal injury and death cases, although such a specialization has not been recognized or approved in accordance with the rules and procedures established by the Louisiana Board of Legal Specialization.
- Consequently, the committee found the attorney violated former Rule 7.4. The committee determined that the respondent acted negligently in failing to make himself aware of and comply with Rule 7.4. They found no evidence of actual injury caused by the violation, and little potential for injury was shown. The committee recommended the attorney be publicly reprimanded and required to attend a CLE on advertising.

Disciplinary Board

- The disciplinary board affirmed the factual findings of the committee.

- According to the disciplinary board, the attorney's actions were based "upon inexperience with the advertising rules rather than a dishonest or selfish motive."

- The attorney appealed the board's ruling to the Louisiana Supreme Court. The court engaged in a significant analysis of the critical question of the mental state required to commit a culpable ethical violation.

Louisiana Supreme Court

The Court dismissed all formal charges against the respondent concluding "[t]he record establishes respondent's actions were not taken with a culpable mental state."

The court reasoned that there were three mental states: (1) intent; (2) knowledge; and (3) negligence. Each less culpable than the former.

Readmission

In re: Easley

14-0059 (La. 2/14/14) 2014, WL 812239

- Petitioner disclosed three alcohol related arrests on his application to sit for the Louisiana Bar Examination. The Louisiana Supreme Court conditionally admitted Petitioner to the bar in 2011 contingent upon a two year probation period and compliance with a LAP agreement.
- The LASC revoked the Petitioner's conditional admission for violating the terms of the LAP agreement by testing positive for alcohol.
- Petitioner filed an application for readmission and successfully completed a long term inpatient program. Subsequently, the petitioner entered into a new five year LAP agreement.

In re: Katherine M. Guste
2012-1434 (La. 12/4/12)
118 So.3d 1023

Count I, Respondent failed to communicate with her client, failed to withdraw from the representation when she was discharged, failed to provide an accounting or refund the unearned portion of the fee she was paid, and failed to return the client's file in a timely fashion.

Count II, Respondent charged an excessive fee. The fees she charged were for both legal and non-legal services. However, because there was no demarcation between the fees, the Court considered all of the legal fees for the purpose of determining whether or not they were excessive.

The Supreme Court held that the attorney violated the rules governing communication with clients, payment of fees, safekeeping property of clients, and obligations upon termination of representation.

Under the circumstances, a two-year suspension from the practice of law was warranted.

