ERIC M. FINK

PROFESSIONAL RESPONSIBILITY

FALL TERM 2022

Eric M. Fink
Associate Professor of Law
Elon University School of Law
Greensboro, North Carolina 27408
https://www.emfink.net/ElonLaw/

Source code
https://github.com/EricMFink/

Contents

Chapter 1

Forming and Ending a Lawyer-Client Relationship

1. Prospective Clients

Model Rules of Professional Conduct

Rule 1.18: Duties to Prospective Client

(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

Clark Capital Management Group, Inc. v. Annuity Investors Life Ins. Co.

149 F.Supp.2d 193 (E.D. Pa. 2001)

Anita Brody, District Judge

Defendant Annuity Investors Life Insurance Co. moves for the disqualification of Stephen L. Friedman and the firm Dilworth Paxson LLP as co-counsel for plaintiff Clark Capital Management Group. Friedman has submitted an opposition to this motion. I will deny the motion for disqualification.

I. Factual Background

On April 14, 2000, Clark Capital filed a complaint against Annuity alleging trademark infringement. Attorneys with the firm of Woodcock Washburn Kurtz Mackiewicz & Norris LLP have represented Clark Capital from day one of this case. In the fall of 2000, Annuity retained Donald E. Frechette with the firm of Edwards & Angell LLP.

Acting on Annuity's behalf, in the Fall of 2000, Frechette contacted by telephone Thomas S. Biemer, a partner at Dilworth, to inquire into Biemer's interest and availability to be retained as co-counsel for Annuity in the present action. Frechette submitted two sworn affidavits describing this communication. Frechette asserts in his first sworn affidavit that he spoke with Biemer by telephone on three occasions. He states that they first spoke on October 26, 2000 for approximately ten minutes. Frechette asserts that, during this conversation, he discussed with Biemer "the background facts of this case, the capabilities of opposing counsel, Mr. Biemer's firm's experience and familiarity with opposing counsel and the trial judge, the nature of Annuity's defenses, the relative merits of each party's case, and potential weaknesses in plaintiff's case." Frechette further states that he described how the case had been handled to date.

According to Frechette, he again spoke with Biemer by telephone on November 6, 2000, for approximately ten to fifteen minutes. He states that, in this conversation, Frechette provided Biemer with additional information relating to specific aspects of the case and Annuity's view of the strengths and weaknesses of these aspects. Frechette also recalls that they discussed one legal theory that might be employed in Annuity's defense. Frechette asserts that he spoke with Biemer for a third time on November 6, 2000, for three to four minutes about a matter of procedure and timing. Finally, Frechette asserts that he believed that any confidential information about the case, disclosed to Biemer during these several conversations, would be kept confidential.

Biemer submitted a sworn affidavit in response to Frechette's affidavit. Biemer states that he recalls the first two conversations described in Frechette's affidavit, but not the third conversation. Biemer agrees that the two attorneys discussed the nature of the case, plaintiff's counsel, and the court. He asserts, however, that he has no recollection that any confidential information was disclosed by Frechette. Biemer recalls only that Frechette informed him that Annuity was claiming the "usual affirmative defenses," which had already been pled and of public record. Biemer states in his affidavit that he has no recollection of any discussion of Annuity's perception of strengths and weaknesses in the case or of possible defense strategy.

On June 12, 2001, when contacted by the court during a conference in this case in which Annuity first raised an objection to Friedman's participation in the case, Biemer stated over the telephone:

> I don't recall, specifically, discussing the merits of the case, other than that it involved something that was named Navigator, it was a trademark case. I don't remember specifically discussing any affirmative defenses, but it's possible we did, I just don't recall, it was a while ago.

In addition, Biemer's affidavit states that he told Frechette during the first conversation that, before Dilworth could agree to represent Annuity, he would have to run a conflict check. Biemer avers that it was not until the second conversation that Frechette asked Biemer to run a conflict check, "if Dilworth was interested in serving as local counsel." Biemer also states that Frechette asked him to send Frechette any relevant information materials about Dilworth. Following the November 6, 2000 telephone conversation, Biemer had no further communications with Frechette about this case, and an offer of retention was never made.

Frechette's second affidavit was submitted in response to Biemer's affidavit. In this affidavit, Frechette asserts that the issue of a conflict search was not discussed during the telephone conversations. He states that Biemer mentioned a conflict check for the first time in a letter dated November 7, 2000. Frechette further states:

> I certainly assumed that Attorney Biemer would not undertake a matter without performing a conflict check and, accordingly, felt no need to specifically inquire as to the matter further.

Annuity never retained Dilworth. On June 11, 2001, Friedman, a Dilworth attorney, entered an appearance on behalf of Clark Capital.

II. Discussion

Annuity asserts that these several telephone conversations between Frechette and Biemer rose to the level of an attorney-client relationship between Annuity and Biemer, such that Friedman is in violation of the Rules of Professional Conduct. This District has adopted the Pennsylvania Rules of Professional Conduct. These Rules provide that:

> A lawyer who has formerly represented a client in a matter shall not thereafter: (a) Represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after a full disclosure of the circumstances and consultation.

Rule of Professional Conduct 1.9.

This prohibition disqualifies the lawyer's entire firm.

While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so. Annuity argues that, because Frechette's telephone conversations with Biemer rose to the level of an attorney-client relationship, Annuity is a "former client" of Dilworth and, therefore, Friedman may not now represent the opposing party in this same matter.

To determine whether Friedman is in violation of these ethical rules, I must decide whether Annuity is a "former client" of Dilworth. In other words, did there previously exist an attorney-client relationship between Annuity and Dilworth. "An attorney-client relationship is one of agency and arises only when the parties have given their consent, either express or implied, to its formation." Both parties agree that no formal attorney-client relationship existed between Annuity and Dilworth. "Where no express relationship exists, the intent to create an attorney-client relationship can be implied from the conduct of the parties." The issue is whether an implied attorney-client relationship arose during the course of the several telephone conversations between Frechette and Biemer. Annuity asserts that an implied attorney-client relationship between Annuity and Biemer arose because, acting on Annuity's behalf, Frechette: (1) disclosed confidential information to Biemer, (2) with a reasonable belief that Biemer was acting in the capacity of attorney for Annuity throughout the course of the communication.

Based on the facts presented, I find that the several brief telephone conversations between Frechette and Biemer did not give rise to an implied attorney-client relationship between Annuity and Dilworth. Frechette asserts in his first sworn affidavit that he disclosed to Biemer confidential information related to Annuity's defenses and legal theories of the case. Biemer admits that it is possible such disclosures were made. However, Biemer contends that he has no recollection of disclosure of any confidential information.

Setting aside for the moment the question of whether confidential information was in fact disclosed, it is clear from the facts presented that Frechette could not have held a reasonable belief that Biemer was acting as an attorney for Annuity during the course of the communication. Frechette initiated the communication with Biemer to inquire into Biemer's interest and availability to be retained as co-counsel for Annuity in the present action. At no time during the communication did Frechette offer to retain Biemer as co-counsel and at no time during the communication did Biemer consent to representation of Annuity. To the contrary, it was evident from Frechette's request that Biemer send informational materials about the firm, that Frechette had not yet decided whether to retain Biemer as co-counsel. Frechette was reserving the right to make a decision after learning more about the firm.

Furthermore, it is evident that Frechette never conceived that Biemer was acting as Annuity's attorney during the communication, because Biemer had not yet run a conflict check. Frechette contests Biemer's assertion that Biemer raised the need to run a conflict check before consenting to representation during the telephone conversations. However, even if Biemer did not raise the need to run a conflict check, Frechette, equally knowledgeable of the ethical rules, was well aware that Biemer would not consent to representation of Annuity before running a conflict check. Frechette explicitly stated in his second sworn affidavit:

> I certainly assumed that Attorney Biemer would not undertake a matter without performing a conflict check and, accordingly, felt no need to specifically inquire as to the matter further.

When Frechette first contacted Biemer on October 26, 2000, the telephone conversation during which Frechette asserts that he first disclosed confidential information to Biemer, Frechette could not have reasonably assumed that Biemer had already run a conflict check. By Frechette's own admission, therefore, it was unreasonable for Frechette to assume during that conversation that Biemer had consented to representation of Annuity. The duty to maintain confidences does not arise absent an attorney-client relationship. It follows that Frechette unreasonably assumed that Biemer would maintain the confidentiality of any information Frechette disclosed, despite Frechette's awareness that no attorney-client relationship had been established. Annuity is not a former client of Biemer and neither Friedman nor Dilworth are in violation of Pennsylvania Rule of Professional Conduct 1.9.

I must still address the concern that confidential information about the case may have been disclosed by Frechette, which potentially could be used to the detriment of Annuity if Friedman is permitted to serve as counsel to Clark Capital. "One of the inherent powers of the federal court is the admission and discipline of attorneys practicing before it." Therefore, when there is a risk that the underlying litigation may be tainted by participation of counsel, the court has the power to fashion an appropriate remedy.

In the event that confidential information was disclosed, I find that disqualification of Dilworth is an inappropriate remedy under the facts of this case, but rather that screening Biemer from the case will appropriately balance the interests of all parties. Biemer asserts that he has no recollection that any confidential information was disclosed to him about this case. Therefore, even if he did receive confidential information about the case, Biemer is not capable of relaying anything of substance to other Dilworth attorneys. Biemer also asserts in his affidavit that he has been screened from the matter from the moment Clark Capital contacted the firm. He states:

> On approximately June 7, 2001, I learned that Dilworth was contacted by Clark Capital and asked to enter its appearance as counsel for Clark Capital. When I learned this, I relayed to one of the heads of Dilworth's litigation department, James Rogers, Esquire, the substance of my conversations with Mr. Frechette as outlined in this Affidavit. While we agreed that there was no conflict given the limited nature of these conversations, in an abundance of caution, it was decided that I would not be involved in any respect with this case and would not have any contact regarding the substance of the case with anyone working on the case for Dilworth. With the exception of my participation in the Conference Call before the Court on June 11, 2001 and the preparation of this Affidavit, I have not had any involvement in this case. Friedman substantiated Biemer's assertion on the record at the June 12, 2001 conference in this matter, stating that Biemer will have nothing to do with this case and that Friedman has had no conversations with Biemer about the case other than to inform Friedman of the brief communication between Biemer and Frechette.

I am not persuaded by Annuity's argument that disqualification of Dilworth is necessary to protect against the "mere appearance of an impropriety" and to maintain the integrity of the legal profession. While the ethical rules are designed, in part, to encourage attorney-client candor, attorneys that have already been retained in a matter and who are well versed in the perimeters of the attorney-client relationship, should be encouraged to take care with their client's confidences in the course of preliminary inquiries with potential co-counsel in another firm. Such inquiries should not form the basis for disqualification of an entire firm in situations, such as this, where it was clear to both parties that an attorney-client relationship was never established. Allowing Friedman to be retained by Clark Capital in this matter requires effective screening of only a single attorney out of approximately 100 attorneys at Dilworth. In light of this, the fact that Annuity is not a former client of Dilworth, and the minimal likelihood that Dilworth's involvement in this case would taint the pending litigation, I will deny Annuity's motion to disqualify Friedman and Dilworth. I will require that Dilworth continue to screen Biemer from any involvement in this case.

2. Establishing Representation

Model Rules of Professional Conduct

Rule 6.2

Rest. (3d) of the Law Governing Lawyers

§ 14. Formation of a Client-Lawyer Relationship

A relationship of client and lawyer arises when:

(1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either

(a) the lawyer manifests to the person consent to do so; or

(b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or

(2) a tribunal with power to do so appoints the lawyer to provide the services.

Togstad v. Vesely, Otto, Miller & Keefe

291 N.W.2d 686 (Minn. 1980)

Per Curiam

This is an appeal by the defendants from a judgment of the Hennepin County District Court involving an action for legal malpractice. The jury found that the defendant attorney Jerre Miller was negligent and that, as a direct result of such

negligence, plaintiff John Togstad sustained damages in the amount of $610,500 and his wife, plaintiff Joan Togstad, in the amount of $39,000. Defendants (Miller and his law firm) appeal to this court from the denial of their motion for judgment notwithstanding the verdict or, alternatively, for a new trial. We affirm.

In August 1971, John Togstad began to experience severe headaches and on August 16, 1971, was admitted to Methodist Hospital where tests disclosed that the headaches were caused by a large aneurysm on the left internal carotid artery. The attending physician, Dr. Paul Blake, a neurological surgeon, treated the problem by applying a Selverstone clamp to the left common carotid artery. The clamp was surgically implanted on August 27, 1971, in Togstad's neck to allow the gradual closure of the artery over a period of days.

The treatment was designed to eventually cut off the blood supply through the artery and thus relieve the pressure on the aneurism, allowing the aneurism to heal. It was anticipated that other arteries, as well as the brain's collateral or cross-arterial system would supply the required blood to the portion of the brain which would ordinarily have been provided by the left carotid artery. The greatest risk associated with this procedure is that the patient may become paralyzed if the brain does not receive an adequate flow of blood. In the event the supply of blood becomes so low as to endanger the health of the patient, the adjustable clamp can be opened to establish the proper blood circulation.

In the early morning hours of August 29, 1971, a nurse observed that Togstad was unable to speak or move. At the time, the clamp was one-half (50%) closed. Upon discovering Togstad's condition, the nurse called a resident physician, who did not adjust the clamp. Dr. Blake was also immediately informed of Togstad's condition and arrived about an hour later, at which time he opened the clamp. Togstad is now severely paralyzed in his right arm and leg, and is unable to speak.

Plaintiffs' expert, Dr. Ward Woods, testified that Togstad's paralysis and loss of speech was due to a lack of blood supply to his brain. Dr. Woods stated that the inadequate blood flow resulted from the clamp being 50% closed and that the negligence of Dr. Blake and the hospital precluded the clamp's being opened in time to avoid permanent brain damage. Specifically, Dr. Woods claimed that Dr. Blake and the hospital were negligent for (1) failing to place the patient in the intensive care unit or to have a special nurse conduct certain neurological tests every half-hour; (2) failing to write adequate orders; (3) failing to open the clamp immediately upon discovering that the patient was unable to speak; and (4) the absence of personnel capable of opening the clamp.

Dr. Blake and defendants' expert witness, Dr. Shelly Chou, testified that Togstad's condition was caused by blood clots going up the carotid artery to the brain. They both alleged that the blood clots were not a result of the Selverstone clamp procedure. In addition, they stated that the clamp must be about 90% closed before

there will be a slowing of the blood supply through the carotid artery to the brain. Thus, according to Drs. Blake and Chou, when the clamp is 50% closed there is no effect on the blood flow to the brain.

About 14 months after her husband's hospitalization began, plaintiff Joan Togstad met with attorney Jerre Miller regarding her husband's condition. Neither she nor her husband was personally acquainted with Miller or his law firm prior to that time. John Togstad's former work supervisor, Ted Bucholz, made the appointment and accompanied Mrs. Togstad to Miller's office. Bucholz was present when Mrs. Togstad and Miller discussed the case.

Mrs. Togstad had become suspicious of the circumstances surrounding her husband's tragic condition due to the conduct and statements of the hospital nurses shortly after the paralysis occurred. One nurse told Mrs. Togstad that she had checked Mr. Togstad at 2 a. m. and he was fine; that when she returned at 3 a. m., by mistake, to give him someone else's medication, he was unable to move or speak; and that if she hadn't accidentally entered the room no one would have discovered his condition until morning. Mrs. Togstad also noticed that the other nurses were upset and crying, and that Mr. Togstad's condition was a topic of conversation.

Mrs. Togstad testified that she told Miller "everything that happened at the hospital," including the nurses' statements and conduct which had raised a question in her mind. She stated that she "believed" she had told Miller "about the procedure and what was undertaken, what was done, and what happened." She brought no records with her. Miller took notes and asked questions during the meeting, which lasted 45 minutes to an hour. At its conclusion, according to Mrs. Togstad, Miller said that "he did not think we had a legal case, however, he was going to discuss this with his partner." She understood that if Miller changed his mind after talking to his partner, he would call her. Mrs. Togstad "gave it" a few days and, since she did not hear from Miller, decided "that they had come to the conclusion that there wasn't a case." No fee arrangements were discussed, no medical authorizations were requested, nor was Mrs. Togstad billed for the interview.

Mrs. Togstad denied that Miller had told her his firm did not have expertise in the medical malpractice field, urged her to see another attorney, or related to her that the statute of limitations for medical malpractice actions was two years. She did not consult another attorney until one year after she talked to Miller. Mrs. Togstad indicated that she did not confer with another attorney earlier because of her reliance on Miller's "legal advice" that they "did not have a case."

On cross-examination, Mrs. Togstad was asked whether she went to Miller's office "to see if he would take the case of her husband." She replied, "Well, I guess it was to go for legal advice, what to do, where shall we go from here? That is what we went for." Again in response to defense counsel's questions, Mrs. Togstad testified as follows:

> Q And it was clear to you, was it not, that what was taking place was a preliminary discussion between a prospective client and lawyer as to whether or not they wanted to enter into an attorney-client relationship?
>
> A I am not sure how to answer that. It was for legal advice as to what to do.
>
> Q And Mr. Miller was discussing with you your problem and indicating whether he, as a lawyer, wished to take the case, isn't that true?
>
> A Yes.

On re-direct examination, Mrs. Togstad acknowledged that when she left Miller's office she understood that she had been given a "qualified, quality legal opinion that she and her husband did not have a malpractice case."

Miller's testimony was different in some respects from that of Mrs. Togstad. Like Mrs. Togstad, Miller testified that Mr. Bucholz arranged and was present at the meeting, which lasted about 45 minutes. According to Miller, Mrs. Togstad described the hospital incident, including the conduct of the nurses. He asked her questions, to which she responded. Miller testified that "the only thing I told her after we had pretty much finished the conversation was that there was nothing related in her factual circumstances that told me that she had a case that our firm would be interested in undertaking."

Miller also claimed he related to Mrs. Togstad "that because of the grievous nature of the injuries sustained by her husband, that this was only my opinion and she was encouraged to ask another attorney if she wished for another opinion" and "she ought to do so promptly." He testified that he informed Mrs. Togstad that his firm "was not engaged as experts" in the area of medical malpractice, and that they associated with the Charles Hvass firm in cases of that nature. Miller stated that at the end of the conference he told Mrs. Togstad that he would consult with Charles Hvass and if Hvass's opinion differed from his, Miller would so inform her. Miller recollected that he called Hvass a "couple days" later and discussed the case with him. It was Miller's impression that Hvass thought there was no liability for malpractice in the case. Consequently, Miller did not communicate with Mrs. Togstad further.

On cross-examination, Miller testified as follows:

> Q Now, so there is no misunderstanding, and I am reading from your deposition, you understood that she was consulting with you as a lawyer, isn't that correct?
>
> A That's correct.
>
> Q That she was seeking legal advice from a professional attorney licensed to practice in this state and in this community?
>
> A I think you and I did have another interpretation or use of the term "Advice." She was there to see whether or not she had a case and whether the firm would accept it.

> Q We have two aspects; number one, your legal opinion concerning liability of a case for malpractice; number two, whether there was or wasn't liability, whether you would accept it, your firm, two separate elements, right?
>
> A I would say so.
>
> Q Were you asked on page 6 in the deposition, folio 14, "And you understood that she was seeking legal advice at the time that she was in your office, that is correct also, isn't it?" And did you give this answer, "I don't want to engage in semantics with you, but my impression was that she and Mr. Bucholz were asking my opinion after having related the incident that I referred to." The next question, "Your legal opinion?" Your answer, "Yes." Were those questions asked and were they given?
>
> MR. COLLINS: Objection to this, Your Honor. It is not impeachment.
>
> THE COURT: Overruled.
>
> THE WITNESS: Yes, I gave those answers. Certainly, she was seeking my opinion as an attorney in the sense of whether or not there was a case that the firm would be interested in undertaking.

Kenneth Green, a Minneapolis attorney, was called as an expert by plaintiffs. He stated that in rendering legal advice regarding a claim of medical malpractice, the "minimum" an attorney should do would be to request medical authorizations from the client, review the hospital records, and consult with an expert in the field. John McNulty, a Minneapolis attorney, and Charles Hvass testified as experts on behalf of the defendants. McNulty stated that when an attorney is consulted as to whether he will take a case, the lawyer's only responsibility in refusing it is to so inform the party. He testified, however, that when a lawyer is asked his legal opinion on the merits of a medical malpractice claim, community standards require that the attorney check hospital records and consult with an expert before rendering his opinion.

Hvass stated that he had no recollection of Miller's calling him in October 1972 relative to the Togstad matter. He testified that:

> A When a person comes in to me about a medical malpractice action, based upon what the individual has told me, I have to make a decision as to whether or not there probably is or probably is not, based upon that information, medical malpractice. And if, in my judgment, based upon what the client has told me, there is not medical malpractice, I will so inform the client.

Hvass stated, however, that he would never render a "categorical" opinion. In addition, Hvass acknowledged that if he were consulted for a "legal opinion" regarding medical malpractice and 14 months had expired since the incident in question, "ordinary care and diligence" would require him to inform the party of the two-year statute of limitations applicable to that type of action.

This case was submitted to the jury by way of a special verdict form. The jury found that Dr. Blake and the hospital were negligent and that Dr. Blake's negligence (but not the hospital's) was a direct cause of the injuries sustained by John Togstad; that there was an attorney-client contractual relationship between

Mrs. Togstad and Miller; that Miller was negligent in rendering advice regarding the possible claims of Mr. and Mrs. Togstad; that, but for Miller's negligence, plaintiffs would have been successful in the prosecution of a legal action against Dr. Blake; and that neither Mr. nor Mrs. Togstad was negligent in pursuing their claims against Dr. Blake. The jury awarded damages to Mr. Togstad of $610,500 and to Mrs. Togstad of $39,000.

In a legal malpractice action of the type involved here, four elements must be shown: (1) that an attorney-client relationship existed; (2) that defendant acted negligently or in breach of contract; (3) that such acts were the proximate cause of the plaintiffs' damages; (4) that but for defendant's conduct the plaintiffs would have been successful in the prosecution of their medical malpractice claim.

We believe it is unnecessary to decide whether a tort or contract theory is preferable for resolving the attorney-client relationship question raised by this appeal. The tort and contract analyses are very similar in a case such as the instant one, and we conclude that under either theory the evidence shows that a lawyer-client relationship is present here. The thrust of Mrs. Togstad's testimony is that she went to Miller for legal advice, was told there wasn't a case, and relied upon this advice in failing to pursue the claim for medical malpractice. In addition, according to Mrs. Togstad, Miller did not qualify his legal opinion by urging her to seek advice from another attorney, nor did Miller inform her that he lacked expertise in the medical malpractice area. Assuming this testimony is true, we believe a jury could properly find that Mrs. Togstad sought and received legal advice from Miller under circumstances which made it reasonably foreseeable to Miller that Mrs. Togstad would be injured if the advice were negligently given. Thus, under either a tort or contract analysis, there is sufficient evidence in the record to support the existence of an attorney-client relationship.

Defendants argue that even if an attorney-client relationship was established the evidence fails to show that Miller acted negligently in assessing the merits of the Togstads' case. They appear to contend that, at most, Miller was guilty of an error in judgment which does not give rise to legal malpractice. However, this case does not involve a mere error of judgment. The gist of plaintiffs' claim is that Miller failed to perform the minimal research that an ordinarily prudent attorney would do before rendering legal advice in a case of this nature.

There is also sufficient evidence in the record establishing that, but for Miller's negligence, plaintiffs would have been successful in prosecuting their medical malpractice claim. Dr. Woods, in no uncertain terms, concluded that Mr. Togstad's injuries were caused by the medical malpractice of Dr. Blake. Defendants' expert testimony to the contrary was obviously not believed by the jury. Thus, the jury reasonably found that had plaintiff's medical malpractice action been properly brought, plaintiffs would have recovered.

Based on the foregoing, we hold that the jury's findings are adequately supported by the record. Accordingly we uphold the trial court's denial of defendants' motion for judgment notwithstanding the jury verdict.

Ferranti Intern. PLC v. Clark

767 F. Supp. 670 (E.D. Pa. 1991)

Ludwig, District Judge

MEMORANDUM

Plaintiff sues for breach of fiduciary duty and professional malpractice and to rescind a $2.75 million employee "settlement and release" agreement, which the complaint alleges was obtained by extortion. Defendant William A. Clark's motion to disqualify the firm of Hogan & Hartson from representing plaintiff Ferranti International plc in this action will be denied for the following reasons:

1. An attorney-client relationship, express or implied, did not exist between Hogan & Hartson and William A. Clark when he was Ferranti International, Inc.'s vice president and general counsel.

2. In July, 1986 defendant Clark, himself an attorney, retained Hogan & Hartson to represent plaintiff Ferranti International plc and its subsidiaries in regard to a government investigation of alleged wrongdoing on the part of their employees. He did so in his capacity as Ferranti International, Inc.'s vice president and general counsel. The need for representation was triggered by a federal grand jury subpoena served on plaintiff's subsidiary, the Marquardt Company. Thereafter, the investigation was widened with target letters and follow-up subpoenas to corporate employees of plaintiff and plaintiff's other subsidiaries.

3. Hogan & Hartson did not represent the corporations' employees. Hogan & Hartson attorneys repeatedly stated to the corporations' employees in defendant's presence that they should obtain separate counsel because of the potential conflict of interest between employer and employee. Defendant helped arrange for employees to be separately represented.

4. Any perception by defendant that he became a client or was a prospective client of Hogan & Hartson as to his personal legal matters was unreasonable and without foundation. Defendant's position as general counsel and corporate officer excluded this law firm from acting as his personal attorney because of the self-evident interest conflict. Given the circumstances, the personal matters discussed did not involve an attorney-client relationship.

5. The information given Hogan & Hartson by defendant regarding plaintiff, its subsidiaries and employees was communicated by him in his capacity as Ferranti International, Inc.'s vice president and general counsel. Proof of defendant's knowledge of such information does not appear to require that a Hogan & Hartson attorney testify as a witness.

6. Until shortly before the present disqualification motion was filed, February 28, 1991, defendant's sole objection to Hogan & Hartson's representation of plaintiff in this action involved the possible calling of Hogan & Hartson attorneys as plaintiff's witnesses. That was first noted by defendant's counsel as a potential problem in September, 1990. If either party intends to call a Hogan & Hartson attorney as a witness, the court should be notified at least 60 days in advance of trial, and any issue thereby raised can be considered at that time.

