TADC ETHICS AND PROFESSIONALISM NEWSLETTER

Fall 2009 Edition

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INTRODUCTION

This newsletter brings you information about topics of relevance to ethics and professionalism.

The Case Law Updates summarize cases of interest. Numerous cases involve legal ethics, professionalism and malpractice, making it infeasible to report about all potentially relevant cases. Selected cases are summarized. The Ethics Opinion Updates summarize the opinions of note that have been released by the Professional Ethics Committee for the State Bar of Texas since our Fall 2008 newsletter.

I.

TEXAS CASE LAW UPDATES

A. "Non-refundable" fees must be held in trust account until earned.

***Cluck v. Comm'n for Lawyer Discipline*, 214 S.W.3d 736 (Tex. App.—Austin 2007, no pet.)**

Patricia Smith ("Smith") approached Tracy Cluck ("Cluck") to represent her in a divorce. Cluck agreed and had Smith sign a contract for legal services, which included a $15,000 non-refundable retainer. The contract further explained that time spent would be billed against the non-refundable fee at $150 per hour. The divorce stalled for a year. One year later, Smith contacted Cluck to resume work on her divorce. At this time, Cluck requested an additional $5,000 non-refundable fee and to increase his hourly rate to $200 per hour. Smith obliged, but later decided to terminate Cluck as her attorney. At that time she also sought return of the $20,000 she had paid Cluck, less reasonable attorney's fees and expenses. Three and a half months after the request, Cluck replied that Smith was not entitled to a refund.

Smith filed a complaint with the State Bar of Texas that resulted in the Commission for Lawyer Discipline bringing suit against Cluck, alleging Cluck: (1) failed to promptly comply with a reasonable request for information; (2) charged an unconscionable fee; (3) failed to adequately communicate the basis for his fee; (4) failed to hold the funds in a trust account; and (5) failed to promptly deliver funds to which his client was entitled and a full accounting upon the client's request. At trial, the Court granted the Commission's Motion for Summary Judgment, finding Cluck violated all the disciplinary rules cited by the Commission.

On appeal, the Court focused on Cluck's failure to hold the funds in a trust account. It held Cluck's fee was not a "true" retainer for several reasons. First, the court noted the contract did not state the $15,000 was payment for lost opportunities; rather, it stated Cluck's hourly fee would be billed against the $15,000. Second, the $5,000 additional payment requested by Cluck made clear that the $15,000 was merely an advance fee payment. Cluck argued, however, he did not violate any disciplinary rules by depositing the money in his operating account because the contract states the fees are nonrefundable. The court disagreed: "A fee is not earned simply because it is designated as non-refundable. Advance fee payments must be held in a trust account until they are earned." Accordingly, the Court found there was a violation of at least one disciplinary rule and at least one ground to support summary judgment; it thus did not reach the other issues raised on appeal.

B. Jury verdict awarding attorneys fees upheld because, intra alia, there was no "bright line" agreement that attorneys' fees would not exceed budget.

[1] Kathy Owen is a member of the Board of Disciplinary Appeals appointed by the Supreme Court of Texas. Any opinions herein are those of Kathy Owen in an individual capacity and do not reflect any opinion of the Board of Disciplinary Appeals.

***McGuire, Craddock, Strother & Hale, P.C. v. Transcon. Realty Investors, Inc. & RT Realty, L.P.*, 251 S.W.3d 890 (Tex. App.—Dallas 2008, pet. denied)**

McGuire Craddock, Strother & Hale ("McGuire") sued Transcontinental Realty Investors and RT Realty (collectively, "Realty Companies") for breach of contract and fraud. The Realty Companies argued McGuire breached its fiduciary duties and sought the equitable remedy of fee forfeiture. Following a jury verdict in favor of McGuire in its lawsuit to collect attorney's fees, the trial court entered a judgment notwithstanding the verdict, ordering forfeiture of all unpaid fees and expenses. In its Motion for JNOV, the Realty Companies argued they conclusively proved the following five breaches of fiduciary duty: (1) the parties' fee agreement was not fair and reasonable; (2) McGuire did not strictly follow their billing instructions; (3) McGuire did not inform them it billed in 15-minute increments; (4) McGuire did not advise them when it raised hourly rates; and (5) McGuire failed to manage the underlying litigation within the proposed litigation budget or update the proposed budget. In response, McGuire argued there was legally sufficient evidence to support the jury's finding it did not breach any fiduciary duty.

