TADC ETHICS AND PROFESSIONALISM NEWSLETTER

Spring 2007 Edition

Editors:[†]
George B. Butts, DLA Piper US LLP; Austin
Kathy J. Owen, DLA Piper US LLP; Dallas
www.dlapiper.com

Licensure as an attorney and counselor at law grants privileges and powers not available to those in any other profession. Attorneys bring suits, seek injunctions, issue subpoenas, draft contracts, and frame important transactions, actions that those in other professions cannot perform. These things, and many others, that attorneys are empowered to do can have both beneficial and devastating consequences.

Along with the powers granted to the legal profession, reciprocal requirements of unique ethical behavior and professionalism are imposed on lawyers. This newsletter, while not exhaustive, will address some of the ethical and professional challenges encountered by attorneys and the manner in which courts and disciplinary bodies have resolved those issues.

I.

BE CAREFUL WHAT YOU PRAY FOR.

Low v. Henry, 50 Tex. S. Ct. J. 607 (2007).

Sanctions in the amount of $50,000.00 were awarded against attorney of Corpus Christi by the 36th District Court of Aransas County. The sanctions were awarded due to a violation of Chapter 10 of the Texas Civil Practice and Remedies Code (hereinafter "Chapter 10"), which requires that a signatory to a pleading certify that he or she has conducted a reasonable inquiry into the allegations and concluded that each allegation or other factual contention in the pleading has, or is likely to have, evidentiary support. Mr. Henry's violation of Chapter 10's requirement was a global allegation that two physicians, the hospital in which plaintiff's decedent was treated, and several other defendants, all prescribed a drug known as Propulsid for the decedent. Two physicians responded to these allegations with a motion for sanctions because they were not involved in prescribing Propulsid to the decedent and medical records in Mr. Henry's possession clearly showed that fact.

Mr. Henry appealed the sanction award to Corpus Christi's Thirteenth Court of Appeals, which considered the appeal sitting *en banc*. In a five-to-two decision, the Court of Appeals reversed the trial court's sanctions order, concluding that the trial judge "acted outside the guiding rules and principles in determining that Mr. Henry's representations warranted sanctions pursuant to Chapter 10," the majority holding instead that the pleadings were stated as alternative allegations and, therefore, were not sanctionable.

An appeal was taken to the Texas Supreme Court, which reversed the Court of Appeals and affirmed the trial court's determination that lawyer Henry violated Chapter 10.

Justice Wainwright, writing for a unanimous court, indicated that under section 10.001 of the Texas Civil Practice and Remedies Code, a person who signs a pleading or motion certifies that each claim, allegation and denial is based on the person's best knowledge, information and belief after a reasonable inquiry. "The fact that an allegation or claim is alleged against several defendants-so called 'group pleadings'- does not relieve the party from meeting the express requirements of Chapter 10. Each claim against each defendant must satisfy Chapter 10." Justice Wainwright also noted that alternative pleading under Texas Rule of Civil Procedure 48 does not offset Chapter 10's requirement that each claim have evidentiary support.

The Supreme Court also concluded that the trial court abused its discretion by imposing severe sanctions without stating a sufficient basis for its holding. The case was remanded for further proceedings consistent with the Supreme Court's opinion.

Comment- The pleading filed by Attorney Henry is no different from thousands of pleadings currently on file in which plaintiffs allege that all defendants did all of the acts complained of. In this case, the Supreme Court makes it unmistakably clear that such pleadings are not only improper, but sanctionable.

[†] The editors would like to thank Eli Burriss, Rob Dunikoski, Edward Marshall, Courtney Stewart and Doug Sweet of DLA Piper US LLP for their contributions to this newsletter.

II.

ARE YOU AUTHORIZED TO PRACTICE LAW? ARE YOU SURE?

Most of us frequently do legal work in states other than Texas. Many law firms have offices in several states and conduct multijurisdictional practices. Some lawyers practice law internationally, engaging in litigation related activities and transactions across international boundaries. All of us take depositions, interview witnesses, produce documents, and engage in multiple activities in other states that we can only do by virtue of being lawyers.

