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Table of Contents

As I See It: The Chair’s perspective	<i>page 5</i>
Ethics 2000 and the Model Rules of Professional Conduct	<i>page 7</i>
The Court Speaks Out: Sex with clients -- Not in Louisiana	<i>page 9</i>
Post-Ashy: Touchet and Gore	<i>page 11</i>
Third-party Medical Provider v. Attorney: Rule 1.15 revisited	<i>page 13</i>
Media Relations in the New Millennium	<i>page 16</i>
The American Legal Ethics Library: Legal profession research on-line	<i>page 20</i>
Gambling: The hidden illness of the 1990s	<i>page 23</i>
Recent Supreme Court Decisions	<i>page 25</i>
Practical Advice	<i>page 28</i>
In the Public Spotlight	<i>page 30</i>

About the Cover



Photo by Rodney B. Hastings

Built in 1840, the East Feliciana Parish Courthouse in Clinton is one of the oldest courthouses in Louisiana that is still in daily use.

The present building replaced a wooden courthouse that dated from 1825-26, which was burned in March 1839.

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As I See It: The Chair's perspective

by *Burt Cestia, Esq., Louisiana Attorney Disciplinary Board Chair*

Greetings fellow attorneys:

April 1, 2000 marks the 10th anniversary of the adoption of Rule XIX and the present Lawyer Disciplinary System by the Supreme Court of Louisiana. I would hope that you all agree that the present system is far superior to the past system. Louisiana has taken the lead in the United States in lawyer discipline by adopting the present Rule XIX from the American Bar Association's model rules with minor modifications. Twice the American Bar Association has studied the development and progress of Louisiana's system.

The average attorney often questions the costs and wonders about the results. I hope this overview helps you better understand the financial needs of the system and gives you a better idea of the results being achieved.

Historical preview

Until 1997, there was one office housing disciplinary counsel and the administrator in the bar association building in New Orleans. The administrator staff consisted of Donna L. Roberts and five staff members. Disciplinary Counsel's office was staffed by four lawyers, a support system of one investigator and six clerical staff. The caseload was approximately 350-450 files per attorney. Funding was inadequate at approximately \$1 million, including a \$350,000 contribution from the Louisiana State Bar Association. There were 13 hearing committees throughout the state and a number of alternate members requiring approximately 55 volunteers.

The Supreme Court of Louisiana assumed the role of pioneer by being one of the first to adopt the American Bar Association's Model Rule for Lawyer Discipline, Rule XIX. Under the watchful eye of the Court, the state's attorney discipline system continues to be a "work in progress."

Over the years the caseload required expansion of the system from both the administrative and prosecutorial prospective. To meet these demands more funding was necessary.

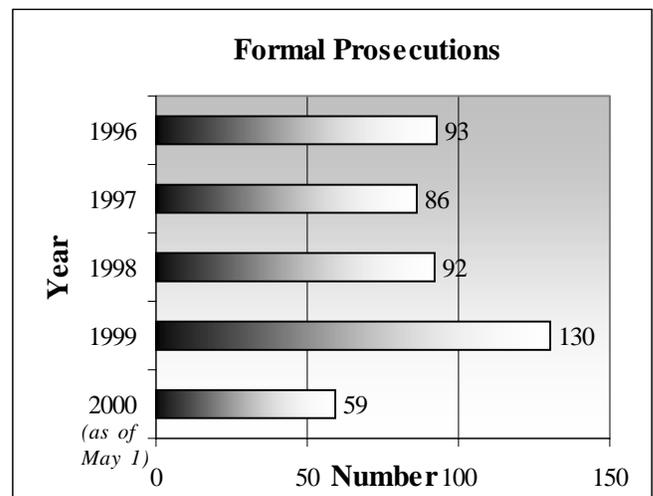
Four years ago, or in 1996, the Louisiana Supreme Court increased the funding system paid for by the bar members. Assessments increased from \$45 per year to \$125 in 1997-98; \$145 in 1998-99; and \$165 since 1999. The assessment yields approximately \$2.6 million per year with no contribution from the Louisiana State Bar Association. The administrator's office is presently housed in Metairie and Donna L. Roberts is still our administrator and has a support staff of 12, including two attorneys. The administrator's office is equivalent to the clerk of court office and handles all scheduling and case records. Disciplinary Counsel maintains two offices, the principal office in Baton Rouge and a second office in Metairie. Chuck Plattsmier is Chief Disciplinary Counsel and has employed eight attorneys with a clerical staff of 14 and five

investigators. The present caseload is 175-200 files per attorney. While the Office of Disciplinary Counsel is not expected to add any new attorney positions in the foreseeable future, the Disciplinary Board monitors the system closely to ensure that it reaches a peak of efficiency.

The number of hearing committees has been expanded to 39 and are located in accordance with need. Staffing of these committees presently requires approximately 117 volunteers across the State. There are an additional 77 volunteer lawyers working as probation monitors.

Into the 21st Century with system improvements

Reduced caseloads and a more professional investigative effort permitted Louisiana's lawyer discipline system to uncover previously overlooked areas of misconduct, which resulted in more vigorous prosecutions. In 1995, only 33 Formal Charges were initiated representing 56 underlying complaints. By 1997, that number had increased to 86 formal prosecutions; by 1998, 92 formal prosecutions representing nearly 238 underlying complaints; and at the close of 1999, the Office of Disciplinary Counsel had initiated 130 formal prosecutions against



Louisiana licensed attorneys representing nearly 350 underlying complaints. Comparing 1999 to the base year of 1995, the state's disciplinary system had initiated nearly four times more disciplinary prosecutions than the 1995 level.

The state Supreme Court has also taken a more aggressive position regarding attorney misconduct. Since 1975, the Court has issued 198 orders of disbarment. From 1997 through 1999, the Court issued 60 disbarment orders representing a 30 percent increase of all disbarments issued by the Court over the 25-year period.

Continued on page 15

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The rules they are a-changin'?

Ethics 2000 and the Model Rules of Professional Conduct

compiled by Rodney B. Hastings, Editor

With the circulation of a third set of draft rules in March, the process of revamping the American Bar Association's Model Rules of Professional Conduct entered the home stretch. The ABA's Commission on the Evaluation of the Rules of Profession Conduct released an initial set of several draft rules in March 1999, followed by a second group of proposed changes in November 1999.

According to the Commission's updated work plan, the members will review comments on the latest draft rules dur-

ing the first part of July, with a preliminary report circulated to the House of Delegates in October. The earliest any vote by the delegates on the proposed rule changes could take place would be the midyear meeting in February 2001.

Below is a partial summary of the proposed changes. Other summaries have been included with relevant articles in this issue. Full text of the proposed rule changes and information on the Ethics 2000 Commission are available on the Internet at <http://www.abanet.org/cpr.ethics2k.html>.

Rule 1.1: Competence

No changes to the core requirement that a lawyer provide competent representation to a client.

Rule 1.3: Diligence

No changes to the text of the rule. Change in language of the comments to reflect the mandatory obligation to act with reasonable diligence.

Rule 1.4: Communication and Informed Consent

A new paragraph defining "informed consent" has been added.

Rule 1.5: Fees

Includes an express prohibition against unreasonable fees; Makes written fee agreements, including the scope of the representation and disbursements for which the client will be responsible, mandatory. Requires the client's written informed consent to the participation of all lawyers involved in fee-splitting.

Rule 1.6: Confidentiality of Information

Adds a lawyer's duty to not reveal information related to a former client currently found in Rule 1.9(c)(2). Expands the permissive ability of an attorney to reveal client information to prevent or rectify harm to others.

Rule 1.7: Concurrent Conflict of Interest: General Rules

Reorganizes the existing rule and clarifies what constitutes a conflict. Requires written informed consent of waiver.

Rule 1.9: Conflict of Interest: Former Client

No substantive change, but changes phrase "consent after consultation" to "gives informed consent to representation." Deletes (c)(2) as described in Rule 1.6.

Rule 1.10: Imputed Disqualification: General Rule

Substitution of a "reasonably should know" standard for "actual knowledge." Elimination of imputation of "personal interest" conflicts.

Rule 1.13: Organization as Client

Minor editorial changes.

Rule 1.14: Clients with Diminished Capacity

Change of caption and terminology. Adds guidance about protective measures that a lawyer may take for a client with diminished capacity.

Rule 1.16: Declining or Terminating Representation

Clarification of several grounds for permissive withdrawal.

Rule 1.17: Sale of a Law Practice

Elimination of requirement that sale be to a single buyer. Elimination of buyer's right to refuse representation unless the seller's clients agree to pay an increased fee.

Rule 1.18: Duties to a Prospective Client

Proposed new rule, with definition of prospective client; duty of confidentiality owed to prospective client; and prohibition on later representation adverse to interest of prospective client, unless informed written consent is obtained.

Rule 2.1: Advisor

No changes. Considered, but rejected, proposal requiring lawyer to inform the client of forms of dispute resolution in cases involving litigation.

Rule 2.2: Intermediary

Recommends deletion. Concepts dealt with in the comment to Rule 1.7.

Rule 3.2: Expediting Litigation

No changes.

Rule 4.1: Truthfulness in Statements to Others

No changes to text. However, amended comments to provide additional guidance on what constitutes a false statement and to clarify that estimates of price or value may constitute a false statement of fact.

Rule 4.2: Communication with Person Represented by Counsel

Allows a lawyer to communicate with a represented person pursuant to a court order.

Rule 4.3: Dealing with Unrepresented Person

Adds prohibition on giving legal advice to unrepresented persons. Limits the prohibition to situations where unrepresented person's interested may be in conflict with the attorney's client.

Rule 4.4: Respect for Rights of Third Persons

Adds two new provisions. One requiring that a lawyer communicating with third persons "not seek to obtain information that the lawyer knows or reasonably should know is subject to an evidentiary or other privilege of another." A second requiring "a lawyer who receives a document and has reason to believe that the document was inadvertently sent" to promptly notify the sender.

Rule 5.1: Responsibilities of a Partner or Supervisory Lawyer

Changes to comments, including the addition of a paragraph specifying some minimum systems necessary to conform to the Rule.

Rule 5.2: Responsibilities of a Subordinate Lawyer

No changes to text.

Rule 5.3: Responsibilities Regarding Nonlawyer Assistants

No changes to text. Change in comment to impose a man-

datory duty to give appropriate instruction and supervision concerning the ethical aspects of a nonlawyer's employment.

Rule 5.6: Restrictions on Right to Practice

Substitute the term "lawyers" for the phrase "partners and associates" in Comment 1.

Rule 6.2: Accepting Appointments

No changes.

Rule 6.4: Law Reform Activities Affecting Client Interests

No changes.

Rule 7.1: Communications Concerning a Lawyer's Services

Change to a simple prohibition against false or misleading communications about the lawyer or the lawyer's services.

Rule 7.4: Communications of Fields of Practice

No changes.

Rule 8.1: Bar Admission and Disciplinary Matters

Two changes to comments: a duty to supplement an answer later found to be wrong exists and bar admission and professional discipline are judicial proceedings subject to the requirements of Rules 1.6 and 3.3.

Rule 8.2: Judicial and Legal Officials

Limits prohibition against false or reckless criticism of judges and government legal officials to statements that are reasonably expected to be disseminated by means of public communication.

Rule 8.3: Reporting Professional Misconduct

Amends language to use Rule 1.6, rather than the attorney-client privilege, as the operative standard for confidentiality for lawyers participating in lawyer assistance programs.