7. Defendant's status as an attorney has contradictory facets. He selected Hogan & Hartson to be plaintiff's counsel and subsequently worked with several of its attorneys in a confidential and apparently close relationship on behalf of plaintiff, the parent of his then employer. Having done so and formed such associations, he may understandably resent and find objectionable the turn of events in which he is now being sued not only by the same law firm but also on behalf of the client that he brought to that firm. However, these personal and business considerations do not necessitate disqualification on legal-ethical grounds.

This is not a case in which a layperson might have perceived or reasonably misperceived that his corporate employer's attorney was also representing him. As a general counsel, defendant must have keenly appreciated the distinction between the corporation and its employees as well as the employees' need for separate counsel. Defendant's assertion that the personal comments and observations exchanged between him and Hogan & Hartson attorneys were in contemplation of, or resulted in, a personal attorney-client relationship is factitious and unconvincing.

8. Although it became a Hogan & Hartson client through defendant, plaintiff has a cognizable interest in being permitted to continue to be represented by this firm. Moreover, disqualification—which is an increasingly frequent issue in the courts— may be the subject of tactical abuse. A party's choice of counsel should be set aside only where the circumstances legally require doing so.

Under the Rules of Professional Conduct and the cases, there is no legal basis on which to disqualify Hogan & Hartson. An evidentiary hearing is unnecessary.

3. Declining and Terminating Representation

Model Rules of Professional Conduct

Rule 1.16: Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;
(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;
(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
(3) the client has used the lawyer's services to perpetrate a crime or fraud;
(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Rest. (3d) of the Law Governing Lawyers

§ 31. Termination of a Lawyer's Authority

(1) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation and with an order of a tribunal requiring the representation to continue.

(2) Subject to Subsection (1) and § 33, a lawyer's actual authority to represent a client ends when:

(a) the client discharges the lawyer;

(b) the client dies or, in the case of a corporation or similar organization, loses its capacity to function as such;

(c) the lawyer withdraws;

(d) the lawyer dies or becomes physically or mentally incapable of providing representation, is disbarred or suspended from practicing law, or is ordered by a tribunal to cease representing a client; or

(e) the representation ends as provided by contract or because the lawyer has completed the contemplated services.

(3) A lawyer's apparent authority to act for a client with respect to another person ends when the other person knows or should know of facts from which it can be reasonably inferred that the lawyer lacks actual authority, including knowledge of any event described in Subsection (2).

§ 32. Discharge by a Client and Withdrawal by a Lawyer

(1) Subject to Subsection (5), a client may discharge a lawyer at any time.

(2) Subject to Subsection (5), a lawyer may not represent a client or, where representation has commenced, must withdraw from the representation of a client if:

(a) the representation will result in the lawyer's violating rules of professional conduct or other law;

(b) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(c) the client discharges the lawyer.

(3) Subject to Subsections (4) and (5), a lawyer may withdraw from representing a client if:

(a) withdrawal can be accomplished without material adverse effect on the interests of the client;

(b) the lawyer reasonably believes withdrawal is required in circumstances stated in Subsection (2);

(c) the client gives informed consent;

(d) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal, fraudulent, or in breach of the client's fiduciary duty;

(e) the lawyer reasonably believes the client has used or threatens to use the lawyer's services to perpetrate a crime or fraud;

(f) the client insists on taking action that the lawyer considers repugnant or imprudent;

(g) the client fails to fulfill a substantial financial or other obligation to the lawyer regarding the lawyer's services and the lawyer has given the client reasonable warning that the lawyer will withdraw unless the client fulfills the obligation;

(h) the representation has been rendered unreasonably difficult by the client or by the irreparable breakdown of the client-lawyer relationship; or

(i) other good cause for withdrawal exists.

(4) In the case of permissive withdrawal under Subsections (3)(f)-(i), a lawyer may not withdraw if the harm that withdrawal would cause significantly exceeds the harm to the lawyer or others in not withdrawing.

(5) Notwithstanding Subsections (1)-(4), a lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation and with a valid order of a tribunal requiring the representation to continue.

§ 33. A Lawyer's Duties When a Representation Terminates

(1) In terminating a representation, a lawyer must take steps to the extent reasonably practicable to protect the client's interests, such as giving notice to the client of the termination, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee the lawyer has not earned.

(2) Following termination of a representation, a lawyer must:

(a) observe obligations to a former client such as those dealing with client confidences (see Chapter 5), conflicts of interest (see Chapter 8), client property and documents (see §§ 44-46), and fee collection (see § 41);

(b) take no action on behalf of a former client without new authorization and give reasonable notice, to those who might otherwise be misled, that the lawyer lacks authority to act for the client;

(c) take reasonable steps to convey to the former client any material communication the lawyer receives relating to the matter involved in the representation; and

(d) take no unfair advantage of a former client by abusing knowledge or trust acquired by means of the representation.

Demov, Morris, Levine & Shein v. Glantz

53 N.Y.2d 553 (N.Y. 1981)

Wachtler, J.

The question on this appeal is whether an attorney may recover upon a cause of action against a former client for fraudulently inducing the attorney to enter into a retainer agreement. The Appellate Division held the cause of action is insufficient as a matter of law and we agree.

In 1972, the City of New York condemned a parcel of land in Queens owned by respondent HGV Associates upon which an amusement park was operated by respondent MHG Enterprises, Inc. Between 1972 and 1976, respondents retained several attorneys to undertake efforts to retain possession of the premises and secure the most advantageous condemnation award. Respondents remained in possession until May 28, 1976, when a Federal court ordered them to vacate the premises.

In June, 1976, respondent Glantz, the vice-president of MHG Enterprises, Inc., and a partner in HGV Associates, signed a retainer agreement which provided that appellants, individual attorneys, and a law firm, would prepare an application for a temporary stay of eviction permitting the amusement park to reopen and would represent respondents in the condemnation proceeding. Appellants were to be paid a fixed sum if the application to reopen was successful and their fee in the condemnation proceeding was dependent upon the amount eventually awarded to respondents. Appellants testified that they made it clear to Glantz that they would not work on the application to reopen unless they could also represent respondents in the condemnation proceeding. Glantz agreed to arrange to have appellants substituted as attorneys of record in the condemnation proceeding.

Appellants submitted the application to restore respondents to possession of the amusement park, which was denied. Thereafter, appellants were informed by respondents' attorney of record in the condemnation proceeding that Glantz had issued instructions not to forward the stipulation of substitution to appellants. Glantz then formally discharged appellants in writing and requested a bill for services rendered.

In October, 1976 appellants commenced an action against respondents for fraud, breach of the retainer agreement, and the reasonable value of legal services rendered. The cause of action for fraud was grounded upon the allegation that appellants were induced to enter the retainer agreement by respondents' promise to permit them to litigate the condemnation proceeding. Appellants also alleged that from the outset, respondents never intended to substitute appellants as attorneys of record in the condemnation proceedings unless and until the application to reopen was granted.

The trial court dismissed the claim for breach of contract, but upheld the cause of action for fraud. After trial a jury awarded appellants $34,000 as the reasonable value of their services and $310,000 as damages for fraud. The Appellate Division modified the judgment, on the law, by dismissing the cause of action sounding in fraud and otherwise affirmed the judgment insofar as is pertinent here.

The unique relationship between an attorney and client, founded in principle upon the elements of trust and confidence on the part of the client and of undivided loyalty and devotion on the part of the attorney, remains one of the most sensitive and confidential relationships in our society. A relationship built upon a high degree of trust and confidence is obviously more susceptible to destructive forces than are other less sensitive ones. It follows, then, that an attorney cannot represent a client effectively and to the full extent of his or her professional capability unless the client maintains the utmost trust and confidence in the attorney.

This philosophy engendered the development of the rule, now well rooted in our jurisprudence, that a client may at anytime, with or without cause, discharge an attorney in spite of a particularized retainer agreement between the parties. Moreover, we have held that since the client has the absolute right on public policy grounds to terminate the attorney-client relationship at any time without cause, it follows as a corollary that the client cannot be compelled to pay damages for exercising a right which is an implied condition of the contract, and the attorney discharged without cause is limited to recovering in quantum meruit the reasonable value of services rendered. In *Martin v. Camp*, we stated that the rule "is well calculated to promote public confidence in the members of an honorable profession whose relation to their clients is personal and confidential".

To be sure, a deliberate misrepresentation of present intent made for the purpose of inducing another to enter a contract will normally constitute actionable fraud if there is a reliance by the party to whom the misrepresentation was made. It is equally well established, however, that a cause of action will not be cognizable in the courts of this State when it is violative of strong public policy.

The public policy of New York which permits a client to terminate the attorney-client relationship freely at any time, notwithstanding the existence of a particularized retainer agreement between the parties, would be easily undermined if an attorney could hold a client liable for fraud on the theory that the client misrepresented his or her true intent when the retainer was executed. When an attorney-client relationship deteriorates to the point where the client loses faith in the attorney, the client should have the unbridled prerogative of termination. Any result which inhibits the exercise of this essential right is patently unsupportable.

Additionally, as a matter of law, the element of reliance essential to a cause of action for fraudulent misrepresentation of present intent cannot be established in this case. Given the rule that a client may discharge an attorney without cause

at any time, it is evident that appellants could not rely upon Glantz's promise to substitute them as attorneys of record in the condemnation proceeding any more than they could rely upon continued representation in the event they had actually been substituted. Thus, an essential element of a claim of fraudulent misrepresentation is conspicuously absent.

Appellants argue that the result reached today enables unscrupulous clients to defraud their attorneys with impunity. We do not agree. We have said that "the law does not permit the client to cheat his attorney." Permitting an attorney improperly discharged to recover the reasonable value of services rendered in *quantum meruit*, a principle inherently designed to prevent unjust enrichment, strikes the delicate balance between the need to deter clients from taking undue advantage of attorneys, on the one hand, and the public policy favoring the right of a client to terminate the attorney-client relationship without inhibition on the other.

Whiting v. Lacara

187 F. 3d 317 (2d Cir. 1999)

Per Curiam

Garrett R. Lacara appeals from two orders of Judge Spatt denying Lacara's motions to withdraw as counsel for plaintiff-appellee Joseph M. Whiting. Although the record before Judge Spatt justified denial of the motions, amplification of Whiting's position at oral argument persuades us to reverse.

In July 1996, appellee, a former police officer, filed a civil rights action against Nassau County, the Incorporated Village of Old Brooksville, the Old Brooksville Police Department, other villages, and various individual defendants. The action was based on the termination of his employment as an officer. He sought $9,999,000 in damages.

Appellee's initial counsel was Jeffrey T. Schwartz. In October 1996, Robert P. Biancavilla replaced Schwartz. A jury was selected in October 1997 but was discharged when Biancavilla withdrew from the case with appellee's consent.

Whiting retained Lacara in December 1997. In June 1998, the district court partially granted defendants' summary judgment motion and dismissed plaintiff's due process claims. The court scheduled the remaining claims, one free speech claim and two equal protection claims, for a jury trial on August 18, 1998. On July 20, 1998, the district court denied appellee's motion to amend his complaint to add a breach of contract claim and another due process claim.

On August 6, 1998, Lacara moved to be relieved as counsel. In support, he offered an affidavit asserting that appellee "had failed to follow legal advice," that appellee "was not focused on his legal rights," and that appellee "demanded publicity against legal advice." Lacara also asserted that appellee had failed to keep adequate contact with his office, was "not sufficiently thinking clearly to be of assistance at the time of trial," and would "be of little or no help during trial." Furthermore, Lacara stated that appellee had "demanded that Lacara argue collateral issues which would not be allowed in evidence," demanded that Lacara continue to argue a due process claim already dismissed by the court, and drafted a Rule 68 Offer without Lacara's consent and demanded that he serve it on defendants. Finally, Lacara asserted that on July 30, 1998, Whiting had entered his office and, without permission, had "commenced to riffle Lacara's 'in box.'" Lacara stated that he had to call 911 when Whiting had refused to leave the office. Lacara offered to provide further information to the court in camera. Whiting's responsive affidavit essentially denied Lacara's allegations. Whiting stated that he would not be opposed to an order relieving counsel upon the condition that Lacara's firm refund the legal fees paid by Whiting.

On August 13, Judge Spatt denied Lacara's motion to withdraw as counsel. Judge Spatt subsequently issued a written order giving the reasons for denying appellant's motion.

On August 13, 1998, Lacara filed a notice of appeal and moved for an emergency stay of the district court's order and to be relieved as appellee's attorney. We granted Lacara's motion for an emergency stay pending appeal but denied his request for relief on the merits at that time. At a status conference on September 23, 1998, the district court entertained another motion from Lacara to withdraw as counsel, which Judge Spatt again denied. Lacara filed a timely appeal, which was consolidated with the earlier appeal.

Judge Spatt denied Lacara's motion pursuant to Rule 1.4 of the Civil Rules of the United States District Court for the Southern and Eastern Districts of New York, which provides that:

> an attorney who has appeared as attorney of record for a party may be relieved or displaced only by order of the court and may not withdraw from a case without leave of the court granted by order. Such an order may be granted only upon a showing by affidavit or otherwise of satisfactory reasons for withdrawal or displacement and the posture of the case, including its position, if any, on the calendar.

In addressing motions to withdraw as counsel, district courts have typically considered whether "the prosecution of the suit is likely to be disrupted by the withdrawal of counsel."

Considerations of judicial economy weigh heavily in favor of our giving district judges wide latitude in these situations, but there are some instances in which an attorney representing a plaintiff in a civil case might have to withdraw even at the cost of significant interference with the trial court's management of its calendar.

For example, the Code of Professional Responsibility might mandate withdrawal where "the client is bringing the legal action merely for the purpose of harassing or maliciously injuring" the defendant. In such a situation, by denying a counsel's motion to withdraw, even on the eve of trial, a court would be forcing an attorney to violate ethical duties and possibly to be subject to sanctions.

Lacara does not claim that he faces mandatory withdrawal. Rather, he asserts three bases for "permissive withdrawal" under the Model Code: (i) Whiting "insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law"; (ii) Whiting's "conduct has rendered it unreasonably difficult for Lacara to carry out employment effectively"; and (iii) Whiting has "deliberately disregarded an agreement or obligation to Lacara as to expenses or fees." Although the Model Code "was drafted solely for its use in disciplinary proceedings and cannot by itself serve as a basis for granting a motion to withdraw as counsel," we continue to believe that "the Model Code provides guidance for the court as to what constitutes 'good cause' to grant leave to withdraw as counsel." However, a district court has wide latitude to deny a counsel's motion to withdraw, as here, on the eve of trial, where the Model Code merely permits withdrawal.

In the instant matter, we would be prepared to affirm if the papers alone were our only guide. Although Lacara has alleged a nonpayment of certain disputed fees, he has not done so with sufficient particularity to satisfy us that withdrawal was justified on the eve of trial. Moreover, there is nothing in the district court record to suggest error in that court's finding that "Whiting has been very cooperative and desirous of assisting his attorney in this litigation." To be sure, we are concerned by Lacara's allegation that appellee trespassed in his office and that appellant had to call 911 to get Whiting to leave. However, Whiting disputes Lacara's description of these events. Moreover, we strongly agree with the district court that, as the third attorney in this case, Lacara had ample notice that appellee was a difficult client.

Nevertheless, we reverse the denial of appellant's motion for withdrawal. Among Lacara's allegations are that Whiting insisted upon pressing claims already dismissed by the district court and calling witnesses Lacara deemed detrimental to his case. At oral argument, Whiting confirmed Lacara's contention that Whiting intends to dictate how his action is to be pursued. Whiting was asked by a member of the panel:

> Are you under the impression that if we affirm Judge Spatt's ruling, you will be able to tell Mr. Lacara to make the arguments you want made in this case? That, if Mr. Lacara says, "That witness doesn't support your case," and you don't agree with that, are you under the impression that if we affirm Judge Spatt's ruling you'll be able to force him to call that witness?

To which Whiting replied, "Yes I am."

Moreover, in his statements at oral argument, Whiting made it clear that he was as interested in using the litigation to make public his allegations of corruption within the Brookville police department as in advancing his specific legal claims. For example, Whiting thought it relevant to inform us at oral argument that police officers in the department were guilty of "illegal drug use, acceptance of gratuities, and ongoing extramarital affairs while they were on duty." Appellee stated that he wanted to call an officer to testify that the officer could not "bring up anything criminal about the lieutenant, the two lieutenants, or the chief, which could get them in trouble or make the department look bad." Finally, Whiting made clear that he disagreed with Lacara about the handling of his case partly because Whiting suspects that Lacara wants to cover up corruption. Appellee stated: "For some strange reason, Mr. Lacara states that he doesn't want to put certain witnesses on the stand. The bottom line is he does not want to make waves and expose all of the corruption that's going on within this community."

Also, at oral argument, appellee continued to bring up the already-dismissed due process claims. He asserted: "They found me guilty of something which was investigated by their department on two separate occasions and closed as unfounded on two separate occasions." We thus have good reason to conclude that Whiting will insist that Lacara pursue the already dismissed claims at trial.

Finally, appellee indicated that he might sue Lacara if not satisfied that Lacara provided representation as Whiting dictated. After admitting that he did not consider Lacara to be the "right attorney" for him in this case, Whiting asserted that he deemed Lacara "ineffective." The following exchange also occurred:

> Question from Panel: If you think that Mr. Lacara is ineffective in representing you as you stand here now, doesn't Mr. Lacara face the prospect of a malpractice suit, by you, against him, if he continues in the case? Appellee's Reply: Yes, I believe he absolutely does. Question from Panel: Then, isn't that all the more reason to relieve him? So that what you say is ineffective and is in effect a distortion of the attorney-client relationship, doesn't continue? Appellee's Reply: I believe I do have grounds to sue Mr. Lacara for misrepresentation ….

We believe that appellee's desire both to dictate legal strategies to his counsel and to sue counsel if those strategies are not followed places Lacara in so impossible a situation that he must be permitted to withdraw.

Attorneys have a duty to the court not to make "legal contentions unwarranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law." We have determined that "an attorney who continues to represent a client despite the inherent conflict of interest in his so doing due to possible Rule 11 sanctions risks an ethical violation." In this case, appellee's belief that he can dictate to Lacara how to handle his case and sue him if Lacara declines to follow those dictates leaves Lacara in a position amounting to a functional conflict of interest. If required to continue to represent Whiting, Lacara will have to choose between exposure to a malpractice action or to potential Rule 11 or other

sanctions. To be sure, such a malpractice action would have no merit. However, we have no doubt it would be actively pursued, and even frivolous malpractice claims can have substantial collateral consequences.

As previously noted, the interest of the district court in preventing counsel from withdrawing on the eve of trial is substantial. Moreover, we would normally be loath to allow an attorney to withdraw on the eve of trial when the attorney had as much notice as did Lacara that he was taking on a difficult client. However, the functional conflict of interest developed at oral argument causes us to conclude that the motion to withdraw should be granted.

We therefore reverse and order the district court to grant appellant's motion to withdraw as counsel. We note that Lacara agreed in this court to waive all outstanding fees and to turn over all pertinent files to Whiting.

Chapter 2

Lawyer & Client as Agent & Principal

1. Scope of Representation & Authority

Model Rules of Professional Conduct

Rule 1.2: Scope of Representation & Allocation of Authority Between Client & Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Rule 1.8(g)

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

Rule 2.1

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Rest. (3d) of the Law Governing Lawyers

§ 21. Allocating the Authority to Decide Between a Client and a Lawyer

§ 22. Authority Reserved to a Client

(1) As between client and lawyer, subject to Subsection (2) and § 23, the following and comparable decisions are reserved to the client except when the client has validly authorized the lawyer to make the particular decision: whether and on what terms to settle a claim; how a criminal defendant should plead; whether a criminal defendant should waive jury trial; whether a criminal defendant should testify; and whether to appeal in a civil proceeding or criminal prosecution.

(2) A client may not validly authorize a lawyer to make the decisions described in Subsection (1) when other law (such as criminal-procedure rules governing pleas, jury-trial waiver, and defendant testimony) requires the client's personal participation or approval.

(3) Regardless of any contrary contract with a lawyer, a client may revoke a lawyer's authority to make the decisions described in Subsection (1).

§ 23. Authority Reserved to a Lawyer

As between client and lawyer, a lawyer retains authority that may not be overridden by a contract with or an instruction from the client:

(1) to refuse to perform, counsel, or assist future or ongoing acts in the representation that the lawyer reasonably believes to be unlawful;

(2) to make decisions or take actions in the representation that the lawyer reasonably believes to be required by law or an order of a tribunal.

§ 25. Appearance Before a Tribunal

A lawyer who enters an appearance before a tribunal on behalf of a person is presumed to represent that person as a client. The presumption may be rebutted.

§ 26. A Lawyer's Actual Authority

A lawyer's act is considered to be that of a client in proceedings before a tribunal or in dealings with third persons when:

(1) the client has expressly or impliedly authorized the act;
(2) authority concerning the act is reserved to the lawyer as stated in § 23; or
(3) the client ratifies the act.

§ 27. A Lawyer's Apparent Authority

A lawyer's act is considered to be that of the client in proceedings before a tribunal or in dealings with a third person if the tribunal or third person reasonably assumes that the lawyer is authorized to do the act on the basis of the client's (and not the lawyer's) manifestations of such authorization.

L.F.S. Corp. v. Kennedy

337 S.E.2d 209 (S.C. 1985)

Gregory, Justice

In this legal malpractice action, appellant L.F.S. Corporation appeals from the grant of respondents' motion for non-suit. Appellant raises numerous issues by twenty-four exceptions; however, we need only reach one issue which moots those remaining. We Affirm.

L.F.S. began planning a subdivision called Havenwood in 1964. In the early 1970's, a dispute arose with the Town of Kershaw concerning the town's obligation to supply water to the subdivision under an alleged oral contract. Respondents were retained to represent the Corporation.

The gravamen of appellant's complaint is that respondents failed to follow instructions concerning settlement negotiations, and permitted summary judgment to be entered based on an unauthorized agreement. Notwithstanding respondents' alleged failure to follow instructions, the record clearly demonstrates L.F.S. subsequently ratified respondents' actions.

After entry of the disputed 1976 order, the town remitted $900.00 in tap fees to the Corporation pursuant to the order. The check was accepted by the Corporation, and endorsed over to respondents to be applied against legal fees owned by the Corporation. Thereafter, one of the Corporation's directors wrote a letter to respondents seeking advice concerning enforcement of the order.

The events subsequent to the 1976 order clearly demonstrate L.F.S. ratified respondents' actions concerning entry of the order. The Corporation accepted financial benefit under the order, and sought to take advantage of the order. Acceptance of both benefits are clear, unequivocal acts of ratification.

Morris v. Ohio Casualty Insurance Co.

35 Ohio St. 3d 45 (Ohio 1988)

Douglas, J.

The sole question posed for our consideration is whether an insurance carrier may be liable for conversion when the carrier authorizes its bank to pay a draft over a forged endorsement. We answer the question in the affirmative and, accordingly, uphold the decision of the court of appeals.

Initially, appellant asks this court to find that its payment to James Whitney, the attorney for the estate and guardianship, constituted payment to the estate and guardianship. Accordingly, appellant would have us hold that appellant's obligation to the estate and guardianship was discharged when appellant both delivered the drafts in question to the agent of the estate and the guardianship, and then authorized payment of such drafts to the same party. We decline to make such a finding in this case.

In essence, appellant asks this court to determine whether an attorney has the inherent power to endorse a settlement check on behalf of his client. If so, appellant would be discharged from its obligation to the estate and guardianship; if not, appellant's obligation remains unpaid and owing. We find both that an attorney has no inherent authority to endorse a settlement check in the name of his client, and that, on the basis of the record before us, attorney Whitney made no such endorsement in this case.

In Ohio, as elsewhere, "an attorney who is without special authorization has no implied or apparent authority, solely by virtue of his general retainer, to compromise and settle his client's claim or cause of action." Similarly, an attorney has no inherent authority to enter into a contract for the sale of real estate for his client. While this court has not previously addressed whether an attorney may endorse

his client's name on a check or draft tendered to effect a settlement, numerous other courts have done so. The clear majority of these courts find that no such authority exists. Therefore, while we recognize that the decisions on this question are in conflict, we believe that the better rule is that an attorney possesses no inherent authority, arising solely from the attorney-client relationship, to endorse his client's name on a settlement check or draft. The authority to receive a negotiable instrument on behalf of a client does not imply the power to endorse it.

Accordingly, we hold that an attorney, absent any express authority from his client, has no authority to endorse the client's name on a check or draft tendered to effect a settlement.

Further, contrary to appellant's contention that attorney Whitney properly endorsed and deposited the drafts into his escrow account, the only admissible evidence in the record, Whitney's affidavit, reflects that Whitney endorsed neither draft and that the drafts were deposited into one of Whitney's general office accounts. Further, even assuming that Whitney endorsed the drafts, an "unauthorized signature" includes both a forgery and a signature made by an agent exceeding his actual or apparent authority. Thus, given our finding that attorneys have no inherent authority to endorse their client's name to a settlement draft, and the undisputed fact that there was no apparent or actual authority vested in Whitney to endorse the drafts herein, Whitney's endorsements, had he made any, would be unauthorized and appellant's obligation to the estate and guardianship would remain in effect.

The endorsements at issue herein were typewritten and restrictive in character. While such endorsements may, at times, be valid, we find that the endorsements at issue herein were unauthorized and thus not valid to operate as the signature of either the administrator or the guardian, the payees thereon.

An " 'unauthorized' signature or indorsement is one made without actual, implied, or apparent authority and includes a forgery." Further, an "unauthorized signature is wholly inoperative as that of the person whose name is signed unless he ratifies it or is precluded from denying it; but it operates as the signature of the unauthorized signer in favor of any person who in good faith pays the instrument or takes it for value." Thus, an unauthorized signature does not operate as the signature of the named payee and, accordingly, may not act to pass title to an instrument or relieve the drawer of his obligation to pay the payee.

In the instant case, appellees presented the sworn affidavits of attorney Whitney, Orin Morris and Tom Swope. These affidavits established that Whitney did not endorse the drafts at issue, and that Morris and Swope neither signed nor authorized anyone else to sign these drafts. Further, Morris and Swope are the only parties who possessed the authority to authorize an agent to sign on their behalf. Moreover, appellant has failed, through the use of any admissible evidence, to re-

fute the statements contained in the affidavits. Accordingly, the endorsements appearing on the second and third drafts, No. X559281 and No. X559280, were unauthorized and the payment of the drafts, as endorsed, constituted a conversion.