Do we have the right to do all of the things that we commonly do because we hold a Texas Law license? As interstate and international practice grows, questions about what is appropriate and allowable, versus what constitutes the unauthorized practice of law, are arising with greater frequency. The following case summaries illustrate some of the problems.[‡]

A. IT'S IMPORTANT TO BE LICENSED SOMEWHERE.

In re Jackman, 761 A.2d 1103 (N.J. 2000).

Jackman was licensed as an attorney in Massachusetts in January 1985, following his graduation from Harvard Law School. He was employed at the Boston law firm of Goodwin, Proctor & Hoar until 1991 when he became employed as an associate at the New Jersey law firm of Sills Cummis Radin Tischman Epstein & Gross.

Jackman applied to sit for the New Jersey bar examination in February 1992. However, as the exam date approached, a closing was scheduled for an unusually large transaction in which the firm was involved, and the firm's managing partner requested that Jackman not take the February bar exam.

In 1993, Mr. Jackman allowed his Massachusetts law license to be placed on inactive status, although he continued practicing with Sills Cummis in New Jersey.

Jackman continued practicing in that manner until 1998, when he decided to leave Sills Cummis for a New York law firm. That firm promptly required that he sit for the New York bar exam. In July 1999, he sat for both the New York and New Jersey bar. As a result of applying to take the New Jersey bar, his history came under the scrutiny of the New Jersey Committee on Character, which recommended against Jackman's certification for admission.

Contrasting the circumstances of this case to cases involving transitory legal activities performed in New Jersey by out-of-state attorneys, the New Jersey Supreme Court held that the continuous and unabashed practice of law in New Jersey for years without a license constituted the unauthorized practice of law.

In reaching this conclusion, the court rejected Jackman's reliance on the growing number of commentators who argue that lawyers who are employed in a multijurisdictional firm, especially when involved in transactional activities, should be provided special consideration when dealing with issues relating to the unauthorized practice of law. The court simply held that New Jersey's statutory laws regarding Attorney licensure must be followed and the court would enforce those laws until they are amended.

B. PRACTICE WITHOUT AUTHORIZATION, FORFEIT YOUR FEES.

Birbrower, Montalbano, Condon & Frank v. Superior Court, 949 P.2d 1 (Cal. 1998).

Birbrower is a professional law corporation incorporated in New York, with its principal place of business in New York. During 1992 and 1993, Birbrower attorneys, defendants Hobbs and Condon, performed substantial work in California relating to the law firm's representation of client, ESQ. Neither Hobbs nor Condon was licensed to practice law in California. In fact, none of Birbrower's attorneys were licensed to practice law in California during Birbrower's ESQ representation.

While representing ESQ, Hobbs and Condon traveled to California on several occasions. In August 1992, they met in California with ESQ and its accountants. During these meetings, Hobbs and Condon discussed various matters related to ESQ's dispute with Tandem and strategy for resolving the dispute. They made recommendations and gave advice. During this California trip, Hobbs and Condon also met with Tandem representatives on four or five occasions

[‡] The editors plan to deal with this subject matter in greater detail in the fall newsletter. The cases summarized here are intended to raise awareness of where the lines between authorized and unauthorized activities are being drawn in different jurisdictions.

over a two-day period. At the meetings, Hobbs and Condon spoke on ESQ's behalf. Hobbs demanded that Tandem pay ESQ $15 million. Condon told Tandem he believed that damages would exceed $15 million if the parties litigated the dispute. Birbrower ultimately handled all phases of pre-trial proceedings leading up to an arbitration proceeding, including settlement discussions.

In January 1994, ESQ sued Birbrower for legal malpractice and related claims in State Court. Birbrower removed the matter to federal court and filed a counterclaim, which included a claim for attorney fees for the work it performed in both California and New York. The matter was then remanded to the state court. ESQ moved for summary judgment on Birbrower's counterclaim, which asserted that ESQ and its representatives breached the fee agreement. ESQ argued that by practicing law without a license in California and by failing to associate California counsel while doing so, Birbrower violated California's laws governing the practice of law, rendering the fee agreement unenforceable.