Rule 8.4: Misconduct

Makes it professional misconduct for a lawyer to state or imply an ability to achieve results by means that violate ethics rules or other laws.

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The Court Speaks Out: Sex with clients – NOT IN LOUISIANA!!

by David R. Frohn, Esq., Board Member, Louisiana Attorney Disciplinary Board

Although, many would agree that a sexual relationship between attorney and client is intuitively unethical and should be avoided, historically attorney-client sexual relationships have received little attention either from the media or from the courts. Recently, however, the issue has received much attention.

This issue has moved out of the bedroom and into the purview of disciplinary proceedings, even though there is no specific prohibition against it in the ABA Model Rules or the Model Code. Rather, it is implicit in some of the rules, or is a natural corollary to one or more of them. For example, the interference of a “lawyer’s own interests,” as given in Rule 1.7(b), has been suggested to be influence that may materially limit a client’s representation. Rule 1.8(b) also contains language that seemingly prohibits a lawyer’s sexual relations with a client on the basis that such a relationship usually eventually works to the disadvantage of the client. Rule 2.1 requires a lawyer to exercise “independent professional judgment.”

With respect to its application to a lawyer’s sexual relations with a client, the ABA Commentaries state:

“Many jurisdictions have recently amended their ethics rules to prohibit sexual relationships between lawyers and client. Even absent such a specific prohibition, however, a sexual relationship between a lawyer and a client implicates the ethics rules—most obviously, Rule 2.1’s requirement of independent professional judgment.”

By far, the most attention paid by lawyer discipline to these relationships is in the area of misconduct, and, as such, Rule 8.4 is oft-cited in support of an absolute prohibition or, at a minimum, a precautionary advice.

Once an attorney has become involved in a sexual relationship with the client, even a successful relationship, the representation will undoubtedly be affected. On the other hand, if the relationship turns sour, the client will be afraid to confront the attorney because of the effect it might have on the representation or the case. Actual harm or the potential for harm is always present with attorney-client sexual relationships. Because an attorney occupies a special position in relation to the client, the attorney possesses the power to bind or injure the client’s legal interests without the client knowing what is hap-

pening until it is too late to do anything about it. Thus, an attorney is in a position to foster personal or third-party gain at the expense of the client’s interests.

The American Bar Association studied the general issue of sexual relationships between attorneys and clients and concluded in Formal Ethics Opinion No. 92-364:

“A sexual relationship between lawyer and client may involve unfair exploitation of the lawyer’s fiduciary position, and/or significantly impair a lawyer’s ability to represent the client competently, and therefore may violate both the Model Rules of Professional Conduct and the Model Code of Professional Responsibility.”

While recognizing that the present rules did not specifically address the issue, the opinion found that the following considerations were potentially implicated:

First, because of the dependence that so often characterizes the attorney-client relationship, there is a significant possibility that the sexual relationship will have resulted from exploitation of the lawyer’s dominant position and influence and, thus breached the lawyer’s fiduciary obligations to the client.

Second, a sexual relationship with a client may affect the independence of the lawyer’s judgment.

Third, the lawyer’s engaging in a sexual relationship with a client may create a prohibited conflict between the interests of the lawyer and those of the client. Fourth, a non-professional yet emotionally charged relationship between attorney and client may result in confidences being imparted in circumstances where the attorney-client privilege is not available, yet would have been absent the personal relationship.

The drafters of the opinion also noted that the criminal defendant client may be particularly dependent on the lawyer. *Id.* at p.1001:124. See also Oklahoma Bar Association Opinion No. 308 (12/9/94) (finding that “[a] lawyer may not engage in a sexual relationship with a client, or a client’s representative, during their lawyer-client relationship, except where the client is the lawyer’s spouse” and that “[c]lients involved in domestic, child custody, criminal, and pro bono matters are particularly vulnerable to abuse of such [confidential client] information.”).

The Louisiana Supreme Court has never squarely addressed this situation. Until recently, the only opinions from the Court that involved sexual misconduct by an attorney are *In re Redd*, 95-1472 (La. 9/15/95), 660 So. 2d 839, *In re Plaisance*, 98-0345 (La. 3/13/98), 706 So. 2d 969, and *In re Bonnie*, 97-2792 (La. 12/

Conflict of Interest

12/97), 704 So. 2d 1179. In *Redd*, the attorney was the legal advisor to a police department that had the duty to issue permits to exotic dancers. The attorney pled guilty to a charge of simple battery when he photographed and touched the breasts of an exotic dancer applicant. The Court noted that the offense did not involve sexual misconduct with a client, but since part of Redd's job was the licensing of exotic dancers, his sexual misconduct towards the applicant "revealed a serious flaw in [his] fitness to practice law." 660 So. 2d at 840. The Court suspended Redd from the practice of law for one year and one day and ordered him to obtain one year of psychiatric treatment.

In *Plaisance*, the Court accepted the consent discipline of disbarment for an attorney who attempted to videotape female employees in his law firm's restroom without their knowledge. 706 So. 2d 969. In *Bonnie*, the Court denied a proposed consent discipline of a public reprimand and twelve months probation for an attorney who, during a nine month period of representation, made improper sexual advances towards his client's wife, and offered her sums of money in exchange for sexual favors.

In two recent cases, the Louisiana Supreme Court faced squarely this issue and held that such a relationship does indeed violate the Rules and, under each case's circumstances, severe penalties were in order.

In *In Re: D. Warren Ashy*, 98-0662 (La. 12/1/98); 721 So. 2d 859, attorney Ashy misled his client into believing she was the subject of a criminal investigation and attempted to have a sexual relationship with her in exchange for representing her in connection with the nonexistent criminal charges. The Hearing Committee recommended that Ashy be publicly reprimanded. The Board agreed. The Supreme Court saw it vastly differently.

In a well-research and thorough opinion, the Court found that such conduct violated Rules 1.7 (conflict of interest), 2.1 (exercise professional independent judgment) and 8.4 (committing a criminal act that reflects adversely on a lawyer's honesty, trustworthiness and fitness as a lawyer; conduct prejudicial to the administration of justice; dishonest, fraud, deceit and misrepresentation). In doing so, the Court examined cases from around the country which have examined this issue. The Court found that a suspension of two years was the appropriate sanction.

Shortly thereafter, the Court was faced with its second "sex with client" case. In *In Re: Robert Shambach*, 98-2432 (La. 1/29/99); 726 So. 2d 892. The client retained Shambach to handle litigation involving a trust. Over the next several years, they became personal friends. He advised her in several other legal matters. Five years into the representation, Shambach and the

client began an extramarital affair. Later, he borrowed \$40,000 from her and gave her a promissory note for \$44,000. She sought repayment in a year, but Shambach was unable to pay her back at that time. Two years later, the personal relationship had deteriorated and she ultimately filed suit against Shambach in an attempt to recover on the note, and obtained a default judgment. Shambach and his wife filed for bankruptcy and listed the judgment as a debt.

The client filed her complaint against Shambach, and the Office of Disciplinary Counsel filed formal charges which alleged that Shambach's conduct amounted to a conflict of interest and prohibited business transaction with a client. Two days before the committee hearing, Shambach reimbursed the client in the amount of \$47,000, which represented the amount he owed her plus interest. The client testified favorably to Shambach at the hearing. According to her, she loaned him the money based on their friendship and not because he was her lawyer. She stated that she did not think that he intended to steal the money and intended to pay her back.

The hearing committee recommended an 18-month suspension. The Board recommended that he be suspended for one year.

The Court noted that at the time of their recommendations, neither the hearing committee nor the Board had the benefit of its opinion in *Ashy*. Although Shambach involved a consensual relationship, the Court found that Shambach had violated the Rules by allowing his personal relationship with his client to interfere with his professional responsibilities toward her. The Court also found that he borrowed substantial funds from her when he knew that she was vulnerable, then discharged this debt in bankruptcy, leaving her with virtually nothing. The Court was not impressed with Shambach's restitution efforts on the eve of the hearing, which called into question the client's testimony on his behalf. The Court ordered a three-year suspension.

* * *

The Court has now established serious lawyer discipline in these circumstances. It observed that a client should be confident that the attorney will use independent legal judgment and put forth the attorney's best legal efforts in the course of the representation. However, any attorney who threatens to limit those efforts on behalf of the client if the client fails to engage in a sexual relationship, has "committed a very serious ethical offense." *Ashy*, 721 So. 2d at 868. In summary, such circumstance "undermines confidence in the legal system and is prejudicial to the administration of justice". *Ashy*, 721 So. 2d at 868. *David R. Frohn, a Board Member since 1998, served as attorney-member beginning in 1992, and, later, Chair of Hearing Committee No. 5 (Lake Charles). His committee presided over Ashy.*

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Post-Ashy: Touchet and Gore

Disciplinary Proceedings

In re Francis A. Touchet, 99-3125 (La. 2/4/00); ____ So. 2d ____, 2000 WL 141200.

Six counts of formal charges were filed by the Office of Disciplinary Counsel against Francis A. Touchet of Livingston, Louisiana. The charges alleged that Touchet engaged in improper conduct toward female clients in violation of Rules of Professional Conduct 1.3 (failure to act with diligence and promptness in representing a client), 1.4 (failure to communicate with a client), 1.5 (fee arrangements), 1.7 (conflict of interest), 1.8 (prohibited transactions between a lawyer and a client), 8.4(a) (violation of the Rules of Professional Conduct), 8.4(b) (commission of a criminal act reflecting adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer), 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). At the time the charges were filed, Touchet had been interimly suspended from the practice of law by the Louisiana Supreme Court.

Count I of the formal charges alleged that in August 1996, a woman consulted Touchet concerning her divorce from an abusive spouse. At the time of the initial consultation, he attempted to solicit sexual favors from the woman in lieu of legal fees and he made improper, sexually suggestive remarks to her.

Count II of the charges alleged that another woman consulted Touchet in January 1995 concerning two paternity matters. At the time of the initial consultation, respondent implied to the client that he would waive his legal fees in return for sexual favors. Sometime between February and April of 1996, Touchet called the client into his office after hours with a phony emergency call. At that time, he pressured the client for payment of his fees by refusing to move forward with her case.

Count III of the charges alleged that another female client consulted Touchet concerning a divorce matter in October 1996. Touchet implied to her that he would waive his legal fees in return for sexual favors, and he made improper, sexually suggestive remarks to her.

Count IV of the formal charges alleged that a woman consulted Touchet in September 1997 concerning her divorce and child custody matter. Touchet pressured her into entering into an improper sexual relationship with him. He improperly solicited sexual favors from this client in lieu of legal fees. He made improper, sexually suggestive remarks to her, made inappropriate gestures around her, and touched her without her consent.

Count V alleged that in October 1997, another female client contacted Touchet concerning her divorce, child custody, and child support matter. In a series of meetings, Touchet improperly solicited sexual favors from his client in lieu of legal fees, and he made improper, sexually suggestive remarks to her.

Count VI of the formal charges alleged similar misconduct. This count alleged that a woman consulted Touchet in the summer of 1993 concerning a business matter. In a series of

meetings, Touchet improperly solicited sexual favors from the client, made improper, sexually suggestive remarks to her, and tried to kiss her without her consent. At one meeting, Touchet touched the client without her consent. At one of his final meetings with this client, Touchet exposed his genitals to her.

Touchet initially denied the factual allegations of the formal charges. He later withdrew his general denial and admitted to the charged misconduct.