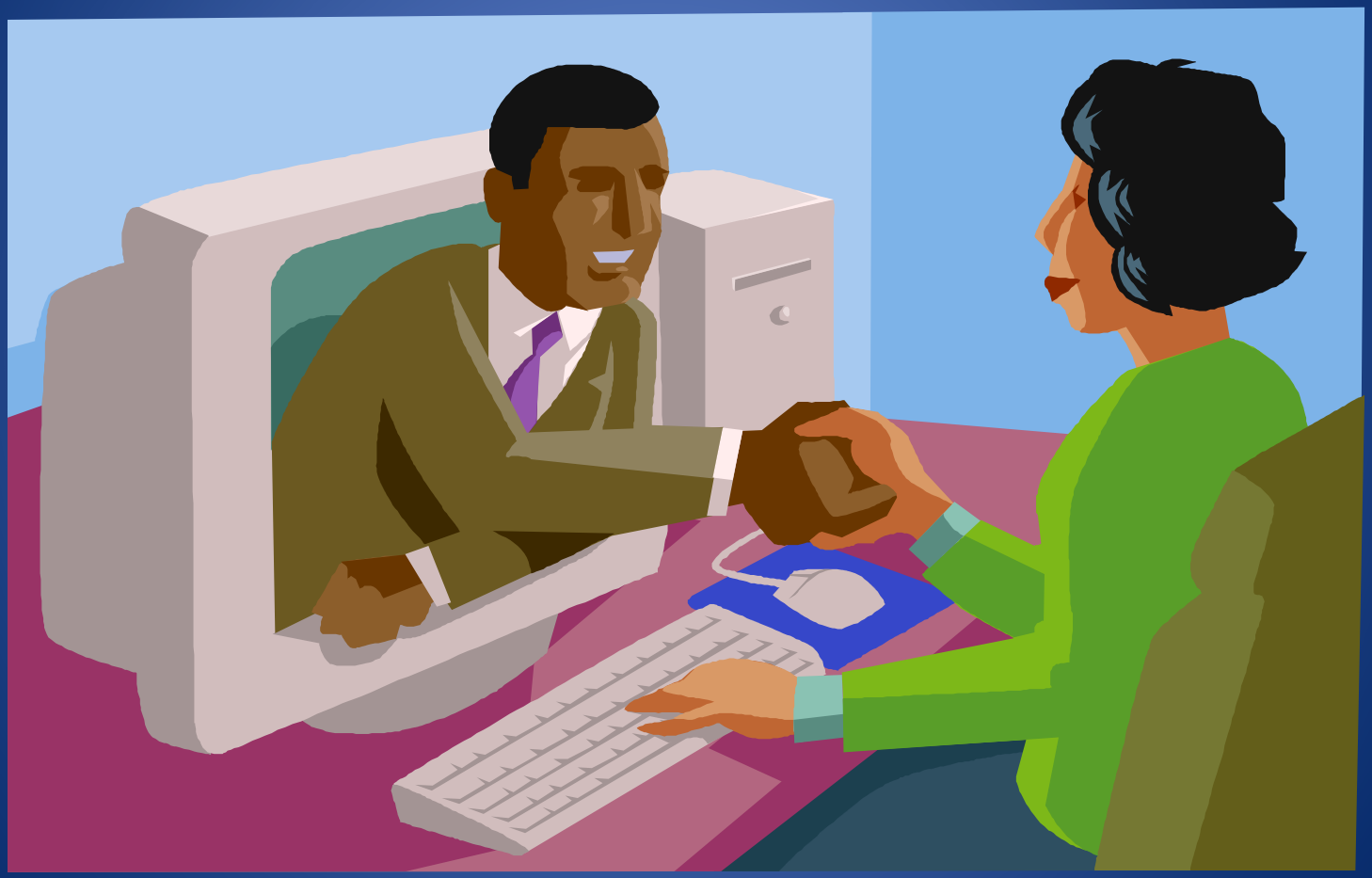
In re: Joan S. Benge
2012-0619 (La. 10/16/12)
100 So.3d 818

Respondent was removed from her office as judge after it was found she had decided a case pending before her for personal reasons.

The Supreme Court, in its order in the judicial proceeding, reserved the right for ODC to pursue lawyer discipline in accordance with Rule XIX.

Respondent was suspended for three (3) years, retroactive to the date of her interim suspension.

Social Media in Litigation



Social Media in Litigation: Notable Statistics

- Facebook reports over 1.23 billion monthly active users as of January 1, 2014.[1]
- 72% of online adults visit Facebook at least once a month.[2]
- As of May 19, 2014, 56.45% of all United States residents use Facebook.
- On average, Facebook users have 217 photographs uploaded.[3]

[1] See Craig Smith, *By the Numbers: 155 Amazing Facebook User & Demographic Statistics,* Digital Marketing Ramblings, October 1, 2014.

[2] *Id.*

[3] *Id.* (As of September 17, 2013).

Using Social Media in Litigation

Question:

Can a lawyer view the public Facebook or MySpace pages posted by another party in pending litigation to get information about that party for use in the lawsuit *if the lawyer does not "friend" the party to get the information?*

Answer:

Yes, according to the New York State Bar Association Committee on Professional Ethics, Opinion #843 (09/10/2010).

If a lawyer has access to the Facebook or MySpace network used by another party in the litigation, the lawyer may access and review the public pages of that party to search for potential impeachment material.