In deciding whether Birbrower had engaged in the unauthorized practice of law, the court acknowledged the tension that exists between interjurisdictional practice and the need to have a state-regulated bar.

As stated in the American Bar Association Model Code of Professional Responsibility, Ethical Consideration EC 3-9, "[r]egulation of the practice of law is accomplished principally by the respective states. Authority to engage in the practice of law conferred in any jurisdiction is not *per se* a grant of the right to practice elsewhere, and it is improper for a lawyer to engage in practice where he is not permitted by law or by court order to do so. However, the demands of business and the mobility of our society pose distinct problems in the regulation of the practice of law by the states. In furtherance of the public interest, the legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice in all matters including the presentation of a contested matter in a tribunal before which the lawyer is not permanently admitted to practice."

However, in spite of the court's recognition of the need to accommodate the growing multistate nature of law practice, the court held that Birbrower's extensive activities in California amounted to the unauthorized practice of law resulting in the forfeiture of its fees.

C. PRACTICE WITHOUT AUTHORIZATION, COLLECT YOUR FEES.

Estate of Condon, 76 Cal. Rptr. 2d 922 (Cal. Ct. App. 1998).

A Colorado law firm did not practice law "in California" within the meaning of a statute proscribing the unauthorized practice of law when its members entered California either physically or virtually to practice law on behalf of a Colorado citizen who was co-executor of a California estate. Thus, the firm was entitled to ordinary statutory fees and to extraordinary fees in whatever amount the court deemed reasonable for services rendered to the co-executor.

The court applied the test set forth in the California Supreme Court's decision in *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 949 P.2d 1 (Cal. 1998). Under *Birbrower*, to be "in California" under the statute, there must be "sufficient contact with the California client to render the nature of the legal service a clear legal representation." *Condon*, 76 Cal. Rptr. 2d at 926. "Mere fortuitous or attenuated contacts will not sustain a finding that the unlicensed lawyer practiced law 'in California.'" *Id.* "The primary inquiry is whether the unlicensed lawyer engaged in sufficient activities in the state, or created a continuing relationship with the California client that included legal duties and obligations." *Id*.

In the *Condon* case, the California Court of Appeals held that the Colorado law firm did not practice law in California because the co-executor who hired the law firm was a resident of Colorado, the firm's primary representation involved the implementation of a buy/sell agreement that was part of an estate plan drafted by the firm in Colorado, negotiation and discussions with beneficiaries of the estate occurred for the most part by phone, fax, and mail while the attorneys were physically located in Colorado, and communication between the client (the co-executor) and the law firm occurred entirely in Colorado.

D. RELY ON THE "FEDERAL EXCEPTION", COLLECT YOUR FEES.

Spanos v. Skouras Theatres Corp., 364 F.2d 161 (2d Cir. 1966).

A California attorney who was engaged to work with client's New York counsel on an antitrust suit in New

York federal court, by contract which contemplated court appearances, could recover for his services, notwithstanding a New York statute condemning unlicensed practice under rule permitting admission *pro hac vice*, although he was not, in fact, so admitted, there being no indication that a pro hac motion, if made, would have been denied.

Considering the issue *en banc*, the U.S. Court of Appeals for the Second Circuit held that under the privileges and immunities clause of the U.S. Constitution, no state can prohibit a citizen with a federal claim or defense from engaging an out-of-state lawyer to collaborate with an in-state lawyer and give legal advice concerning that matter.

E. RELY ON THE "FEDERAL EXCEPTION", FORFEIT YOUR FEES.

In re Peterson, 163 B.R. 665 (Bankr. D. Conn. 1994).