The hearing committee, relying on the cases of *In re Ashy*, 721 So. 2d 859 (La. 1998) and *In re Redd*, 660 So.2d 839 (1995) for guidance, found that the baseline sanction for Touchet's misconduct was disbarment.¹ The committee noted four aggravating factors, including dishonest and selfish motive, pattern of misconduct with multiple offenses, vulnerability of the victims, and substantial experience in the practice of law (admitted in 1987). The committee found no mitigating factors, rejecting those advanced by Touchet including no prior discipline, reputation in the community, mental, emotional and personal health problems, and remorse. Given the multiple counts of misconduct and the "egregious facts of this matter," the committee recommended that Touchet be disbarred. Touchet objected to this sanction on the ground that disbarment was too harsh.

The Disciplinary Board found that Touchet violated duties owed to his clients, the public, the legal system and the profession. The Board also found that the respondent's conduct was knowing and intentional, and that the injury caused by his misconduct was great. The Board concurred with the aggravating factors found by the committee, but accepted as mitigating factors the absence of a prior disciplinary record and remorse. The Board, however, observed that the instant case was "multiple times worse" than *Ashy* and also recommended that the respondent be disbarred from the practice of law. Neither the respondent nor the Office of Disciplinary Counsel objected to the Board's recommendation.

The Louisiana Supreme Court accepted the recommendation of the Disciplinary Board, and ordered that the respondent be disbarred from the practice of law, retroactive to the date of his interim suspension. The Court also assessed all costs and expenses of the matter against the Respondent in accordance with Supreme Court Rule XIX, Section 10.1.

In reaching its decision, the Court discussed the *Ashy* case, noting that in that case it addressed for the first time whether sexual advances by an attorney toward a client could constitute a violation of the Rules of Professional Conduct. Citing American Bar Association Formal Ethics Opinion No. 92-364, the Court in *Ashy* had recognized that such conduct could violate the professional rules, including Rule 1.7(b) (conflict of interest) and 2.1 (duty to exercise independent judgment) of the Rules of Professional Conduct.

The Court further explained that by attempting to sexually exploit his clients, Touchet had unquestionably violated his

professional duty to protect their interests. Touchet's conduct was made even more reprehensible by the fact that many of his clients consulted him in connection with emotionally-charged domestic matters, and respondent attempted to use their vulnerability to further his sexual interests. The Court pointed out that in *Ashy*, it imposed a two-year suspension on an attorney for one count of sexual misconduct in connection with a single client. The case at issue involved six separate counts of misconduct involving six different clients, justifying a harsher sanction than imposed in *Ashy*. In reaching its decision, the Court also looked to cases from other states in which attorneys had been disbarred for similar misconduct.

End Notes

¹ In *Ashy*, the respondent attempted to have a sexual relationship with one of his clients in exchange for representing her in connection with non-existent criminal charges. The Court found the actions of Ashy particularly egregious and in violation of Rules of Professional Conduct 1.7, 2.1 and 8.4. Although the Disciplinary Board had recommended a public reprimand, the Court ruled that the sanction was too lenient and suspended Ashy for two years. *Ashy*, 721 So.2d at 868. In *Redd*, the respondent was suspended for one year and one day and ordered to obtain one year of psychiatric treatment for sexual misconduct of touching and taking photographs of an exotic dancer's breasts. Respondent was the legal advisor to the Baton Rouge Police Department whose duty was to issue permits to exotic dancers. The Court noted that the exotic dancer was not the respondent's client; however, the respondent's conduct "revealed a serious flaw in respondent's fitness to practice law." *Redd*, 660 So.2d at 840-41.

In Re: Brent Stafford Gore, 99-3213 (La. 1/28/00); ___ So.2d ___, 2000 WL 101268.

In the course of representation, Gore entered into a consensual sexual relationship with a client. Subsequently, Gore filed a petition for divorce on behalf of the client and represented her until a final judgment was rendered. The Office of Disciplinary Counsel alleged that at no time during the representation did Gore inform the client that a potential conflict of interest existed. The ODC further alleged that when Gore filed the Motion for Judgment of Divorce on his client's behalf, alleging that the client and her husband had lived separate and apart for more than six months, he knew that the client and her husband still lived together.

Following the institution of formal charges, Gore filed a petition for consent discipline in which he admitted that a consensual sexual relationship existed between him and the client. Gore also admitted failing to inform the client that a potential conflict of interest therefore existed. Gore denied any knowledge of the fact that the client and her husband were still living together at the time of the filing of the motion, but did acknowledge that his failure to be more diligent in his investigation of the factual representations made by the client violated Rule 1.3 of the Rules of Professional Conduct.

The Court noted that "although the instant case involves a sexual relationship between respondent and his client, it is nonetheless distinguishable from *Ashby* and *Schambach*, as there is no allegation that respondent attempted to use his position as attorney to coerce sex or money from [his client]." Therefore, the Court held that, under the circumstances, the proposed consent discipline of a six-month suspension, followed by two years of probation, was appropriate.

-- **Touchet prepared by Elizabeth M. Truett, Esq., staff attorney, Louisiana Attorney Disciplinary Board; Gore prepared by Rodney B. Hastings, Editor**

Ethics 2000 & Rule 1.8

In light of recent state supreme court decisions, such as *Ashy*, finding that client-lawyer sexual relationships are implicitly prohibited by the Rules of Professional Conduct and the adoption of rules explicitly regulating client-lawyer sexual conduct in a number of jurisdictions, the Ethics 2000 Commission has recommended that a new *per se* rule prohibiting most client-lawyer sexual relationships be added to the ABA's Model Rules of Professional Conduct.

Proposed Rule 1.8(k) reads: "A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the lawyer-client relationship commenced."

While recognizing that most egregious behavior of lawyers in these types of situations can be addressed through the existing rules, the Commission nonetheless supports a total, rather than a partial ban on client-lawyer sexual relationships, except for those pre-dating the formation of the client-lawyer relationship.

The comments to the proposed rule state that "issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship." In such instances, the comment suggests, "the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship," and that it would be appropriate to use Rule 1.7 guidelines in making that evaluation.

-- **Rodney B. Hastings, Editor**



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Third-party Medical Provider v. Attorney: *Rule 1.15 revisited*

by Kathleen T. Verret, Esq., and Susan Tart, Esq.

The Disciplinary Board in recent months has reviewed several cases involving attorneys charged with violating Rule 1.15(b) of the Rules of Professional Conduct, for their failure to pay third-party medical providers. Many practitioners have complained that medical providers and other third party providers are utilizing the discipline system as a sort of collection agent. However, many of the cases seen are not disputes between the attorney and the medical provider. These are cases where the attorney either negligently or intentionally failed to protect the interest of the third party. In spite of the increasing number of complaints being filed, violations of this rule are simple to avoid. The purpose of this article is to address this ever-increasing problem, and to discuss recent cases on the issue.

Rule 1.15 (b) provides as follows:

“Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.”

The lawyer usually becomes aware of outstanding medical bills in two different ways. The lawyer has sent the client for treatment and guaranteed to the doctor the payment of all medical expenses out of any settlement or recovery obtained in the case; or the lawyer has received from the doctor a notice of medical provider lien/privilege. In either instance, the lawyer has obtained knowledge that a third party has an interest in the settlement funds the lawyer will later receive on behalf of his client. Pursuant to Rule 1.15(b), once the lawyer obtains the funds, he has an ethical obligation to promptly pay any third party that has an interest in those funds. Any failure to do so exposes the attorney to possible disciplinary sanctions.

The next question is how should the attorney handle the funds once they are received? This is clearly addressed by Rule 1.15(a):

“A lawyer shall hold property of clients or a third person that is in a lawyer’s possession in connection with a representation separate from the lawyer’s own property. Funds shall be kept in a separate account maintained in a bank or similar institution in the state where the lawyer’s office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be

preserved for a period of five years after termination of the representation.” (Emphasis added).

Thus, the money of third parties, such as medical providers, must be placed in the attorney’s client trust account and remain there until it is disbursed accordingly, with all records of same maintained by the lawyer for five years.

There have been instances when the funds in question have been removed from the trust account and placed in a private safe or other unregulated depository. This is referred to as the black box defense, a term first coined by the Louisiana Supreme Court in *Louisiana State Bar Association v. Whittington*, 459 So.2d 520 (La. 1984), after Whittington placed funds belonging to his client in an envelope inside a black box which he first held in his office and later in his home. Whittington claimed that he did not deposit the funds in his client trust account because he feared the Internal Revenue Service would levy his bank accounts for back taxes he allegedly owed. *Id.* at 523. His client was not informed of this practice and Whittington kept no documentation of the total amount of cash he held on the client’s behalf. Each individual file contained notes reflecting the total amount of cash held, as well as court costs and fees. Whittington testified that he kept his own cash in the black box in a separate envelope. Whittington offered no evidence to substantiate that he continuously held the client’s funds in cash in a black box until he turned them over. Considering the facts of the case combined with the lack of documentation of the amount of cash held and Whittington’s admission that his own cash was kept in the black box, the Supreme Court found clear and convincing proof that he had commingled his client’s funds and converted them to his own use in violation of DR 1-102 and DR 9-102 (now Rules 8.4 and 1.15). *Id.* at 524

There have been several other cases where the lawyer has disbursed the portion of the settlement proceeds belonging to the medical provider directly to the client. Although there is no evidence of conversion involved, and it may appear to be right since it is the debt of the client, this practice is a direct violation of Rule 1.15(b). In the case *In Re: Charles W. Dittmer Jr.*, 743 So.2d 195 (La. 1999), Dittmer settled his client’s personal injury case for \$68,000. The medical provider, Dr. Gottsegen, mailed a notice of health care provider’s privilege to the respondent’s office. The medical bill for the client was \$3,852, but the respondent was successful in getting the bill reduced to \$3,000. At the time of settlement, Dittmer issued a check in the amount of \$3,000 meant for Gottsegen to his client. According to Dittmer, his client “demanded” that she be allowed to pay Gottsegen directly and with her own check. Dittmer complied with his client’s demand and issued a separate check to her. Dittmer was charged by the Office of Disciplinary Coun-

Third-party providers

sel with violating Rule 1.15(a) and (b). The respondent filed a petition for consent discipline, which was accepted by the Disciplinary Board and the Supreme Court. Dittmer was suspended from the practice of law for six months, totally deferred, and placed on probation for one year with a probation monitor to periodically review his files to determine if any payments were due and owing to third party medical providers.

In the case *In Re: Dennis S. Mann*, 98-DB-091 (3/8/99), the Disciplinary Board issued a public reprimand against Mann for his failure to protect the interest of a third party medical provider in violation of rule 1.15. In this instance, Mann executed a letter of guarantee in favor of the medical provider. As in *Dittmer*, Mann disbursed all of the settlement proceeds to his client, including the funds due the medical provider. It

is noted that in both cases the medical providers were eventually paid their fees.

In sum, lawyers should place all settlement or judgment funds into the client trust account when received. In addition, third-party medical providers, and others having an interest in those funds, should be promptly notified of settlement and paid. Finally, appropriate records should be kept for at least five years. By following the simple pronouncements of Rule 1.15(a) and (b), the practitioner can avoid becoming an unwilling participant in the disciplinary system and having their reputation and bar record blemished.

Kathleen T. Verret and Susan A. Tart are former Board staff attorneys. Ms. Verret now works for a major corporation in Chicago. Ms. Tart is a law clerk for the Honorable Harry T. Lemmon, Louisiana Supreme Court justice.