Basic Capital managed legal work for the Realty Companies. In June 1995, McGuire entered into a written engagement agreement with Basic Capital in connection with a dispute. In that agreement, McGuire committed to provide a description of the service performed, the name of the person performing the service, the hourly rate charged for the service, and the number of hours billed for the service. In a separate letter, McGuire set forth the hourly rates of its attorneys. Subsequently, McGuire submitted monthly bills that did not list the attorneys' hourly rates and contained block billing, as opposed to itemized billing. Basic Capital paid the bills and never complained about the format. In 1996, the Realty Companies wanted McGuire to represent them in a separate, but related, matter. McGuire and Basic Capital agreed orally that McGuire would continue to bill as it had in the previous matter. McGuire continued to submit bills in the same format as it had for the previous matter and Basic Capital continued to pay them in a timely manner.

In 1997, Basic Capital asked McGuire to submit a proposed litigation budget for the existing litigation. In that budget, McGuire emphasized the difficulty of forecasting legal expenses and that it was quite possible legal fees could be substantially more or less than the estimate. McGuire also stated the budget projection was not a guarantee or assurance of a maximum fee or that legal fees would not exceed projected amounts. Tom Craddock, one of the shareholders of McGuire, testified his firm's fees later exceeded the budget because the case progressed in a much more difficult and contested manner than anticipated.

The Court of Appeals noted Basic Capital was aware McGuire billed in 15-minute increments, as the bills Basic Capital received reflected this practice. The court also noted the Realty Companies' expert witness acknowledged that billing in quarter hour increments was typical. Regarding the fact McGuire raised its hourly rates without notice, the Court noted that whether or not this practice violates the Texas Disciplinary Rules (the Realty Companies alleged it did), a private cause of action did not exist for violations of the disciplinary rules. Moreover, the Court noted that McGuire had informed the associate general counsel at Basic Capital the firm periodically raises its rates.

The Court of Appeals mentioned that Craddock did not believe he had an obligation to stay within the proposed budget because the Realty Companies were receiving status reports and monthly statements. He also stated Basic Capital did not instruct him to stay within the budget and the Realty Companies knew where the litigation was at all times. Basic Capital testified it relied upon this litigation budget and that it *thought* McGuire would not exceed the budget without first obtaining consent. The Court intimated that failure to have a bright line agreement relating to the budget militated against finding a breach of fiduciary duty.

The Court ultimately found McGuire's evidence regarding its billing and litigation budget practices substantial enough to support the jury's finding in favor of McGuire; the Court thus rendered judgment on the jury verdict.

C. Award of attorneys' fees four times the amount in controversy did not raise a per se fact issue because attorneys' fees are presumed reasonable under T.C.P.R.C. § 38.003.

***Hayden v. Sacks*, No. 01-01-0200-CV, 2009 Tex. App. LEXIS 3199 (Tex. App.—Houston [1st] May 7, 2009, no pet.)**

Sacks & Associates won on summary judgment in a suit brought against a client for breach of the law

firm's fee agreement. The trial court also ruled the law firm was entitled to attorney's fees, but reserved ruling on the amount of reasonable attorney's fees. Sacks & Associates later sought summary judgment against Hayden for the reasonableness of the attorney's fees incurred in seeking summary judgment. Hayden filed no response to the law firm's motion. The law firm prevailed. On appeal, Hayden challenged the fees awarded to the law firm on three grounds: (1) the law firm's motion to did not segregate between recoverable and nonrecoverable grounds; (2) David Sacks' ("Sacks") affidavit in support of the fee recovery is conclusory and lacks supporting evidence; (3) awarding attorney's fees in an amount that is four times the amount in controversy creates a fact issue *per se*.

The Court of Appeals paid relatively little attention to grounds one and three by noting a failure to respond to Sacks & Associates' Motion could not overcome the presumption of reasonableness accorded attorney's fees in Texas Civil Practice & Remedies Code § 38.003. However, the Court did explore ground two after noting this allegation—that Sacks' affidavit testimony is conclusory and lacks supporting evidence—raised a defect of substance that Hayden did not waive by not responding to the Motion.

The Court concluded Sacks' affidavit in support of the fee recovery was sufficient for a variety of reasons. The Court first noted the affidavit demonstrated, on its face, Sacks' competency to swear to the facts stated: Sacks was president and custodian of the records of the law firm; he was also board certified in civil appellate law. The court held these recitals establish compliance with the requirements of Texas Rule of Civil Procedure 166a(f). In the affidavit, Sacks described the work encompassed by the fees sought, which included drafting original and amended pleadings, conducting discovery, filing motions, responding to motions, and preparing for and appearing in court. The Court noted these facts were clear, direct, and otherwise credible—and not "generalities," as alleged by Hayden.