As long as the lawyer does not "friend" the other party or direct a third person to do so, the lawyer can access the social network pages of the party without violating Rule 8.4 (prohibiting deceptive or misleading conduct), Rule 4.1 (prohibiting false statements of fact or law), or Rule 5.3(b)(1) (imposing responsibility on lawyers for unethical conduct by nonlawyers acting at their direction.)

Question:

Can a lawyer ask a third person whom a witness does not know to "friend" the witness for the purpose of obtaining information from non-public Facebook or MySpace pages for possible use in the litigation *if the third person does not reveal his affiliation with the lawyer or the true purpose for seeking access to the information?*

Answer:

According to an advisory opinion issued by the Philadelphia Bar Association Professional Guidance Committee, Op. No. 2009-02, March 2009, several Pennsylvania Rules of Professional Conduct are implicated in this inquiry.

Rule 5.3: Responsibilities Regarding Nonlawyer Assistants

The lawyer is procuring the conduct. Therefore, the lawyer is responsible for the conduct under the Rules even if he is not himself engaging in the conduct that may violate a rule.

Rule 8.4(c): Misconduct involving dishonesty, fraud, deceit or misrepresentation

If the lawyer asked the witness outright for access, it would not be deceptive so that would be permissible. But the proposed course of action involves deception so it would violate Rule 8.4(c).

Rule 4.1(a) Truthfulness in Statements to Others

The proposed conduct violates Rule 4.1(a) because it constitutes making a false statement of material fact to the witness.

Using Social Media in Litigation

Question:

May a lawyer advise their client, after litigation has commenced, to remove “posts” on social media that reflect negatively?

Answer:

No, according to a July 25, 2014 ethics opinion from the North Carolina Bar Association.[4] The opinion concluded that generally, relevant social media postings must be preserved.

[4] North Carolina State Bar, 2014 Formal Ethics Opinion 5, July 25, 2014.

Using Social Media in Litigation

- More precisely, the North Carolina State Bar agreed with a recent New York State Bar opinion. They noted:

  "a lawyer may advise a client about posting on a social media website and may review and discuss the client's posts, including what posts may be removed, if the lawyer complies with the rules and law on preservation and spoliation of evidence."

- Thus, if removal of the postings does not result in spoliation and is not otherwise illegal or in violation of a court order, the lawyer may in fact instruct the client to remove the "posts."

Using Social Media in Litigation

- In that same decision the North Carolina Bar Association opined that, in the event there is a danger that spoliation could result from the destruction of the posts, the lawyer has an affirmative obligation to “advise the client to preserve the posting by printing the material, or saving the material to a memory stick, compact disc, DVD, or other technology, including web-based technology, used to save documents, audio, and video.”

EEOC v. Simply Storage Mgmt., L.L.C.

270 F.R.D. 430, 434 (S.D. Ind. 2010)

- In a sexual harassment action, the EEOC requested a discovery conference because counsel for the parties could not agree as to the proper scope of discovery regarding the production of the claimants' social networking site profiles, and the information contained thereon. The Claimants contended that the requests were overbroad, not relevant, and unduly burdensome because they would infringe the claimants' privacy and result in harassment and embarrassment to the claimants.

- The court concluded that merely locking a profile from public access does not prevent discovery and ordered that the Claimants produce relevant social networking site communications.

- "[a]lthough privacy concerns may be germane to questions of whether requested discovery is burdensome or oppressive and whether it has been sought for a proper purpose in the litigation, a person's expectation and intent that her communication be maintained as private is not a legitimate basis from shielding those communications from discovery."

Using Social Media in Litigation

Question

May a lawyer instruct their client to change the security and privacy settings on their social media pages to the highest level of restricted access?

Answer

Yes, a lawyer can instruct their client to change the security and privacy settings on their social media pages to the highest level of restriction absent a court order to the contrary, or if the restriction would result in a violation of the law. North Carolina State Bar, 2014 Formal Ethics Opinion 5, July 25, 2014.