Appellant authorized the payment of the drafts. Even though the appellant was the original drawer, appellant was also the drawee for purposes of liability.

We, therefore, affirm the judgment of the court of appeals and remand the cause to the trial court for determination of the currently pending claims.

Makins v. District of Columbia

861 A. 2d 590 (D.C. 2004)

Nebeker, Senior Judge

The United States Court of Appeals for the District of Columbia Circuit has certified the following question to this court:

> Under District of Columbia law, is a client bound by a settlement agreement negotiated by her attorney when the client has not given the attorney actual authority to settle the case on those terms but has authorized the attorney to attend a settlement conference before a magistrate judge and to negotiate on her behalf and when the attorney leads the opposing party to believe that the client has agreed to those terms.

For reasons set forth below, we answer the question in the negative. In so doing, we confine our analysis to the undisputed facts and those recited in the certified question.

In November 1998, Brenda Makins, represented by John Harrison, Esquire, brought an action against the District of Columbia in the United States District Court for the District of Columbia claiming sex discrimination and retaliatory firing. Makins had been employed in the District's Department of Corrections from 1995 until her discharge in 1997. Her complaint sought reinstatement, compensatory damages, and attorneys' fees.

In the summer of 2000, at a pre-trial conference, the district judge referred Makins' case to a magistrate judge "for settlement purposes only" and ordered the District to "have present at all settlement meetings an individual with full settlement authority." A similar admonition was absent as to Ms. Makins. A few days later, the magistrate ordered the "lead attorney(s) for the parties" to appear before him for a settlement conference; the order required that the "parties shall either attend the settlement conference or be available by telephone for the duration of the settlement conference."

When the conference took place, Makins was not present. After two and a half hours of negotiations, Harrison and the attorneys for the District reached an agreement. Makins would receive $99,000 and have her personnel records amended from "discharged" to "resigned" (to preserve her retirement benefits if she were able to obtain other creditable employment). In return, Makins would dismiss her claims against the District. Mr. Harrison left the hearing room with cell phone in hand, apparently to call Ms. Makins. When he returned, the attorneys "shook hands" on the deal and later reduced it to writing. A few days later, when Harrison presented Makins with a copy for her signature, she refused to sign it. The District then filed a Motion to Enforce Settlement. Makins retained another attorney, and the court held an evidentiary hearing in which Harrison, Makins, and the lead attorney for the District testified.

The testimony of Makins and Harrison was at odds respecting whether Harrison had been given authority to settle absent a provision for her reinstatement to her job. The District Court, observing this "sharp conflict" in testimony, declined to resolve it. Instead, the court assumed arguendo that Harrison did not have actual authority to settle the case short of reinstatement. The court granted the District's motion to enforce the settlement on the alternative ground that Harrison had apparent authority to bind Makins to the agreement. The court saw "no justification for the District of Columbia not to reasonably believe that Mr. Harrison had the full confidence and authority of his client."

There is arguably some inconsistency as to the extent of authority required of an attorney in settlement negotiations. Indeed, a review of relevant case law and principles enunciated by the American Bar Association and the American Law Institute demonstrate some differences not only over the extent of authority, but also the appropriate definitions of authority. To the extent that there tends to be this inconsistency among the cases, it reflects, in part, a difference in the application or integration of agency law with legal ethics principles, the attorney-client relationship and policy considerations.

This dissonance may in part be seen as a result of the intersection of ethical guidelines and rules governing the client-lawyer relationship and the relationship of a principal to her agent in the context of settlement agreements. On the one hand, the District of Columbia Code of Professional Responsibility Ethical Consideration 7-7 provides that it is the exclusive authority of "the client to decide whether [s]he will accept a settlement offer." Similarly, District of Columbia Rule of Professional Conduct 1.2(a) provides that a "lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter." On the other hand, "it is well established that settlement agreements are entitled to enforcement under general principles of contract law." Agency principles are applied to determine whether the attorney or agent had authority to bind his principal to the settlement contract.

Of course, an attorney can settle his client's case if he or she has actual authority to do so. Agency principles also recognize the authority of the agent to bind the client based on the doctrine of apparent authority.

The Restatement (Second) of Agency § 8 defines apparent authority as "the power to affect the legal relations of another person by transactions with third persons, professedly as an agent for the other, arising from and in accordance with the other's manifestations to such third persons." Thus, unlike actual authority, apparent authority does not depend upon any manifestation from the principal to her agent, but rather from the principal to the third party. This court has stated that apparent authority arises when a principal places an agent "in a position which causes a third person to reasonably believe the principal had consented to the exercise of authority the agent purports to hold. This falls short of an overt, affirmative representation by a principal." In such circumstances, an agent's representations need not expressly be authorized by his principal. The apparent authority of an agent arises when the principal places the agent in such a position as to mislead third persons into believing that the agent is clothed with the authority which in fact he does not possess. Apparent authority depends upon "the third-party's perception of the agent's authority." The third party's perception may be based upon "written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on her behalf by the person purporting to act for her."

We reiterate that apparent authority is an established doctrine in this court's jurisprudence, and that settlement agreements are enforceable under general contract principles. But because apparent authority depends upon the principal's manifestations to the third party, the issue before us is what conduct by a client in the settlement context is sufficient reasonably to cause a third person to believe that the attorney representing the client has full, final settlement authority, rather than something short of that. Whether an agent had apparent authority is a question of fact and the party asserting the existence of apparent authority must prove it. In determining whether the agent had apparent authority to bind the principal, "consideration should be given, *inter alia*, to the actual authority of the agent, the usual or normal conduct of the agent in the performance of his or her duties, previous dealings between the agent and the party asserting apparent authority, any declarations or representations allegedly made by the agent, and lastly, the customary practice of other agents similarly situated." We take as a given that a third party in the shoes of the District of Columbia would reasonably assume that Makins had authorized attorney Harrison (1) to attend the settlement conference, and (2) to negotiate on her behalf; neither Makins nor amicus contends otherwise. We hold, however, that absent further manifestations by Makins—not Harrison—which are not contained in the certified question, there was insufficient conduct by the client to support a reasonable belief by the District that Harrison had full and final authority to agree to the settlement terms.

As pointed out, in the District of Columbia the decision to settle belongs to the client, a fact confirmed by our decisions.

The RESTATEMENT (THIRD) further confirms the generally accepted distinction between the power to conduct negotiations and the power to end the dispute. Conducting settlement negotiations is properly in the attorney's domain: "in the absence of a contrary agreement or instruction, a lawyer normally has authority to initiate or engage in settlement discussions, although not to conclude them." Concluding those settlement negotiations, however, is strictly the client's prerogative: "the decision to settle is reserved to the client because a settlement definitively disposes of client rights."

These ethical principles are key to the issue before us, because they not only govern the attorney-client relationship, they inform the reasonable beliefs of any opposing party involved in litigation in the District of Columbia, as well as the reasonable beliefs of the opposing party's counsel, whose practice is itself subject to those ethical constraints. It is the knowledge of these ethical precepts that makes it unreasonable for the opposing party and its counsel to believe that, absent some further client manifestation, the client has delegated final settlement authority as a necessary condition of giving the attorney authority to conduct negotiations. And it is for this reason that opposing parties—especially when represented by counsel, as here—must bear the risk of unreasonable expectations about an attorney's ability to settle a case on the client's behalf. "When a lawyer purports to enter a settlement binding on the client but lacks authority to do so, the burden of inconvenience resulting if the client repudiates the unauthorized settlement is properly left with the opposing party, who should know that settlements are normally subject to approval by the client and who has received no manifested contrary indication from the client."

Applying these principles, we conclude that the two client manifestations contained in the certified question—sending the attorney to the court-ordered settlement conference and permitting the attorney to negotiate on the client's behalf—were insufficient to permit a reasonable belief by the District that Harrison had been delegated authority to conclude the settlement. Some additional manifestation by Makins was necessary to establish that she had given her attorney final settlement authority, a power that goes beyond the authority an attorney is generally understood to have. The District, in its briefs, points only to actions and representation of record by Harrison, not Makins, as support for the reasonableness of its belief. Thus, it asserts that "Mr. Harrison represented that Ms. Makins was available by telephone and that he would consult with her when appropriate"; that "Mr. Harrison spoke on his cell phone with plaintiff at least three times during the conference"; and that "at one point, Mr. Harrison left the room to phone plaintiff about the defendant's latest settlement proposal, and returned, phone in hand, to accept the proposal with one new condition regarding amendment of personnel forms." All of this information (including information purportedly about

the client, Makins) was known to the District of Columbia only through representations made by Harrison, the attorney. As the Circuit Court stated in certifying the question to us: "Neither the District nor the magistrate ever heard from Makins, in person or by telephone. What the District derives from the telephone calls between Makins and Harrison amounts to nothing more than Harrison's representations of—and the District's educated guesses about—what was said in private between them, a disputed factual question the district court did not resolve." Harrison's conduct and representations about his own authority, in short, are not dispositive to whether Makins herself furnished the basis for a reasonable belief that he was authorized to conclude the settlement.

At the *en banc* argument, counsel for the District characterized the record as showing that Makins "sent" Harrison to the settlement conference, thus manifesting to the court and the District his apparent authority to settle her claim. But Makins had little choice, short of discharging Harrison, except to allow him to continue to represent her in the negotiations at the ordered conference. To execute a settlement agreement then and there is quite another matter.

Since Ms. Makins, as principal, did not make any manifestation of authority to the District's attorneys, other than retaining Harrison, under the facts as certified in the question, a finding of apparent authority is precluded under the law of this jurisdiction. The District also presents several policy arguments supporting enforcement of settlement agreements on apparent authority grounds, none of which we find compelling. To be sure, settlement of disputes, both in trial courts and on appeal, is to be encouraged as sound public policy. However, we are not persuaded that the settlement process will be impeded simply by requiring some manifestation of the client's authorization to support a claim of apparent authority in these cases where the client challenges the authority of his attorney to settle the claim. In addition, "apparent authority is an equitable doctrine that places the loss on one whose manifestations to another have misled the latter." Our holding is consistent with this principle. Since Makins manifested nothing by words or conduct on which reliance could be placed (she merely continued to retain Harrison), our answer to the certified question is not erosive to that policy.

We answer the certified question in the negative.

2. Organizational Clients

Model Rules of Professional Conduct

Rule 1.13: Organization as Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Rest. (3d) of the Law Governing Lawyers

§ 96. Representing an Organization as Client

(1) When a lawyer is employed or retained to represent an organization:

(a) the lawyer represents the interests of the organization as defined by its responsible agents acting pursuant to the organization's decision-making procedures; and

(b) subject to Subsection (2), the lawyer must follow instructions in the representation, as stated in § 21(2), given by persons authorized so to act on behalf of the organization.

(2) If a lawyer representing an organization knows of circumstances indicating that a constituent of the organization has engaged in action or intends to act in a way that violates a legal obligation to the organization that will likely cause substantial injury to it, or that reasonably can be foreseen to be imputable to the organization and likely to result in substantial injury to it, the lawyer must proceed in what the lawyer reasonably believes to be the best interests of the organization.

(3) In the circumstances described in Subsection (2), the lawyer may, in circumstances warranting such steps, ask the constituent to reconsider the matter, recommend that a second legal opinion be sought, and seek review by appropriate supervisory authority within the organization, including referring the matter to the highest authority that can act in behalf of the organization.

§ 97. Representing a Governmental Client

A lawyer representing a governmental client must proceed in the representation as stated in § 96, except that the lawyer:

(1) possesses such rights and responsibilities as may be defined by law to make decisions on behalf of the governmental client that are within the authority of a client under §§ 22 and 21(2);

(2) except as otherwise provided by law, must proceed as stated in §§ 96(2) and 96(3) with respect to an act of a constituent of the governmental client that violates a legal obligation that will likely cause substantial public or private injury or that reasonably can be foreseen to be imputable to and thus likely result in substantial injury to the client;

(3) if a prosecutor or similar lawyer determining whether to file criminal proceedings or take other steps in such proceedings, must do so only when based on probable cause and the lawyer's belief, formed after due investigation, that there are good factual and legal grounds to support the step taken; and
(4) must observe other applicable restrictions imposed by law on those similarly functioning for the governmental client.

In the Matter of Silva

636 A.2d 316 (R.I. 1994)

Per Curiam

The respondent, Daniel J. Silva, appeared before this court on December 2, 1993, pursuant to an order to show cause why discipline should not be imposed. The Disciplinary Board conducted an evidentiary hearing and received legal memoranda from the respondent and disciplinary counsel. The board has filed with us its decision and a concurring opinion signed by three members of the board.

The board found that Silva violated several provisions of the Rules of Professional Conduct when he failed to report a diversion of mortgage funds by his long-time friend Edward Medeiros. Silva served as counsel to Medeiros's mortgage company, Medcon Mortgage Corporation, and Suncoast Savings and Loan of Hollywood, Florida. In his capacity as closing attorney for Suncoast, Silva received wire transfers of mortgage proceeds in his client account. Upon receipt of the wire transfers from Suncoast, Silva simply turned the proceeds over to Medeiros and/or MEDCON for disbursement. In the fall of 1990 Silva learned that Medeiros had diverted funds from a closing funded by Suncoast in which Silva acted as closing attorney. The diverted funds were designated to pay off a preexisting mortgage on the property. Silva advised Medeiros that his conduct was criminal. Silva did not notify Suncoast of the diversion of funds, nor did he inform the title insurance company, which had issued a title policy that did not except the prior mortgage from coverage, that the prior mortgage had not been discharged. Silva testified that Medeiros forbade him to do so on the basis of Medeiros's assertion of the attorney/client privilege on behalf of both MEDCON and himself personally.

In December 1990 Silva received a wire transfer from Suncoast for another closing with MEDCON. Notwithstanding his knowledge of the previous diversion of funds by Medeiros, Silva did not disburse the funds in accordance with the terms listed on the closing sheet; instead, he turned the proceeds over to MEDCON. Silva kept $100 of the proceeds as his fee for serving as a conduit of the funds.

Medeiros converted those funds to his own use, and was subsequently convicted and imprisoned. The respondent was never charged with committing a criminal act.

The respondent's position before the board and this court is that he was prohibited from disclosing Medeiros's defalcation by the provisions of Rule 1.6 of the Rules of Professional Conduct. Respondent also took the position that he had no obligation to protect Suncoast's interests. We do not agree with either of his contentions.

On the basis of the record before us, we believe that Silva had an obligation to both MEDCON and Suncoast to ensure that the transactions in which he acted as attorney and/or agent were carried out with fair dealing and good faith. We further believe that Silva had an obligation to report Medeiros's overt act of diverting the funds as soon as he learned of it. In addition Silva should have withdrawn from representing both MEDCON and Suncoast as soon as he discovered Medeiros's fraud.

Although we consider Silva's failure to act appropriately and to make the requisite disclosures serious breaches of his ethical obligation, we find no evidence that Silva's actions were motivated by personal gain. Rather, he appears to have had a genuine belief that Medeiros's assertion of the attorney/client privilege and the requirements of Rule 1.6 prohibited the disclosure we now say was required.

Silva did not appear to appreciate and understand to whom he owed the duty of confidentiality. It is apparent from this record, however, that he was counsel to the corporate entity MEDCON, and therefore, it was to MEDCON he owed the duty of confidentiality. Silva's dealings with Medeiros did not establish the attorney/client relationship that would trigger the application of the prohibitions against disclosure encompassed in Rule 1.6. Therefore, Silva's obligations to both Suncoast and MEDCON required him to disclose Medeiros's overt criminal act of conversion of the funds.

This court concurs with the findings of the disciplinary board that Silva exercised very poor judgment and that he engaged in serious misconduct. We are constrained however to depart from the board's recommendation for sanction. We believe that Rule 1.6 has created a great deal of confusion among the members of the Rhode Island Bar. We therefore censure Silva for his failure to fulfill his ethical obligations to the parties to these transactions. The court's issuance of this sanction rather than the three-month suspension of Silva's license is due in part to the absence of any motive for personal gain and Silva's ten years at the bar without a disciplinary complaint. The court's position on the appropriate level of sanction, however, would be more severe were it not for the apparent confusion in the mind of this attorney concerning whom he represented and the silence of Rule 1.6 on that question.

Brennan v. Ruffner

640 So. 2d 143 (Fla. 1994)

Pariente, J.

We affirm a final summary judgment entered in favor of a lawyer and against a disgruntled minority shareholder of a closely held corporation. We find that an attorney/client relationship did not exist between the individual shareholder and the attorney representing the corporation. Consequently, there is no basis for a legal malpractice action. We further reject the other theories of liability asserted by appellant.

In 1976, appellant, Robert J. Brennan, M.D., along with a Dr. Martell, employed appellee, Charles L. Ruffner, Esq., to incorporate their medical practice as a professional association. In connection with the incorporation, the lawyer prepared a shareholder's agreement. In 1982, a third doctor, Dr. Mirmelli, joined the corporation, and each doctor became a one-third shareholder in the new firm. The lawyer, who was corporate counsel since 1976, was requested to draft a new shareholder's agreement. After approximately 8 months of negotiation, the shareholders executed a new shareholder's agreement. The new agreement included a provision for the involuntary termination of any shareholder by a majority vote of the two other shareholders. It is undisputed that Dr. Brennan was aware of this provision at the time he signed the documents and that he signed the agreement upon reassurances from Dr. Mirmelli that he would not join with Dr. Martell in using the provision against Dr. Brennan.

However, despite the assurances, in 1989 Dr. Martell and Dr. Mirmelli involuntarily terminated Dr. Brennan as a shareholder and employee of the corporation. Dr. Brennan instituted a lawsuit against Dr. Martell and Dr. Mirmelli claiming breach of contract and fraud in the inducement. The verified complaint in that lawsuit specifically alleged that Dr. Brennan was *not* represented by counsel in the negotiation of the shareholder's agreement. That lawsuit was settled. Dr. Brennan then filed this suit for legal malpractice, breach of contract, breach of fiduciary duty and breach of contract as a third party beneficiary. In contradiction to the sworn allegations of the first lawsuit, Dr. Brennan alleged in this complaint that the lawyer represented him individually, as well as the corporation, in the preparation and drafting of the agreement. The lawyer denied undertaking the representation of Dr. Brennan individually.

In a legal malpractice action, a plaintiff must prove three elements: the attorney's employment, the attorney's neglect of a reasonable duty and that such negligence resulted in and was the proximate cause of loss to the plaintiff. Florida courts have uniformly limited attorney's liability for negligence in the performance of their professional duties to clients with whom they share privity of contract.

The material undisputed facts in this case support a legal conclusion that there was no privity of contract between Dr. Brennan and the corporation's lawyer. It is undisputed that the lawyer was representing the corporation. The issue raised by Dr. Brennan's complaint was whether the lawyer was also representing him individually. While Dr. Brennan made the initial contact with the lawyer, there is no evidence in the record to create a credible issue of fact that the lawyer ever represented Dr. Brennan individually. Dr. Brennan's sworn complaint against the other doctors, which preceded the legal malpractice action against the lawyer, states he was unrepresented by counsel in the negotiation of the shareholder's agreement.

Dr. Brennan argues that a separate duty to him as a shareholder arose by virtue of the lawyer's representation of the closely held corporation. Although never squarely decided in this state, we hold that where an attorney represents a closely held corporation, the attorney is not in privity with and therefore owes no separate duty of diligence and care to an individual shareholder absent special circumstances or an agreement to also represent the shareholder individually. While there is no specific ethical prohibition in Florida against dual representation of the corporation and the shareholder if the attorney is convinced that a conflict does not exist, an attorney representing a corporation does not become the attorney for the individual stockholders merely because the attorney's actions on behalf of the corporation may also benefit the stockholders. The duty of an attorney for the corporation is first and foremost to the corporation, even though legal advice rendered to the corporation may affect the shareholders. Cases in other jurisdictions have similarly held.

We reject the notion that the lawyer in this case could be held liable to one of the minority shareholders for a breach of fiduciary duty. In any closely held corporation, there will be an inherent conflict between the potential rights of the minority shareholder and the rights of the corporation in a shareholder's agreement concerning termination. At the time this agreement was drafted, any one of the three shareholders could have ended up becoming the minority shareholder. While Dr. Brennan claimed in the complaint that the lawyer had a duty to advise him of a conflict of interest and never advised him of a potential conflict, the facts in the record do not support that contention. Dr. Brennan testified in deposition that he simply did not recall any conversations. However, the accountant for the corporation specifically remembered a conversation where the lawyer told the doctors collectively that he represented only the corporation in the drafting of the shareholder agreement. Absent some evidence that the corporation's lawyer conspired or acted with the two shareholders to insert provisions that would work to the detriment of the third shareholder; that the corporation's lawyer concealed his representation of another individual shareholder; or that the attorney agreed to the dual representation, there is no breach of fiduciary duty established in this case.

Finally, even assuming arguendo that a duty existed based on an attorney/client relationship, a third party beneficiary theory or a breach of fiduciary relationship, we simply do not find any factual dispute concerning the issue of proximate cause. It is undisputed that Dr. Brennan was aware of the provisions in the agreement and chose to take his chances upon being reassured by Dr. Mirmelli that he would never use the provisions against Dr. Brennan.

In re Grand Jury Subpoena: Under Seal

415 F. 3d 334 (4th Cir. 2005)

Wilson, District Judge (sitting by designation)

This is an appeal by three former employees of AOL Time Warner from the decision of the district court denying their motions to quash a grand jury subpoena for documents related to an internal investigation by AOL. Appellants in the district court [argued] that the subpoenaed documents were protected by the attorney-client privilege. Because the district court concluded that the privilege was AOL's alone and because AOL had expressly waived its privilege, the court denied the appellants' motion. We affirm.

I.

In March of 2001, AOL began an internal investigation into its relationship with PurchasePro, Inc. AOL retained the law firm of Wilmer, Cutler & Pickering to assist in the investigation. Over the next several months, AOL's general counsel and counsel from Wilmer Cutler interviewed appellants, AOL employees Kent Wakeford, John Doe 1, and John Doe 2.

The investigating attorneys interviewed Wakeford, a manager in the company's Business Affairs division, on six occasions. At their third interview, and the first one in which Wilmer Cutler attorneys were present, Randall Boe, AOL's General Counsel, informed Wakeford, "We represent the company. These conversations are privileged, but the privilege belongs to the company and the company decides whether to waive it. If there is a conflict, the attorney-client privilege belongs to the company." Memoranda from that meeting also indicate that the attorneys explained to Wakeford that they represented AOL but that they "could" represent him as well, "as long as no conflict appeared." The attorneys interviewed Wakeford again three days later and, at the beginning of the interview, reiterated that they represented AOL, that the privilege belonged to AOL, and that Wakeford could retain personal counsel at company expense.

The investigating attorneys interviewed John Doe 1 three times. Before the first interview, Boe told him, "We represent the company. These conversations are privileged, but the privilege belongs to the company and the company decides whether to waive it. You are free to consult with your own lawyer at any time." Memoranda from that interview indicate that the attorneys also told him, "We can represent you until such time as there appears to be a conflict of interest, but the attorney-client privilege belongs to AOL and AOL can decide whether to keep it or waive it." At the end of the interview, John Doe 1 asked if he needed personal counsel. A Wilmer Cutler attorney responded that he did not recommend it, but that he would tell the company not to be concerned if Doe retained counsel.

AOL's attorneys interviewed John Doe 2 twice and followed essentially the same protocol they had followed with the other appellants. They noted, "We represent AOL, and can represent you too if there is not a conflict." In addition, the attorneys told him that, "the attorney-client privilege is AOL's and AOL can choose to waive it."

In November, 2001, the Securities and Exchange Commission began to investigate AOL's relationship with PurchasePro. In December 2001, AOL and Wakeford, through counsel, entered into an oral "common interest agreement," which they memorialized in writing in January 2002. The attorneys acknowledged that, "representation of their respective clients raised issues of common interest to their respective clients and that the sharing of certain documents, information, and communications with clients" would be mutually beneficial. As a result, the attorneys agreed to share access to information relating to their representation of Wakeford and AOL, noting that "the oral or written disclosure of Common Interest Materials would not diminish in any way the confidentiality of such Materials and would not constitute a waiver of any applicable privilege."

Wakeford testified before the SEC on February 14, 2002, represented by his personal counsel. Laura Jehl, AOL's general counsel, and F. Whitten Peters of Williams & Connolly, whom AOL had retained in November 2001 in connection with the PurchasePro investigation, were also present, and both stated that they represented Wakeford "for purposes of the deposition." During the deposition, the SEC investigators questioned Wakeford about his discussions with AOL's attorneys. When Wakeford's attorney asserted the attorney-client privilege, the SEC investigators followed up with several questions to determine whether the privilege was applicable to the investigating attorneys' March-June 2001 interviews with Wakeford. Wakeford told them he believed, at the time of the interviews, that the investigating attorneys represented him and the company.

John Doe 1 testified before the SEC on February 27, 2002, represented by personal counsel. No representatives of AOL were present. When SEC investigators questioned Doe about the March-June 2001 internal investigation, his counsel asserted that the information was protected and directed Doe not to answer any questions about the internal investigation "in respect to the company's privilege."

He stated that Doe's response could be considered a waiver of the privilege and that, "if the AOL lawyers were present, they could make a judgment, with respect to the company's privilege, about whether or not the answer would constitute a waiver."

On February 26, 2004, a grand jury in the Eastern District of Virginia issued a subpoena commanding AOL to provide "written memoranda and other written records reflecting interviews conducted by attorneys for AOL" of the appellants between March 15 and June 30, 2001. While AOL agreed to waive the attorney-client privilege and produce the subpoenaed documents, counsel for the appellants moved to quash the subpoena on the grounds that each appellant had an individual attorney-client relationship with the investigating attorneys, that his interviews were individually privileged, and that he had not waived the privilege. Wakeford also claimed that the information he disclosed to the investigating attorneys was privileged under the common interest doctrine.

The district court denied John Doe 1's and John Doe 2's motions because it found they failed to prove they were clients of the investigating attorneys who interviewed them. The court based its conclusion on its findings that: (1) the investigating attorneys told them that they represented the company; (2) the investigating attorneys told them, "we can represent you," which is distinct from "we do represent you"; (3) they could not show that the investigating attorneys agreed to represent them; and (4) the investigating attorneys told them that the attorney-client privilege belonged to the company and the company could choose to waive it.