Chapter 11 debtors moved to recover attorneys' fees paid to a bankruptcy attorney based on the theory that he had engaged in the unauthorized practice of law. The court held that the bankruptcy attorney had engaged in the unauthorized practice of law and that he must return all fees paid to him. The regulation of the right to practice law is left to the states unless preempted by a federal statute. One way in which state law is preempted is through federal rules authorizing individuals to practice before a federal court. This is the so-called "federal practice" exception.

In *Peterson*, the Court's decision to order fee forfeiture turned on the scope of the local rules of the federal district court and the bankruptcy court. The Court concluded that the local rules allowed an attorney who is not licensed in Connecticut to practice before the bankruptcy court and even maintain an office in the state, so long as the services rendered are limited to those reasonably necessary and incident to the specific matter pending in the bankruptcy court. However, the Court distinguished this permitted practice of law before the bankruptcy court from maintaining an office for the purpose of giving legal advice on bankruptcy matters to all clients who seek it and accepting all cases that can be filed in the state. The *Peterson* Court concluded that the attorney in the case at bar had engaged in the unauthorized practice of law because he had established an office in Connecticut and held himself out as able to give advice to "all comers."

F. DO ARBITRATION, PRACTICE ANYWHERE. OR NOT?

Colmar, Ltd. v. Fremantlemedia N. Am., Inc., 801 N.E.2d 1017 (Ill. App. Ct. 2003).

As matter of first impression, the fact that a distributor's attorney was not admitted to practice in state was irrelevant to validity of arbitration award. Arbitrator did not exceed his authority by permitting out-of-state attorney to participate in arbitration proceedings.

This court was called upon to determine for the first time what effect, if any, an out-of-state attorney's representation of an out-of-state client during arbitration in Illinois had on an arbitration award. The Court found that the out of state attorney's representation had no effect on the validity of the arbitration award.

After considering the applicable Illinois cases, the modern trend in the jurisprudence of multijurisdictional practice, and the public policy reasons promoting both the rule prohibiting unauthorized practice and the general voidance rule, the Court found that the harsh general rule - that judgments that result from legal proceedings brought in a court of record on a party's behalf by a person who is not licensed to practice law in the state are void - should not be applied in the instant case. The court pointed out that the American Arbitration Association's rules to which the parties contractually agreed to be bound, do not require that the party's representative be an attorney at all.

In this case, relevant factors weigh in favor of finding that the out of state lawyer's activities were authorized, primarily because they related to his regular representation of FMNA in California and involved issues that were not specific to Illinois law.

While the RESTATEMENT stops short of creating an express exemption from the rules of unauthorized practice for out-of-state attorneys participating in arbitration proceedings, the ABA Commission on Multijurisdictional Practice recently proposed a model rule which does just that.

It is worth pointing out the tension that exists between this case and the *Birbrower* case. Specifically, *Birbrower* held that the participation in legal proceedings leading up to an arbitration in California was the practice of law in California. On the other hand, the Illinois Court of Appeals held that

the participation in arbitration did not constitute the practice of law in Illinois.

G. *PRO HAC VICE* ADMISSION IS A PRIVILEGE, NOT A RIGHT.

Luis Ramirez v. Gordon R. England, 320 F. Supp. 2d 368 (D. Md. 2004).

In contrast to general admission to the bar of a state or of a federal court, the Supreme Court of the United States has held that where, as here, authority to approve a *pro hac vice* appearance is consigned to the discretion of the court, there is a not a cognizable property interest within the terms of the Fourteenth Amendment and the United States Constitution does not obligate a court to afford a *pro hac vice* applicant with procedural due process in passing on an application for permission to appear *pro hac vice.*

Neither the rules of the court nor the United States Constitution requires the temporary admission to practice of one who is not a member of the bar of the Court. The decision of a *pro hac vice* motion is committed to the sound discretion of the Court. In acting upon such a motion, the Court not only may, but should, take into account whether the attorney in question has demonstrated sufficient competence and character to be permitted, in association with a member of the bar of the court, to represent a litigant. In making this assessment, a court may take into account whether the attorney proposed for admission *pro hac vice* has acted in compliance with all applicable laws and rules governing the practice of law in this and other jurisdictions, and whether the applicant has acted competently and responsibly in other proceedings.