Ethics 2000 & Rule 1.15

The Ethics 2000 Commission draft proposals contain no changes to Model Rule 1.15 (a) and (b). However, the comments have been changed to recognize the fact that while the black letter of this Rule is written in mandatory terms, the comments are often permissive. While sometimes that may be appropriate, Rule 1.15(a) clearly requires that client property, including money, be kept separate from the lawyer's own. The first comment of Rule 1.15 has been changed to make that clear.

The pertinent portion of the proposed comment reads as follows:

"All property which is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts."

A recommendation has been made to change the wording of Rule 1.15(c) to cover all instances of disputed funds. The proposed language of the draft also makes clear that an attorney must "promptly distribute all portions of the property as to which the interests are not in dispute."

-- Rodney B. Hastings, Editor



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As I See It

Continued from page 5

The Louisiana Supreme Court remains committed to improving the ethical and professional standard in our legal profession.

As of May 1, the Office of Disciplinary Counsel filed 59 formal charges for the year 2000. There are presently 173 cases that are being heard or have been heard at the committee level and are awaiting opinions. The Disciplinary Board presently has 80 cases pending. Each monthly panel receives approximately 12 formal prosecution cases with an additional seven appeal of dismissals per docket. In addition, 26 cases are pending before the Louisiana Supreme Court. The system is working efficiently.

Another improvement includes the system's ability to react quickly if attorneys violating the rules pose an immediate threat of irreparable harm to the public. Disciplinary Counsel's office has the ability to obtain an order for a hearing from the Supreme Court within hours after obtaining such knowledge.

Mass disaster investigations

Also important is that presently disciplinary counsel's office has the capability of reacting rapidly to disasters. The Disciplinary Counsel's staff was on the scene in Bogalusa when the Gaylord paper mill accident occurred and on the dock in New Orleans when the ship collided with the wharf. The staff was there to investigate and ensure that professional rules were not being violated.

In conjunction with federal and state law enforcement officials the ODC has conducted undercover investigations into "case running." So far these operations have resulted in 3 disbarments. In recognition of this activity, over the last year, Chief Disciplinary Counsel Chuck Plattsmier and his staff have received the Excellence in Law Enforcement Award from the New Orleans Metropolitan Crime Commission and the Fraud Buster Award from the Louisiana Chapter of the International Association of Special Investigation Units.

Improvements to the disciplinary process

Historically, the investigative process in the discipline

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system could take between 18 and 24 months. By 1999, 80 percent of the files under investigation were less than 6 months old and 92.5 percent were less than one year old – a substantial reduction in the time delays. The hearing committees, Board and Supreme Court continue to expedite cases through the disciplinary system.

The system is only as good as the volunteers that make it function and the training they receive. The administrator's office along with the Disciplinary Board members has provided excellent training for the committee members and new Board members. They are instructed in procedures dealing with Rule XIX; the importance of maintaining the time guidelines for holding hearings, writing opinions, etc.; how to conduct a hearing; and how to author an opinion, including form and content. Presently no committee member, whether attorney member or lay-member, participates in a hearing without having been properly trained.

Benefits of the disciplinary system

An often overlooked benefit for the average practitioner is that Rule XIX and disciplinary counsel's office presently expeditiously handles all complaints and the falsely accused attorney is given immediate opportunity to explain his position. If no violation of the professional rules has occurred the matters are closed, relieving the attorney of the worry and concern that is caused by a complaint.

At this point I hope that you are better informed about your disciplinary system, know that the funds from the assessments are being used wisely and that the results reflect what you want in a disciplinary system. Members of the state's disciplinary system, volunteers at all levels, are working diligently to insure that the public is being protected and our profession is restored to the position of respect it deserves.



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Media Relations in the New Millennium

by *Mary E. Mouton, Esq.*

Advances in technology have resulted in positive changes for attorneys and the legal system. Legal information is more accessible to the public than ever before.¹ We can access research faster. Court filings are computerized. We have all grown accustomed to this expanded access to information, including the media. As a result, more and more legal issues are garnering media coverage in outlets as diverse as cable channels to websites. Reporters can obtain public filings faster which means they will start asking questions sooner. Some may be quite experienced in legal proceedings and understand every aspect from facts to law. Others, however, may become confused or overwhelmed by a voluminous record - especially those reporters who are on deadline.

The Internet multiplies the spread of information with emailing of articles and pleadings. In extreme cases, entire websites may target your case or client,² proliferating the Internet with truths but also half-truths. Your client's image can be glorified or damaged in a very short amount of time. Given the numerous venues of communication and the potential for misinformation in the deluge, it's been argued that an attorney should always consider responding to publicity as part of the diligent representation of a client.³ Pledging silence to the media is always easier, but it may not be the best strategy to defend your client's position, or to ensure that the story will be accurate and fair.

The lawyer's framework

In Louisiana, Rule 3.6 of the Rules of Professional Conduct governs the role of attorneys in trial publicity and sets guidelines to forbid publicity which an attorney knows or reasonably should know would have a substantial likelihood of materially prejudicing a proceeding.

Louisiana has not adopted the ABA's Model Rule 3.6,⁴ which was substantially revised in 1994 in an attempt to bal-

ance the right to a fair trial with free speech concerns. The ABA's rule applies only to attorneys who are, or have been involved in the investigation or litigation of a case. Louisiana's rule makes no such distinction and can therefore be construed to apply to all lawyers regardless of their relationship to the case.

The ABA's revisions followed the United States Supreme Court's decision in *Gentile v. State Bar of Nevada*.⁵ In *Gentile*, the Supreme Court reversed imposition of discipline imposed on a criminal defense attorney for statements he made at a press conference. The attorney held the media briefing to counter negative publicity after his client was indicted. The Supreme Court found the rule unconstitutionally vague as interpreted and applied by the Nevada Supreme Court.

Louisiana's Rule 3.6 does not reflect these amendments, is restrictive, and speaks more in terms of what attorneys shall not state and provides examples of what could have a substantially likelihood of materially prejudicing a proceeding. Not much helpful case law exists to guide attorneys. In *U.S. v. Davis*,⁶ the court distinguished *Gentile* and upheld a gag order in an alleged police corruption case on grounds that allowing comment by trial participants would create a substantial likelihood of materially prejudicing a proceeding.

Of course, always review the applicable local court rules relating to publicity.⁷

Tips for dealing with the media

It's better strategy to work with the media rather than to avoid or to hide from the press, even if the extent of your comment is limited. Often a terse "no comment" is the response before any serious consideration is given to the idea of cooperating with a reporter. Should inaccuracies or inequities result in the ensuing article, asking for a correction becomes more difficult because you refused to get involved in

Rule 3.6 Trial Publicity

(a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

(b) A statement referred to in Paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement shall include, but not be limited to:

(1) The character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) In a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) The performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) Any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) Information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or

the journalistic process. By preparing yourself to work with a reporter, you stand a greater chance of reading a more accurate and balanced article in the newspaper the next day. Below are some suggestions for dealing with the press:

Speak in simple terms – your audience does not have a law degree.

Be honest and straightforward. Speaking to the press should not invoke rules of strict statutory construction. It's journalism. What may be appropriate legal jargon may not convey the same meaning to a non-lawyer. President Clinton's legalistic media responses during the Monica Lewinsky matter illustrate the pitfalls.⁸

Find out the reporter's deadline and respect it.

When a reporter calls, find out when he must file his story and be sure to return the call before that deadline. It won't do much good after the story's been filed.

Avoid "no comment."

One of the most damaging images is that of a defendant walking briskly past a courthouse uttering, "no comment" or trying to dodge a camera. It is possible to refrain from commenting substantially yet still provide a reasonable quote to the media. Remember, a reporter can write the story with or without your input. Think seriously before you refuse an opportunity to get involved in the gathering of facts and comments.

Develop your media comments before you talk to the reporter. Don't be caught off guard.

Review Rule 3.6 and gather your thoughts before you talk to a reporter. Before every interview, you should be able to succinctly state your position in just a few simple sentences. Anticipate questions and have your answers prepared in advance as you would for any legal argument. Try to provide the reporter with short, clear quotes that summarize your position.

Help the reporter understand the case.

Many reporters are working on several stories a day. It's worth the extra time to help the reporter understand an issue. It may mean the difference between accuracies and inaccuracies in the piece. Invite the reporter to call you back to double check facts or statistics. While most reporters will read legal pleadings and memos, don't assume that they have done so by the time they conduct the interview.

Don't threaten the reporter with litigation.

Too often, attorneys resort to threatening libel suits against the media as a tactic, rather than a legitimate remedy. Sometimes it works to delay publication of a story. Very often it doesn't delay publication and you've created a contentious relationship with that reporter or news organization. Rather than threatening litigation, approach the situation as an effort to set the record straight, clarify and explain issues. The editor will be more responsive to that approach.

Beware of exclusive interviews.

Granting an exclusive interview delights one reporter but usually annoys the rest. Pick and choose carefully those reporters to whom you want to offer exclusive interviews. You may discourage other media from pursuing the story. If the story interests other media, you will find yourself caught between competing news organizations trying to get the story.

Don't ask to see the article in advance.

As much as you'd like to see a draft of the article, don't ask the reporter for a peek. That goes for the reporter's notes too, unless you're prepared to enter into a First Amendment battle. La. R.S. 1451 *et seq.* outlines the conditional privilege granted to reporters. There is qualified protection for nonconfidential news.⁹

Don't be afraid to ask questions.

Before you agree to do an interview, it's okay to find out in a general sense what is to be asked during the interview, who

(6) The fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

(c) Notwithstanding Paragraphs (a) and (b) (1-5), a lawyer involved in the investigation or litigation of a matter may state without elaboration:

- (1) The general nature of the claim or defense;
- (2) The information contained in a public record;

(3) That an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;

(4) The scheduling or result of any step in litigation;

(5) A request for assistance in obtaining evidence and information necessary thereto;

(6) A warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or the public interest; and

(7) In a criminal case:

(i) The identity, residence, occupation and family status of the accused;

(ii) If the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) The fact, time and place of arrest; and

(iv) The identity of investigating and arresting officers or agencies and the length of the investigation.

else will be interviewed, and when the story will be published. That allows you an opportunity to gather statistics and facts so that you will be better prepared for the interview.

Correct any misstatements or misimpressions on the part of the reporter before it's too late.

Don't be afraid to raise potentially negative issues with the reporter, if you sense he's misinformed. If you sense that the reporter does not understand a point, take the time to clarify the issue. Make sure you understand the question that a reporter is asking and make sure you answer that question.

They call it news for a reason.

Be sensitive to the fact that news is about just that - new trends, information, or developments. Strike when the iron is hot. A reporter will need an interview when a story is breaking, not the next day or day after.

Don't go off the record.

Consider every conversation you have with a reporter to be on the record, for publication. That includes discussions you have on the initial phone call or as you escort the reporter out of your office. If you have a good relationship with the reporter, it's okay to go off the record, but be careful. The reporter might feel that certain facts you've disclosed are a matter of public record and therefore not confidential. It's safer to avoid the situation altogether.

Don't underestimate the media and the influential role it plays in the court of public opinion. In this information age, advocates would serve their clients well by carefully evaluating media inquiries to determine whether silence is the most effective strategy. Attorneys are more than advocates relegated to court proceedings. Once a client takes on a public profile, image and reputation are at stake. As counselors and advisors, attorneys should consider all possible responses so that your client's position is enhanced or protected in the public forum.