The court initially granted Wakeford's motion to quash because it found that his communications with the investigating attorneys were privileged under the common interest agreement between counsel for Wakeford and counsel for AOL. Following a motion for reconsideration, the court reversed its earlier ruling and held that the subpoenaed documents relating to Wakeford's interviews were not privileged because it found that Wakeford's common interest agreement with AOL postdated the March-June 2001 interviews. In addition, the court held that Wakeford failed to prove that he was a client of the investigating attorneys at the time the interviews took place. The court based its conclusion on its findings that: (1) none of the investigating attorneys understood that Wakeford was seeking personal legal advice; (2) the investigating attorneys did not provide any personal legal advice to him; and (3) the investigating attorneys believed they represented AOL and not Wakeford. This appeal followed.

II.

Appellants argue that because they believed that the investigating attorneys who conducted the interviews were representing them personally, their communications are privileged. However, we agree with the district court that essential touch-

stones for the formation of an attorney-client relationship between the investigating attorneys and the appellants were missing at the time of the interviews. There is no evidence of an objectively reasonable, mutual understanding that the appellants were seeking legal advice from the investigating attorneys or that the investigating attorneys were rendering personal legal advice. Nor, in light of the investigating attorneys' disclosure that they represented AOL and that the privilege and the right to waive it were AOL's alone, do we find investigating counsel's hypothetical pronouncement that they could represent appellants sufficient to establish the reasonable understanding that they were representing appellants. Accordingly, we find no fault with the district court's opinion that no individual attorney-client privilege attached to the appellants' communications with AOL's attorneys.

"The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." "When the privilege applies, it affords confidential communications between lawyer and client complete protection from disclosure." Because its application interferes with "the truth seeking mission of the legal process," however, we must narrowly construe the privilege, and recognize it "only to the very limited extent that excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth." Accordingly, the privilege applies only to "confidential disclosures by a client to an attorney made in order to obtain legal assistance." The burden is on the proponent of the attorney-client privilege to demonstrate its applicability."

The person seeking to invoke the attorney-client privilege must prove that he is a client or that he affirmatively sought to become a client. "The professional relationship hinges upon the client's belief that he is consulting a lawyer in that capacity and his manifested intention to seek professional legal advice." An individual's subjective belief that he is represented is not alone sufficient to create an attorney-client relationship. Rather, the putative client must show that his subjective belief that an attorney-client relationship existed was reasonable under the circumstances.

With these precepts in mind, we conclude that appellants could not have reasonably believed that the investigating attorneys represented them personally during the time frame covered by the subpoena. First, there is no evidence that the investigating attorneys told the appellants that they represented them, nor is there evidence that the appellants asked the investigating attorneys to represent them. To the contrary, there is evidence that the investigating attorneys relayed to Wakeford the company's offer to retain personal counsel for him at the company's expense, and that they told John Doe 1 that he was free to retain personal counsel. Second, there is no evidence that the appellants ever sought personal legal advice from the investigating attorneys, nor is there any evidence that the investigating attorneys rendered personal legal advice. Third, when the appellants spoke with

the investigating attorneys, they were fully apprised that the information they were giving could be disclosed at the company's discretion. Under these circumstances, appellants could not have reasonably believed that the investigating attorneys represented them personally. Therefore, the district court's finding that appellants had no attorney-client relationship with the investigating attorneys is not clearly erroneous.

The appellants argue that the phrase "we can represent you as long as no conflict appears," manifested an agreement by the investigating attorneys to represent them. They claim that, "it is hard to imagine a more straightforward assurance of an attorney-client relationship than 'we can represent you.' " We disagree. As the district court noted, "we can represent you" is distinct from "we do represent you." If there was any evidence that the investigating attorneys had said, "we do represent you," then the outcome of this appeal might be different. Furthermore, the statement actually made, "we can represent you," must be interpreted within the context of the entire warning. The investigating attorneys' statements to the appellants, read in their entirety, demonstrate that the attorneys' loyalty was to the company. That loyalty was never implicitly or explicitly divided. In addition to noting at the outset that they had been retained to represent AOL, the investigating attorneys warned the appellants that the content of their communications during the interview "belonged" to AOL. This protocol put the appellants on notice that, while their communications with the attorneys were considered confidential, the company could choose to reveal the content of those communications at any time, without the appellants' consent.

We note, however, that our opinion should not be read as an implicit acceptance of the watered-down "Upjohn warnings" the investigating attorneys gave the appellants. It is a potential legal and ethical mine field. Had the investigating attorneys, in fact, entered into an attorney-client relationship with appellants, as their statements to the appellants professed they could, they would not have been free to waive the appellants' privilege when a conflict arose. It should have seemed obvious that they could not have jettisoned one client in favor of another. Rather, they would have had to withdraw from all representation and to maintain all confidences. Indeed, the court would be hard pressed to identify how investigating counsel could robustly investigate and report to management or the board of directors of a publicly-traded corporation with the necessary candor if counsel were constrained by ethical obligations to individual employees. However, because we agree with the district court that the appellants never entered into an attorney-client relationship with the investigating attorneys, they averted these troubling issues.

U.S. v. Stein

463 F. Supp. 2d 459 (S.D.N.Y. 2006)

Kaplan, District Judge

Defendant Carol Warley was a partner in KPMG LLP, one of the world's largest accounting firms. She was questioned in the course of an IRS investigation by attorneys hired by KPMG. When that investigation gave way to a threatened indictment of KPMG, the firm, in an effort to curry favor with prosecutors and avoid prosecution, waived its attorney-client privilege and gave the government documents embodying the substance of the attorneys' communications with Ms. Warley. Warley contends that the attorneys were representing her as well as KPMG, that her attorney-client privilege was compromised by the actions of the government and KPMG, and that the evidence should be suppressed. She thus raises a troublesome question that arises whenever an employee of a business organization consults with counsel retained by the entity about matters involving both the employee and the entity—when does the lawyer represent the employee as well as the entity?

This problem could be avoided if counsel in these situations routinely made clear to employees that they represent the employer alone and that the employee has no attorney-client privilege with respect to his or her communications with employer-retained counsel. Indeed, the Second Circuit advised that they do so years before the communications here in question. But there is no evidence that the attorneys who spoke to Ms. Warley followed that course.

Facts

Ms. Warley was a partner of KPMG at all relevant times. In 2003, the IRS was investigating KPMG's tax shelter activities, including some in which clients of Warley had participated. In the course of the investigation, Warley communicated with KPMG's in-house counsel and with two law firms retained by KPMG, Kronish Lieb Weiner & Hellman LLP and King & Spalding LLP. Warley does not recall having been told that the attorneys represented only KPMG or that any privilege belonged solely to the firm and could be waived by the firm without her consent.

In September 2004, in circumstances that have been discussed elsewhere, KPMG waived its attorney-client privilege for communications relating to the IRS summons. It gave the government documents relating to these communications, and the government apparently intends to use them in prosecuting Warley and others. The government argues that KPMG's waiver was sufficient to allow it to obtain the documents and disputes Warley's claim of privilege.

Warley identifies two sets of allegedly privileged communications relating to which the government has documents. First, Warley was interviewed by attorneys from Kronish and King & Spalding on two occasions in August 2003. The government is in possession of a memorandum of these interviews prepared by a Kronish attorney as well as his handwritten notes. In addition, it has listed as a trial witness one of the Kronish attorneys present at these interviews.

The second allegedly privileged communication is an email exchange in January and February of 2003 between Warley and Steven Gremminger, an in-house attorney for KPMG, relating to the tax strategies under investigation. The government has a copy of this email string.

Both parties point to the substance of the communications to support their respective claims that privilege did or did not attach. Warley further relies upon KPMG's 2003 partnership agreement, which provided that "the General Counsel shall act on behalf of all Members, except where a dispute arises between an individual Member and the Firm." Finally, Warley alleges that counsel retained by KPMG jointly represented KPMG and her personally in two lawsuits prior to the events at issue here.

Discussion

A. Scope of Privilege

The question whether employee communications with counsel retained by the employer about matters relating to the employment are privileged vis-a-vis the employee—in other words, whether the employee has a personal attorney-client privilege that only the employee may waive—is troublesome because competing interests are at play.

On the one hand, an employee, like any other agent, owes the employer a duty to disclose to the employer any information pertinent to the employment. This includes an obligation "to assist the employer's counsel in the investigation and defense of matters pertaining to the employer's business." Moreover, an employer has a substantial interest in retaining freedom of action to respond to investigations and other legal threats, an interest borne of the desire to remain in business and of duties to other constituents of the entity. Allowing individual employees to assert personal attorney-client privilege over communications with the employer's counsel could frustrate an employer's ability to act in its own self interest, perhaps to the detriment of other employees, stockholders, or partners.

Nevertheless, there are weighty considerations on the other side of the scale. Once a government investigation begins, the interests of employees and of the entity may diverge. Indeed, that may be true in other circumstances in which employees communicate with employer counsel. Employees often are unaware of the potential personal consequences of cooperating with lawyers hired by their employers.

Even more troublesome, they may cooperate with employer-retained counsel in the belief that their communications are protected by a personal privilege, sometimes as a result of a misapprehension of the law and occasionally perhaps as a result of deception, inadvertent or otherwise.

Courts have wrestled with this problem for some time now. In the absence of evidence that the employee was deceived by the employer as to the existence of a personal attorney-client relationship or as to a personal right to control the disclosure of privileged materials, circuits have employed different standards to determine when personal privilege attaches. Some have looked at whether the individual reasonably believed that there was a personal attorney-client relationship, although the Second Circuit has rejected this approach. Others have focused on whether the individual expressly requested personal advice or representation. In *In re Bevill, Bresler & Schulman Asset Management Corp.*, the Third Circuit enunciated a five-part test that has been adopted by at least two other circuits

> First, the individual claiming personal privilege must show they approached counsel for the purpose of seeking legal advice. Second, they must demonstrate that when they approached counsel they made it clear that they were seeking legal advice in their individual rather than in their representative capacities. Third, they must demonstrate that the counsel saw fit to communicate with them in their individual capacities, knowing that a possible conflict could arise. Fourth, they must prove that their conversations with counsel were confidential. And, fifth, they must show that the substance of their conversations with counsel did not concern matters within the company or the general affairs of the company.

Our circuit addressed the issue in *United States v. International Brotherhood of Teamsters*. The *Teamsters* court first noted that courts typically have said that the attorney-client privilege for an employee's communication with corporate counsel about corporate matters belongs to the corporation, not the individual employee. Nevertheless, it said, courts have found a personal privilege where the individual met "certain requirements." It quoted the Third Circuit's *Bevill* test as one such example and noted that other courts have required the employee "make it clear to corporate counsel that he seeks legal advice on personal matters." Drawing upon all of these sources, the Circuit concluded that the individual before it lacked any personal privilege with respect to the communications at issue because he "neither sought nor received legal advice from his employer's counsel on personal matters."

Teamsters' holding thus rests on the scope of "personal matters." But the meaning of that phrase has not been developed. Do "personal matters" involve solely the individual, with no impact on the entity's interests whatsoever? Or may they encompass matters that implicate both the individual and the entity? Although the facts of *Teamsters* suggest that the Circuit might have contemplated the former view, it did not expressly address the question.

Some guidance may be gained from circuits that have addressed this issue in the context of the fifth *Bevill* factor, which requires that the communication "not concern matters within the company or the general affairs of the company." The Tenth Circuit concluded that this factor

> only precludes an officer from asserting an individual attorney client privilege when the communication concerns the corporation's rights and responsibilities. However, if the communication between a corporate officer and corporate counsel specifically focuses upon the individual officer's personal rights and liabilities, then the fifth prong of Bevill can be satisfied even though the general subject matter of the conversation pertains to matters within the general affairs of the company. For example, a corporate officer's discussion with his corporation's counsel may still be protected by a personal, individual attorney-client privilege when the conversation specifically concerns the officer's personal liability for jail time based on conduct interrelated with corporate affairs.

The First Circuit adopted the Tenth Circuit's interpretation and discussed its application where communications involving the individual's liabilities "do not appear to be distinguishable" from those concerning the entity's interests. Acknowledging that both the employee and the entity could have an attorney-client relationship with the attorney with respect to such a communication, but noting also the fiduciary duty owed by a corporate officer to the corporation, the First Circuit concluded that "a corporation may unilaterally waive the attorney-client privilege with respect to any communications made by a corporate officer in his corporate capacity, notwithstanding the existence of an individual attorney-client relationship between him and the corporation's counsel." Thus, under the First Circuit formulation, individual privilege may be asserted successfully only when "communications regarding individual acts and liabilities are segregable from discussions about the corporation." To hold otherwise, the court reasoned, "would open the door to a claim of jointly held privilege in virtually every corporate communication with counsel."

The Tenth and First Circuits thus have argued persuasively that communications implicating personal liability for acts within the scope of an individual's employment may be protected by individual attorney-client privilege, at least in some circumstances. It is an open question whether such communications involve "personal matters" within the meaning of Teamsters. But it is unnecessary to resolve that issue here. As discussed below, and particularly in light of the fact that the burden of proof lies with the party asserting privilege, Warley fails to meet any standard.

B. Warley's Claims

To begin with, there is no evidence that Warley was deceived by KPMG or its attorneys about the nature of her relationship with counsel. Although she claims to have "understood that counsel were representing her personally as a partner in

the firm," her subjective belief alone does not support a conclusion that KPMG's acts were responsible for that belief. Accordingly, the analysis of her claims rests on whether the communications involved "personal matters."

Warley's communications with counsel were about events and conduct within the scope of her work as a partner at KPMG, thus clearly implicating KPMG's interest in responding to the IRS investigation. The events and conduct, however, also implicated Warley's personal interests and liabilities, as is amply evidenced by her status as a defendant in this case. Warley's communications thus present the difficult circumstance where both the individual's and the entity's interests are involved.

As discussed above, the scope of "personal matters" under *Teamsters* is unclear. Under a narrow reading, the fact that the communications implicated KPMG's interests alone would require that Warley's claim of privilege be rejected. Even under the approach adopted by the First and Tenth Circuits, however, Warley could not prevail on a privilege claim absent a showing that communications implicated her interests alone and were segregable from those involving KPMG's interests. Nothing in the allegedly privileged documents or the affidavits submitted with this motion indicates that the communications focused on her personal interests alone. The Court therefore need not determine the parameters of "personal matters," as Warley's disclosures would not come within even a broad view of the term.

Warley nevertheless argues that her communications were privileged vis-a-vis herself because (1) the KPMG partnership agreement provides that "the General Counsel shall act on behalf of all Members, except where a dispute arises between an individual Member and the Firm," and (2) counsel retained by KPMG represented both Warley and the firm in litigation on two occasions prior to the communications here at issue. But these contentions are not persuasive.

To begin with, the occasions on which Warley and KPMG were jointly represented occurred in circumstances in which Warley was a witness, not a party, to the litigation. The Court is not persuaded that representation of an employee by employer-retained counsel where the employee's role is that of a witness in a lawsuit against the employer could give rise to a reasonable expectation on the part of the employee that all communications she might have with employer-retained counsel, even a long time thereafter, were made in the context of an individual attorney-client relationship.

Nor has Warley offered any evidence that she in fact subjectively relied either upon the language in the partnership agreement or the previous litigation experience in concluding that Kronish, King & Spalding, or Gremminger was representing her individually.

Conclusion

In the end, Warley's showings amount merely to a claim of her subjective belief which, without more, is insufficient to meet her burden of proving privilege. For the foregoing reasons, Warley's motion for relief from the government's alleged violation of her attorney-client privilege is denied.

3. Clients with Diminished Capacity

Model Rules of Professional Conduct

Rule 1.14

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Rest. (3d) of the Law Governing Lawyers

§ 24. A Client with Diminished Capacity

(1) When a client's capacity to make adequately considered decisions in connection with the representation is diminished, whether because of minority, physical illness, mental disability, or other cause, the lawyer must, as far as reasonably possible, maintain a normal client-lawyer relationship with the client and act in the best interests of the client as stated in Subsection (2).

(2) A lawyer representing a client with diminished capacity as described in Subsection (1) and for whom no guardian or other representative is available to act, must, with respect to a matter within the scope of the representation, pursue the lawyer's reasonable view of the client's objectives or interests as the client would define them if able to make adequately considered decisions on the matter, even if the client expresses no wishes or gives contrary instructions.

(3) If a client with diminished capacity as described in Subsection (1) has a guardian or other person legally entitled to act for the client, the client's lawyer must treat that person as entitled to act with respect to the client's interests in the matter, unless:

   (a) the lawyer represents the client in a matter against the interests of that person; or

   (b) that person instructs the lawyer to act in a manner that the lawyer knows will violate the person's legal duties toward the client.

(4) A lawyer representing a client with diminished capacity as described in Subsection (1) may seek the appointment of a guardian or take other protective action within the scope of the representation when doing so is practical and will advance the client's objectives or interests, determined as stated in Subsection (2).

Chapter 3

Attorney Fees & Client Property

1. Attorney Fees

Model Rules of Professional Conduct

Rule 1.5. Fees

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) the fee customarily charged in the locality for similar legal services;
(4) the amount involved and the results obtained;
(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) whether the fee is fixed or contingent.

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

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event

of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or
(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
(3) the total fee is reasonable.

1.8(f)

A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;
(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
(3) information relating to representation of a client is protected as required by Rule 1.6.

Matter of Cooperman

633 N.E.2d 1069 (N.Y. 1994)

Bellicosa, J.

The issue in this appeal is whether the appellant attorney violated the Code of Professional Responsibility by repeatedly using special nonrefundable retainer fee agreements with his clients. Essentially, such arrangements are marked by the payment of a nonrefundable fee for specific services, in advance and irrespective

of whether any professional services are actually rendered. The local Grievance Committee twice warned the lawyer that he should not use these agreements. After a third complaint and completion of prescribed grievance proceedings, the Appellate Division suspended the lawyer from practice for two years. It held that the particular agreements were per se violative of public policy. We affirm the order of the Appellate Division.

I.

In 1990, the petitioner, Grievance Committee for the Tenth Judicial District, initiated a disciplinary proceeding charging attorney Cooperman with 15 specifications of professional misconduct. They relate to his use of three special nonrefundable retainer fee agreements.

The first five charges derive from a written fee agreement to represent an individual in a criminal matter. It states: "My minimum fee for appearing for you in this matter is Fifteen Thousand ($15,000.00) Dollars. This fee is not refundable for any reason whatsoever once I file a notice of appearance on your behalf." One month after the agreement, the lawyer was discharged by the client and refused to refund any portion of the fee. The client filed a formal complaint which the Grievance Committee forwarded to Cooperman for a response. Cooperman had already received a Letter of Caution not to use nonrefundable retainer agreements, and while this new complaint was pending, Cooperman was issued a second Letter of Caution admonishing him not to accept the kind of fee arrangement at issue here. He rejected the admonition, claiming the fee was nonrefundable.

Charges 6 through 10 refer to a written retainer agreement in connection with a probate proceeding. It states in pertinent part: "For the MINIMAL FEE and NON-REFUNDABLE amount of Five Thousand ($5,000.00) Dollars, I will act as your counsel." The agreement further provided: "This is the minimum fee no matter how much or how little work I do in this investigatory stage and will remain the minimum fee and not refundable even if you decide prior to my completion of the investigation that you wish to discontinue the use of my services for any reason whatsoever." The client discharged Cooperman, who refused to provide the client with an itemized bill of services rendered or refund any portion of the fee, citing the unconditional nonrefundable fee agreement.

The last five charges relate to a fee agreement involving another criminal matter. It provides: "The MINIMUM FEE for Mr. Cooperman's representation to any extent whatsoever is Ten Thousand ($10,000.00) Dollars. The above amount is the MINIMUM FEE and will remain the minimum fee no matter how few court appearances are made. The minimum fee will remain the same even if Mr. Cooperman is discharged." Two days after execution of the fee agreement, the client discharged Cooperman and demanded a refund. As with the other clients, he demurred.

Cooperman's persistent refusals to refund any portion of the fees sparked at least three separate client complaints to the Grievance Committee. In each case, Cooperman answered the complaint but refused the Grievance Committee's suggestion for fee arbitration. Thereafter, the Grievance Committee sought authorization from the Appellate Division, Second Department, to initiate formal disciplinary proceedings against Cooperman. It tendered an array of arguments that these retainer agreements are unethical because, first, they violate the lawyer's obligation to "refund promptly any part of a fee paid in advance that has not been earned." Further, the agreements create "an impermissible chilling effect upon the client's inherent right upon public policy grounds to discharge the attorney at any time with or without cause." The petition also alleged that the fees charged by Cooperman were excessive, and that he wrongfully refused to refund unearned fees. Finally, it notes that denominating the fee payment as nonrefundable constitutes misrepresentation.

After an extensive hearing, the Referee made findings supporting violations on all 15 charges. On appropriate motion, the Appellate Division confirmed the Referee's report with respect to charges 2 through 5, 7 through 10, and 12 through 15. The Court disaffirmed the report as to charges 1, 6 and 11, which alleged that the retainer agreements constituted deceit and misrepresentation. In sustaining the remaining charges, the Court held that these retainer agreements were unethical and unconscionable and "violative of an attorney's obligations under the Code of Professional Responsibility to refund unearned fees upon his or her discharge." The Court also concluded that Cooperman's fees were excessive. The Court suspended him from the practice of law for a period of two years but did not order restitution.

II.

Whether special nonrefundable retainer fee agreements are against public policy is a question we left open in *Jacobson v. Sassower*, a fee dispute case. We agree with the Appellate Division in this disciplinary matter that special nonrefundable retainer fee agreements clash with public policy and transgress provisions of the Code of Professional Responsibility, essentially because these fee agreements compromise the client's absolute right to terminate the unique fiduciary attorney-client relationship.

The particular analysis begins with a reflection on the nature of the attorney-client relationship. Sir Francis Bacon observed, "the greatest trust between people is the trust of giving counsel." This unique fiduciary reliance, stemming from people hiring attorneys to exercise professional judgment on a client's behalf—"giving counsel"—is imbued with ultimate trust and confidence. The attorney's obligations, therefore, transcend those prevailing in the commercial marketplace. The duty to deal fairly, honestly and with undivided loyalty superimposes onto the attorney-client relationship a set of special and unique duties, including main-

taining confidentiality, avoiding conflicts of interest, operating competently, safeguarding client property and honoring the client's interests over the lawyer's. To the public and clients, few features could be more paramount than the fee—the costs of legal services. The Code of Professional Responsibility reflects this central ingredient by specifically mandating, without exception, that an attorney "shall not enter into an agreement for, charge, or collect an illegal or excessive fee," and upon withdrawal from employment "shall refund promptly any part of a fee paid in advance that has not been earned." Accordingly, attorney-client fee agreements are a matter of special concern to the courts and are enforceable and affected by lofty principles different from those applicable to commonplace commercial contracts.

Because the attorney-client relationship is recognized as so special and so sensitive in our society, its effectiveness, actually and perceptually, may be irreparably impaired by conduct which undermines the confidence of the particular client or the public in general. In recognition of this indispensable desideratum and as a precaution against the corrosive potentiality from failing to foster trust, public policy recognizes a client's right to terminate the attorney-client relationship at any time with or without cause. This principle was effectively enunciated in *Martin v. Camp*: "The contract under which an attorney is employed by a client has peculiar and distinctive features thus notwithstanding the fact that the employment of an attorney by a client is governed by the contract which the parties make the client with or without cause may terminate the contract at any time."

The unqualified right to terminate the attorney-client relationship at any time has been assiduously protected by the courts. An attorney, however, is not left without recourse for unfair terminations lacking cause. If a client exercises the right to discharge an attorney after some services are performed but prior to the completion of the services for which the fee was agreed upon, the discharged attorney is entitled to recover compensation from the client measured by the fair and reasonable value of the completed services. We have recognized that permitting a discharged attorney "to recover the reasonable value of services rendered in quantum meruit, a principle inherently designed to prevent unjust enrichment, strikes the delicate balance between the need to deter clients from taking undue advantage of attorneys, on the one hand, and the public policy favoring the right of a client to terminate the attorney-client relationship without inhibition on the other."

Correspondingly and by cogent logic and extension of the governing precepts, we hold that the use of a special nonrefundable retainer fee agreement clashes with public policy because it inappropriately compromises the right to sever the fiduciary services relationship with the lawyer. Special nonrefundable retainer fee agreements diminish the core of the fiduciary relationship by substantially altering and economically chilling the client's unbridled prerogative to walk away from the lawyer. To answer that the client can technically still terminate misses the reality of the economic coercion that pervades such matters. If special nonre-

fundable retainers are allowed to flourish, clients would be relegated to hostage status in an unwanted fiduciary relationship—an utter anomaly. Such circumstance would impose a penalty on a client for daring to invoke a hollow right to discharge. The established prerogative which, by operation of law and policy, is deemed not a breach of contract is thus weakened. Instead of becoming responsible for fair value of actual services rendered, the firing client would lose the entire "nonrefundable" fee, no matter what legal services, if any, were rendered. This would be a shameful, not honorable, professional denouement. Cooperman even acknowledges that the essential purpose of the nonrefundable retainer was to prevent clients from firing the lawyer, a purpose which, as demonstrated, directly contravenes the Code and this State's settled public policy in this regard.

Nevertheless, Cooperman contends that special nonrefundable retainer fee agreements should not be treated as per se violations unless they are pegged to a "clearly excessive" fee. The argument is unavailing because the reasonableness of a particular nonrefundable fee cannot rescue an agreement that impedes the client's absolute right to walk away from the attorney. The termination right and the right not to be charged excessive fees are not interdependent in this analysis and context. Cooperman's claim, in any event, reflects a misconception of the nature of the legal profession by turning on its head the axiom that the legal profession "is a learned profession, not a mere money-getting trade."

DR 2-110 (A) and (B) of the Code of Professional Responsibility add further instruction to our analysis and disposition:

> Withdrawal from Employment *A* In general. 3 A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned. *B* Mandatory withdrawal. A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment, if: 4 The lawyer is discharged by the client.