SUMMARY

These cases demonstrate that the determination of whether law practice is authorized or not is a fact specific inquiry.

When working in a state in which you are not licensed, keep that fact in mind. Recognize that each jurisdiction controls the right to practice law and defines what constitutes the unauthorized practice of law within that state. Each jurisdiction has its own court decisions and ethics opinions that will define what constitutes the practice of law. If you are practicing law on an extensive and continuing basis in another state, be certain that you understand the rules that apply to your work and confirm that the work that you are doing does not constitute the unauthorized practice of law as that state defines it. If you are relying on the "federal exception" be sure that you do only federal practice and, obviously, that you are admitted to the bar of the federal court in which you are working. Do not assume that your licensure in Texas assures that you have the right to *pro hac vice* admission to the courts of other states. You don't. Your admission *pro hac vice* is subject to the applicable laws and rules of your host state and courts, and the discretion of the judge in whose court you seek *pro hac vice* admission. Keep in mind that the consequence of unauthorized practice can be devastating, the complete forfeiture of all fees resulting from unauthorized law practice.

III.

2006 – THE YEAR IN REVIEW.

A. WHAT THE PROFESSIONAL ETHICS COMMITTEE HAD TO SAY.

During 2006, the Supreme Court of Texas Professional Ethics Committee for the State Bar of Texas ("PEC") issued nine ethics opinions. The opinions covered issues from fee sharing to internet referrals. The opinions most applicable to our practice are summarized below. Full text of the opinions can be found at www.law.uh.edu/libraries/ethics/

1. INTERNET REFERRALS?

Opinion Number 573, July 2006

QUESTION PRESENTED: What requirements must be met in order for a Texas lawyer to participate in a privately sponsored Internet service that obtains information over the Internet from potential clients about their legal problems and forwards the information to lawyers who have paid to participate in the Internet service?

SUMMARY OF OPINION: A Texas lawyer may participate in a privately sponsored Internet service if the service does not exercise discretion in determining which lawyer receives information from potential clients.

Whether or not a Texas lawyer can participate in a privately sponsored Internet service depends on whether the service is classified as a "prohibited referral service" or "a permissible advertising or public relations service." A previous opinion, Opinion 561 (August 2005), stated that a for-profit Internet site which was not restricted from exercising

discretion in determining which specific lawyers would receive information about potential clients visiting the website was a prohibited referral service.

The PEC provides the following list of requirements for a service to be classified as a permissible advertising or public relations service:

a. The process must be wholly automated.
b. The service must take steps to notify potential clients that lawyers have paid a fee to be listed, and must make no assertions about quality of lawyers in service. Other related notification requirements must also be met.
c. The fee charged by the service must be reasonable under Rule 7.03(b).
d. The service must not unreasonably restrict the number of lawyers to the extent that the service is, in effect, making a referral.
e. Initial communication with the potential client is advertising sent by electronic means, and clearly states the reason for the communication.
f. The lawyer cannot communicate with the potential client in person, by telephone or by any live, interactive communication until requested by the client.

The lawyer has the responsibility to ensure that the service complies with the listed requirements.

2. WHO CAN MAKE MY COPIES?

Opinion Number 572, June 2006

QUESTION PRESENTED: May a lawyer, without the express consent of a client, deliver material containing privileged information of the client to an independent contractor, such as a copy service, hired by the lawyer to perform services in connection with the lawyer's representation of the client?

SUMMARY OF OPINION: Unless the client has instructed otherwise, a lawyer may deliver materials containing privileged information to an independent contractor, such as a copy service, hired by the lawyer in the furtherance of the lawyer's representation of the client if the lawyer reasonably expects that the confidential character of the information will be respected by the independent contractor.