As to whether Sacks' fees were reasonable and necessary, the Court noted the affidavit tracked seven of the eight recognized, non-exclusive factors under *Arthur Andersen* that courts properly consider in determining whether a fee is reasonable. The Court concluded the affidavit constitutes legally competent evidence that the fees sought by the law firm were both reasonable and necessary.

II.

FEDERAL CASE LAW UPDATES

A. Federal district court allows malpractice suit by insurer against attorney hired to represent insured.

Hartford Ins. Co. of the Midwest v. Koeppel, 629 F. Supp. 2d 1293 (M.D. Fla. 2009)

On March 2, 2005, while operating his automobile, Ronald Davis collided with a motorcycle driven by Gaspare Oliveri causing Oliveri significant injuries. Davis was insured under an automobile liability policy issued by Hartford Insurance with a limit of $100,000. Oliveri subsequently filed a claim against Mr. Davis. Hartford assessed that Oliveri's claim would greatly exceed the policy limit, and tendered a check for the policy limit with a proposed release to Oliveri. Oliveri did not negotiate the $100,000 check or execute Hartford's proposed release. Hartford continued to pursue settlement within the policy limits.

Mr. Oliveri's attorney later tendered a time sensitive settlement offer for the policy limits and requiring mutual releases by the parties on August 4, 2005. Hartford hired a Florida attorney, Steven Koeppel to handle the demand letter. In its complaint, Hartford maintains that Koeppel negligently responded to the demand letter, resulting in Oliveri pursuing a lawsuit against Davis in Florida state court. Hartford later settled the claim on Davis' behalf for more than the policy limits, and then brought suit against Koeppel.

Hartford sought damages from Koeppel for legal malpractice, equitable subrogation, legal malpractice as third-party beneficiary, and breach of contract as third-party beneficiary. Koeppel argued that Hartford lacked standing to bring suit because Koeppel was not Hartford's attorney. He argued that, under Florida law, a lawyer's professional duties extend only to those with whom they have a contractual relationship. The only exception exists in the area of will drafting because the client has an intent to benefit a third party. He argued that Hartford, however, did not stand to benefit from the settlement letter because it was for an amount they had already tendered—the policy limit—and thus no attorney-client relationship existed between them. Koeppel argued that, by this same logic, Hartford was not an intended beneficiary and thus could not bring a claim of legal malpractice as a third party beneficiary. Finally, Koeppel claimed that Hartford's malpractice subrogation claim is prohibited by Florida law.

Sitting in diversity, the federal district court held that Florida state courts had not determined whether privity of contract exists between an insurance company and lawyer it hires to represent an insured. The court observed that only a minority of jurisdictions preclude a direct legal malpractice claim by an insurer against the attorney retained to represent an insured. Citing public policy reasons, including that it is the insurer's duty and right to defend a suit against the insured, and that a "harms-benefits calculus weighs in favor of recognizing it, the court "guessed" that Florida courts would follow the majority and permit a direct malpractice suit against a lawyer hired by the insurer to represent the insured or as a third party beneficiary. However, the court dismissed the subrogation claim as being prohibited under Florida law.

B. Statements by client to his attorneys were not made in confidence and, therefore, were not privileged, resulting in attorneys being compelled to testify as to client's statements in government investigation.

United States v. Nicholas, No. 09-50161, 2009 WL 3152971 (9th Cir. 2009)

In May 2006, a California office of the law firm Irell & Manella LLP undertook the representation of Broadcom Corporation in connection with the company's internal investigation stemming from a government inquiry into stock backdating at the company. At the same time, the firm undertook representation of Broadcom's Chief Financial Officer, William J. Ruehle. Irell's representation of Mr. Ruehl involved two shareholder lawsuits filed against him regarding those same stock option granting practices being investigated by the federal government. Irell did not obtain Mr. Ruehle's informed written consent prior to undertaking both representations.

In a meeting with Irell lawyers, Mr. Ruehle disclosed information regarding his role Broadcom's stock option granting practices. The Irell lawyers never disclosed to Ruehle that they were representing only Broadcom at the meeting, and Irell later disclosed what Ruhle told them to Broadcom's outside auditors. The information eventually reached the Securities and Exchange Commission and federal prosecutors.

In denying the federal government's subsequent request to use Ruhle's statements given to Irell, the district court held that Irell violated their duty of loyalty to Mr. Ruehle. The duty of undivided loyalty prevents a lawyer from assuming a position adverse to the client or disclosing client confidences without the client's knowing, intelligent, and voluntary consent in writing. The district court ordered all of Mr. Ruehle's statements stemming from the meeting suppressed. The court also referred Irell to the State Bar of California for appropriate discipline. The United States appealed to the Ninth Circuit Court of Appeals.