We believe that if an attorney is prohibited from keeping any part of a prepaid fee that has not been earned because of discharge by the client, it is reasonable to conclude also that an attorney may not negotiate and keep fees such as those at issue here. In each of Cooperman's retainer agreements, the Appellate Division found that the lawyer transgressed professional ethical norms. The fee arrangements expressed an absoluteness which deprived his clients of entitlement to any refund and, thus, conflicted with DR 2-110(A)(3).

Since we decide the precise issue in this case in a disciplinary context only, we imply no views with respect to the wider array of factors by which attorneys and clients may have fee dispute controversies resolved. Traditional criteria, including the factor of the actual amount of services rendered, will continue to govern those situations. Thus, while the special nonrefundable retainer agreement will

be unenforceable and may subject an attorney to professional discipline, quantum meruit payment for services actually rendered will still be available and appropriate.

Notably, too, the record in this case contradicts Cooperman's claim that he acted in "good faith." He urges us to conclude that he "complied with the limited legal precedents at the time." The conduct of attorneys is not measured by how close to the edge of thin ice they skate. The measure of an attorney's conduct is not how much clarity can be squeezed out of the strict letter of the law, but how much honor can be poured into the generous spirit of lawyer-client relationships. The "punctilio of an honor the most sensitive" must be the prevailing standard. Therefore, the review is not the reasonableness of the individual attorney's belief, but, rather, whether a "reasonable attorney, familiar with the Code and its ethical strictures, would have notice of what conduct is proscribed." Cooperman's level of knowledge, the admonitions to him and the course of conduct he audaciously chose do not measure up to this necessarily high professional template. He even acknowledged at his disciplinary hearing that he knew that "there were problems with the nonrefundability of retainers." Cooperman's case, therefore, constitutes a daring test of ethical principles, not good faith. He failed the test, and those charged with enforcing transcendent professional values, especially the Appellate Divisions, ought to be sustained in their efforts.

Our holding today makes the conduct of trading in special nonrefundable retainer fee agreements subject to appropriate professional discipline. Moreover, we intend no effect or disturbance with respect to other types of appropriate and ethical fee agreements. Minimum fee arrangements and general retainers that provide for fees, not laden with the nonrefundability impediment irrespective of any services, will continue to be valid and not subject in and of themselves to professional discipline.

The Court is also mindful of the arguments of some of the amici curiae concerned about sweeping sequelae from this case in the form of disciplinary complaints or investigations that may seek to unearth or examine into past conduct and to declare all sorts of unobjectionable, settled fee arrangements unethical. We are confident that the Appellate Divisions, in the highest tradition of their regulatory and adjudicatory roles, will exercise their unique disciplinary responsibility with prudence, so as not to overbroadly brand past individualized attorney fee arrangements as unethical, and will, instead, fairly assess the varieties of these practices, if presented, on an individualized basis. Therefore, we decline to render our ruling prospectively, as requested.

In the Matter of Fordham

423 Mass. 481 (Mass. 1996)

O'Connor J.

This is an appeal from the Board of Bar Overseers' dismissal of a petition for discipline filed by bar counsel against attorney Laurence S. Fordham. On March 11, 1992, bar counsel served Fordham with a petition for discipline alleging that Fordham had charged a clearly excessive fee for defending Timothy Clark in the District Court against a charge that he operated a motor vehicle while under the influence of intoxicating liquor (OUI) and against other related charges. Fordham moved that the board dismiss the petition and the board chair recommended that that be done. Bar counsel appealed from the chair's decision to the full board, and the board referred the matter to a hearing committee.

After five days of hearings, and with "serious reservations," the hearing committee concluded that Fordham's fee was not substantially in excess of a reasonable fee and that, therefore, the committee recommended against bar discipline. Bar counsel appealed from that determination to the board. By a vote of six to five, with one abstention, the board accepted the recommendation of the hearing committee and dismissed the petition for discipline. Bar counsel then filed in the Supreme Judicial Court for Suffolk County a claim of appeal from the board's action.

Fordham moved in the county court for a dismissal of bar counsel's appeal. A single justice denied Fordham's motion and reported the case to the full court. We conclude that the single justice correctly denied Fordham's motion to dismiss bar counsel's appeal. We conclude, also, that the board erred in dismissing bar counsel's petition for discipline. We direct a judgment ordering public censure be entered in the county court.

We summarize the hearing committee's findings. On March 4, 1989, the Acton police department arrested Timothy, then twenty-one years old, and charged him with OUI, operating a motor vehicle after suspension, speeding, and operating an unregistered motor vehicle. At the time of the arrest, the police discovered a partially full quart of vodka in the vehicle. After failing a field sobriety test, Timothy was taken to the Acton police station where he submitted to two breathalyzer tests which registered .10 and .12 respectively.

Subsequent to Timothy's arraignment, he and his father, Laurence Clark consulted with three lawyers, who offered to represent Timothy for fees between $3,000 and $10,000. Shortly after the arrest, Clark went to Fordham's home to service an alarm system which he had installed several years before. While there, Clark discussed Timothy's arrest with Fordham's wife who invited Clark to discuss the case with Fordham. Fordham then met with Clark and Timothy.

At this meeting, Timothy described the incidents leading to his arrest and the charges against him. Fordham, whom the hearing committee described as a "very experienced senior trial attorney with impressive credentials," told Clark and Timothy that he had never represented a client in a driving while under the influence case or in any criminal matter, and he had never tried a case in the District Court. The hearing committee found that "Fordham explained that although he lacked experience in this area, he was a knowledgeable and hard-working attorney and that he believed he could competently represent Timothy. Fordham described himself as 'efficient and economic in the use of his time.' "

"Towards the end of the meeting, Fordham told the Clarks that he worked on a time charge basis and that he billed monthly. In other words, Fordham would calculate the amount of hours he and others in the firm worked on a matter each month and multiply it by the respective hourly rates. He also told the Clarks that he would engage others in his firm to prepare the case. Clark had indicated that he would pay Timothy's legal fees." After the meeting, Clark hired Fordham to represent Timothy.

According to the hearing committee's findings, Fordham filed four pretrial motions on Timothy's behalf, two of which were allowed. One motion, entitled "Motion in Limine to Suppress Results of Breathalyzer Tests," was based on the theory that, although two breathalyzer tests were exactly .02 apart, they were not "within" .02 of one another as the regulations require. The hearing committee characterized the motion and its rationale as "a creative, if not novel, approach to suppression of breathalyzer results." Although the original trial date was June 20, 1989, the trial, which was before a judge without jury, was held on October 10 and October 19, 1989. The judge found Timothy not guilty of driving while under the influence.

Fordham sent the following bills to Clark:

1. April 19, 1989, $3,250 for services rendered in March, 1989.
2. May 15, 1989, $9,850 for services rendered in April, 1989.
3. June 19, 1989, $3,950 for services rendered in May, 1989.
4. July 13, 1989, $13,300 for services rendered in June, 1989.
5. October 13, 1989, $35,022.25 revised bill for services rendered from March 19 to June 30, 1989.
6. November 7, 1989, $15,000 for services rendered from July 1, 1989 to October 19, 1989."

The bills totaled $50,022.25, reflecting 227 hours of billed time, 153 hours of which were expended by Fordham and seventy-four of which were his associates' time. Clark did not pay the first two bills when they became due and expressed to Fordham his concern about their amount. Clark paid Fordham $10,000 on June 20, 1989. At that time, Fordham assured Clark that most of the work had been completed "other than taking the case to trial." Clark did not make any subse-

quent payments. Fordham requested Clark to sign a promissory note evidencing his debt to Fordham and, on October 7, 1989, Clark did so. In the October 13, 1989, bill, Fordham added a charge of $5,000 as a "retroactive increase" in fees. On November 7, 1989, after the case was completed, Fordham sent Clark a bill for $15,000.

Bar counsel and Fordham have stipulated that all the work billed by Fordham was actually done and that Fordham and his associates spent the time they claim to have spent. They also have stipulated that Fordham acted conscientiously, diligently, and in good faith in representing Timothy and in his billing in this case.

The board dismissed bar counsel's petition for discipline against Fordham because it determined, relying in large part on the findings and recommendations of the hearing committee, that Fordham's fee was not clearly excessive. Pursuant to S.J.C. Rule 3:07, DR 2-106(B), "a fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence, experienced in the area of the law involved, would be left with a definite and firm conviction that the fee is substantially in excess of a reasonable fee." The rule proceeds to list eight factors to be considered in ascertaining the reasonableness of the fee:

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
2. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
3. The fee customarily charged in the locality for similar legal services.
4. The amount involved and the results obtained.
5. The time limitations imposed by the client or by the circumstances.
6. The nature and length of the professional relationship with the client.
7. The experience, reputation, and ability of the lawyer or lawyers performing the services.
8. Whether the fee is fixed or contingent.

In concluding that Fordham did not charge a clearly excessive fee, the board adopted, with limited exception, the hearing committee's report. The board's and the hearing committee's reasons for dismissing the petition are as follows: Bar counsel and Fordham stipulated that Fordham acted conscientiously, diligently, and in good faith in his representation of the client and his billing on the case. Although Fordham lacked experience in criminal law, he is a "seasoned and well-respected civil lawyer." The more than 200 hours spent preparing the OUI case were necessary, "in part to educate Fordham in the relevant substantive law and court procedures," because he had never tried an OUI case or appeared in the District Court. The board noted that "although none of the experts who testified at the disciplinary hearing had ever heard of a fee in excess of $15,000 for a first-offense OUI case, the hearing committee found that Clark had entered into the transaction with open eyes after interviewing other lawyers with more experience in such matters." The board also thought significant that Clark "later

acquiesced, despite mild expressions of concern, in Fordham's billing practices." Moreover, the Clarks specifically instructed Fordham that they would not consider a guilty plea by Timothy. Rather they were interested only in pursuing the case to trial. Finally, Timothy obtained the result he sought: an acquittal.

Bar counsel contends that the board's decision to dismiss the petition for discipline is erroneous on three grounds: First, "the hearing committee and the Board committed error by analyzing only three of the factors set out in DR 2-106 (B) (1)-(8), and their findings with regard to these criteria do not support their conclusion that the fee in this case was not clearly excessive"; second, the board "misinterpreted DR 2-106's prohibition against charging a clearly excessive fee by reading into the rule a 'safe harbor' provision"; and third, "by allowing client acquiescence as a complete defense."

In reviewing the hearing committee's and the board's analysis of the various factors, as appearing in DR 2-106 (B), which are to be considered for a determination as to whether a fee is clearly excessive, we are mindful that, although not binding on this court, the findings and recommendations of the board are entitled to great weight. We are empowered, however, to review the board's findings and reach our own conclusion. In the instant case we are persuaded that the hearing committee's and the board's determinations that a clearly excessive fee was not charged are not warranted.

The first factor listed in DR 2-106(B) requires examining "the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly." Although the hearing committee determined that Fordham "spent a large number of hours on the matter, in essence learning from scratch what others already know," it "did not credit Bar Counsel's argument that Fordham violated DR 2-106 by spending too many hours." The hearing committee reasoned that even if the number of hours Fordham "spent were wholly out of proportion" to the number of hours that a lawyer with experience in the trying of OUI cases would require, the committee was not required to conclude that the fee based on time spent was "clearly excessive." It was enough, the hearing committee concluded, that Clark instructed Fordham to pursue the case to trial, Fordham did so zealously and, as stipulated, Fordham spent the hours he billed in good faith and diligence. We disagree.

Four witnesses testified before the hearing committee as experts on OUI cases. One of the experts, testifying on behalf of bar counsel, opined that "the amount of time spent in this case is clearly excessive." He testified that there were no unusual circumstances in the OUI charge against Timothy and that it was a "standard operating under the influence case." The witness did agree that Fordham's argument for suppression of the breathalyzer test results, which was successful, was novel and would have justified additional time and labor. He also acknowledged that the acquittal was a good result; even with the suppression of the breathalyzer tests, he testified, the chances of an acquittal would have been "not likely at a bench trial."

The witness estimated that it would have been necessary, for thorough preparation of the case including the novel breathalyzer suppression argument, to have billed twenty to thirty hours for preparation, not including trial time.

A second expert, testifying on behalf of bar counsel, expressed his belief that the issues presented in this case were not particularly difficult, nor novel, and that "the degree of skill required to defend a case such as this was not that high." He did recognize, however, that the theory that Fordham utilized to suppress the breathalyzer tests was impressive and one of which he had previously never heard. Nonetheless, the witness concluded that "clearly there is no way that he could justify these kind of hours to do this kind of work." He estimated that an OUI case involving these types of issues would require sixteen hours of trial preparation and approximately fifteen hours of trial time. He testified that he had once spent ninety hours in connection with an OUI charge against a client that had resulted in a plea. The witness explained, however, that that case had involved a second offense OUI and that it was a case of first impression, in 1987, concerning new breathalyzer equipment and comparative breathalyzer tests.

An expert called by Fordham testified that the facts of Timothy's case presented a challenge and that without the suppression of the breathalyzer test results it would have been "an almost impossible situation in terms of prevailing on the trier of fact." He further stated that, based on the particulars in Timothy's case, he believed that Fordham's hours were not excessive and, in fact, he, the witness, would have spent a comparable amount of time. The witness later admitted, however, that within the past five years, the OUI cases which he had brought to trial required no more than a total of forty billed hours, which encompassed all preparation and court appearances. He explained that, although he had not charged more than forty hours to prepare an OUI case, in comparison to Fordham's more than 200 expended hours, Fordham nonetheless had spent a reasonable number of hours on the case in light of the continuance and the subsequent need to reprepare, as well as the "very ingenious" breathalyzer suppression argument, and the Clarks' insistence on trial. In addition, the witness testified that, although the field sobriety test, breathalyzer tests, and the presence of a half-empty liquor bottle in the car placed Fordham at a serious disadvantage in being able to prevail on the OUI charge, those circumstances were not unusual and in fact agreed that they were "normal circumstances."

The fourth expert witness, called by Fordham, testified that she believed the case was "extremely tough" and that the breathalyzer suppression theory was novel. She testified that, although the time and labor consumed on the case was more than usual in defending an OUI charge, the hours were not excessive. They were not excessive, she explained, because the case was particularly difficult due to the "stakes and the evidence." She conceded, however, that legal issues in defending OUI charges are "pretty standard" and that the issues presented in this case were not unusual. Furthermore, the witness testified that challenging the breathalyzer

test due to the .02 discrepancy was not unusual, but the theory on which Fordham proceeded was novel. Finally, she stated that she thought she may have known of one person who might have spent close to one hundred hours on a difficult OUI case; she was not sure; but she had never heard of a fee in excess of $10,000 for a bench trial.

In considering whether a fee is "clearly excessive," the first factor to be considered pursuant to that rule is "the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly." That standard is similar to the familiar standard of reasonableness traditionally applied in civil fee disputes. Based on the testimony of the four experts, the number of hours devoted to Timothy's OUI case by Fordham and his associates was substantially in excess of the hours that a prudent experienced lawyer would have spent. According to the evidence, the number of hours spent was several times the amount of time any of the witnesses had ever spent on a similar case. We are not unmindful of the novel and successful motion to suppress the breathalyzer test results, but that effort cannot justify a $50,000 fee in a type of case in which the usual fee is less than one-third of that amount.

The board determined that "because Fordham had never tried an OUI case or appeared in the district court, Fordham spent over 200 hours preparing the case, in part to educate himself in the relevant substantive law and court procedures." Fordham's inexperience in criminal defense work and OUI cases in particular cannot justify the extraordinarily high fee. It cannot be that an inexperienced lawyer is entitled to charge three or four times as much as an experienced lawyer for the same service. A client "should not be expected to pay for the education of a lawyer when he spends excessive amounts of time on tasks which, with reasonable experience, become matters of routine." "While the licensing of a lawyer is evidence that he has met the standards then prevailing for admission to the bar, a lawyer generally should not accept employment in any area of the law in which he is not qualified. However, he may accept such employment if in good faith he expects to become qualified through study and investigation, as long as such preparation would not result in unreasonable delay or expense to his client." Although the ethical considerations set forth in the ABA Code of Professional Responsibility and Canons of Judicial Ethics are not binding, they nonetheless serve as a guiding principle.

The third factor to be considered in ascertaining the reasonableness of a fee is its comparability to "the fee customarily charged in the locality for similar legal services." The hearing committee made no finding as to the comparability of Fordham's fee with the fees customarily charged in the locality for similar services. However, one of bar counsel's expert witnesses testified that he had never heard of a fee in excess of $15,000 to defend a first OUI charge, and the customary flat fee in an OUI case, including trial, "runs from $1,000 to $7,500." Bar counsel's other expert testified that he had never heard of a fee in excess of $10,000 for a bench

trial. In his view, the customary charge for a case similar to Timothy's would vary between $1,500 and $5,000. One of Fordham's experts testified that she considered a $40,000 or $50,000 fee for defending an OUI charge "unusual and certainly higher by far than any I've ever seen before." The witness had never charged a fee of more than $3,500 for representing a client at a bench trial to defend a first offense OUI charge. She further testified that she believed an "average OUI in the bench session is two thousand dollars and sometimes less." Finally, that witness testified that she had "heard a rumor" that one attorney charged $10,000 for a bench trial involving an OUI charge; this fee represented the highest fee of which she was aware. The other expert witness called by Fordham testified that he had heard of a $35,000 fee for defending OUI charges, but he had never charged more than $12,000 (less than twenty-five per cent of Fordham's fee).

Although finding that Fordham's fee was "much higher than the fee charged by many attorneys with more experience litigating driving under the influence cases," the hearing committee nevertheless determined that the fee charged by Fordham was not clearly excessive because Clark "went into the relationship with Fordham with open eyes," Fordham's fee fell within a "safe harbor," and Clark acquiesced in Fordham's fee by not strenuously objecting to his bills. The board accepted the hearing committee's analysis apart from the committee's reliance on the "safe harbor" rule.

The finding that Clark had entered into the fee agreement "with open eyes" was based on the finding that Clark hired Fordham after being fully apprised that he lacked any type of experience in defending an OUI charge and after interviewing other lawyers who were experts in defending OUI charges. Furthermore, the hearing committee and the board relied on testimony which revealed that the fee arrangement had been fully disclosed to Clark including the fact that Fordham "would have to become familiar with the law in that area." It is also significant, however, that the hearing committee found that "despite Fordham's disclaimers concerning his experience, Clark did not appear to have understood in any real sense the implications of choosing Fordham to represent Timothy. Fordham did not give Clark any estimate of the total expected fee or the number of $200 hours that would be required." The express finding of the hearing committee that Clark "did not appear to have understood in any real sense the implications of choosing Fordham to represent Timothy" directly militates against the finding that Clark entered into the agreement "with open eyes."

That brings us to the hearing committee's finding that Fordham's fee fell within a "safe harbor." The hearing committee reasoned that as long as an agreement existed between a client and an attorney to bill a reasonable rate multiplied by the number of hours actually worked, the attorney's fee was within a "safe harbor" and thus protected from a challenge that the fee was clearly excessive. The board,

however, in reviewing the hearing committee's decision, correctly rejected the notion "that a lawyer may always escape discipline with billings based on accurate time charges for work honestly performed."

The "safe harbor" formula would not be an appropriate rationale in this case because the amount of time Fordham spent to educate himself and represent Timothy was clearly excessive despite his good faith and diligence. Disciplinary Rule 2-106(B)'s mandate that "a fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence, experienced in the area of the law involved, would be left with a definite and firm conviction that the fee is substantially in excess of a reasonable fee," creates explicitly an objective standard by which attorneys' fees are to be judged. We are not persuaded by Fordham's argument that "unless it can be shown that the 'excessive' work for which the attorney has charged goes beyond mere matters of professional judgment and can be proven, either directly or by reasonable inference, to have involved dishonesty, bad faith or overreaching of the client, no case for discipline has been established." Disciplinary Rule 2-106 plainly does not require an inquiry into whether the clearly excessive fee was charged to the client under fraudulent circumstances, and we shall not write such a meaning into the disciplinary rule.

Finally, bar counsel challenges the hearing committee's finding that "if Clark objected to the numbers of hours being spent by Fordham, he could have spoken up with some force when he began receiving bills." Bar counsel notes, and we agree, that "the test as stated in the DR 2-106(A) is whether the fee 'charged' is clearly excessive, not whether the fee is accepted as valid or acquiesced in by the client." Therefore, we conclude that the hearing committee and the board erred in not concluding that Fordham's fee was clearly excessive.

Fordham argues that our imposition of discipline would offend his right to due process. A disciplinary sanction constitutes "a punishment or penalty" levied against the respondent, and therefore the respondent is entitled to procedural due process. Fordham contends that the bar and, therefore, he, have not been given fair notice through prior decisions of this court or the express language of DR 2-106 that discipline may be imposed for billing excessive hours that were nonetheless spent diligently and in good faith. It is true, as Fordham asserts, that there is a dearth of case law in the Commonwealth meting out discipline for an attorney's billing of a clearly excessive fee. There is, however, as we have noted above, case law which specifically addresses what constitutes an unreasonable attorney's fee employing virtually the identical factors contained within DR 2-106. More importantly, the general prohibition that "a lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee," is followed by eight specific, and clearly expressed, factors, to be evaluated by the standard of "a lawyer of ordinary prudence," in determining the propriety of the fee. In addition, nothing contained within the disciplinary rule nor within any pertinent case law indicates in any manner that a clearly excessive fee does

not warrant discipline whenever the time spent during the representation was spent in good faith. The fact that this court has not previously had occasion to discipline an attorney in the circumstances of this case does not suggest that the imposition of discipline in this case offends due process. We reject Fordham's due process argument.

In charging a clearly excessive fee, Fordham departed substantially from the obligation of professional responsibility that he owed to his client. The ABA Model Standards for Imposing Lawyer Sanctions § 7.3 endorses a public reprimand as the appropriate sanction for charging a clearly excessive fee. We deem such a sanction appropriate in this case. Accordingly, a judgment is to be entered in the county court imposing a public censure. The record in this case is to be unimpounded.

Culpepper & Carroll, PLLC v. Cole

929 So. 2d 1224 (La. 2006)

Per Curiam

Connie Daniel Cole seeks review of a judgment of the court of appeal affirming an award of attorney's fees to his former counsel. For the reasons that follow, we reverse the judgment of the court of appeal.

Facts and Procedural History

Connie Daniel Cole retained attorney Bobby Culpepper of the law firm of Culpepper & Carroll, PLLC to represent him in a contest of his mother's will. Mr. Cole requested that the firm handle the matter on a one-third contingent fee basis, and Mr. Culpepper agreed to do so. On September 20, 2000, Mr. Culpepper sent Mr. Cole a letter in which he confirmed that he would accept the representation on a contingent fee basis of one-third "of whatever additional property or money we can get for you."

After negotiation between Mr. Culpepper and counsel for the estate of Mr. Cole's mother, Mr. Cole was offered property worth $21,600.03 over and above what he would have received under the terms of the decedent's will. Mr. Culpepper thought the compromise was reasonable and recommended to Mr. Cole that he accept the offer. However, Mr. Cole refused to settle his claim for that amount, believing he was entitled to a larger share of his mother's succession as a forced heir. When Mr. Culpepper refused to file suit in the matter, Mr. Cole terminated his representation. Mr. Cole then proceeded in proper person to challenge his mother's will, but he was unsuccessful and recovered nothing.

On April 12, 2004, Mr. Culpepper filed a "Petition on Open Account" on behalf of the Culpepper law firm. The suit was filed in Ruston City Court against Mr. Cole, seeking the sum of $6,950.01, plus legal interest, together with 25% on the principal and interest as additional attorney's fees. Attached to the petition were Mr. Culpepper's invoice for attorney's fees and a demand letter to Mr. Cole seeking the payment of "the entire balance of $6,950.01 that you owe Culpepper & Carroll, PLLC."

Mr. Cole, appearing in proper person, answered the law firm's petition and denied that he owed any money. Mr. Cole explained in his answer that "Mr. Culpepper did this on a contingency fee basis," that Mr. Culpepper "quit the case," and that Mr. Cole paid court costs but Mr. Culpepper "would not go to court."

Following a trial on the merits, at which both parties testified, the city court rendered judgment in favor of the law firm, awarding the sum of $6,950.01, plus legal interest from the date of judicial demand until paid, together with 25% on the principal and interest as additional attorney's fees, and costs. In oral reasons for judgment, the city court judge stated that a "contingency fee was present" based on the record, including the testimony in open court and the written admission in Mr. Cole's answer that there was a contingent fee arrangement. The court noted that "work was accomplished" by Mr. Culpepper and further noted that, according to the testimony, the settlement would have produced a better result than if the case had gone to trial on the issue of forced heirship. Thus, the court was satisfied that the law firm met its burden of proof.

Mr. Cole appealed the city court's judgment, and in a 2-1 ruling, the court of appeal amended the judgment and affirmed. The majority agreed that a valid contingent fee contract existed between Mr. Cole and Mr. Culpepper, and found that by refusing to sign the "favorable settlement" negotiated by Mr. Culpepper before he was discharged, Mr. Cole was in effect depriving Mr. Culpepper of the contingent fee he had already earned. Accordingly, the court of appeal affirmed the award to Mr. Culpepper of $6,950.01 in attorney's fees, plus legal interest. However, the court of appeal found that the money owing in this case does not derive from an open account, but rather from a contractual obligation in the form of a contingent fee agreement. Based on this reasoning, the court of appeal amended the trial court's judgment to delete the award to the law firm of 25% additional attorney's fees plus costs under the open account statute.

Judge Caraway dissented. He recognized that a contingent fee contract existed in this case, but found that because there was ultimately no recovery in the case, no fee was due to Mr. Culpepper. Judge Caraway further observed that to allow an attorney to collect a fee when the client rejects a settlement offer and later recovers nothing "ignores multiple and serious concerns embodied in the rules of professional conduct."

Upon Mr. Cole's application, we granted certiorari to review the correctness of the court of appeal's ruling.

Discussion

As a threshold matter, we note the trial court made a finding of fact that a contingent fee contract existed between Mr. Cole and Mr. Culpepper. Based on our review of the record, we find no manifest error in this determination.

Having found a contingent fee contract exists, we now turn to the question of whether Mr. Culpepper is entitled to recover any attorney's fees under this contract. Pursuant to the parties' agreement, Mr. Culpepper is entitled to one-third "of whatever additional property or money" he obtained on behalf of Mr. Cole. It is undisputed that Mr. Cole recovered no additional property or money as a result of the litigation against his mother's estate. Because Mr. Cole obtained no recovery, it follows that Mr. Culpepper is not entitled to any contingent fee.