End Notes

¹ Chief Justice William H. Rehnquist wrote, "The federal Judiciary continues to progress toward the next century with the help of technological advancements. Installation of a nationwide data communications network in the Judiciary was completed in October, one year ahead of schedule. More than 700 Judiciary sites and 28,000 Judiciary employees are now linked electronically by a secure internal electronic communications network. Similarly, the Judiciary's Internet sites are increasingly used to disseminate publications, statistics, and other information about the federal Judiciary and its programs. Use of this technology is expected to generate savings of about \$1 million annually in paper and postage costs. Judicial opinions are regularly posted on the Internet in many circuits, as are schedules, local rules, fee schedules, and job vacancies. Prototype electronic case files systems which could allow

courts to receive, send, store, and retrieve case-related documents in electronic format also have been developed and are being tested in a number of district and bankruptcy courts." 1998 Year-End Report on the Federal Judiciary.

² See www.enviroweb.org/mcspotlight-na/home.html relating to a libel suit against McDonald's; <http://free-market.com/forums/microsoft> for a Microsoft debate forum.

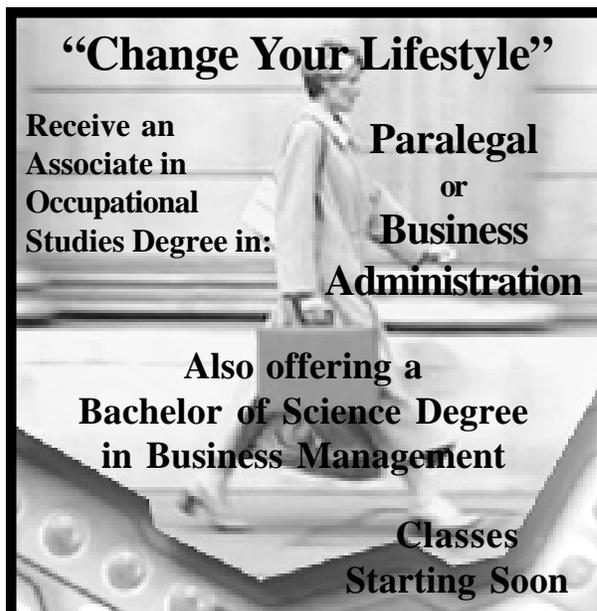
³ See ABA/BNA Lawyer's Manual on Professional Conduct 61:1001, 1009, citing comments to ABA Model Rule 3.6.

⁴ Rule 3.6 Trial Publicity

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

- (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
- (2) information contained in a public record;
- (3) that an investigation of a matter is in progress;
- (4) the scheduling or result of any step in litigation;
- (5) a request for assistance in obtaining evidence and information necessary thereto;
- (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and



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- (7) in a criminal case, in addition to subparagraphs (1) through (6):
- i. the identity, residence, occupation and family status of the accused,
 - ii. if the accused has not been apprehended, information necessary to aid in apprehension of that person;
 - iii. the fact, time and place of arrest; and
 - iv. the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

⁵ 501 U.S. 1030 (1991)

⁶ 904 F.Supp. 564, 568 (E.D.La. 1995)

⁷ See, for example, Local Criminal Rule 53 *et seq.* of the Federal Uniform District Court rules.

⁸ An article in a Public Relations Society of America publication sums it up best: "On the Jan. 21, 1998 edition of "The NewsHour with Jim Lehrer", the President said, "I did not ask anyone to tell anything other than the truth. *There is no improper relationship.*" (Emphasis added) Maybe there was an improper relationship, but by using the present tense, Clinton indulged what NBC's Len Cannon called his "resistance to full body contact with the truth." Aviva Diamond, Lessons From a Troubled White House, PRSA Tactics, October, 1998.

⁹ La. R.S. 45:1459

Mary Mouton is Director of Public Relations at Media Direct in New Orleans. A former broadcast journalist, she graduated from Tulane Law School in 1990 and practiced civil litigation for five years before returning to the communications field.

Ethics 2000 & Rule 3.6

The ABA's Ethic 2000 Commission released a draft of proposed changes to Model Rule 3.6 in February. It recommended that paragraph (a) be amended to read: "A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that *the lawyer knows or reasonably should know* will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."

The Commission concluded that a "reasonable lawyer" standard provides a better frame of reference for judging the lawyer's assessment of the likelihood that a statement will be disseminated by means of public communication than the current "reasonable person" standard. The Commission also recommends changing the scienter requirement from "reason to expect" to "knows or reasonably should know." This would make the wording of this Rule consistent with that defined in the Terminology section of the Rules.

Just prior to the release of the ABA's draft, The Virginia Supreme Court adopted an amended form of the ABA Model Rules of Professional Conduct, including a substantially different version of Model Rule 3.6.

Citing concerns that a specific list of prohibited statements might be "constitutionally suspect," the Virginia rule omits the list of permissible statements included in paragraph (b) of the Model Rule and adopts the "substantial likelihood of material prejudice" standard of *Gentile*.

More information on the new Virginia Rules of Professional Conduct can be found at the Virginia State Bar's website (<http://www.vsb.org/profguides/modrules.html>).

— Rodney B. Hastings, Editor



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The American Legal Ethics Library: Legal profession research on-line

by Mike Hunt, Esq., and Kelsey Kornick, Esq.,
Phelps Dunbar, L.L.P.

A new resource for legal ethics research is available to the Louisiana practitioner. The American Legal Ethics Library is a digital library on legal and judicial ethics, which is free of charge and accessible on the Internet at www.law.cornell.edu/ethics.

The Library is organized under the auspices of Cornell Law School,¹ in collaboration with lawyers from around the country. The Library presently contains the searchable text of the Professional Rules governing lawyers for 23 states. The format, which compares the Professional Rules to their counterparts in the Model Rules of Professional Responsibility and the Model Rules of Professional Conduct, is consistent among the states which allows for easy comparison.

The Library also includes state-by-state narratives on the law of lawyering. The current Library edition includes narratives for 12 states,² including Louisiana and neighboring states Texas and Arkansas. Major law firms and legal academics working on a *pro bono* basis, authored the narratives on the law of lawyering for their states.³ Narratives for additional states will be included in future editions.

After logging on to the website, you will encounter a brief overview of the Library's contents, as well as two different ways to access the Library's materials, either by jurisdiction or by topic. The jurisdictional materials for each state are subdivided into various categories, such as Professional Rules and Commentary, Disciplinary Procedures, Ethics Opinions, Information on Bar Admission, and Judicial Conduct. Links to legal and administrative websites pertinent for each state can be found under each of these topic headings.

The Professional Rules and Commentary category includes two links: one to the ethics narrative for that state and one to the state's rules of professional conduct. Clicking on either of these links provides access to a substantive outline which can be manipulated by using either the numbered icons at the top of the page or the "plus/minus" icons. At any time, you can enter a certain section of the outline by clicking on its heading.

The topical materials are subdivided into an outline based upon the Model Rules of Professional Conduct. Each rule or "topic" includes a list of jurisdictions grouped according to the rules they are based upon, either the Model Rules, the Model Code, or other sources. Links in this section allow you to access each state's full text legal narrative.

You can conduct searches in either the materials organized by topic or the jurisdictional materials by clicking the query key. The drawback to searching in the library's topical materials is that it only searches the terms in the topic or rule heading and not the actual text of each state's narrative. If you choose to search the jurisdictional materials, you will be



able to search the full text of the narrative but will only be able to search one jurisdiction at a time.

The website uses Folio Infobase Technology which allows full-text searching of the library. As mentioned above, searching the infobase is as easy as clicking the "query" button in the left-hand column. Enter your search string in the search dialog box using the appropriate query syntax (i.e., "and," "or," "not," /5, etc.). The query syntax used to search the Folio Infobase is similar to the syntax used with other on-line research services. For an extensive list of the Folio Infobase query syntax or for more information on searching, click on the "how to query" button.

Options at the bottom of the search dialog box allow you to display your search results either as they appear in the full record or in the headings only. In both formats, the search term or terms are highlighted by red arrows.

The following is a sample from the Louisiana narrative which appears in the Library:

0.2:240

Disciplinary Process

Disciplinary proceedings in Louisiana are intended to protect the courts and the public, not to impose punishment. **In Re Reed, 22 So2d 552 (La 1945)**. They are neither criminal nor civil. **Sup Ct Rule XIX, §18(A)**.

Complaints about lawyer misconduct may be filed by anyone. Complainants may call 1-800-326-8022 to request a complaint form. This form must be completed and returned to the

Office of Disciplinary Counsel, 4000 Sherwood Forest Blvd., Suite 607, Baton Rouge, Louisiana, 70816. As an alternative, a complainant may also write a letter to the Office of Disciplinary Counsel including their name, address and telephone number. The letter must include a description of the lawyer's alleged misconduct and include all important information, including the lawyer's name, address, telephone number and dates of events.

Before formal charges are brought, the proceeding is confidential. Nevertheless, disciplinary counsel may reveal the pendency, subject matter and status of an investigation if at least one of the following factors is present: the respondent has waived confidentiality, the proceeding is based upon conviction of a crime or reciprocal discipline, the allegations have become generally known to the public, or if others must be notified to protect the public, the administration of justice or the legal profession.

If one of these factors is met, notice will be given that nonpublic information will be disclosed and the respondent has 21 days from the mailing of the notice to object to its disclosure. If the respondent objects, the information remains private unless a court orders its disclosure. Nonpublic information is released without notice to the lawyer only if the information is essential to an ongoing investigation and notice to the lawyer would prejudice that investigation. Otherwise, nonpublic information may only be disclosed to the LSBA or the lawyer disciplinary enforcement agencies. Once formal charges are filed and served, the proceeding becomes public. Nevertheless, the deliberations of the hearing committee, disciplinary board or Supreme Court or any information under protective order remain confidential. **Sup Ct Rule XIX, § 16.**

Communications relating to lawyer misconduct and testimony given in proceedings are absolutely privileged. Lawsuits predicated on this information may not be instituted against any complainant or witness. Although witnesses are not automatically immune from criminal prosecution, the Supreme Court may grant such immunity upon the application of the disciplinary counsel. Members of the disciplinary board, the hearing committees, disciplinary counsel, their staff and members of other ethics committees are also immune from suit for conduct in the course of their duties. **Sup Ct Rule XIX, §12.**

If, during the course of the disciplinary proceedings, the respondent alleges that he or she cannot assist in his or her defense due to a mental or physical incapacity, the Supreme Court will immediately transfer the respondent to disability inactive status pending a formal determination of the lawyer's capacity. If the claim is valid, the respondent will be placed on disability inactive status and the proceedings will be deferred until the respondent petitions to return to active status which, if granted, will re-institute the deferred disciplin-

ary proceedings. If the claim is invalid, the disciplinary proceedings will resume and the respondent will be placed on interim suspension until the disciplinary matter is resolved. **Sup Ct Rule XIX, §22.**

A lawyer may petition to be removed from disability inactive status once a year unless the Court directs otherwise. The Court is responsible for investigating this request and deeming the lawyer fit to re-enter the practice of law. The Court may order the attorney to submit to such examinations as will prove his or her competence and learning in the law. The Court may also direct that the respondent undergo a medical evaluation. When petitioning for a return to active status, the attorney must reveal the names of all of the treating physicians or institutions used since his or her transfer to disability inactive status and submit a waiver of the doctor-patient privilege. The attorney must justify his or her removal from disability status by clear and convincing evidence. **Sup Ct Rule XIX, §22(E).**

GROUNDS FOR DISCIPLINE

The grounds for lawyer discipline are located in **Sup Ct Rule XIX, §9.** These grounds include violation or attempted violation of the Rules of Professional Conduct or any other rule regarding professional conduct of lawyers, engaging in conduct which violates the rules of professional conduct of another jurisdiction, willfully violating a valid order of the court or disciplinary board imposing discipline, willfully failing to appear before the board for admonition, or knowingly failing to respond to a lawful demand from a disciplinary authority. The sanctions for such misconduct and the procedure for imposing those sanctions are discussed below.