The appeals court started its analysis by stating that an attorney-client relationship indeed existed between Irell and Ruhle when Ruhle made the statements at issue. However, the court held that the lower erred in placing the burden on the government to show the statements were not privileged. Under federal law, the party asserting the attorney-client privilege has the burden of establishing the relationship and the privileged nature of the communication. Therefore, Ruhle was required to show which, if any, specific comments were subject to the privilege. The court found it significant that, in his meetings leading up to his disclosures to Irell, Ruhle had acknowledged that what he told Irell would be conveyed to outside auditors in an effort to convince them that the financial statements of Broadcom were in compliance with the law. The court went on to hold that Ruehle's statements to the Irell attorneys were thus not made in confidence, but rather for the purpose of disclosure to the outside auditors, and as such were not privileged. The court concluded, therefore, that the United States could properly call Irell attorneys as witnesses to testify to the information they learned from Ruehle.

C. Attorneys representing both debtor corporation and company officers in bankruptcy proceeding disqualified from company's representation, but allowed to represent individuals because no circuit authority precluded it.

In re Restaurant Dev. Group, Inc., 402 B.R. 282 (N.D. Ill. 2009)

On January 12, 2007, Restaurant Development Group, Inc. filed a voluntary bankruptcy petition under chapter 7 of the Bankruptcy Code. The law firm of Crane, Heyman, Simon, Welch & Clar represented Debtor in the filing of that bankruptcy petition

The appointed trustee filed a multicount adversary complaint against the debtor's principals and officers, Roger Greenfield and Theodore Kasemir, alleging that they effectuated a scheme to transfer the debtor's assets in order to defraud its creditors. The trustee sought alter ego and successor liability on Greenfield and Kasemir. The Crane firm subsequently filed

appearances on behalf of Greenfield and Kasemir in their individual capacity.

The bankruptcy court then, *sua sponte*, broached the issue of a potential conflict of interest in the Crane firm's simultaneous representation of both the debtor, and Greenfield and Kasemir. The court stated that Greenfield and Kasemir, as officers of the debtor, had a duty to assist the trustee in the proper disposition of the estate. The court held that the attorney for the debtor—in this case Crane—has a fiduciary obligation not only to the debtor, but to the entire estate. This includes informing the trustee of the debtor's agent—Kasemire and Greenfield—refusal to follow the debtor's advice. If the debtor is not fulfilling its obligations to the estate, the debtor's counsel has the responsibility to inform the court.

Citing the limited caselaw on conflicts in the bankruptcy setting, the court held that, even if there was a conflict, disqualification of the Crane firm in this instance would be inappropriate. The court balanced the two competing interests in determining whether disqualification is appropriate. On one hand, the rules governing conflicts of interest protect the interests of present and former clients in the undivided loyalty of their attorney. On the other hand, disqualification is a drastic remedy that deprives a litigant of counsel of their choosing.

In holding that the Crane firm could continue to represent Greenfield and Kasemire individually, but not the debtor, the court observed that disqualifying the Crane firm completely would deprive Greenfield and Kasemire of their choice of counsel. Moreover, although a potential conflict may exist between the debtor and the individual defendants, the trustee has the power to waive such a conflict. The court took the trustee's lack of objection to the Crane firm's continued representation of Greenfield and Kasemire as a waiver of the conflict.

Importantly, the court held that the trustee had not violated its fiduciary duty in not seeking disqualification. Zealous representation does not require making every possible motion, but only those which will, after balancing the costs and benefits, be in the best interest of the client.

As to the issue of discipline by the state bar, the court held that, because of the lack of binding precedent in the Seventh Circuit addressing the issues in this case, as well as the lack of any party objecting to the Crane firm's continued representation of Greenfield and Kasemire, the conflict of interest was not so obvious so as to subject the Crane firm to discipline.

D. Court upholds contingency fee contract requiring payment of 35% of $9,000,000, holding the contingency agreement for "debt lobbying" was not contrary to public policy.

Jacobsen v. Oliver, 555 F. Supp. 2d 72 (D.D.C. 2008)

Alleging a breach of loyalty, plaintiff David Jacobsen sought disgorgement of a 35% fee paid to his attorneys following an award of $9,000,000 in his actions against the Islamic Republic of Iran. The attorneys moved for summary judgment.

The defendants claimed that the contingent fee was reasonable, and the fee issue was *res judicata* because the trial judge had entered a charging lien in defendants' favor. Mr. Jacobsen contended that the contract with the defendants was void as contrary to public policy, thus he should not be required to pay the contingent fee. He also alleged that the defendants breached their fiduciary duty of loyalty, which required full or partial disgorgement of the fee.