Nonetheless, Mr. Culpepper urges us to find that his contingency should attach to the settlement offer he obtained on behalf of his client, even though his client refused to accept that offer. According to Mr. Culpepper, he did the work for which Mr. Cole retained him, and he is therefore entitled to one-third of the amount offered in settlement, notwithstanding Mr. Cole's rejection of the settlement offer.

With the benefit of hindsight, it would have been in Mr. Cole's best interest to accept the settlement offer obtained by Mr. Culpepper. However, it is clear that the decision to accept a settlement belongs to the client alone. Therefore, regardless of the wisdom of Mr. Cole's decision, his refusal to accept the settlement was binding on Mr. Culpepper.

To allow Mr. Culpepper to recover a contingent fee under these circumstances would penalize Mr. Cole for exercising his right to reject the settlement. We find no statutory or jurisprudential support for such a proposition. Indeed, this court has rejected any interpretation of the Rules of Professional Conduct which would place restrictions on the client's fundamental right to control the case.

In summary, we find that Mr. Culpepper did not obtain any recovery on behalf of Mr. Cole. In the absence of a recovery, it follows that Mr. Culpepper cannot collect a contingent fee for his services. Accordingly, we must reverse the judgment of the court of appeal awarding a contingent fee to Mr. Culpepper.

2. Client Property

Model Rules of Professional Conduct

Rule 1.15. Safekeeping property

(a) A lawyer shall hold property of clients or third persons 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 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.

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(d) 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.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

Nebraska State Bar Association v. Statmore

352 N.W.2d 875 (Neb. 1984)

Per Curiam

This is an original disciplinary proceeding by the Nebraska State Bar Association against Clay B. Statmore, an attorney admitted to practice in Nebraska. After a hearing before the Committee on Inquiry of the First Disciplinary District and a review by the Disciplinary Review Board, formal charges against Statmore have been filed in this court.

Statmore does not deny the charges. The charges allege violations of the following:

CANON 1. A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession.

> DR 1-102. Misconduct. A. A lawyer shall not: 1. Violate a Disciplinary Rule. 6. Engage in any other conduct that adversely reflects on his fitness to practice law. CANON 9. A Lawyer Should Avoid Even the Appearance of Professional Impropriety. DR 9-102. Preserving Identity of Funds and Property of a Client. B. A lawyer shall: 1. Promptly notify a client of the receipt of his funds, securities, or other properties. 4. Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive. We review the evidence de novo to determine if discipline should be imposed and, if discipline is warranted, the nature of the discipline which is appropriate under the circumstances.

On April 15, 1982, Statmore undertook representation of Deborah A. Kuzara regarding a charge of driving while intoxicated, second offense. Kuzara, on June 2, gave Statmore her check for $500—the agreed fee for the representation. Statmore deposited Kuzara's June 2 check, which was returned twice by the bank due to insufficiency of Kuzara's account. Statmore contacted Kuzara and her father in New Jersey about the insufficient fund check.

On June 22 Kuzara issued another check (check A) for $500, which Statmore deposited but which was returned to Statmore's Lincoln bank on account of Kuzara's insufficient funds. On June 30 Kuzara sent Statmore still another check (check B) in the amount of $540—$500 for Statmore's fee, plus $40 for the check service charges regarding the other Kuzara checks. Check B was returned on account of insufficient funds. Unbeknown to Statmore, his bank had held check A and collected that check on July 9, 1982, with credit to Statmore's business account in the sum of $495 ($500 less a $5 service charge). Statmore again contacted Kuzara about the insufficient fund checks. At this time Statmore was still unaware that the bank had credited his account $495 for check A on July 9.

Statmore took check B to the Lancaster County attorney and requested criminal prosecution. Notified by the county attorney regarding prosecution on check B, Kuzara hired attorney George Thompson of Bellevue, Nebraska. Kuzara later delivered $540 to the county attorney for check B. On November 12 the county attorney sent $540 to Statmore regarding check B.

Kuzara contacted Statmore about the possibility of a double payment, that is, check A credited to Statmore on July 9 and the funds from the county attorney on November 12 regarding check B. Statmore asked for verification from Kuzara that there was in fact a double payment, and felt he was getting a "runaround" about the checks.

Attorney Thompson wrote Statmore on January 5, 1983, pointed out the double payment, and requested a reply. Statmore did not respond to Thompson's letter. Early in February, Statmore checked his deposit slips and saw that there indeed had been the "$495 deposit" (check A) to his account on July 9. This was apparently Statmore's first verification of payment on check A. Thompson again wrote to Statmore on March 2 and demanded Kuzara's $495 by return mail. Statmore never responded to that letter. By March 14 Statmore conclusively realized that he had received double payment from Kuzara. On March 16 Thompson telephoned Statmore, who then acknowledged the double payment and told Thompson he did not have the funds to reimburse Kuzara.

On May 23 Kuzara filed a complaint with the Counsel for Discipline of the Nebraska State Bar Association. Counsel for Discipline wrote Statmore as soon as Kuzara filed her complaint. Statmore paid Kuzara $250 on June 28 and the same day wrote the Counsel for Discipline that he had "recently" paid Kuzara $250. In his June 28 letter to the Counsel for Discipline, Statmore also mentioned that the "remaining $245 should be repaid within the next fourteen days." Statmore paid nothing further until the day of the hearing before the Committee on Inquiry.

On the day of the hearing before the Committee on Inquiry, September 20, Statmore brought the Counsel for Discipline a check for $245 to pay Kuzara, and stated he "didn't know who to send it to."

Statmore says he never reconciles his monthly bank statement and, therefore, had no knowledge that check A had cleared and been credited to his account on July 9. Such ignorance regarding check A existed at the time Statmore received the money from the Lancaster County attorney regarding check B.

Throughout all the time in question, Statmore was having financial problems: failed to pay utilities (some of which were disconnected) and did not pay office rent (moved his office after delinquency in rent). Statmore implies that the somewhat chaotic office situation explains, if not excuses, the sorry state of affairs during his representation of Kuzara.

Implicit in the license to practice law is the requirement that the recipient of the license shall demean himself in a proper manner and shall refrain from practices which bring discredit upon the lawyer, the profession, and the courts.

Any violation of the ethical standards relating to the practice of law, or any conduct of an attorney which tends to bring reproach upon the courts or the legal profession, constitutes grounds for suspension or disbarment.

When the double payment occurred, Statmore held Kuzara's money, which he was not authorized to retain. Kuzara's conduct or mistake concerning payment of her checks did not relieve Statmore of his professional duty regarding his client's funds. Accurate accountability of a client's funds is the responsibility of the lawyer, not the client. Statmore's slipshod office management and careless bookkeeping prevented any semblance of the accurate accounting lawyers must maintain with respect to a client's funds. As a result of Statmore's poor management and failure to keep track of payment from Kuzara, there was a commingling of a client's money—an area of gravest concern of this court in reviewing claimed lawyer misconduct. The prohibition against commingling of funds is a salutary rule adopted

> to provide against the probability in some cases, the possibility in many cases, and the danger in all cases that such commingling will result in the loss of clients' money. Moral turpitude is not necessarily involved in the commingling of a client's money with an attorney's own money if the client's money is not endangered by such procedure and is always available to him. However, inherently there is danger in such practice for frequently unforeseen circumstances arise jeopardizing the safety of the client's funds, and as far as the client is concerned the result is the same whether his money is deliberately misappropriated by an attorney or is unintentionally lost by circumstances beyond the control of the attorney.

A lawyer's poor accounting procedures and sloppy office management are not excuses or mitigating circumstances in reference to commingled funds.

We realize that Statmore has repaid Kuzara the overpayment. However, a lawyer's restitution of a client's funds after being faced with legal accountability does not exonerate professional misconduct.

Among the major considerations in determining whether a lawyer should be disciplined is maintenance of the highest trust and confidence essential to the attorney-client relationship. As a profession, the bar continuously strives to build and safeguard such trust and confidence, but conduct such as before us in the present case weakens the efforts of the overwhelming majority of lawyers in Nebraska whose conduct meets, if not exceeds, the Code of Professional Responsibility.

To determine whether and to what extent discipline should be imposed, it is necessary that we consider the nature of the offense, the need for deterring others, the maintenance of the reputation of the bar as a whole, the protection of the public, the attitude of the offender generally, and his present or future fitness to continue in the practice of law.

Therefore, under the circumstances we find that a suspension is appropriate discipline for Statmore and that Statmore should be suspended from the practice of law for a period of 6 months. During such suspension, we sincerely suggest that Statmore reappraise the candor, fairness, and responsibility a lawyer owes to his client. We recommend that Statmore revise his accounting procedures and office management to prevent recurrence of any misconduct. Suspension of Statmore

shall be effective September 1, 1984, and shall last for 6 months. Statmore shall make suitable arrangements that his clients' matters pending at and during his suspension shall be suitably protected.

Chapter 4

Duty of Care

1. Competence, Diligence, & Communication

Model Rules of Professional Conduct

Rule 1.1: Competence

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

Comment:

Legal Knowledge and Skill

1. In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.
2. A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A

lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

3. In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for illconsidered action under emergency conditions can jeopardize the client's interest.
4. A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

5. Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Retaining or Contracting With Other Lawyers

6. Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.
7. When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Maintaining Competence

8. To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Rule 1.3: Diligence

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

Rule 1.4: Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

2. Malpractice

The term "legal malpractice" is sometimes used generally to refer to any claim against an attorney for breach of fiduciary duty, and sometimes more specifically for claims involving the duty of care. The elements of such claims are similar to other torts: the existence of a duty, breach of the duty, and harm caused by the breach. In claims based on the duty of care, the standard of liability is negligence, i.e. failure to exercise the degree of care of a reasonably prudent attorney under similar circumstances. In contrast, attorneys may be strictly liable for breaching the duties of loyalty, impartiality, or confidentiality.

Model Rules of Professional Conduct Rule 1.8(h)

A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or
(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

Rest. (3d) of the Law Governing Lawyers

§ 48. Professional Negligence—Elements and Defenses Generally

In addition to the other possible bases of civil liability described in §§ 49, 55, and 56, a lawyer is civilly liable for professional negligence to a person to whom the lawyer owes a duty of care within the meaning of § 50 or § 51, if the lawyer fails to exercise care within the meaning of § 52 and if that failure is a legal cause of injury within the meaning of § 53, unless the lawyer has a defense within the meaning of § 54.

§ 49. Breach of Fiduciary Duty—Generally

In addition to the other possible bases of civil liability described in §§ 48, 55, and 56, a lawyer is civilly liable to a client if the lawyer breaches a fiduciary duty to the client set forth in § 16(3) and if that failure is a legal cause of injury within the meaning of § 53, unless the lawyer has a defense within the meaning of § 54.

§ 50. Duty of Care to a Client

For purposes of liability under § 48, a lawyer owes a client the duty to exercise care within the meaning of § 52 in pursuing the client's lawful objectives in matters covered by the representation.

§ 51. Duty of Care to Certain Nonclients

For purposes of liability under § 48, a lawyer owes a duty to use care within the meaning of § 52 in each of the following circumstances:

(1) to a prospective client, as stated in § 15;
(2) to a nonclient when and to the extent that:

   (a) the lawyer or (with the lawyer's acquiescence) the lawyer's client invites the nonclient to rely on the lawyer's opinion or provision of other legal services, and the nonclient so relies; and

(b) the nonclient is not, under applicable tort law, too remote from the lawyer to be entitled to protection;

(3) to a nonclient when and to the extent that:

(a) the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer's services benefit the nonclient;

(b) such a duty would not significantly impair the lawyer's performance of obligations to the client; and

(c) the absence of such a duty would make enforcement of those obligations to the client unlikely; and

(4) to a nonclient when and to the extent that:

(a) the lawyer's client is a trustee, guardian, executor, or fiduciary acting primarily to perform similar functions for the nonclient;

(b) the lawyer knows that appropriate action by the lawyer is necessary with respect to a matter within the scope of the representation to prevent or rectify the breach of a fiduciary duty owed by the client to the nonclient, where (i) the breach is a crime or fraud or (ii) the lawyer has assisted or is assisting the breach;

(c) the nonclient is not reasonably able to protect its rights; and

(d) such a duty would not significantly impair the performance of the lawyer's obligations to the client.

§ 52. The Standard of Care

(1) For purposes of liability under §§ 48 and 49, a lawyer who owes a duty of care must exercise the competence and diligence normally exercised by lawyers in similar circumstances.

(2) Proof of a violation of a rule or statute regulating the conduct of lawyers:

(a) does not give rise to an implied cause of action for professional negligence or breach of fiduciary duty;

(b) does not preclude other proof concerning the duty of care in Subsection (1) or the fiduciary duty; and

(c) may be considered by a trier of fact as an aid in understanding and applying the standard of Subsection (1) or § 49 to the extent that (i) the rule or statute was designed for the protection of persons in the position of the claimant and (ii) proof of the content and construction of such a rule or statute is relevant to the claimant's claim.

§ 53. Causation and Damages

A lawyer is liable under § 48 or § 49 only if the lawyer's breach of a duty of care or breach of fiduciary duty was a legal cause of injury, as determined under generally applicable principles of causation and damages.

§ 54. Defenses; Prospective Liability Waiver; Settlement with a Client

(1) Except as otherwise provided in this Section, liability under §§ 48 and 49 is subject to the defenses available under generally applicable principles of law governing respectively actions for professional negligence and breach of fiduciary duty. A lawyer is not liable under § 48 or § 49 for any action or inaction the lawyer reasonably believed to be required by law, including a professional rule.

(2) An agreement prospectively limiting a lawyer's liability to a client for malpractice is unenforceable.

(3) The client or former client may rescind an agreement settling a claim by the client or former client against the person's lawyer if:

(a) the client or former client was subjected to improper pressure by the lawyer in reaching the settlement; or

(b) (i) the client or former client was not independently represented in negotiating the settlement, and (ii) the settlement was not fair and reasonable to the client or former client.

(4) For purposes of professional discipline, a lawyer may not:

(a) make an agreement prospectively limiting the lawyer's liability to a client for malpractice; or

(b) settle a claim for such liability with an unrepresented client or former client

without first advising that person in writing that independent representation is appropriate in connection therewith.

§ 55. Civil Remedies of a Client Other Than for Malpractice

(1) A lawyer is subject to liability to a client for injury caused by breach of contract in the circumstances and to the extent provided by contract law.

(2) A client is entitled to restitutionary, injunctive, or declaratory remedies against a lawyer in the circumstances and to the extent provided by generally applicable law governing such remedies.

§ 56. Liability to a Client or Nonclient Under General Law

Except as provided in § 57 and in addition to liability under §§ 48-55, a lawyer is subject to liability to a client or nonclient when a nonlawyer would be in similar circumstances.

§ 57. Nonclient Claims—Certain Defenses and Exceptions to Liability

(1) In addition to other absolute or conditional privileges, a lawyer is absolutely privileged to publish matter concerning a nonclient if:

(a) the publication occurs in communications preliminary to a reasonably anticipated proceeding before a tribunal or in the institution or during the course and as a part of such a proceeding;

(b) the lawyer participates as counsel in that proceeding; and

(c) the matter is published to a person who may be involved in the proceeding, and the publication has some relation to the proceeding.

(2) A lawyer representing a client in a civil proceeding or procuring the institution of criminal proceedings by a client is not liable to a nonclient for wrongful use of civil proceedings or for malicious prosecution if the lawyer has probable cause for acting, or if the lawyer acts primarily to help the client obtain a proper adjudication of the client's claim in that proceeding.

(3) A lawyer who advises or assists a client to make or break a contract, to enter or dissolve a legal relationship, or to enter or not enter a contractual relation, is not liable to a nonclient for interference with contract or with prospective contractual relations or with a legal relationship, if the lawyer acts to advance the client's objectives without using wrongful means.

§ 58. Vicarious Liability

(1) A law firm is subject to civil liability for injury legally caused to a person by any wrongful act or omission of any principal or employee of the firm who was acting in the ordinary course of the firm's business or with actual or apparent authority.

(2) Each of the principals of a law firm organized as a general partnership without limited liability is liable jointly and severally with the firm.

(3) A principal of a law firm organized other than as a general partnership without limited liability as authorized by law is vicariously liable for the acts of another principal or employee of the firm to the extent provided by law.

2.1 Existence of a Duty

Marker v. Greenberg

313 N.W.2d 4 (Minn. 1981)

SCOTT, Justice.

This is an appeal from an order of the Hennepin County District Court in a legal malpractice action brought by the surviving joint tenant against the attorney who drafted the deed. By that order the trial court granted respondent Robert Greenberg's motion for summary judgment on the grounds that plaintiff could not bring the action absent an attorney-client relationship and that the six-year statute of limitations barred the action since the statutory period began to run in 1973 when the alleged negligence occurred. We affirm.

For purposes of this appeal, the facts are uncontested. Appellant's father, Theodore Marker, retained respondent, an attorney, for estate planning services. In December 1972 respondent prepared a will for appellant's father. In August 1973, on behalf of appellant's father, respondent drafted deeds which conveyed certain real estate to appellant's father and appellant as joint tenants.

Appellant's father died on December 24, 1977. Because the real estate in question was held by appellant and his father as joint tenants, its entire value, $120,000, was included in the decedent's gross estate for tax purposes.

Appellant asserts that, if he and his father had held the real estate as tenants in common, $20,858.18 in federal and state taxes would have been saved. Appellant commenced this action to recover the amount of the additional estate taxes, claiming the loss resulted from respondent's negligence in not having the real estate conveyed into tenancy in common.

Appellant was never a client of respondent. Appellant does not allege that he was a beneficiary of his father's estate with respect to this property, but that he was a surviving joint tenant.

The trial court granted summary judgment in favor of the respondent and dismissed the complaint. Therefore, the issue arises as to whether a surviving joint tenant has a cause of action for malpractice against the attorney who drafted the joint tenancy deeds when the surviving joint tenant was never a client of the attorney.

The general rule in legal malpractice is that an attorney is liable for professional negligence only to a person with whom the attorney has an attorney-client relationship and not, in the absence of special circumstances such as fraud or improper motive, to anyone else. Courts have recognized exceptions, however, where strict privity is not required. Exceptions are frequently found in cases involving drafting or executing a will.

Many courts have followed the lead of the California Supreme Court, which declared in *Lucas v. Hamm*, that an intended beneficiary may bring an action for legal malpractice against the decedent's attorney where the attorney's negligent act caused the named beneficiary to lose the intended bequest.

The relaxation of the strict privity requirement is very limited, however. Especially in probate proceedings, this stringent restriction is a necessity to prevent a myriad of causes of action. The will cases listed above which follow *Lucas v. Hamm* are all situations in which the attorney by his actions produced an instrument that failed to carry out the testamentary intent of the testator, either by faulty drafting or by improper attestation. The cases extending the attorney's duty to non-clients are limited to a narrow range of factual situations in which the client's sole purpose in retaining an attorney is to benefit directly some third party. As stated by the Iowa Supreme Court in *Brody v. Ruby*, "It is clear, however, that the third party, in order to proceed successfully in a legal malpractice action, must be a direct and intended beneficiary of the lawyer's services."

In determining the extent of an attorney's duty to a non-client, courts frequently consider the factors expressed by the *Lucas* court:

The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury, and the policy of preventing future harm.

Applying these factors to the deed drafted by respondent for appellant's father reveals that the respondent owed no duty to appellant. This is not a case where the property did not pass to the intended recipient upon the death of the testator. The deed was effective at the time it was recorded in 1973. There was no invalidity in the deed. Appellant does not allege that the disposition of the property was contrary to the intent of his father. The benefit which Theodore Marker wished to give to his son was the joint ownership of the property, and this was accomplished by the documents.

The facts of *Bucquet v. Livingston*, to which appellant compares his situation, are distinguishable. In *Bucquet*, the beneficiaries of an inter vivos trust alleged professional negligence by the defendant attorney in drafting the trust agreement. The complaint alleged that the attorney was employed to plan the settlor's estate and to carry out his intent that the non-marital half of the trust principal would ultimately pass to the beneficiaries free of estate taxes after his wife's death. Because the attorney negligently included a general power of appointment in the instrument, additional taxes were imposed which reduced the corpus of the trust passing to the beneficiaries. In that case the express purpose of the trust was minimization of taxes. No such purpose is alleged in the instant case. In *Bucquet* the desired savings in taxes failed because of the faulty drafting by the attorney. In the present case, there is no allegation that the deed as drafted failed to accomplish the objective of the client as expressed to the respondent.

The facts of the instant case are more similar to those of *Hiemstra v. Huston*. In that case the court recognized the exception established in earlier California cases holding an attorney liable to an intended beneficiary for defects in drafting of a will. The court nevertheless held that the complaint failed to state a cause of action in the allegations that under a will drafted by the defendant attorneys the plaintiff son received a smaller bequest than he would have received under an earlier will of testator. The court noted that plaintiff did not assert any legal deficiency in the will, nor did plaintiff assert either as a conclusion or by allegation of ultimate facts that the will failed to reflect the intent of the testator. The court concluded that if plaintiff was deprived of a substantial part of his father's estate, it was the result not of any negligence on the part of the defendant attorneys but of the testator's intention as expressed in the valid document.

In the case before us, the objective of the deed was to transfer ownership of the real estate to joint tenancy between the father and the son. The complaint alleges no invalidity in the documents and no conflict of the result with decedent's intentions. The estate taxes that were due at Theodore Marker's death were the natural result of the form of ownership chosen by the decedent and not the result of any negligence by respondent. In this case summary judgment was proper. We therefore need not discuss the disputed application of the statute of limitations.

2.2 Breach of the Duty

Ishmael v. Millington

241 Cal. App. 2d 520 (Cal. Ct. App. 1966)

FRIEDMAN, J.

This is a legal malpractice action in which the plaintiff-client appeals from a summary judgment granted the defendant-attorney. The factual narrative will possess heightened significance against a backdrop of general doctrine:

Actionable legal malpractice is compounded of the same basic elements as other kinds of actionable negligence: duty, breach of duty, proximate cause, damage. Touching the first element, duty, the general rule is that "the attorney, by accepting employment to give legal advice or to render other legal services, impliedly

agrees to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake."

In this case the defense is that the client sought no advice from the attorney and was given none; by the client's express admission, she did not rely on the attorney, thus, that her alleged damage was not proximately caused by the attorney's cause of action.

The facts are presented by summary judgment affidavits, which include extracts from depositions. There is no significant conflict in the evidence. Roberta Ishmael, the plaintiff, was formerly married to Earl F. Anders. The couple had three children. They lived in Gridley, where Mr. Anders was a partner in a family trucking business. Domestic difficulties resulted in a separation, and Mrs. Anders moved to Sacramento where she secured employment. She and her husband agreed upon a divorce and property settlement. She knew that she was entitled to one-half the marital property.

Mr. Anders called upon defendant Robert Millington, a Gridley attorney who had for some time represented him and his trucking firm. Mr. Millington advised Anders that if he could establish adulterous conduct by Mrs. Anders, he might be awarded more than one-half the community property. For one reason or another there was a decision that the wife rather than the husband would apply for divorce. At Anders' request Mr. Millington agreed to act as the wife's attorney, to prepare the necessary papers and to file a divorce action for her. He drew up a complaint and a property settlement agreement and handed these documents to Mr. Anders, who took them to Sacramento and had his wife sign them. She knew that Mr. Millington had represented her husband in the past. Faulty recall prevents ascertainment whether Mrs. Anders ever met personally with the attorney before the papers were drawn. She did not discuss the property settlement agreement with the attorney before she signed it. Mr. Millington believed the divorce and property settlement arrangements were "cut and dried" between the husband and wife; he "assumed that she knew what she was doing;" he believed that she was actually getting half the property but made no effort to confirm that belief.

In her deposition the former Mrs. Anders testified that in signing the complaint and property settlement agreement she relied solely on her husband and did not rely on the attorney. Later, when so instructed, she traveled to the courthouse at Oroville, where she and her corroborating witness met Mr. Millington. He escorted her through a routine ex parte hearing which resulted in an interlocutory divorce decree and judicial approval of the property settlement.

According to her complaint, the former Mrs. Anders discovered that in return for a settlement of $8,807 she had surrendered her right to community assets totaling $82,500. Ascribing her loss to the attorney's negligent failure to make inquiries

as to the true worth of the community property, she seeks damages equivalent to the difference between what she received and onehalf the asserted value of the community.

By the very act of undertaking to represent Mrs. Anders in an uncontested divorce suit, Mr. Millington assumed a duty of care toward her, whatever its degree. Described in terms traditionally applicable to the attorney-client relationship, the degree of care exacted by that duty was that of a figurative lawyer of ordinary skill and capacity in the performance of like tasks.

The degree of care is related to the specific situation in which the defendant found himself. The standard is that of ordinary care under the circumstances of the particular case. A lawyer owes undivided loyalty to his client. Minimum standards of professional ethics usually permit him to represent dual interests where full consent and full disclosure occur. The loyalty he owes one client cannot consume that owed to the other. Most descriptions of professional conduct prohibit his undertaking to represent conflicting interests at all; or demand that he terminate the threeway relationship when adversity of interest appears. Occasional statements sanction informed representation of divergent interests in "exceptional" situations. Even those statements demand complete disclosure of all facts and circumstances which, in the attorney's honest judgment, may influence his client's choice, holding the attorney civilly liable for loss caused by lack of disclosure.

Divorces are frequently uncontested; the parties may make their financial arrangements peaceably and honestly; vestigial chivalry may impel them to display the wife as the injured plaintiff; the husband may then seek out and pay an attorney to escort the wife through the formalities of adjudication. We describe these facts of life without necessarily approving them. Even in that situation the attorney's professional obligations do not permit his descent to the level of a scrivener. The edge of danger gleams if the attorney has previously represented the husband. A husband and wife at the brink of division of their marital assets have an obvious divergence of interests. Representing the wife in an arm's length divorce, an attorney of ordinary professional skill would demand some verification of the husband's financial statement; or, at the minimum, inform the wife that the husband's statement was unconfirmed, that wives may be cheated, that prudence called for investigation and verification. Deprived of such disclosure, the wife cannot make a free and intelligent choice. Representing both spouses in an uncontested divorce situation (whatever the ethical implications), the attorney's professional obligations demand no less. He may not set a shallow limit on the depth to which he will represent the wife.