Delivering materials containing privileged information to an independent contractor to facilitate the lawyer's representation of a client (and not for the purpose of disclosing information to others) does not constitute "revealing" such privileged information within the meaning of Rule 1.05, provided that the lawyer reasonably expects that the independent contractor will not disclose or use such items or their contents except as directed by the lawyer and will otherwise respect the confidential character of the information. *See also Compulit v. Bantec, Inc.*, 177 F.R.D. 410 (W.D. Mich. 1997) (lawyer-client privilege is not lost if a law firm hires an independent contractor to provide a necessary service that the law firm believes it needs in order to effectively represent its clients); RESTATEMENT (Third) of the Law Governing Lawyers § 60 (2000) ("independent contractors who assist in the representation, such as investigators, lawyers in other firms, prospective expert witnesses, and public courier companies and photocopy shops, to the extent reasonably appropriate in the client's behalf ....").

3. WHOSE NOTES ARE THEY?

Opinion Number 570, April 2006

QUESTIONS PRESENTED: May a lawyer refuse a former client's request to disclose or turn over the lawyer's notes made in the course of and in furtherance of his representation of the client?

SUMMARY OF OPINION: Upon request from a former client, a lawyer must provide his notes from the lawyer's file for that former client except when the lawyer has the right to withhold the notes, or when not withholding the notes would violate a duty owed to a third person or risk causing serious harm to the client.

The scope of this opinion is limited to notes created by a lawyer. This opinion does not address the issue with respect to other types of documents or information contained in a lawyer's file, because a lawyer's ethical obligations may vary depending on the type, source, or content of the document. Rules 1.14(b) and 1.15(d) together provide that, generally, the documents in a lawyer's file that are property to which the client is entitled must be transferred to the client upon request unless the lawyer is permitted by law to retain those documents and can do so without prejudicing the interests of the client in the subject matter of the representation.

There are some unusual circumstances based on a lawyer's duties owed to others, including other clients, third persons and courts, or to the client, that would justify the withholding of certain lawyer's notes from a client. Examples include notes that

contain information obtained in discovery subject to a court's protective order forbidding disclosure of the information to the client, notes where the disclosure would violate the lawyer's duty to another person, and notes containing information that could reasonably be expected to cause serious harm to a mentally ill client. However, as a general rule, the notes must be given to the client.

4. IS THERE A CONFLICT?

Opinion Number 569, March 2006

QUESTIONS PRESENTED: May a lawyer provide legal representation to a client in a matter against a third party who was a customer of a law-related business owned by the lawyer?

SUMMARY OF OPINION: A lawyer may provide legal representation to a client in a matter against a third party who was a customer of a law-related business owned by the lawyer provided that the lawyer fully complies with Rule 1.06(b)(2) and if necessary Rule 1.06(c) as to any possible conflict of interest that arises with respect to the interests of the client

This opinion presumes that the customer of the law-related business is explicitly advised that legal services are not being provided to the customer and that there is no client-lawyer relationship between the customer and the law-related business. The lawyer will be presumed to have an interest in the continuing success of his law-related business and in the goodwill of past and prospective customers of the business. Such an interest would normally create a conflict of interest for the lawyer in a proposed legal representation of a client against a customer of the law-related business. However, the lawyer may proceed with the representation if lawyer determines that there is no conflict, or if the client waives the conflict. Note that the waiver must come from the legal client, not the client of the law related practice.

5. WHO CAN SHARE MY FEE?

Opinion Number 568, April 2006

QUESTION PRESENTED: Under the Texas Disciplinary Rules of Professional Conduct, may a lawyer share a contingent fee with a suspended or disbarred lawyer?

SUMMARY OF OPINION: In Opinion 568, the PEC addressed a situation in which a lawyer was suspended after having had referred a contingent fee case to another lawyer subject to a fee sharing agreement. In prior opinions, the PEC had found suspension or disbarment to be tantamount to the lawyer's "voluntary abandonment" of the case, which disqualified the lawyer from compensation because the lawyer could not complete the work that the lawyer was hired to perform. In the present case, however, the lawyer had completed all work on the case prior to the suspension.