First, the court held that *res judicata* did not bar the Mr. Jacobsen's claims. The trial court's charging lien was not a "final judgment on the merits" concerning the validity of the fee arrangement. Moreover, the parties involved in the trial court where the charging lien was granted were not identical to those in the present action.

Next, the court held that the mere presence of terms in the contract that were unenforceable under the D.C. Rules of Professional Responsibility did not render the entire contract contrary to public policy. The court observed that neither party had sought to enforce the prohibited provisions. Even if the defendants had sought enforcement of the provisions, they could be severed from the contract, leaving the remainder intact, because they were not essential elements of the bargain.

Mr. Jacobsen also argued that the contract constituted an impermissible contingent fee contract for lobbying services. The court held that, on its face, the contract did not involve lobbying. However, even if a subsequent oral modification of the contract involved lobbying activities, such activities were for "debt" lobbying—for the payment of the plaintiff's claim against Iran—and would not make render the contract void.

In assessing Mr. Jacobsen's claim of breach of fiduciary duty based on the fee arrangement, the court held that the plaintiff knowingly and freely entered into

the contract with the defendants. Moreover, 35% was "within the range commonly charged" by lawyers in the field. Additionally, there were no changed circumstances rendering the fee unreasonable because, although Iran failed to appear resulting in a default judgment, significant obstacles remained before payment was received—namely a change in the Foreign Sovereign Immunities Act.

Finally, the Court held that the evidence, specifically the terms of the contract and fee arrangement, even when viewed in the light most favorable to Mr. Jacobsen, would not cause a reasonable trier of fact to find that defendants breached their fiduciary duty of loyalty. The defendants' minor, technical, and harmless violations of ethical rules were not indicative of a breach of fiduciary duty.

E. Attorney discharged from job as in-house counsel was not entitled to use attorney client privileged documents in support of her claim for wrongful termination where documents were taken without client's permission.

Nesselrotte v. Allegheny Energy, Inc., 615 F. Supp. 2d 397 (W.D. Penn. 2009)

Toni Nesselrotte was an attorney who had worked for Allegheny Energy, Inc for over twenty years. She was also a member of the Pennsylvania and West Virginia bars. Allegheny gave Nesselrotte approximately two weeks notice of the termination of her employment. After receiving the notice, she downloaded and took home various documents, including a series of emails from her superior, Allegheny's General Counsel, which were marked as attorney-client privilege. She subsequently brought suit for wrongful termination and cited the emails as proof. Allegheny objected to their use, and filed a counterclaim for breach of fiduciary duty based on Nesselrotte's taking and use of the documents, and moved for summary judgment.

Nesselrotte admitted to taking documents marked "confidential" and "attorney-client privileged" without permission. She did not inform Allegheny that she had them until two years later. The court held that such behavior constituted a breach of the duty of honesty that she owed Allegheny, her client, because she did not perform her duties with complete candor as required under Pennsylvania law.

Nesselrotte also admitted that some of the documents she took were not relevant to her case against Allegheny, but that she intended to use them in her future practice. The court held that such behavior, taking client information and using it for her personal benefit, violated her duty of fidelity to Allegheny.

Citing the Pennsylvania Rules of Professional Conduct, Nesselrotte countered that she was entitled to take the documents because "a lawyer may reveal such information to the extent that the lawyer reasonably believes necessary…to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client…or to respond to the allegations in any proceeding concerning the lawyer's representation of the client." However, the court noted, nothing in the rules permit a lawyer to circumvent the rules of discovery as set forth in the Federal Rules of Civil Procedure by taking client information without the client's permission. Moreover, the Pennsylvania Rules of Professional Conduct require the attorney to notify the client when their information is taken.

Finding for Allegheny, the court concluded that the manner in which Plaintiff took Allegheny's property violated her common law fiduciary duty of honesty, and that in taking Allegheny's property for her own gain, she violated her duty of fidelity to her client.

F. Arbitration award set aside and sanctions awarded against opposing attorney individually for withholding discovery and failing to correct false testimony at arbitration hearing.

Positive Software Solutions, Inc. v. New Century Mortgage Corp., No. 3:03-CV-0257-N (N.D. Tex. Feb. 25, 2009).

In 2003, Positive Software sued New Century Mortgage for allegedly misusing the software it had licensed to New Century. New Century was represented by the law firm of Susman Godfrey. A provision in the licensing agreement required arbitration of disputes. Federal District Judge Godbey ordered the parties to arbitration and the arbitrator sided with New Century.