The general standard of professional care is appropriate to the garden variety situation, where the attorney represents only one of several parties or interests. It falls short of adequate description where the attorney's professional relationship extends to two clients with divergent or conflicting interests in the same subject matter. A more specific statement of the same rule is needed to guide the fact trier

to the law's demands when the attorney attempts dual representation. In short, an attorney representing two parties with divergent interests must disclose all facts and circumstances which, in the judgment of a lawyer of ordinary skill and capacity, are necessary to enable his client to make free and intelligent decisions regarding the subject matter of the representation.

In view of the degree of care imposed by law on an attorney in defendant's position, a fact trier might reasonably find him negligent in failing to disclose to plaintiff the limited representation she was receiving and in failing to point to the possibility of independent legal advice. The question of breach was thus a triable issue which could not be resolved on a summary judgment motion.

Legal malpractice may consist of a negligent failure to act. The attorney's negligence, whether consisting of active conduct or a failure to act, need not be the sole cause of the client's loss. Here the attorney is charged not with erroneous advice, but with failure to advise, failure to investigate, failure to disclose. The wife's reliance on her husband's alleged misrepresentations is not at all inconsistent with the claim that her loss was the result of the attorney's negligent failure. A jury might find that the husband's misrepresentations were a realizable likelihood which made the attorney's inaction negligent, thus forming a concurrent (and not superseding) cause of harm. Causation was a jury question which could not be resolved as a matter of law.

Contributory negligence on plaintiffs part was specially pleaded and, if established, would bar malpractice recovery. Plaintiff, as she testified, relied on her husband's list of assets; apparently did not trouble to investigate or even to inquire whether she was getting her share of property; was seemingly content to let her husband take charge; accepted his attorney for the limited purpose of piloting her through the divorce formalities. A court, however, cannot say that reasonable jurors would inevitably characterize her conduct as contributory negligence. That issue was a triable issue of fact.

Thus, notwithstanding the lack of conflict in the evidence, the summary judgment rests on the determination of issues reserved for decision by a fact trier and which could not be resolved as a matter of law. Since triable issues of fact existed, the motion should have been denied.

Equitania Ins. v. Slone & Garrett

191 S.W.3d 552 (Ky. 2006)

Wintersheimer, Justice

This appeal is from an opinion of the Court of Appeals which affirmed a judgment of the circuit court based on a summary judgment/jury verdict that rejected the claim of the Equitania Insurance Company and its Vimont shareholder group for legal malpractice against Garrett and her law firm.

The major issues are whether the proper standard for proving liability in a legal malpractice case was followed and whether the instructions given by the trial judge to the jury regarding specific factual issues violated the rule in favor of bare-bones jury instructions.

Two groups of shareholders, the Vimont group, composed of four of the shareholders, and the Pavenstedt group, composed of a group of shareholders led by Johann Pavenstedt began to vie for control of Equitania, an insurance company which provided insurance for horse owners. After the Vimont group bought out the Pavenstedt group, the company continued to decline in its efforts to return a profit. Vimont eventually entered an agreement to sell the book of business to Markel Insurance Company. That deal was closed in January 1995. In March of that year, the Vimont group filed a civil action in circuit court, seeking to rescind the agreement between them and the Pavenstedt group. That case was assigned to Fayette Circuit Judge Gary Payne. A judgment was rendered against the Vimont group and it was upheld by the Court of Appeals in an unpublished opinion.

Laurel Garrett and the law firm of Slone & Garrett represented the Vimont group in its attempt to gain control of the company prior to Vimont buying the shares of Pavenstedt. As a result of that representation, Vimont filed a civil action against Garrett in circuit court in February of 1997, alleging legal malpractice by Garrett in connection with her representation. That case was assigned to Fayette Circuit Judge John R. Adams and it is the principal subject of this appeal. Judge Adams ruled against Vimont and the Court of Appeals upheld that decision. This appeal followed.

This case is a complex legal malpractice claim brought by Vimont against Garrett alleging that she negligently advised them during the midst of the shareholder dispute. They claim that Garrett negligently failed to properly advise them as to how to retain control of the corporation; that the methods she advised violated the insurance code; violated a fiduciary duty to shareholders; was unethical, and was substantially more expensive. The circuit judge granted Garrett a partial summary judgment based on his interpretation of the contract which was different from the interpretation made by the circuit judge in the earlier civil case. The other portion of the claim was resolved in favor of Garrett by a jury verdict. The Court of Appeals upheld the decision of the circuit court, and this Court granted discretionary review.

I. Jury Instructions

Correct instructions are absolutely essential to an accurate jury verdict. The fundamental function of instructions is to tell the jury what it must believe from the evidence in order to resolve each dispositive factual issue in favor of the party who has the burden of proof on that issue.

We should note it is well recognized that the function of instructions is only to state what the jury must believe from the evidence. There should not be an abundance of detail but the jury instructions should provide only the "bare bones" of the question for the jury. The bare bones may then be fleshed out by counsel during closing argument.

The jury instructions given by the trial court over the objection by Vimont were not an accurate statement of the law regarding legal malpractice in Kentucky. Vimont objected to the instructions and tendered instructions of their own which were not used. The instructions given follow:

> Instruction No. 2: It was the duty of Defendant, Laurel Garrett, in undertaking the legal representation of the plaintiffs, to possess to an ordinary extent the technical knowledge commonly possessed in her profession, to exercise that degree of care and skill which an ordinary, reasonably competent lawyer would exercise under the same or similar circumstances. Provided, however, a lawyer cannot be held responsible for errors in judgment or for advising a course of action even if that course of action ultimately proves to be unsuccessful.

The given instructions were incorrect for several reasons. It was properly preserved because there was an objection to Instruction No. 2 in the submitted instructions.

Kentucky law does not provide for an exception for attorney liability for errors in judgment. A case relied on by the Court of Appeals, *Daugherty v. Runner*, stated that misjudgment of the law will generally not render a lawyer liable. However, *Daugherty* did not state that a lawyer can never be held liable for an error in judgment. The tendered instructions did not advise the jury that it had to be an error of law which precluded liability, nor did it inform the jury that there are circumstances in which misjudgment of the law could be a basis for liability. There can be many circumstances in which lawyers can commit errors of judgment which deviate from the standard of care. Whether an error of judgment is legal malpractice is a question of fact for the jury.

Vimont offered an expert, Manning Warren, to evaluate the methods undertaken by Garrett to assist the company in its shareholders dispute. Specifically, Warren testified that Garrett should have pursued an administrative process with the Department of Insurance to join the Vimont group to the Pavenstedt agreement which, if successful, would have resulted in the shareholders maintaining control of Equitania and would have resolved the issue. This would have avoided a prolonged battle with Pavenstedt and would have avoided spending over two million

dollars by buying the stock. They also would have avoided the issues with the Department of Insurance regarding change of control as a result of their purchase. It was their conclusion that Garrett committed ongoing malpractice by failing to advise them of change of control issues. Warren further testified that it was a deviation to fail to pursue this option. However, it is apparently undisputed that the Department of Insurance would not have approved a Pavenstedt sale even if it had been properly submitted.

Kentucky should not allow lawyers to avoid liability for committing errors in judgment which the average reasonably prudent lawyer would not commit. Any avoidance of liability should only be allowed for errors of judgment made in absolute good faith.

Here, Garrett failed to plead or present evidence regarding her alleged errors in judgment so as to justify her decision. The error in judgment instruction indirectly required the jury to define and understand abstract legal principles. The jury could not have reasonably understood the distinction between errors in judgment and legal malpractice. It is of interest to note that the instruction provided by Vimont in this case is similar to the instructions provided in Daugherty.

The proper jury instruction must follow a form similar to that in *Palmore*:

> It was the duty of Defendant in undertaking the legal representation of Plaintiff to exercise the degree of care and skill expected of a reasonably competent lawyer acting under similar circumstances. If you are satisfied from the evidence that Defendant failed to comply with this duty and that such failure was a substantial factor causing the loss, you will find for Plaintiff; otherwise you will find for Defendant.

This instruction form contains the elements prescribed in Daugherty without requiring the jury to understand abstract legal principles. The jury is able to determine from the evidence whether there was a breach of duty and whether that breach caused the loss.

Consequently, under the circumstances regarding the instructions, this matter is reversed and remanded. The decisions of the Court of Appeals and the trial court are reversed and this matter is remanded to the trial court for a jury determination as to all factual issues.

2.3 Harm Caused by the Breach

Daugherty v. Runner

581 S.W.2d 12 (Ky. Ct. App. 1978)

HAYES, Judge.

This appeal is from a judgment entered pursuant to a jury verdict which exonerated the appellee, an attorney, from the charges of legal malpractice. The charges of the legal malpractice claim arose from a medical malpractice cause of action on behalf of the deceased, Lula Daugherty Roach. This type of action is commonly referred to as a "suit within a suit." The basis for the legal malpractice claim is that appellee Runner, while representing the deceased Roach for injuries sustained in an automobile accident, failed to pursue a medical malpractice claim by the estate of Roach against the hospital where Roach was treated for her injuries after her accident and against the doctors who treated her, until her claim was barred by the statute of limitations.

The jury found for Runner on the legal malpractice claim and additionally found that the appellant would have recovered on the medical malpractice case, if suit had been timely filed, in the amount of $146,123.75. Both parties appealed.

The appellant contends that the trial court erred in submitting the issue of Runner's negligence to the jury and in failing to instruct the jury properly.

Appellee's cross-appeal is of a protective nature wherein it is contended that if we reverse the trial court based on appellant's assignments of error, then appellee believes the jury verdict awarding appellant $146,123.75 on his medical malpractice claim is erroneous because of improperly admitted evidence.

We will not reach the claim of appellee on cross-appeal since we affirm the judgment of the lower court.

On February 22, 1972, Mrs. Roach and her husband Russell were involved in an automobile accident near Richmond, Kentucky. After receiving emergency medical treatment in Richmond, Mrs. Roach was transferred to St. Joseph Hospital in Lexington, Kentucky. She was admitted on February 22, 1972, under the care of an orthopedic doctor, George Gumbert, Jr. Mrs. Roach died in the hospital on March 17, 1972. The official cause of death listed on the certificate of death was bronchial pneumonia due to, or as a consequence of, generalized peritonitis and bacterial endocarditis. On the date of Mrs. Roach's death, her husband Russell, individually and as executor of the estate of Mrs. Roach, entered into a contract

with attorney Runner to the effect that Runner was to "institute a claim for damages against any and all responsible parties as a result of injuries received upon the 22nd day of February, 1972." The contract was a standard contract approved by the Louisville Bar Association.

A later contract, dated July 28, 1973, was entered into between James Russell Roach and another attorney, whereby this "second attorney" was to represent Roach, individually and as administrator of the estate of Lula Roach, in the medical malpractice claim. James Russell Roach was a nonresident, so the present appellant, Byrd E. Daugherty, was appointed ancillary administrator.

Suit was filed on August 1, 1973, in Fayette Circuit Court on behalf of Daugherty by his present attorney, against St. Joseph Hospital and others based on the medical malpractice claim. The trial court in that case granted a summary judgment against Daugherty and the estate of Lula Roach because the suit was not filed within the period of limitations.

Runner testified he was not hired to represent the estate of Lula Roach on a medical malpractice claim; made an investigation of the facts surrounding the auto accident; filed suit on same in Federal Court for the Eastern District of Kentucky at Lexington against the driver of the other auto in the accident, and never suspected the possibility of a medical malpractice claim.

Appellant contends it is what Runner did not do that makes him liable for malpractice. It is asserted he did not examine the hospital records until after the statute of limitations had run on any medical malpractice claim, and that he never advised his client that he did not handle medical malpractice cases. There was also testimony on behalf of appellant that Russell Roach, who had died prior to the trial, had telephoned Runner in January, 1973, inquiring of Runner the status of any medical malpractice investigation Runner was conducting. Runner denied ever having such a conversation. It is uncontradicted, however, that appellant hired the "second attorney" on March 15, 1973, to represent him in the medical malpractice claim against St. Joseph Hospital and others.

The Fayette Circuit Court had determined that the statute of limitations began to run on the medical malpractice claim "on March 17, 1972, and certainly no later than July 20, 1972, when the record of the decedent's treatment was fully complete." From the evidence in the record and the legal briefs filed on behalf of the parties, it is unclear why the second attorney, who accepted a retainer fee, did not file the medical malpractice claim within the period of time permitted by the statute and case law of this Commonwealth.

The appellant contends that the trial court erred in (1) submitting the question of the attorney's negligence to the jury; (2) allowing an expert opinion to be presented to the jury based upon improper evidence; and, (3) in failing to instruct the jury that the fact that other hired counsel might have been able to toll the statute of limitations was no defense to appellee Runner.

The standard of care is generally composed of two elements—care and skill. The first has to do with care and diligence which the attorney must exercise. The second is concerned with the minimum degree of skill and knowledge which the attorney must display.

In determining whether that degree of care and skill exercised by the attorney in a given case meets the requirements of the standard of care aforementioned, the attorney's act, or failure to act, is judged by the degree of its departure from the quality of professional conduct customarily provided by members of the legal profession.

As it would be in negligence cases generally, the question of whether the conduct of the attorney meets the standard of care test is one for the trier of the facts to determine.

Having determined that the standard of care an attorney owes his client is not that of a "reasonable man" under the circumstances, but is that care and skill as men of the legal profession commonly, or ordinarily, possess and exercise under the circumstances, and having determined that this is generally a question for the trier of the facts, we look now at the facts of the instant case.

The appellant Daugherty contends the trial court erred in submitting the negligence of appellee Runner to the jury. He in effect is saying he, Daugherty, was entitled to a directed verdict on this point because Runner was negligent as a matter of law.

Appellant was required to prove in the legal malpractice suit (1) that Runner was employed by appellant; (2) that he neglected his duty to exercise the ordinary care of a reasonably competent attorney acting in the same or similar circumstances; and (3) that such negligence resulted in and was the substantially contributing factor in the loss to the client.

The appellant has presented two theories in support of his argument that he was entitled to a directed verdict on the question of Runner's negligence. The first is that Runner was retained to bring all possible legal actions resulting from the injuries and death of Mrs. Roach, including a medical malpractice action, if appropriate, and that he failed to carry out this duty. This argument is clearly without merit. The written contract between the parties recited that Runner was retained "to institute a claim for damages against any and all responsible parties, as a result of injuries received upon the 22 day of February, 1972." While there was some testimony about a conversation with Runner regarding a medical malpractice action, the evidence was disputed on that matter, and the question of whether Runner had any duty to handle any medical malpractice case was certainly one for the jury.

Appellant's second theory in support of his directed verdict argument seems to be that even if Runner was not employed specifically to pursue a medical malpractice action, that he nevertheless had a duty to obtain and examine the medical records

of the patient, to investigate the treatment procedures administered to her, and to inform his client that there may have been some question about the medical care and treatment she received, but that he did not handle medical malpractice. Appellee's contention on this issue is simply that Mr. Runner was not retained under the contract to handle a medical malpractice case, and he therefore had no duties in that regard.

We are not ready to hold that Mr. Runner had absolutely no duties to his client with regard to a medical malpractice action simply because the written contract did not specifically mention a malpractice suit. To do so would require the client, presumably a layman who is unskilled in the law, to recognize for himself all potential legal remedies. An attorney cannot completely disregard matters coming to his attention which should reasonably put him on notice that his client may have legal problems or remedies that are not precisely or totally within the scope of the task being performed by the attorney.

On the other hand, we certainly cannot say that Mr. Runner was neglectful as a matter of law. There was considerable testimony concerning Runner's negligence, or lack of it. There was expert testimony from two attorneys, one for each side.

Runner's testimony, in summary, was that he was hired to represent the Roaches only for the injuries Mrs. Roach sustained as a result of the automobile collision of February 22nd. He testified that he did not handle medical malpractice claims because he was not competent to do so. He had never processed one. He testified that the fact Mrs. Roach entered the hospital with, according to the hospital admission report, multiple contusions and abrasions, a fractured nose, fractured right shoulder and a compressed fracture of the spine, and that she died in the hospital some thirty (30) days later, did not arouse his suspicion of a medical malpractice claim. He did not review the hospital records until he filed the wrongful death action on behalf of Mrs. Roach in Federal Court in Lexington, Kentucky, on June 9, 1972. Runner's law associate, who actually reviewed the medical records on June 9, 1972, testified the records were incomplete as there was no autopsy report in the medical records on June 9th.

Runner further testified that no one representing the deceased Mrs. Roach ever called to his attention the possibility of a medical malpractice claim until the "second attorney" previously mentioned contacted him some few days before the statute of limitations ran on the medical malpractice claim. Runner's testimony was that he told this other attorney to "go ahead" with the medical malpractice claim.

Appellant offered proof that Runner was contacted by members of Mrs. Roach's family concerning the medical malpractice case long before the statute ran. They were concerned with what Runner was doing about the medical malpractice case. The appellant produced expert testimony from a local lawyer to the effect that

Runner's failure to inquire into the cause of death of Mrs. Roach and his failure to review the medical records was not consistent with good legal practice and, in fact, was a substantial departure therefrom.

The other important testimony was that the Roach family, including Daugherty, a brother of Mrs. Roach, had discussed, among themselves, the medical malpractice case as early as December, 1972. They had in fact contacted two attorneys in Lexington, who declined the case. They were aware of the statute of limitations.

The family then proceeded to northern Kentucky, where on March 15, 1973, they employed the "second attorney" to represent the estate in the medical malpractice case. He filed no complaint.

Some time after July 28, 1973, he turned the case over to the appellant's current attorney, who on August 1, 1973, filed a medical malpractice claim in Fayette Circuit Court which was subsequently dismissed as barred by the statute of limitations.

Under these circumstances the question of whether Runner had exercised the degree of care and skill expected of a reasonably competent attorney was a question for the jury to decide.

This is true especially in light of the fact that there was disputed testimony concerning whether the possibility of a medical malpractice action had been discussed with Runner.

The issue of Runner's negligence was submitted to the jury under the following instructions:

(1) It was the duty of the defendant, E. Michael Runner, Attorney at Law, in undertaking the legal representation of the Estate of Lula Daugherty Roach, to exercise that degree of care and skill expected of a reasonably competent lawyer acting in the same or similar circumstances about which you have heard evidence, and this general duty, included the following specific duties:

   (a) Not to undertake representation in a legal matter in which he knew or should have known he was not competent without associating with himself a lawyer that was competent to handle it;

   (b) Not to undertake representation in a legal matter without preparation adequate in the circumstances.

(2) The Jury will answer the following interrogatory: Do you believe from the evidence that the defendant, E. Michael Runner, failed in one or more of the duties imposed upon him by instruction number 4, and such failure was the substantial factor in the Estate of Lula Daugherty Roach not recovering the award set out in instruction number 3 and incorporated in Verdict A?

Nine of the jurors answered the question in the negative. While we may have found differently had we sat as jurors in this case, we believe there is sufficient evidence to support this jury's verdict, and we therefore will not disturb it. Based upon the conflicting evidence, we fail to see how Runner was negligent as a matter of law.

We note that the trial court's instruction mistakenly required the jury to find that Runner's breach of duty, if any, was "the" substantial factor in the plaintiffs failure to recover. The instruction should have read, "a" substantial factor. However, the trial court was not made aware of the error by objection, and it has not been raised on appeal, nor could it be. For this reason we are not able to review the question. In any event, it does not appear to be so substantial as to have caused the plaintiff any prejudice.

In conclusion, we would add that we do agree somewhat with a statement appellant makes in his well-written brief. Appellant states thusly:

> Perhaps the issue that is involved in this case is far beyond the instant action, and must be laid at the doors of the Bar as a whole and more specifically, appellee. Maybe we, as a profession, have not discharged our responsibility to inform the public as a whole, and more specifically, Mr. Roach, that we specialize and limit our practice. However, in the end result, the effect on the client is the same; the public expects, and has the right to demand, that their legal affairs will be approached with expertise and initiative and anything short of that is a violation of the trust and confidence reposed in a member of our profession.

To that, we would simply repeat that all the evidence in this case was submitted to a jury of twelve citizens of this community, nine of whom found for the attorney. Even though we may have found differently had we sat as jurors in this case, we cannot disturb their verdict, as it was sufficiently supported by the evidence.

TIG Ins. v. Giffin, Winning, Cohen & Bodewes

444 F. 3d 587 (7th Cir. 2006)

Evans, Circuit Judge

TIG Insurance Company appeals the dismissal of its malpractice case against the Giffin Winning law firm and one of its attorneys, Carol Hansen Posegate.

To explain the malpractice claim we must reach back to the underlying lawsuit, in which Giffin Winning, at least for a time, represented Illinois State University (ISU) in a class-action, gender-discrimination lawsuit brought by several female professors. In the suit, the plaintiffs contended that they were being paid less than male professors and that ISU retaliated against female professors who complained

about the discrimination. Their attorney was Joel Bellows. TIG was ISU's liability insurer at the time and it paid the attorney fees which are at the heart of the present malpractice action; TIG, in turn, was reimbursed by its reinsurers.

The malpractice alleged in the present case arose out of discovery problems in the case. The major problem involved Giffin Winning's failure to produce three documents called gender equity studies (two of which are at issue here) in their response to a discovery request. The response was signed in October 1996. A month later the case was stayed. Soon thereafter, the law firm of Latham & Watkins filed an appearance on behalf of ISU and essentially took control of ISU's defense, though Giffin Winning remained of record. Latham had an attorney-client relationship with ISU's insurer TIG. Giffin Winning did not.

The facts show that Giffin Winning received two gender equity studies from ISU in 1994—while the Varner case was still pending before the Equal Employment Opportunity Commission. Two years later, when the law firm received the second request for documents, the subject of the October 1996 response at issue here, they routed the request to William Gorrell, the former executive director for Information Systems and the head of the Planning Policy department at ISU. He did not at that time forward the studies to Giffin Winning for production and the law firm did not produce them on its own. On this point, Judge Mihm later said that Gorrell was the one who "dropped the ball entirely."

During the stay in the case, Bellows talked with Gorrell, who by then was no longer employed by ISU and had his own lawsuit pending against the school for wrongful termination. He independently provided Bellows with the gender equity studies. He also executed an affidavit detailing particulars of a "planning policy database" on which he said the studies were based.

Once the stay was lifted, Bellows confronted Latham with the studies. (The Latham firm was now representing ISU). Bellows demanded that ISU turn over the database on which he alleged the studies were based. Apparently thinking the best defense is a good offense, Latham's first response apparently was to point fingers, saying Bellows had also not adequately complied with discovery requests. Also at this time, Latham began preparing a motion to disqualify Bellows for improperly soliciting privileged information from Gorrell.

For his part, Bellows filed a motion for sanctions against both ISU and Giffin Winning, in part based on the failure to produce the gender equity studies. As relevant here, Bellows' contention in his motion for sanctions was not simply that the studies were not produced. After all, he now had the studies. Rather, he claimed that the gender equity studies were not produced because of a conspiracy to hide the "Planning Policy database." To have produced the studies, he argued, "would have alerted the Varner plaintiffs to the existence of the databases."

We now arrive at the essence of the case—the pivotal facts about the database. At a 4-day hearing on the pending motions, Gorrell testified that the database contained variables relevant to the issue of gender equity and was maintained in a format which enabled a user to prepare comparative studies. He testified that the gender equity studies were prepared from this database. He said he had done one of the studies himself, though he also said he had never personally accessed the database. The actual data processing, he said, was done by his research assistant, Anna Wells, and her preparation of the data for his 1994 study would have taken her no more than a day or two using the database:

> Q How long did it take Anna Wells to compile the information for the 1994 study?
>
> A It could be done in a day or two.

That apparently was news to Wells. She testified that she did not use any database in compiling the data.

> Q Ms. Wells, when you collected the information reflected in these tables, was there a single source that you could go to to collect all the information reflected in the tables?
>
> A No.
>
> Q Was there a single database maintained by the Planning Policy department that contained all of the information reflected in these tables?
>
> A No.

She used hard copy (probably the same 279 banker boxes of material which had, in fact, been produced to Bellows), and it took her "a few weeks, several weeks" to locate the information and format it for use. Why? Because, as Judge Mihm found, there was no database and never had been:

> I don't believe that the plaintiffs have ever established the existence of the kind of database that I thought was being alleged here, that there was some button at ISU that could be punched that would involve a print-out of all this information. That clearly is not true. The nonexistence of the database—which Bellows said there was an alleged conspiracy to hide—is not seriously contested.

Nevertheless, Judge Mihm sanctioned Giffin Winning $10,000 for discovery lapses, a sanction which was later vacated. Judge Mihm, however, wisely denied Bellows' request for a default judgment based on the failure to produce the gender equity studies. He remarked that "I don't believe it was appropriate—but even if I had ordered that, I think that would have been reversed on appeal." In addition, although he denied Latham's motion to disqualify Bellows because of his contact with Gorrell, Judge Mihm sanctioned Bellows $10,000 as well. Ultimately, the case was settled; mercifully, we think.

We now get to the present malpractice action that TIG filed against Giffin Winning in which the damages TIG alleges are the attorney fees it paid Latham to defend against the sanction motion—a whopping $1.2 million, give or take, for

the work of 27 attorneys and various paralegals. It seems that when Latham said it took the motion seriously, it meant it. As we said, TIG paid the bill and was subsequently reimbursed by its reinsurers.

The elements of a legal malpractice action in Illinois are well-settled. They are: "(1) the existence of an attorney-client relationship that establishes a duty on the part of the attorney; (2) a negligent act or omission constituting a breach of that duty; (3) proximate cause; and (4) damages." A legal malpractice case is similar to any other negligence claim, and traditional principles apply. Proximate cause describes two distinct requirements—cause in fact and legal cause. Cause in fact exists only if the defendant's conduct was a "material element and a substantial factor in bringing about the injury." Legal cause, on the other hand, is largely a question of foreseeability. The relevant inquiry is whether "the injury is of a type that a reasonable person would see as a likely result of his or her conduct." The occurrence must have been "reasonably" foreseeable: "Not what actually happened, but what the reasonably prudent person would then have foreseen as likely to happen, is the key to the question of reasonableness."