DISCIPLINARY PROCEEDINGS

Although a more thorough explanation of the procedure for disciplinary proceedings in Louisiana follows, here is a summary of the system: 1) A *complaint* of misconduct is filed with the disciplinary counsel; 2) the disciplinary counsel *investigates* the charges and either dismisses the case, recommends that the respondent consent to an admonition, petitions for the respondent to be transferred to *disability inactive status* or requests the approval of a hearing committee to file *formal charges*; 3) if the case is *dismissed*, the complainant may appeal to a panel of the disciplinary board within 30 days and may appeal the board's decision to the Supreme Court if it can be shown that the disciplinary board acted arbitrarily, capriciously or unreasonably; 4) if the respondent will not consent to an *admonition* or if the disciplinary counsel requests approval to file formal charges, the matter is referred to a hearing committee; 5) the hearing committee reviews the matter and submits a report to the adjudicative committee of the disciplinary board; 6) the adjudicative committee will review the record and either dismiss the matter or recommend the imposition of discipline; 7) if necessary as determined by

the type of discipline recommended, the disciplinary board will file a report with the Supreme Court; 8) the Supreme Court will review the matter and render its decision.

In all cases where service is required, **Sup Ct Rule XIX, §13** requires the petition to be served through personal service or by mail. Service of all other papers may be accomplished through personal service or in accordance with **La CCP arts 1313 and 1314**.

The American Legal Ethics Library is a unique facility for research on matters involving the legal profession. No other single source contains the breadth of ethics materials available in the Library. Moreover, this resource is free and readily available on the Internet.

End Notes

¹ Cornell Law School's Legal Information Institute is responsible for the Library. Financial support was provided by the W.M. Kech Foundation. The project is under the editorial leadership of Roger C. Crampton, the Robert S. Stevens Professor of Law at Cornell.

² Narratives for the following states are included in the current edition: Arizona, Arkansas, California, Colorado, District of Columbia, Florida, Illinois, Louisiana, Maryland, New York, Pennsylvania and Texas.

³ The law firms and individuals who have contributed narratives include: Snell & Wilmer; Prof. Howard W. Brill; Brobeck, Phleger & Harrison; Holland & Hart; Covington & Burling; Holland & Knight; Mayer Brown & Platt; Wildman, Harrold, Allen & Dixon; Phelps Dunbar, LLP; Saul, Ewing, Weinberg & Green; Michels & Hockenjos; Skadden, Arps, Slate, Meagher & Flom; Drinker Biddle & Reath LLP; and Vinson & Elkins.

Ethics 2000 & the World Wide Web

As the reach of the Internet grows more pervasive, law firms and practitioners have started to incorporate aspects of the World Wide Web into the legal profession. Several rule changes recommended by the Ethics 2000 Commission are aimed at addressing some of the ethical issues raised by these treks into cyberspace.

The Commission recommends that Rule 7.2 (Advertising) be changed "to accommodate the new technology that is currently being used by law firms to market legal services, e.g. websites and e-mail." To avoid the issue of having to amend the text of the Rule to avoid not mentioning these new marketing devices or any others developed in the future, the proposed amendment would discontinue listing examples of public media, leaving the comment sections to make any direct references to what may be included in that phrase. The Rule would also be amended to allow lawyers to maintain electronic records of their advertisements.

The Commission proposes amending Rule 7.3 (Direct Contact with Prospective Clients) to prohibit solicitation of business by "real-time electronic communications," e.g. an Internet chat room. Additionally, a lawyer sending e-mail to a person known to need legal services in a matter will be required to identify the e-mail as an advertisement.

The final web-related amendment is a recommendation by the Committee to recognize that a law firm's website address is a professional designation governed by Rule 7.5 (Firm Names and Letterheads). Attorneys would be prohibited from using a website address that violates Rule 7.1. However, law firms with offices in more than one jurisdiction would be permitted to use a common website address as long as the website indicates the jurisdictional limitations of a lawyer identified as associated with an office of the firm that is located in a jurisdiction in which the lawyer is not licensed.

--Rodney B. Hastings, Editor

Learn the Facts

The Louisiana Attorney Disciplinary Board has speakers available to inform your civic or professional group about the role that the Board plays in the state's attorney disciplinary system.

To schedule a speaker call Jennifer Stewart at (504) 834-1488 or 1-800-489-8411

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The stakes are high, the odds can be deadly

Gambling: The hidden illness of the 1990s

by William Leary, Esq., Director of Lawyers Assistance Program, Inc.

Let me tell you about three phone calls that recently came in on the toll-free line of the Louisiana State Bar Association's Lawyers Assistance Program.

The daughter of a lawyer called to ask for help for her father who had recently written a check on his trust account to pay off his weekend gambling losses. He was now being investigated by the Internal Revenue Service. After questioning the daughter, we learned that the father also had a cocaine problem.

Another caller wanted to help a lawyer who had received treatment for alcohol addiction two years ago. The lawyer was not drinking now, but leaves the office around noon every day to eat lunch and gamble at the riverboat casino in his city.

The third call came from a lawyer who asked for help for his legal secretary. She was deeply in debt and had started to steal from the office's petty cash to pay off her losses on the video poker machines. She also suffered from depression.

These calls are just three examples of people suffering from the effects of the disorder called "compulsive gambling." Compulsive gambling is a progressive illness that is diagnosable and treatable. It not only affects the gambler, but the family, the employer, and the public. Compulsive gambling is a malady whose characteristics mirror physical addictions such as alcoholism and drug dependence. Yet it is called the "hidden illness" since there is no smell on the breath, or stumbling of steps or slurring speech generally associated with alcohol or drug addiction. Nonetheless, gambling is just as debilitating.

Like Louisiana's program, a handful of LAPs have started to receive an increasing number of calls about compulsive gambling. The burgeoning number of riverboat and land-based casinos has caused this trend.

What is a compulsive gambler? One of the best definitions comes from Gamblers Anonymous:

A compulsive gambler is a person (male or female) whose gambling causes a continuing and growing problem in any department of his life. He becomes dominated by an irresistible urge to gamble. Often, he appears bent upon his own destruction.

As he continues to gamble, he loses three basic things: time, money and a sense of values. The time and money are lost forever, but he can regain his sense of values. He can regain an evaluation of what is really necessary to bring about a good and useful life.

Since 1980, gambling has been recognized by the American Psychiatric Association as a psychological disorder. When the standards for diagnosing compulsive gambling were updated in 1984, an interesting pattern emerged. Being addicted to gambling is a lot like being addicted to cocaine, but with no substance involved.

The American Psychiatric Association has accepted com-

pulsive gambling as a "disorder of impulse control." A compulsive gambler is a person who has persistent and recurrent maladaptive gambling behavior that disrupts personal, family or vocational pursuits. (*Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, American Psychiatric Association, 1994, D.S.M. IV.*)

Psychologists have identified some personality traits common among compulsive gamblers – achievement, exhibitionism, dominance, heterosexuality, deference and endurance. Depression is also quite common.

Compulsive gamblers often have two of the most common characteristics of physical addiction: tolerance and withdrawal. Tolerance means that an addict needs to have more and more of the addictive substance to achieve the same "high." Compulsive gamblers tend to increase the amount of their bets over time as they "chase," or try to win back all the money they have lost. Withdrawal occurs when the addict is denied the "fix." When compulsive gamblers cannot bet, they commonly become restless, anxious and irritable.

Compulsive gambling is no respecter of sex, age, race, or economic status. In this sense, there is no typical compulsive gambler. The need for action or excitement and a craving for a quick and instant wealth seem to characterize most problem gamblers. Also, there is a need to achieve and dominate.

Most people who gamble will lose money; the odds are always against winning. People gamble because they like the excitement of taking a chance, the action, the thrill of winning, and the fun of being with friends. Rarely is there any financial gain.

There are three phases in the progression of compulsive gambling: the adventurous or winning phase, the losing phase and the desperation phase.

The adventurous or winning phase is characterized as a happy period. The excitement is high; it seems to be the key emotion. During this phase, gambling is seen as rewarding and fun. There is a sense of power and ego enhancement. While there are losses, the wins seem to be remembered with fondness and the losses viewed as an expense of the fun. As the losses grow larger, they are rationalized as a normal, but temporary, run of bad luck.

During this phase, the gambler is usually able to make up his losses through a few wins or from borrowing. The early stages of gambling appear very much like the early stages of alcoholism. Denial is a part of the ego defense system, and the good times still outweigh the pain. During this phase, many gamblers experience a big win, which is much like the first experience of cocaine for the cocaine addict.

The "chase," or losing phase, leaves the gambler depressed, with a feeling of betrayal and loss. To catch up, he has to get extra money because surplus funds have been exhausted. He

starts to conceal his losses, and borrows more and more. As he tries to get even, the losses become more painful. He is chasing another big win that will restore his security or put him ahead. To do this, the bets continually get larger, and, consequently, so do the losses. During this period, the losses start to wear away at self-esteem, and the gambler starts to lie to cover up. He makes loans which he may not repay. He is depressed and frustrated. Quarrels and family disputes occur more frequently, sometimes with violence.

The desperation phase is the period where the gambler becomes obsessed with getting even. He suffers long periods of depression, which might be accompanied by heavy alcohol or drug consumption to relieve this pain. He is now severely threatening the family's financial security. He makes secret loans, and may resort to theft or embezzlement, usually thinking that he will repay the debt as soon as he gets back in the money. Bailouts by family or friends become the major source of income allowing him to continue the action. During this phase, the gambler will sometimes liquidate life insurance policies and sell long-held stock. He panics at the thought that if money is unobtainable and credit dries up, he may be forced to stop gambling. At this point, the gambler experiences greater anxiety and depression.

Suicide is a very serious threat during this final phase of compulsive gambling. Feelings of hopelessness and helplessness are key conditions of suicide, and these feelings are the constant companions of the gambler. At the end of the desperation phase, the gambler has to get help or he might die. The suicide rate among compulsive gamblers is believed to be the highest of an addicted group.

While compulsive gambling is a progressive, destructive disorder that has no cure, help is available. If you know a lawyer who you think has a compulsive gambling problem, and you do not feel free to discuss the behavior, then you should get professional help for that person. Most bar associations have Lawyers Assistance Programs that can help individuals confront and deal with compulsive gambling. Lawyers Assistance Programs offer a wide range of services to members of the bar, directing individuals toward assessment, treatment, consultations and interventions. LAPs also make referrals to professionals and self-help organizations.

For compulsive gamblers, Gamblers Anonymous offers a proven, time-tested program to help a person return to a normal life. While the illness will be with the individual forever, remember, compulsive gambling is a treatable disease. As it is for alcohol and substance dependence, abstinence is essential for the patient to be successful. For many, Gamblers Anonymous will be sufficient. For others, it is necessary for them to understand why they gamble. Unless they do, and deal with the intolerable feelings – the helplessness, depression or guilt – then abstinence results in a sense of futility and the person eventually returns to gambling.

Compulsive gambling has been underdiagnosed by professionals who don't think to ask about it. But that is changing. Help is available.

(This article first appeared in the March-April 1998 issue

of the Bar Leader and is reprinted by permission of the author.)