Positive software later discovered that the arbitrator, Peter J. Shurn, had previously worked with the Susman Godfrey lawyers representing New Century and the judge vacated the arbitration award, noting that Shurn was required to disclose the potential for a conflict of interest and failed to do so. Judge Godbey also noted wrongdoing by Susman Godfrey during the discovery process. New Century had claimed that it had removed all versions of the software from its system, but months prior to the arbitration it had found what may have

been some remnants of the program on its computers. Susman Godfrey did not produce the software script, which Godbey believed effected the outcome of the arbitration. A three-judge panel upheld Godbey's order vacating the arbitration award.

Positive Software then filed suit against Susman Godfrey alleging that Susman partner Ophelia Camina and the firm as a whole conspired to commit fraud, withhold evidence, and produce false testimony at the now vacated arbitration. They also asked for sanctions on Camina and her firm. Judge Godbey ordered production of the firms' work product to determine whether sanctions were appropriate.

Godbey found sanctions appropriate against Camina, but not her firm. He noted that she had acted in bad faith by issuing an order to destroy relevant evidence, issuing an order to produce evidence only if it was favorable to New Century, and she failed to correct false testimony at the arbitration. Godbey determined that the expense of Positive's increased work-load caused by Camina's actions amounted to $10,000, and awarded Positive sanctions in that amount.

G. Attorney publicly censured for failing to retain entirety of "flat fee" in trust account until earned.

In re Robert W. Mance III, 06-BG-890, 2009 D.C. App. LEXIS 473 (D.C. Sept. 24, 2009)

District of Columbia attorney Robert Mance was hired by William Saunders to represent Sanders' son in a criminal homicide case. Mance charged a "flat fee" of $15,000, half of which was payable in advance. Mance accepted the initial payment of $7,500, but very early in the representation his client retained a new attorney. Mance had deposited some of the advance payment into his operating account, and a portion in his client trust account. He was able to quickly repay Saunders the amount in the trust account, but delayed in paying the remainder because it was already spent. Saunders filed a complaint with the D.C. Bar, but later withdrew it. The D.C. Bar nevertheless sought Mance's 60-day suspension. The case eventually made it to the District of Colombia Court of Appeals.

The appeals court held that a flat fee is of the nature of an advance payment of unearned fees. Unlike a true retainer, a flat fee is paid in return for future benefit to client, as opposed to a benefit conferred upon payment. Therefore, rule 1.15 (the Texas equivalent of rule 1.14) required Mance to keep all funds he collected as a flat fee in a trust account until he earned them. The court determined that to hold otherwise would infringe on a client's unfettered right to choose their own counsel. The court punished Mance by way of a public censure.

III.

ETHICS OPINION UPDATES FROM THE PROFESSIONAL ETHICS COMMITTEE OF THE STATE BAR OF TEXAS

Opinion No. 585, September 2008

Question Presented:

In a community with only a limited number of lawyers available, may a lawyer counsel his client to retain all of the lawyers in that community for the purpose of denying local representation to the opposing party?

Summary of Opinion:

A lawyer represented a party in a lawsuit filed in a community where there were a limited number of local lawyers. The lawyer proposed that the client hire all of the lawyers in that community so that the opposing party would not be able to employ a local lawyer for representation in the lawsuit.
The Texas Disciplinary Rules of Professional Conduct do not directly address this issue. Rule 5.06 does not apply to this situation because the issue presented does not concern an agreement, such as a partnership agreement, employment agreement, or settlement agreement, that would restrict a lawyer's right to practice law.

However, counseling a client to retain all lawyers in a community in order to deprive the opposing party of the ability to retain a local lawyer could violate Rule 4.04 of the Texas Disciplinary Rules of Professional Conduct. Specifically, Rule 4.04(a) provides that, in representing a client, "a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person…." Applying this rule, if the substantial purpose for advising a client to retain all of the lawyers in a community would be to burden or embarrass the other party, or to cause a delay, such conduct would violate Rule 4.04(a), without regard to whether burden, embarrassment, or delay was the actual result of the conduct. On the other hand, if there was a substantial purpose for advising the client to retain all lawyers in a community other than to burden or embarrass the other party, or to cause a delay, such conduct would not violate Rule 4.04(a).

Opinion No. 586, October 2008

Question Presented:

Are binding arbitration clauses in lawyer-client engagement agreements permissible under the Texas Disciplinary Rules of Professional Conduct?

Summary of Opinion:

A lawyer wanted to include a binding arbitration provision in his engagement agreements with clients, which would require binding arbitration of fee disputes and malpractice claims. The terms of the arbitration provision would not be unfair to a typical client willing to agree to arbitration.