Facebook: Networking and Friend Requests

Federal Rule of Bankruptcy Procedure 9003, Model Rule 3.5, and Louisiana Rule of Professional Conduct Rule 3.5 prohibit most ex parte contacts between lawyers and a presiding judge.

Question: Do contacts between lawyers and judges via social media violate the rules limiting ex parte contact?

Federal Rule of Bankruptcy Procedure 9003- Prohibition of Ex Parte Contacts

(a) General Prohibition. Except as otherwise permitted by applicable law, any examiner, any party in interest, and any attorney, accountant, or employee of a party in interest shall refrain from ex parte meetings and communications with the court concerning matters affecting a particular case or proceeding.

(b) United States Trustee. Except as otherwise permitted by applicable law, the United States trustee and assistants to and employees or agents of the United States trustee shall refrain from ex parte meetings and communications with the court concerning matters affecting a particular case or proceeding. This rule does not preclude communications with the court to discuss general problems of administration and improvement of bankruptcy administration, including the operation of the United States trustee system.

American Bar Association Model Rule 3.5

A lawyer shall not:

(a) Seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(a) Communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(c) Communicate with a juror or prospective juror after discharge of the jury if:

1) The communication is prohibited by law or court order;

2) The juror has made known to the lawyer a desire not to communicate; or

3) The communication involves misrepresentation, coercion, duress or harassment; or

(d) Engage in conduct intended to disrupt a tribunal

Louisiana Rule of Professional Conduct 3.5

A lawyer shall not:

(a) Seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) Communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(c) Communicate with a juror or prospective juror after discharge of the jury if:

1. The communication is prohibited by law or court order;
2. The juror has made known to the lawyer a desire not to communicate; or
3. The communication involves misrepresentation, coercion, duress or harassment; or

(d) Engage in conduct intended to disrupt a tribunal

Answer

It depends,

(a) In New York, ethics rules permit judges and attorneys to add each other as “friends” on social networking sites, reasoning that doing so is analogous to adding contact information to a Rolodex or speaking in a public place. Judges must be cautious to avoid showing bias or communicating in a way that suggests impropriety. The Committee stated “Thus, the question is not whether a judge can use a social network but, rather, how he/she does so.” New York Advisory Opinion 08-176, January 29, 2009.

(b) The Kentucky, Maryland, Ohio, and Arizona bar authorities all have reached similar conclusions.[5]

(c) All noted the importance of proceeding carefully to maintain impartiality and the appearance of impartiality on social media websites.[6]

(d) The American Bar Association recommends that the judge and lawyer disclose the electronic communication in some cases, even if the judge does not believe that the connection justifies recusal. American Bar Association Formal Opinion 462, February 21, 2013.

[5] www.ncsc.org/Topics/Media/Social-Media-and-the-Courts

[6] *Id.*

(e) Tennessee has also permitted such contact. Advisory Op. No. 12-01, October 23, 2012.

(f) Utah's Ethics Advisory Committee has decided that merely being Facebook "friends" does not imply that a judge is another person's friend in the traditional sense of the word: "Whether someone is truly a friend depends on the frequency and the substance of contact, and not on an appellation created by a website for users to identify those who are known to the user."[7]

(g) In Florida, Judges may not "friend" lawyers who might appear before them through electronic social media. Florida Supreme Court, Judicial Ethics Advisory Committee, Opinion No. 2009-20, November 17, 2009.

(h) California, Massachusetts, and Oklahoma appear to follow Florida, and conclude that a judge should not friend a lawyer who appears or could appear before her.[8]

[7] Utah Ethics Advisory Committee Informal Opinion 12-01, August 31, 2012.

[8] www.ncsc.org/Topics/Media/Social-Media-and-the-Courts

IOLTA ACCOUNTS

The LSBA Rules of Professional Conduct Committee has recommended that Rule 1.15 be amended to require that all client trust accounts be reconciled at least monthly.