William R. Leary is the Executive Director of the Louisiana Lawyers Assistance Program, Inc. of the Louisiana State Bar Association. A lawyer, Leary is a Board Certified Substance Abuse Counselor and a Certified Compulsive Gambling Counselor. He has written and lectured extensively on substance abuse and other addictions.

Symptoms of the compulsive gambler

These are 20 questions from Gamblers Anonymous. Compulsive gamblers will answer "yes" to at least seven of these questions.

1. Did you ever lose time from work due to gambling?
2. Has gambling ever made your home life unhappy?
3. Did gambling ever affect your reputation?
4. Have you ever felt remorse after gambling?
5. Did you ever gamble to get money with which to pay debts or otherwise solve financial difficulties?
6. Did gambling cause a decrease in your ambition or efficiency?
7. After losing, did you feel you must return as soon as possible and win back your losses?
8. After a win, did you have a strong urge to return and win more?
9. Did you often gamble until your last dollar was gone?
10. Did you ever borrow to finance your gambling?
11. Have you ever sold anything to finance gambling?
12. Were you reluctant to use "gambling money" for normal expenditures?
13. Did gambling make you careless of the welfare of yourself and your family?
14. Did you ever gamble longer than you had planned?
15. Have you ever gambled to escape worry or trouble?
16. Have you ever committed, or considered committing, an illegal act to finance gambling?
17. Did gambling cause you to have difficulty sleeping?
18. Do arguments, disappointments or frustrations give you an urge to gamble?
19. Did you ever have an urge to celebrate any good fortune by gambling?
20. Have you every considered self-destruction as a result of gambling?

— William Leary

Recent Supreme Court Decisions

In Re: Eric R. Bissel, 99-3042 (La. 1/28/00);
_____ So.2d _____, 2000 WL 101029

Bissel was retained by heirs to handle an estate matter. In the course of the representation, Bissel was made an authorized signatory on a checking account maintained by the estate. Over a two-year period, Bissel, without the knowledge of his clients, wrote numerous checks on this account for his own use. Bissel acknowledged his misconduct and reimbursed a majority of the funds prior to the clients' filing a complaint with the ODC.

After acknowledging that in cases where an attorney has intentionally commingled and converted client funds, the Court has generally ordered disbarment, the Court found that because of the presence of "significant mitigating factors" a lesser sanction was appropriate.

TWO-YEAR SUSPENSION, WITH 16 MONTHS DEFERRED, SUBJECT TO CONDITIONS

In Re: Van H. Brass, 00-0180 (La. 2/18/00); _____ So.
2d _____, 2000 WL 194826

In November 1996, the ODC filed formal charges consisting of two counts of unethical conduct. The first count alleged that Brass failed to take any action after being retained to handle a criminal matter. The second count alleged that Brass represented to a client that, for the payment of \$15,000, Brass could have criminal charges dismissed. Brass initially filed a response denying the misconduct, but later filed a consent discipline petition admitting the misconduct. The consent discipline proposed that Brass be suspended from the practice of law for a period of one year. Ultimately, the Court rejected this petition.

After dismissal of the consent discipline petition, the ODC filed a second set of formal charges alleging that on three occasions Brass failed to pursue a legal matter and then misrepresented to the clients the actual disposition of the matter. Brass also failed to refund any unearned fees in these matters. Brass filed a second consent discipline petition admitting the misconduct in both sets of formal charges and proposing that he be disbarred from the practice of law.

DISBARMENT

In Re: Dale C.P. Cannizzaro, 00-0413 (La. 3/17/00);
_____ So. 2d _____, 2000 WL 286245

A client retained Cannizzaro to represent him in a personal injury matter. The case ultimately settled, and when Cannizzaro disbursed the settlement proceeds he retained \$660 to pay a third-party medical provider. However, Cannizzaro failed to pay the medical provider promptly and failed to properly safeguard the funds he retained for that purpose.

In an unrelated case, a client retained Cannizzaro to handle

a child custody and criminal matter. Cannizzaro failed to adequately communicate with the client and eventually was dismissed by the client.

Prior to the filing of formal charges, Cannizzaro filed a Petition for Consent Discipline, in which he admitted the misconduct and recommended a 10-month suspension. In mitigation, Cannizzaro submitted a supporting memorandum stating that the misconduct occurred during a period of time when he faced personal and medical hardships.

10-MONTH SUSPENSION

In Re: Leonard J. Cline, 99-2779 (La. 2/29/00); _____ So.
2d _____, 2000 WL 225871

After dismissing the law firm initially hired to handle a personal injury matter on her behalf, a client retained Cline to represent her in the matter. Cline paid the law firm's outstanding costs and sent a form letter agreeing to "protect whatever interest in the attorney's fees herein to which [the firm] may be entitled." Without notice to Cline or the client, the law firm subsequently recorded its employment contract and notified the insurance company of the firm's interest in the client's claim.

After Cline negotiated a settlement in the matter, the insurance company issued two settlement drafts made payable to the client, Cline and the first law firm. Without the knowledge of the firm, an endorsement purporting to be that of the firm's was placed on the back of both drafts.

During the investigation of the matter, Cline denied forging the law firm's endorsement and indicated that he had given both drafts to the client in order to obtain proper endorsements on them.

While the matter was being considered by a hearing committee, Cline submitted a Petition for Consent Discipline. In the petition, Cline acknowledged "the truth of the assertions set forth in the" formal charges; however, he claimed "that at no time did he ever personally endorse the name of [the law firm] to a check, commit a criminal act or misappropriate the funds of [the law firm]." Cline proposed a completely deferred one-year-and-one-day suspension, subject to two years of supervised probation with conditions. The Court ultimately rejected this petition.

Following remand, the matter was presented for formal hearing before a hearing committee. The committee concluded that Cline violated either Rule 1.15(b) (by failing to notify the first law firm that Cline had received property in which the firm had an interest) or Rule 5.3 (by failing to adequately supervise the client insofar as she was being used as a courier by Cline). Based in part on Cline's prior discipline, the committee recommended Cline be suspended from the practice of law for a period of six months, fully deferred, subject to one year period of probation with conditions.

The Board found that Cline violated Rule 1.15(b) and that

the remaining formal charges were not proven by clear and convincing evidence. The Board recommended that Cline receive a six-month suspension, with three months deferred, followed by two years of supervised probation with conditions.

After observing that there was no evidence in the record indicating that Cline had personally forged the endorsements on the two settlement checks, the Court stated that the “sole issue presented is whether [Cline’s] actions in supervising the transmission of the checks . . . and his handling of [the law firm’s] purported fee interest in the settlement complied with the Rules of Professional Conduct.”

Citing several factors, the Court found that the ODC failed to prove that Cline violated Rule 1.15(b), but did prove that Cline failed to properly supervise a non-lawyer in violation of Rule 5.3(b).

SIX-MONTH SUSPENSION, WITH THREE MONTHS DEFERRED, FOLLOWED BY TWO YEARS OF SUPERVISED PROBATION WITH CONDITIONS

In Re: David L. Levingston, 00-0161 (La. 2/25/00);
_____ So. 2d _____, 2000 WL 223721

A client retained Levingston to handle a succession matter. The succession was neither complicated nor unusual; however, Levingston charged a legal fee in excess of \$47,000. The ODC alleged that the fee charged was grossly excessive and that Levingston had refused to return the excessive portion, despite being called upon to do so.

Levingston initially filed an answer admitting he handled the succession at issue, but denying the remainder of the allegations of the formal charges. Later, Levingston filed a consent discipline petition admitting the factual allegations and recommending a three-year suspension.

THREE-YEAR SUSPENSION

In Re: H. Gayle Marshall, 99-3104 (La. 1/7/00);
_____ So.2d _____, 2000 WL 19524

For a substantial fee Marshall agreed to prepare fictitious documents for two clients who had misappropriated federal funds. Subsequently, Marshall and the two clients were indicted by a federal grand jury. Marshall pleaded guilty to charges of obstruction of justice and making false declarations before a grand jury.

DISBARMENT

In Re: James A. McCann, 99-2862 (La. 2/11/00);
_____ So. 2d _____, 2000 WL 166189

A client retained McCann to handle a personal injury matter. When the matter was settled, McCann retained \$5,000 to pay medical expenses. McCann placed these funds in his client trust account, but before he could disburse the funds, the Internal Revenue Service seized his client trust account, along with all of his other accounts. As a result, McCann failed to pay the third-party medical providers. Additionally, he failed to respond to the client’s request to return the funds so that the client could pay the medical providers.

The client subsequently obtained a default judgment against McCann, which McCann failed to pay. McCann also failed to make any effort to reimburse or repay the amount his client had lost.

After the filing of formal charges, McCann submitted an answer generally admitting the factual allegations, but denying any attempt to “abscond with settlement funds.” However, after a formal hearing, the committee found that McCann “knew that any money deposited into any of his bank accounts . . . would be subject to seizure by the IRS.” Therefore, the committee concluded that McCann’s actions were intentional.

Recognizing that “this case differs somewhat from the ordinary conversion case, in that [McCann] did not directly convert third-party funds to his own use,” but noting that “it is significant that once the funds were seized, McCann made no efforts to have the funds released from the seizure” and “made no effort at restitution for over nine years after the funds were seized,” the Court found McCann’s conduct caused actual harm to his client and disbarment was appropriate.

DISBARMENT

In Re: Edward M. Nichols Jr., 00-0102 (La. 2/11/00);
_____ So. 2d _____, 2000 WL 166056

A client retained Nichols to represent her in a contractual dispute. Nichols failed to make a request for arbitration, which was apparently required under the contract. When the claim was subsequently dismissed, Nichols failed to pursue a related claim on his client’s behalf. Nichols also failed to keep the client reasonably informed about the status of the legal matter.

Following the institution of formal charges, Nichols and the ODC filed a joint Petition for Consent Discipline. In the petition, Nichols admitted he failed to competently represent the client, neglected the client’s legal matter and failed to communicate with the client.

The Court recognized that Nichols’ failure to request arbitration “may constitute legal malpractice, but does not necessarily involve ethical misconduct.” However, noting that Nichols’ failure to pursue the related claim and failure to communicate with his client caused actual harm, the Court found Nichols had violated the professional rules.

SIX-MONTH SUSPENSION, DEFERRED, SUBJECT TO ONE YEAR OF PROBATION

In re: Letita Jachintha Parker-Davis, 99-2953 (La. 1/7/00),
_____ So.2d _____, 2000 WL 19466

Formal charges were filed against Parker-Davis alleging she allowed a claim to prescribe and failed to advise a client of her rights or to advise her to seek independent counsel regarding the prescribed claim.

A relative of Parker-Davis’ allegedly sustained injuries when a display fell in a supermarket. Later, the relative discussed the case with Parker-Davis. Although no retainer agreement was signed, one month prior to the prescriptive date, Parker-Davis had the relative sign a medical authorization. The authorization stated in pertinent part: “[y]ou are hereby authorized to give to my attorney, Letita Parker-Davis, all information, facts and par-

ticulars, including reports, records, . . .” Parker-Davis obtained these medical records but did not attempt to settle the personal injury claim or file a lawsuit prior to the prescription date.

After the prescription date, Parker-Davis contacted the relative and informed her that the case had prescribed. Parker-Davis gave the relative a check in the amount of \$300, explaining that “when a case expires, this is what lawyers do.”

At the formal hearing, Parker-Davis stated she believed the client was representing herself in connection with the personal injury claim. Parker-Davis testified she agreed to obtain the client’s medical records and to show her how to do a quantum study to determine the value of her claim. However, the committee concluded that an attorney-client relationship existed.