The American Bar Association has noted that provisions requiring arbitration of fee disputes have gained more acceptance as compared to provisions that require arbitration of malpractice claims. Moreover, Comment 19 to Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct states that where a procedure has been established for the resolution of fee disputes, such as arbitration or mediation established by a bar association, the lawyer should conscientiously consider submitting to it. The State Bar of Texas also favors voluntary arbitration as the preferred method for resolving fees disputes. Thus, arbitration provisions that require binding arbitration of fees disputes appear to be permissible.

Unlike the arbitration of fees disputes, the Texas Disciplinary Rules of Professional Conduct do not directly address agreements that require arbitration of malpractice claims. The Texas Disciplinary Rules of Professional Conduct do, however, prohibit lawyers from prospectively agreeing with a client to limit the lawyer's malpractice liability unless the agreement is permitted by law and the client is represented by independent counsel with respect to the agreement. That said, agreements that require arbitration of malpractice disputes do not limit the lawyer's liability for malpractice. Rather, such a clause simply shifts the forum for the resolution of a malpractice claim. Therefore, an agreement that requires arbitration of a malpractice claim is not *per se* violative of the Texas Disciplinary Rules of Professional Conduct.

Furthermore, Rule 1.08 of the Texas Disciplinary Rules of Professional Conduct does not apply to a transaction establishing a lawyer-client relationship. Consequently, a lawyer is not required to advise a client to seek independent counsel before including a binding arbitration provision in an agreement establishing a lawyer-client relationship. The agreement, however, cannot be unfair to the client, such as by requiring arbitration in a remote location or by imposing excessive costs that would effectively foreclose the client's ability to engage in the arbitration process.

Finally, in order to comply with the lawyer's obligations under Rule 1.03(b) of the Texas Disciplinary Rules of Professional Conduct, the lawyer should explain the advantages and disadvantages of binding arbitration to the extent the lawyer reasonably believes it is necessary for the client to make an informed decision. The scope of the explanation necessary will depend on the sophistication, education, and experience of the client.

Opinion No. 587, May 2008

Question Presented:

May a lawyer communicate with an administrative agency before filing a matter with the administrative agency that will have decision making authority over the matter to be filed for the purpose of attempting to obtain a favorable decision in the matter?

Summary of Opinion:

A lawyer plans to file a matter with a state administrative agency. Before filing the matter, the lawyer proposed to contact persons within the agency with the purpose of attempting to obtain a favorable decision from the agency. The lawyer did not intend to notify other potential parties of any written or oral communications with the administrative agency in question.

Rule 3.05 of the Texas Disciplinary Rules of Professional Conduct provides that a lawyer shall not seek to influence a tribunal concerning a pending matter by means prohibited by law or applicable rules and, except as permitted by law and not prohibited by applicable rules, a lawyer shall not communicate *ex parte* with a tribunal for the purpose of influencing the tribunal.

In addition, Rule 3.05(c)(2) specifies that a matter in pending before a tribunal when the tribunal has been selected to determine the matter or it is reasonably foreseeable that the tribunal will be so selected. Therefore, unless there is some applicable law that permits the lawyer to do so, the lawyer may not communicate *ex parte* with the agency decision maker, or cause another to do so, with the purpose of influencing the outcome of the mater.

Rule 3.05, however, does not prevent all communications with the state agency. Rule 3.05 refers only to the judge or agency decision maker and does not apply to all personnel associated with a court or administrative agency. Lawyers routinely contact court and agency personnel other than the judge or decision maker. Communications with such personnel are governed by Rule 3.05 only if such communications are intended as an indirect communication with the decision maker for the purpose of influencing the outcome of the agency's decision in a matter.

IV.

MISCELLANEOUS UPDATES

ABA Model Rule 1.10 – Imputation of Conflicts of Interest: General Rule (final version adopted of ABA Recommendation 114 referenced in Fall 2008 newsletter)

Lateral hiring has become increasingly common place in today's legal market. Navigating conflicts of interest is a significant part of the lateral hiring process for both the attorney moving firms and the firm to which the attorney is moving. In particular, determining whether an attorney's representation of a client at his or her former firm will result in the disqualification of all of the attorneys in the new firm is a particularly prickly issue. Recently, the ABA adopted amendments to Model Rule 1.10 that encourage the use of screening procedures to prevent all members of the new firm from being disqualified based solely upon an attorneys' representation of a client at his or her former firm.

Model Rule 1.10 now permits the hiring law firm to implement ethical screens with respect to the lawyer who moves laterally from one private law firm to another so that conflicts of interest that apply to the moving lawyer under Model Rule 1.9 are not imputed to all lawyers in the hiring firm. Specifically, Model Rule 1.10(a)(2) now provides that all lawyers associated with a firm are not prohibited from representing a client where any one them is prohibited from representing a client pursuant to Rule 1.9(a) or (b) where "the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefore."