The PEC observed the Fourteenth District Court of Appeals had twice held "voluntary abandonment" only applied to situations where the lawyer had not completed the legal services prior to disbarment. The PEC found this rationale governed even after Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct was amended (effective March 1, 2005) to abolish the pure referral fee where the referring attorney's duties ended with the referral. Accordingly, the PEC opined a lawyer may share a contingent fee with a suspended or disbarred lawyer if the suspended or disbarred lawyer fully performed all work on the case before the suspension or disbarment occurred.

6. WHO IS MY CLIENT?

Opinion Number 567, February 2006

QUESTION PRESENTED: May a lawyer who represents a city render legal advice to an ethics board appointed by the city council regarding the investigation and determination of a complaint against a majority of the members of the city council?

SUMMARY OF OPINION: Opinion 567 involves a private attorney who serves as City Attorney at the discretion of the city council. The city council sets the attorney's compensation, and the attorney represents the city and the city's ethics board on all matters. The PEC notes the attorney may not advise the city's ethics board regarding an ethics complaint filed by a citizen against a majority of the city council members. Although a lawyer does not represent council members individually just because he represents the city, the lawyer's own interest in continued employment by the city creates a conflict of interest under Rule 1.06(b)(2). The PEC further notes in this instance the lawyer cannot cure the conflict by obtaining client consent, because a "disinterested lawyer would conclude that the client should not agree to the representation under the circumstances."

7. SHOW ME THE MONEY?

Opinion Number 566, February 2006

QUESTION PRESENTED: May a lawyer, acting as a receiver, ethically pay a portion of his fee to the parties' lawyers?

SUMMARY OF OPINION: Opinion 566 involves a lawyer serving as a receiver in a family law matter. As a result of the sale of some property, the receiver earns a fee. The receiver wishes to pay a portion of that fee to the lawyers representing the parties. The PEC holds the lawyer/receiver would violate Rule 8.04 (assisting another lawyer to violate the Disciplinary Rules) by making such a payment because the parties' lawyers would violate Rule 1.08(e) by accepting the payments. Rule 1.08(e)(2) prohibits a lawyer from accepting compensation for representing a client from a non-client if the payment would interfere with the lawyer's independence of judgment. The PEC reasons "[t]he expectation of receipt of a portion of the receiver's fee could impair the impartial exercise of a lawyer's judgment in assessing the qualifications of potential receivers and result in bias toward a receiver who shares fees."

8. IS HE STILL MY CLIENT?

Opinion Number 565, January 2006

QUESTION PRESENTED: Must a lawyer continue to represent a client in an appeal on a remaining matter in a case when the client has filed pro se motions seeking relief from a settlement of the case and the client has filed two grievances against the lawyer?

SUMMARY OF OPINION: In Opinion 565, a lawyer handling an appeal is the subject of two grievances filed by his client, neither of which is directly related to the issues in the appeal. The lawyer asks whether he must continue to represent the client in the appeal. The opinion states withdrawal is not mandatory because it does not appear continued representation of the client is or has become adversely limited by the lawyer's own interests (Rule 1.06(b)(2)) and because there is no reason to believe the lawyer will be a witness in the case on appeal (Rule 1.15(a)(1)). Nevertheless, the lawyer may withdraw voluntarily if he can do so without material adverse effect on the client (Rule 1.15(b)(1)), if the lawyer has fundamental disagreements with the client's objectives (Rule 1.15(b)(4)), or if the client has rendered the representation unreasonably difficult (Rule 1.15(6)). The PEC warns the lawyer may not withdraw unless allowed by the appellate court and, if allowed to withdraw, must take reasonable steps to protect the client's rights pursuant to Rule 1.15(d).

B. WHAT THE COURTS HAD TO SAY.

During 2006, several decisions were issued by Texas courts of appeals and the Supreme Court of Texas relating to ethics and professionalism. Two opinions relating to fee contracts are summarized below.