The committee further found that Parker-Davis had failed to act with diligence in representing a client and had failed to communicate with a client. However, the committee found that the \$300 payment was not an attempt to settle any potential malpractice claim, and, therefore, Parker-Davis had not violated Rule 1.8(h), which prohibits an attorney from settling a claim for malpractice without advising the client to seek independent representation.

THREE-MONTH SUSPENSION, DEFERRED, WITH CONDITIONS

In Re: Dwight D. Reed, 99-3435 (La. 1/19/00); So.2d _____, 2000 WL 39125

After receiving information suggesting that Reed was improperly handling funds in his client trust account, the Office of Disciplinary Counsel obtained copies of Reed’s bank records. The investigation determined that Reed had commingled and converted \$2,000 belonging to a client. Reed subsequently repaid these funds.

A joint petition seeking consent discipline was filed prior to the filing of formal charges. Reed admitted that he failed to safeguard the property of his client.

ONE-YEAR SUSPENSION, DEFERRED, WITH PROBATION

In Re: Clifton J. Spears Jr., 00-0028 (La. 2/4/00); So.2d _____, 2000 WL 141198

The complainant contacted Spears to discuss a personal injury matter; however, the issue of fees was not discussed nor was a written contract entered into. Thereafter, Spears failed to file the suit on behalf of the complainant before the running of prescription. Nevertheless, Spears led the complainant to believe that her claim was still viable. He then paid her \$5,000 from his personal funds and led her to believe that these funds were from a settlement of the case.

Prior to the filing of formal charges, Spears filed a petition for consent discipline.

SUSPENSION FOR ONE YEAR AND 31 DAYS, ALL BUT 30 DAYS DEFERRED, SUBJECT TO A TWO-YEAR PERIOD OF PROBATION WITH SPECIAL CONDITIONS

In Re: Ronald A. Welcker, 99-3239 (La. 1/14/00); So.2d _____, 2000 WL 39153

Two sets of formal charges were filed against Welcker alleging a total of 18 counts of misconduct, including lack of diligence, failure to communicate with a client, failure to protect the property of a client or third person, failure to supervise the conduct of a non-lawyer, commission of a criminal act, engaging in conduct prejudicial to the administration of justice, engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, making false statements of material fact to a third person, failure to cooperate in a disciplinary investigation, and engaging in the unauthorized practice of law.

After the formal charges were filed, Welcker filed a petition for consent discipline, admitting the misconduct except for the unauthorized practice of law.

The Court, after noting that Welcker has twice been disbarred for conversion and commingling of funds, extended the minimum period for readmission for an additional five years from the date of finality of this judgment.

DISBARMENT

In Re: Aylmer M. Wyche III, 00-0209 (La. 3/31/00); So. 2d _____, 2000 WL 353491

The ODC filed three counts of formal charges against Wyche. The first count alleged that, after being suspended, Wyche appeared in open court on behalf of a plaintiff in a civil matter. The second count alleged that, after being retained in a redhibition case, Wyche failed to keep the client informed of the status of the case. The third count alleged that Wyche failed to cooperate in the ODC’s investigation of the two complaints filed against him. Wyche failed to answer or otherwise respond to the formal charges.

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Attorney misconduct in depositions

by Juliet Puissegur Bland, Esq.

Ordinarily, we, as attorneys, become aware of attorney misconduct only when the most egregious cases come to light. This is particularly true in the area of depositions.

For instance, *In re: Estiverne*, 99-0949 (La. 9/24/99), 741 So. 2d 649, resulted from charges being filed by the Office of Disciplinary Counsel against attorney Nicolas Estiverne for his behavior immediately following a deposition at his office.

During the deposition, a heated oral exchange occurred between Estiverne and opposing counsel, which resulted in the cancellation of a second deposition for the same day. After each attorney conducted a *proces verbal* for the cancelled deposition, Estiverne left the room and opposing counsel and the court reporter prepared to leave. Several minutes later, Estiverne returned to the room with a handgun. *Id.* at 650. The hearing committee found that Estiverne intended to threaten and intimidate opposing counsel and that he, in fact, did threaten and intimidate his opponent. *Id.* at 651. On appeal, the Louisiana Supreme Court accepted these findings of fact. *Id.* at 653.

Estiverne was found to have violated Rule 4.4 and Rule 8.4 of the Rules of Professional Conduct. *Id.* Rule 4.4 prohibits a lawyer from using "means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person." Rule 8.4 states in pertinent part:

"It is professional misconduct for a lawyer to:

(a) Violate or attempt to violate the Rules of Profession 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; . . .

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

Rule 8.4(a), (b) and (d) of the Rules of Professional Conduct.

The Louisiana Supreme Court suspended Estiverne from practicing law for one year and one day for his violation of Rule 4.4 and Rule 8.4. *Estiverne*, 741 So. 2d at 653.

Very few cases of attorney misconduct in depositions occur in this manner. However, the more common and fertile area for violation of the Rules of Professional Conduct lies in an attorney's preparation of a witness for a deposition. Often, an attorney in his zeal to represent his client and, of course, to win, opens the gate to the slippery slope of coaching a witness to the point of telling the witness what to say. While helping a

witness organize and articulate their thoughts is acceptable, telling the witness precisely what and how to say his testimony goes to far. An attorney who gives a witness the exact words to use may lead the witness to falsify or misrepresent material facts in order to reiterate what they believe their attorney wants them to say. Joseph D. Piorkowski, Jr., *Professional Conduct and the Preparation of Witnesses for Trial: Defining the acceptable limitations of "Coaching"*, 1 Geo. J. Legal Ethics 389, 390-391, Fall 1987.

Every attorney knows that preparation is critical to success and this includes preparing a witness for a deposition or trial. Failure to prepare your witness may lead to at best, an angry client; and, at the worst, a malpractice claim. Here is a short list of objectives that may help to keep you, a hard-working attorney who wants to win, from crossing that invisible line of preparing a witness to putting words in his mouth:

- Help the witness tell the truth;
- Make sure the witness includes all the relevant facts;
- Eliminate the irrelevant facts;
- Organize the facts in a credible and understandable sequence;
- Permit the attorney to compare the witness' story with the client's story;
- Introduce the witness to the legal process;
- Instill the witness with self-confidence;
- Establish a good working relationship with the witness;
- Refresh, but do not direct, the witness' memory;
- Eliminate opinion and conjecture from the testimony;
- Focus the witness' attention on the important areas of testimony;
- Make the witness understand the importance of his or her testimony; and
- Teach the witness to fight anxiety, and particularly to defend him or herself during cross-examination.

Id. at 390-391 (citing, *R. Aron & J. Rosner, How to Prepare Witnesses for Trial*, 4, pgs. 82-83 (1985)).

Preparing and familiarizing the witness for what lies ahead in the deposition and keeping the witness focused on telling the truth can best sum up these objectives. By achieving these objectives at the deposition stage, you have completed an important step in your trial preparation and you avoid infringing on the Rules of Professional Conduct. Remember, winning is important but not at the cost of your reputation and, perhaps, your license to practice law.



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In the Public Spotlight: Constance C. Dolese, Ph.D.

Dr. Constance Dolese's involvement with the attorney disciplinary system began after she was approached by a friend who knew of her retirement and of her involvement as a volunteer in the community. This year Dr. Dolese entered her second three-year term as a public member of Hearing Committee #11.

Why did you become a public member on a hearing committee of the Louisiana Attorney Disciplinary Board?

When I retired, I continued to use my skills and experience in the role of a volunteer in community endeavors. A friend who is in the legal profession suggested that I consider making application to be a public member on a hearing committee in the Louisiana Attorney Disciplinary Board model program. I was pleased to offer my services. While employed, I had had broad administrative experience, and I had chaired disciplinary hearings of professional personnel. I had also chaired a committee to develop a disciplinary code for students, which was implemented by construction of disciplinary procedures, including a hearing officer. I was responsible for in-service training of administrators about the entire process.

What do you think of the inclusion of a public member on the hearing committee? It is an excellent idea to include members of the public in the Louisiana Attorney Disciplinary Board system because this lends a high level of credibility to the process.

Over the past several decades, the legal profession and other professions, in the eyes of many, rightly or wrongly, have suffered a decrease in prestige. Lawyers and the legal profession, as well as the public, are anxious to reclaim their justifiable stature.

When a public member serves on a hearing committee along with two lawyers, this is a way of bringing the public into the tent, so to speak. This touches the heart of credibility.

I am reminded of this every time I sit at a hearing on a committee. My peers and I take this responsibility very seriously. We are keenly aware that we must do our part to help the legal profession maintain the full confidence of the public.

What factors do you rely on in making your determination of a lawyer's innocence or guilt relative to the allegations contained in the formal charges? I simply follow the procedures. Before each hearing, the hearing committee members are send information. I study those materials, listen carefully at the hearing, and ask questions when appropriate.

There is also a dimension of intuition and common sense -- that's on the part of the lawyers, too, but especially on the part of the public members.

A retired educational administrator with the New Orleans Public School system, Dr. Dolese has extensive experience in the field of education, including stints as adjunct professor, assistant superintendent, teacher and principal. She has also authored several articles and publications.

Dr. Dolese and her husband, Roderick, have one child, Dolores Dolese Nolan. Her hobbies include reading, travelling, gardening, sewing and photography.



Volunteer nonlawyer public members like Dr. Dolese comprise one-third of all hearing committees and the Disciplinary Board. We welcome the opportunity to recognize one of these vital members of the state's attorney disciplinary system.

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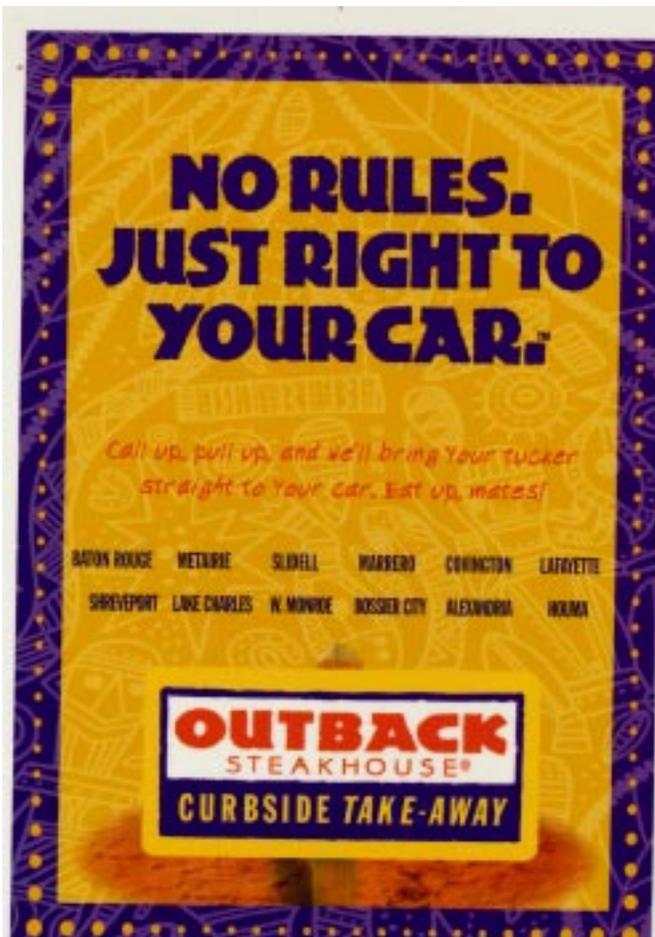
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