When screening procedures are implemented to prevent a conflict from being imputed to the hiring firm, Model Rule 1.10(a)(2) requires a series of statements and disclosures to the client of the former firm to enable the former firm's clients to ascertain compliance with the screening procedures implemented by the hiring firm. Specifically, screening procedures will preclude the disqualifications of a lateral hire from being imputed to the hiring firm only when:

> (ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and
>
> (iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

V.

ETHICAL IMPLICATIONS OF SOCIAL NETWORKING ON THE INTERNET – A CAUTION

In the past few years, it has become increasingly common for lawyers to join online social networking services like Facebook, Twitter and LinkedIn. Practitioners are using these sites as research tools, to stay connected with colleagues, and even to solicit business. Although the ethical rules in most states reflect a relatively dated vision of the internet (regulating static websites and email), there are several important ethical considerations that lawyers must keep in mind when using social networks as part of their practice.

For defense lawyers, social networking sites are increasingly useful as reconnaissance tools. Litigators use LinkedIn to corroborate an expert's résumé, and scour Facebook postings and Twitter comments for incriminating statements made by an opponent's witness. However, savvy users often restrict their profiles and postings to their network of friends. A recent ethics opinion from Pennsylvania cautions against infiltrating closed social networks for strategic purposes. The opinion analyzed a lawyer's plan to

access a witness' MySpace page by having a third-party ask to become the witness' MySpace "friend." The bar committee held that, by failing to disclose the purpose of the request, the lawyer would violate Pennsylvania's version of Rule 8.04(a).[2] *See also* Tex. Disc. R. Prof. Conduct 8.04(a) (prohibiting attorneys from "engage[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation."). Of course, a lawyer could also violate Rule 4.02, even when disclosing his identity, if he asks to become an online "friend" of an opposing party or their expert. *See* Tex. Disc. R. Prof. Conduct 4.02 (prohibiting attorneys from communicating with persons represented by counsel or retained by counsel regarding the subject matter of litigation).

Lawyers are also using social networks in increasing numbers to build professional contacts and publish profiles targeted at clients and referral sources. The key feature of social networking sites, continuously evolving content, could expose practitioners to a number of unexpected ethical obligations. Each time a user makes a new "friend" or receives a post on his or her Facebook "wall," their visible profile is altered. Although Texas's lawyer advertising rules have not yet been interpreted or applied in the context of social networks, Rule 7.04 could require lawyers to continuously monitor their online profiles to ensure that the content is compliant with the ethical rules. Sites like LinkedIn, which allow users to solicit and provide endorsements about fellow users, pose additional problems. Some states impose severe restrictions on a lawyer's use of endorsements or testimonials, and something as simple as a peer recommendation on LinkedIn could be viewed as a violation.[3] Although Texas does not have such restrictions, lawyers should take care before posting endorsements of colleagues who practice in other jurisdictions. Likewise, in the future, Rule 7.07 could be interpreted to require lawyers to file copies of social networking profiles with the Bar's advertising review committee in certain circumstances. Rule 7.04 could be interpreted to require lawyers to retain copies of each iteration of their online profiles, and to include the same disclosures and disclaimers in their profiles that they include on formal law firm websites. Until the Professional Ethics Committee weighs in on these issues, lawyers should tread carefully.

Finally, it should go without saying that communications over social networks are seldom private, and lawyers should treat their online communications as conversations with the entire world. Lawyers in several states have been reprimanded for criticizing judicial officials on social networks.[4] Lawyers are also vulnerable to discipline under Rule 3.07 if they spread potentially inflammatory trial publicity on social networks, even if the poster believes that his comments are being shared only among friends. Rule 1.05 should caution an attorney not to unintentionally disclose privileged or confidential information in a status update. Attorneys who provide legal commentary on their Facebook profiles should include the necessary disclaimers to avoid inadvertently creating an attorney-client relationship with other web users.

Social networks, like many other technological innovations, have the potential to significantly improve the practice of law. However, practitioners should not allow the informality and convenience of online communications to obscure their ethical obligations. If a communication would be improper over the telephone or in a television advertisement, it probably has no place on Facebook.

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[2] *Available at* http://www.philadelphiabar.org/ WebObjects/PBAReadOnly.woa/Contents/ Web ServerResources/MSResources/Opinion_2009-2.pdf

[3] *See, e.g.*, Ark. Disc. R Prof. Conduct 7.1(d) (A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it… contains a testimonial or endorsement).

[4] *See* John Schwartz, *A Battle for Lawyers: Online Attitudes vs. Rules of Bar*, N.Y. TIMES, Sept. 13, 2009.