1. CAN YOU CHANGE A FEE AGREEMENT MIDSTREAM IN LITIGATION?

McCleery v. Commission for Lawyer Discipline, ___ S.W.3d ___, 2006 WL 2864652 (Tex. App.—Houston [1st Dist] 2006, no pet. h.).

In *McCleery*, an attorney accepted a pro bono referral from the Houston Volunteer Lawyers Program ("HVLP"). The client was an elderly, infirm gentleman with a grade school education. The representation involved claims against a home repair business and the lender who financed the work. A Professional Services Agreement ("PSA") for the pro bono representation was entered into between the attorney and the client. The PSA stated that HVLP attorneys did not charge for attorney services. Further, the attorney understood that it was HVLP's policy that any fees that might be awarded during the course of representation were to be donated to HVLP.

The attorney filed suit against the home repair business, finance company, and their owners individually, alleging DTPA violations, fraud, conspiracy, and breach of contract. The case was mediated, but it was not settled. On the evening before the trial, the attorney met the client at a restaurant for dinner and presented him for the first time with a 40% contingency fee contract on the basis of "all sums collected." The attorney did not explain that his fee would be calculated on any non-cash award received. The client had not seen the document prior to the dinner on the eve of trial. The attorney did not tell the client that he could have an independent legal review of the contract by another lawyer. The client signed the contract. A jury trial resulted in a judgment in favor of the client. The defendants appealed and a settlement was reached in which the client received a $36,210 cash payment plus a forgiveness of the debt worth $13,790. The attorney characterized the settlement as a $50,000 award, and under the fee agreement, took a $20,000 fee on the basis of 40% of both the cash and non-cash portions of the settlement, and withheld $1,427 in

expenses. Consequently, out of the $36,210 cash payment, the attorney received $21,427 leaving the client with $14,783. The attorney did not donate his $20,000 fee to the HVLP.

The attorney was disciplined for violating TDRPC 1.04(a) and 1.04(c). The court of appeals found that the evidence supported these findings by charging a pro bono client an unconscionable fee, even if the client had suggested that the attorney recover a fee, where the client was elderly, infirm, indigent and poorly educated, and the attorney presented client with a 40 percent contingency fee contract for the first time on the eve of trial. The court also found that although forgiveness of note and release of lien on the client's house was a remedy sought in the litigation, the attorney did not explain that his fee would also be calculated on any non-cash award received. Finally, the court held that the attorney did not tell client that he could have an independent legal review of the contract, the fee agreement changed the attorney-client relationship, and the change benefited only the attorney. The attorney received a public reprimand, was ordered to pay restitution in the amount of $20,000 and was ordered to pay attorneys' fees, costs and expenses in the amount of $11,274.

2. BUT THAT WAS MY FEE!

Hoover Slovacek L.L.P v. Walton, 206 S.W.3d 557 (Tex. 2006).

In *Hoover*, a law firm included a provision in its contingency fee contract which provided that in the event the attorney was discharged before completing the representation, the client must immediately pay a fee equal to the present value of the attorney's interest in the client's claim. The firm brought an action against a former client to collect $1.7 million dollars under a contingency fee agreement, arguing that the appropriate fee was a percentage of the present value of a $6 million dollar settlement offer that was pending at the time the firm was discharged. The former client, who was represented by new counsel ultimately settled the claims in the underlying action for $900,000. The Supreme Court found the termination fee provision to be against public policy and unconscionable.

The court held that, while the issue of whether a particular fee amount or contingency percentage charged by the attorney is unconscionable under all relevant circumstances of the representation is an issue for the finder of fact, citing to *Curtis v. Commission for Lawyer Discipline*, 20 S.W.3d 227 (Tex. App.—Houston [14th Dist.] 2000, no pet.), the issue of whether a contract, including a fee agreement between attorney and client, is contrary to public policy and unconscionable at the time it is formed is a question of law.

This opinion contains a good discussion of attorney's fiduciary duties, contingency fee contracts, and remedies for lawyers fired without cause.