This is not the same as (but, in this case, necessarily a bit difficult to distinguish from) a determination as to whether the fees themselves are reasonable. For purposes of proximate cause, if the fees do not reflect work reasonably, foreseeably related to the negligence alleged in the case, it does not matter that in some other sense they might be "reasonable." We draw this distinction in response to TIG's argument, that because the fees were paid, they are *prima facie* reasonable. In this situation, we find the argument breathtaking, say nothing of irrelevant.

Proximate cause is the issue on which this case falters. Having said that, we recognize that the Illinois courts indicate that proximate cause should ordinarily be decided not as a matter or law, but by a trier of fact. However, in a situation in which it is clear as a matter of law that the injury could not have been foreseeable, Illinois courts have upheld summary judgment on the issue. The situation before us is such a case.

The fundamental negligence allegedly committed by Giffin Winning was a failure to produce documents—especially gender equity studies—pursuant to a discovery request. The attorneys had routed the request to Gorrell, who was at that point still employed by ISU. He did not forward the studies to the attorneys. However, the attorneys had copies of the studies, which they also failed to produce. This is a clear breakdown of the discovery process, which we infer was not going at all smoothly on either side of this case.

In this all-too-common situation, the question for us is whether it would be reasonably foreseeable that a failure to produce these documents would result in the injury alleged here. Could the attorneys foresee that Gorrell, who failed to produce the documents when they turned the request over to him, would then, after he became disgruntled with ISU, independently provide the documents to Bel-

lows? Beyond that, would reasonable people foresee that Gorrell would mislead Bellows about a database which did not exist? Would reasonable people then think that, upon hearing Gorrell's story, Bellows' first impulse would be to move for sanctions including default judgment in the case? Would reasonable people foresee that, next, a large law firm, apparently thinking of Judge Mihm as a bit trigger-happy, would jump into high gear out of fear of default judgment and launch an army of 27 attorneys, plus paralegals, to defend against the possibility that Judge Mihm might grant default judgment on the basis of an alleged conspiracy to hide something which does not exist? In other words, was the Latham response to a failure to produce documents and the resulting injury foreseeable?

We think it was not as a matter of law. Our point can be illustrated by a very different sort of negligence action. In *Abrams*, the city failed to send an ambulance for a woman, Abrams (of course), who was in labor. A friend, who then drove her to the hospital, ran a red light and collided with a car driven by a drug-and-alcohol-impaired driver with a suspended license. Abrams was seriously injured and spent 2 weeks in a coma; sadly, her baby died. The court found, however, that as a matter of law there was no proximate cause. The city could not have foreseen the situation that unfolded. Perhaps a bit callously, the court remarked that "millions of women in labor make it safely to the hospital each year by private transportation."

It is also true—though less tragically so—that countless failures to produce documents occur in the federal courts every year. That is not a good thing. But we are not at a point at which it is foreseeable that such a failure will spawn a million-dollar bill for attorney fees. If it were, litigation would become more of a blood sport than it already is. Lawyers would be even more obsessive about irrelevant and tedious details. No good could come of it.

There is, in fact, nothing which distinguishes the failure to produce in this case with countless others. Judge Mihm himself made this point in response to Bellows' argument that this was the worst discovery abuse he had ever seen. Judge Mihm said:

> But you said in your 34 years of practice this was the most shocking thing you had ever seen in terms of this discovery issue. I wonder what kind of practice you've had if that's the case because, boy, in the scheme of things, I've seen things 50 times worse than this.

What is foreseeable as a result of a failure to produce documents is the reasonable procedure set out in Civil Rule of Civil Procedure 37, which provides for sanctions only after other reasonable efforts to work out disagreements fail. It may be that, as Judge Mihm also said, that did not happen enough in this case. But ISU and Giffin Winning could hardly be expected to foresee all this trouble over a phantom database. Why would they? It was ISU's alleged database and Giffin Winning was representing ISU at the time. They knew of no database; they were hiding no database; there was no database. For Giffin Winning's carelessness in failing to

produce documents (which Bellows had in his possession), the sanction of $10,000 might well have been sustained on appeal. But as a matter of law, the injury alleged here was not reasonably foreseeable.

2.4 Damages

Kituskie v. Corbman

714 A. 2d 1027 (Pa. 1998)

CASTILLE, Justice.

This Court granted allocatur in this matter in order to address two issues. The first issue is whether the collectibility of damages in an underlying action is relevant to and, therefore, admissible in a legal malpractice action. The second issue is, if collectibility of damages should be considered, which party bears the burden of proving collectibility. Because we find that collectibility of damages in the underlying action should be considered in a legal malpractice action and that the defendant/attorney bears the burden of proof, we affirm the order of the Superior Court and remand for further proceedings consistent with this opinion.

Allocatur is the Pennsylvania Supreme Court's analog to Certiorari by the U.S. Supreme Court. Pennsylvania judicial procedure is replete with similarly whimsical terms, lending a Dickensian air to litigation in the Keystone State.

The facts relevant to this appeal are not in dispute. Leo J. Kituskie is a Pennsylvania resident who is a practicing periodontist. On September 3, 1989, Kituskie was injured in a two-car automobile accident during his vacation in San Jose, California. The traffic collision report for the accident stated that a vehicle being driven by Evan Mark Trapp crossed a highway on-ramp into the path of Kituskie's automobile after it struck a curb and a cyclone fence. The traffic collision report also indicated that Trapp was driving while intoxicated and that his vehicle was being operated at the time of the accident at a high rate of speed. After the accident, Kituskie returned to the Philadelphia area in order to begin treatment for his injuries. As a result of this automobile accident, Kituskie avers that he suffers from a degenerative and arthritic back condition which makes it difficult for him to work full-time as a periodontist.

On September 9, 1989, Kituskie retained Scott K. Corbman, Esquire, to pursue his claim against Trapp for the personal injuries he sustained in the accident. Corbman is an attorney licensed to practice law in the Commonwealth of Pennsylvania and is a principal/shareholder in the law firm of Garfinkle, Corbman, Greenberg and Jurikson, P.C.

Corbman proceeded to obtain Kituskie's medical reports. After reviewing the medical reports, Corbman made a claim on Kituskie's behalf against Trapp's insurance carrier, California State Automobile Association ("CSAa.). During settlement negotiations with CSAA, Corbman learned that Trapp's insurance policy had a limit of $25,000.

On September 17, 1990, more than one year after the accident, Corbman discovered that the California statute of limitations for injuries such as those suffered by Kituskie was only one year as opposed to the two-year statute of limitations in Pennsylvania. CSAA ultimately informed Corbman that it would not make a settlement offer to Kituskie because the one-year statute of limitations had passed without Corbman instituting a formal legal action. As soon as Corbman learned this information, Corbman met with Kituskie and informed him that his claim had been terminated because no suit was filed or settlement reached within the one-year statute of limitations period. During this meeting, Corbman advised Kituskie to seek the services of another attorney in order to assert a legal malpractice claim against Corbman and the Garfinkle firm.

On August 28, 1991, Kituskie, represented by new counsel, filed a legal malpractice claim against Corbman and the Garfinkle law firm in the Montgomery County Court of Common Pleas. Immediately prior to jury selection, counsel for each side filed motions in limine requesting that each side be precluded from presenting expert testimony on the issue of CSAA possibly settling the matter within the policy limits of Trapp's policy. Neither of these motions dealt directly with the issue of whether the jury in this legal malpractice action could consider Kituskie's ability to collect on an underlying judgment against Trapp. However, the trial court, realizing that its resolution of whether collectibility of damages in an underlying case could be an issue at trial, withheld its disposition of the two motions in limine. On January 6, 1995, prior to commencing the trial in this matter, the trial court decided that collectibility of damages in an underlying case was not relevant to a legal malpractice claim in Pennsylvania. Thus, the trial court granted both motions in limine.

Following a trial on the matter, on January 11,1995, a jury found that Corbman and the Garfinkle firm were liable to Kituskie for legal malpractice in the amount of $2,300,000. Corbman and the Garfinkle firm appealed to the Superior Court. The Superior Court, in a published opinion, vacated the judgment and remanded for further proceedings because it held that the collectibility of damages in an underlying case should be considered in a legal malpractice action. The Superior Court also held that the attorney being sued for legal malpractice bore the burden

of proving as a defense in the form of mitigation of damages that the potential underlying case which formed the basis of the legal malpractice award would have been uncollectible. This Court granted allocatur in order to decide whether collectibility should be part of a legal malpractice action and, if so, which party bears the burden of proof as to that issue.

In order to establish a claim of legal malpractice, a plaintiff/aggrieved client must demonstrate three basic elements:

1. employment of the attorney or other basis for a duty;
2. the failure of the attorney to exercise ordinary skill and knowledge; and
3. that such negligence was the proximate cause of damage to the plaintiff.

An essential element to this cause of action is proof of actual loss rather than a breach of a professional duty causing only nominal damages, speculative harm or the threat of future harm. Damages are considered remote or speculative only if there is uncertainty concerning the identification of the existence of damages rather than the ability to precisely calculate the amount or value of damages. In essence, a legal malpractice action in Pennsylvania requires the plaintiff to prove that he had a viable cause of action against the party he wished to sue in the underlying case and that the attorney he hired was negligent in prosecuting or defending that underlying case (often referred to as proving a "case within a case").

A review of case law in the Commonwealth shows that the issue of whether collectibility of damages in an underlying case should also be a part of a legal malpractice action is one of first impression. Other jurisdictions, however, have addressed this issue and have held that collectibility of damages should also be considered in a legal malpractice action.

Like these other jurisdictions, this Court believes that collectibility of damages in the underlying action should also be part of the analysis in a legal malpractice action. We do so because we recognize that a legal malpractice action is distinctly different from any other type of lawsuit brought in the Commonwealth. A legal malpractice action is different because, as described above, a plaintiff must prove a case within a case since he must initially establish by a preponderance of the evidence that he would have recovered a judgment in the underlying action (here, the underlying action would have involved Kituskie's lawsuit against Trapp). It is only after the plaintiff proves he would have recovered a judgment in the underlying action that the plaintiff can then proceed with proof that the attorney he engaged to prosecute or defend the underlying action was negligent in the handling of the underlying action and that negligence was the proximate cause of the plaintiff's loss since it prevented the plaintiff from being properly compensated for his loss. However, this Court has held that the plaintiff in a legal action should only be compensated for his actual losses. Actual losses in a legal malpractice action are measured by the judgment the plaintiff lost in the underlying action and the attorney who negligently handled the underlying action is the party held responsible

for the lost judgment. However, as noted by the Superior Court, "it would be inequitable for the plaintiff to be able to obtain a judgment against the attorney which is greater than the judgment that the plaintiff could have collected from the third party; the plaintiff would be receiving a windfall at the attorney's expense." Thus, we now hold that collectibility of damages in the underlying case is a matter which should be considered in legal malpractice actions.

Because this Court has concluded that collectibility of damages is an issue which should be considered in legal malpractice actions, we now must decide who bears the burden of proof. While other jurisdictions considering the issue of collectibility of damages have unanimously concluded that collectibility is a part of a legal malpractice action, they have been split on which party in the legal malpractice action bears the burden of proof. A majority of courts in other jurisdictions have placed the burden of proving collectibility on the plaintiff because it is viewed as being closely related to the issue of proximate cause, a burden which clearly the plaintiff bears as part of his prima facie case. In doing so, these courts place the burden on the plaintiff because a plaintiff can prove that the attorney's malfeasance was the proximate cause of his loss only if he demonstrates that he would have succeeded on the underlying action and that he would have succeeded in collecting on the resulting judgment.

A minority of courts in other jurisdictions, however, have rejected the majority's line of reasoning and placed the burden of proving non-collectibility on the defendant/attorney. These courts have recognized that the plaintiff must prove a case within a case. These minority of courts, however, do not believe that it logically follows from the case within a case burden of proof that the plaintiff must also prove that the damages in the underlying case would have been collectible. Instead, these courts believe that the burden of proof in a legal malpractice action only requires the plaintiff to prove a loss of judgment on a valid claim. To require the plaintiff to also prove collectibility of damages would result in placing an unfair burden on the plaintiff where the plaintiffs legal malpractice action is often brought years after the initial accident causing his injuries solely because the defendant/lawyer failed to act in a timely and competent manner. Thus, the minority of courts believe that it is more logical and fair to treat collectibility as an affirmative defense which the defendant/attorney must plead and prove in order to avoid or mitigate the consequences of that attorney's negligent acts. Moreover, this minority has criticized the majority position because it ignores the possibility of settlement between the plaintiff and the underlying tortfeasor and also overlooks that the passage of time itself can be a militating factor either for or against collectibility of the underlying case.

After considering both positions, this Court finds the reasoning of the minority position to be more persuasive. Thus, we adopt the minority position and hold that a defendant/lawyer in a legal malpractice action should plead and prove the affirmative defense that the underlying case was not collectible by a preponderance of the evidence.

Accordingly, for the reasons expressed above, we find that the Superior Court correctly held that collectibility of damages in an underlying case is a matter which must be considered in a legal malpractice action and that the defendant/lawyer bears the burden of proving that the underlying case which formed the basis of the damages award in a legal malpractice action would not have been fully collectible. Therefore, the order of the Superior Court is affirmed and the matter remanded for further proceedings.

3. Ineffective Assistance of Counsel

Strickland v. Washington

466 U.S. 668 (1984)

JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires us to consider the proper standards for judging a criminal defendant's contention that the Constitution requires a conviction or death sentence to be set aside because counsel's assistance at the trial or sentencing was ineffective.

I

A

During a 10-day period in September 1976, respondent planned and committed three groups of crimes, which included three brutal stabbing murders, torture, kidnapping, severe assaults, attempted murders, attempted extortion, and theft. After his two accomplices were arrested, respondent surrendered to police

and voluntarily gave a lengthy statement confessing to the third of the criminal episodes. The State of Florida indicted respondent for kidnapping and murder and appointed an experienced criminal lawyer to represent him.

Counsel actively pursued pretrial motions and discovery. He cut his efforts short, however, and he experienced a sense of hopelessness about the case, when he learned that, against his specific advice, respondent had also confessed to the first two murders. By the date set for trial, respondent was subject to indictment for three counts of first-degree murder and multiple counts of robbery, kidnapping for ransom, breaking and entering and assault, attempted murder, and conspiracy to commit robbery. Respondent waived his right to a jury trial, again acting against counsel's advice, and pleaded guilty to all charges, including the three capital murder charges.

In the plea colloquy, respondent told the trial judge that, although he had committed a string of burglaries, he had no significant prior criminal record and that at the time of his criminal spree he was under extreme stress caused by his inability to support his family. He also stated, however, that he accepted responsibility for the crimes. The trial judge told respondent that he had "a great deal of respect for people who are willing to step forward and admit their responsibility" but that he was making no statement at all about his likely sentencing decision.

Counsel advised respondent to invoke his right under Florida law to an advisory jury at his capital sentencing hearing. Respondent rejected the advice and waived the right. He chose instead to be sentenced by the trial judge without a jury recommendation.

In preparing for the sentencing hearing, counsel spoke with respondent about his background. He also spoke on the telephone with respondent's wife and mother, though he did not follow up on the one unsuccessful effort to meet with them. He did not otherwise seek out character witnesses for respondent. Nor did he request a psychiatric examination, since his conversations with his client gave no indication that respondent had psychological problems.

Counsel decided not to present and hence not to look further for evidence concerning respondent's character and emotional state. That decision reflected trial counsel's sense of hopelessness about overcoming the evidentiary effect of respondent's confessions to the gruesome crimes. It also reflected the judgment that it was advisable to rely on the plea colloquy for evidence about respondent's background and about his claim of emotional stress: the plea colloquy communicated sufficient information about these subjects, and by forgoing the opportunity to present new evidence on these subjects, counsel prevented the State from cross-examining respondent on his claim and from putting on psychiatric evidence of its own.

Counsel also excluded from the sentencing hearing other evidence he thought was potentially damaging. He successfully moved to exclude respondent's "rap sheet." Because he judged that a pre-sentence report might prove more detrimental than helpful, as it would have included respondent's criminal history and thereby would have undermined the claim of no significant history of criminal activity, he did not request that one be prepared.

At the sentencing hearing, counsel's strategy was based primarily on the trial judge's remarks at the plea colloquy as well as on his reputation as a sentencing judge who thought it important for a convicted defendant to own up to his crime. Counsel argued that respondent's remorse and acceptance of responsibility justified sparing him from the death penalty. Counsel also argued that respondent had no history of criminal activity and that respondent committed the crimes under extreme mental or emotional disturbance, thus coming within the statutory list of mitigating circumstances. He further argued that respondent should be spared death because he had surrendered, confessed, and offered to testify against a co-defendant and because respondent was fundamentally a good person who had briefly gone badly wrong in extremely stressful circumstances. The State put on evidence and witnesses largely for the purpose of describing the details of the crimes. Counsel did not cross-examine the medical experts who testified about the manner of death of respondent's victims.

[* * *]

[T]he trial judge found numerous aggravating circumstances and no (or a single comparatively insignificant) mitigating circumstance. With respect to each of the three convictions for capital murder, the trial judge concluded: "A careful consideration of all matters presented to the court impels the conclusion that there are insufficient mitigating circumstances. . . to outweigh the aggravating circumstances." He therefore sentenced respondent to death on each of the three counts of murder and to prison terms for the other crimes. The Florida Supreme Court upheld the convictions and sentences on direct appeal.

B

Respondent subsequently sought collateral relief in state court on numerous grounds, among them that counsel had rendered ineffective assistance at the sentencing proceeding. Respondent challenged counsel's assistance in six respects. He asserted that counsel was ineffective because he failed to move for a continuance to prepare for sentencing, to request a psychiatric report, to investigate and present character witnesses, to seek a presentence investigation report, to present meaningful arguments to the sentencing judge, and to investigate the medical examiner's reports or cross-examine the medical experts.

[Strickland unsuccessfully challenged the conviction in state court, based on ineffective assistance of counsel. He then brought a habeas corpus action in federal court, again based on ineffective assistance of counsel. The Supreme Court "granted certiorari to consider the standards by which to judge a contention that the Constitution requires that a criminal judgment be overturned because of the actual ineffective assistance of counsel."]

II

In a long line of cases […] this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled.

Because of the vital importance of counsel's assistance, this Court has held that, with certain exceptions, a person accused of a federal or state crime has the right to have counsel appointed if retained counsel cannot be obtained. That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

For that reason, the Court has recognized that "the right to counsel is the right to the effective assistance of counsel." Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense. Counsel, however, can also deprive a defendant of the right to effective assistance, simply by failing to render "adequate legal assistance".

The Court has not elaborated on the meaning of the constitutional requirement of effective assistance in the latter class of cases—that is, those presenting claims of "actual ineffectiveness." In giving meaning to the requirement, however, we must take its purpose—to ensure a fair trial—as the guide. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

III

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

A

As all the Federal Courts of Appeals have now held, the proper standard for attorney performance is that of reasonably effective assistance. [. . .] When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness.

More specific guidelines are not appropriate. The Sixth Amendment refers simply to "counsel," not specifying particular requirements of effective assistance. It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.

Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.

These basic duties neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance. In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like, are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause. Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.

Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case. As the Court of Appeals concluded, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions.

B

An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. The purpose of the Sixth Amendment guarantee of counsel is to ensure

that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.

In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. rejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent.

One type of actual ineffectiveness claim warrants a similar, though more limited, presumption of prejudice. In *Cuyler* v. *Sullivan,* 446 U. S., at 345-350, the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. Even so, the rule is not quite the *per se* rule of prejudice that exists for the Sixth Amendment claims mentioned above. Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance."

Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence. Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense.

It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding. Respondent suggests requiring a showing that the errors "impaired the presentation of the

defense." That standard, however, provides no workable principle. Since any error, if it is indeed an error, "impairs" the presentation of the defense, the proposed standard is inadequate because it provides no way of deciding what impairments are sufficiently serious to warrant setting aside the outcome of the proceeding.

On the other hand, we believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case. This outcome-determinative standard has several strengths. It defines the relevant inquiry in a way familiar to courts, though the inquiry, as is inevitable, is anything but precise. The standard also reflects the profound importance of finality in criminal proceedings. Moreover, it comports with the widely used standard for assessing motions for new trial based on newly discovered evidence. Nevertheless, the standard is not quite appropriate.

Even when the specified attorney error results in the omission of certain evidence, the newly discovered evidence standard is not an apt source from which to draw a prejudice standard for ineffectiveness claims. The high standard for newly discovered evidence claims presupposes that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged. An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.

Accordingly, the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution, and in the test for materiality of testimony made unavailable to the defense by Government deportation of a witness. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency. Although these factors may actually have entered into counsel's selection of strategies and, to that limited extent, may thus affect the

performance inquiry, they are irrelevant to the prejudice inquiry. Thus, evidence about the actual process of decision, if not part of the record of the proceeding under review, and evidence about, for example, a particular judge's sentencing practices, should not be considered in the prejudice determination.

The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer — including an appellate court, to the extent it independently reweighs the evidence — would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

IV

A number of practical considerations are important for the application of the standards we have outlined. Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's per-

formance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

V

Having articulated general standards for judging ineffectiveness claims, we think it useful to apply those standards to the facts of this case in order to illustrate the meaning of the general principles. […]

Application of the governing principles is not difficult in this case. The facts as described above make clear that the conduct of respondent's counsel at and before respondent's sentencing proceeding cannot be found unreasonable. They also make clear that, even assuming the challenged conduct of counsel was unreasonable, respondent suffered insufficient prejudice to warrant setting aside his death sentence.

With respect to the performance component, the record shows that respondent's counsel made a strategic choice to argue for the extreme emotional distress mitigating circumstance and to rely as fully as possible on respondent's acceptance of responsibility for his crimes. Although counsel understandably felt hopeless about respondent's prospects, nothing in the record indicates […] that counsel's sense of hopelessness distorted his professional judgment. Counsel's strategy choice was well within the range of professionally reasonable judgments, and the decision not to seek more character or psychological evidence than was already in hand was likewise reasonable.

The trial judge's views on the importance of owning up to one's crimes were well known to counsel. The aggravating circumstances were utterly overwhelming. Trial counsel could reasonably surmise from his conversations with respondent that character and psychological evidence would be of little help. Respondent had already been able to mention at the plea colloquy the substance of what there was to know about his financial and emotional troubles. Restricting testimony on respondent's character to what had come in at the plea colloquy ensured that contrary character and psychological evidence and respondent's criminal history, which counsel had successfully moved to exclude, would not come in. On these facts, there can be little question, even without application of the presumption of adequate performance, that trial counsel's defense, though unsuccessful, was the result of reasonable professional judgment.

With respect to the prejudice component, the lack of merit of respondent's claim is even more stark. The evidence that respondent says his trial counsel should have offered at the sentencing hearing would barely have altered the sentencing profile presented to the sentencing judge. As the state courts and District Court found, at most this evidence shows that numerous people who knew respondent thought he was generally a good person and that a psychiatrist and a psychologist believed he was under considerable emotional stress that did not rise to the level of extreme disturbance. Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed. Indeed, admission of the evidence respondent now offers might even have been harmful to his case: his "rap sheet" would probably have been admitted into evidence, and the psychological reports would have directly contradicted respondent's claim that the mitigating circumstance of extreme emotional disturbance applied to his case.

[* * *]

Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Here there is a double failure. More generally, respondent has made no showing that the justice of his sentence was rendered unreliable by a breakdown in the adversary process caused by deficiencies in counsel's assistance. Respondent's sentencing proceeding was not fundamentally unfair.

We conclude, therefore, that the District Court properly declined to issue a writ of habeas corpus. The judgment of the Court of Appeals is accordingly

Reversed.

Knowles v. Mirzayance

556 U.S. Ill (2009)

Justice THOMAS delivered the opinion of the Court.

In this case, respondent Alexandre Mirzayance claimed ineffective assistance of counsel because his attorney recommended withdrawing his insanity defense. The California courts rejected this claim on state postconviction review. We must decide whether this decision was contrary to or an unreasonable application of clearly established federal law. We hold that it was not. Mirzayance failed to establish that his counsel's performance was ineffective.

I

Mirzayance confessed that he stabbed his 19-year-old cousin nine times with a hunting knife and then shot her four times. At trial, he entered pleas of not guilty and not guilty by reason of insanity (NGI). Under California law, when both of these pleas are entered, the court must hold a bifurcated trial, with guilt determined during the first phase and the viability of the defendant's NGI plea during the second. During the guilt phase of Mirzayance's trial, he sought to avoid a conviction for first-degree murder by obtaining a verdict on the lesser included offense of second-degree murder. To that end, he presented medical testimony that he was insane at the time of the crime and was, therefore, incapable of the premeditation or deliberation necessary for a first-degree murder conviction. The jury nevertheless convicted Mirzayance of first-degree murder.

The trial judge set the NGI phase to begin the day after the conviction was entered but, on the advice of counsel, Mirzayance abandoned his NGI plea before it commenced. He would have borne the burden of proving his insanity during the NGI phase to the same jury that had just convicted him of first-degree murder. Counsel had planned to meet that burden by presenting medical testimony similar to that presented in the guilt phase, including evidence that Mirzayance was insane and incapable of premeditating or deliberating. Because the jury rejected similar evidence at the guilt phase (where the State bore the burden of proof), counsel believed a defense verdict at the NGI phase (where the burden was on the defendant) was unlikely. He planned, though, to have Mirzayance's parents testify and thus provide an emotional account of Mirzayance's struggles with mental illness to supplement the medical evidence of insanity. But on the morning that the NGI phase was set to begin, Mirzayance's parents refused to testify. After consulting with co-counsel, counsel advised Mirzayance that he should withdraw the NGI plea. Mirzayance accepted the advice.

After he was sentenced, Mirzayance challenged his conviction in state postconviction proceedings. Among other allegations, he claimed that counsel's recommendation to withdraw the NGI plea constituted ineffective assistance of counsel under *Strickland*. The California trial court denied the petition, and the California Court of Appeal affirmed without offering any reason for its rejection of this particular ineffective-assistance claim. Mirzayance then filed an application for federal habeas relief, which the District Court denied without an evidentiary hearing. The Court of Appeals reversed the District Court and ordered an evidentiary hearing on counsel's recommendation to withdraw the NGI plea. During that evidentiary hearing, a Magistrate Judge made factual findings that the District Court later adopted.

According to the Magistrate Judge, counsel's strategy for the two-part trial was to seek a second-degree murder verdict in the first stage and to seek an NGI verdict in the second stage. This strategy faltered when the jury instead convicted Mirzayance of first-degree murder. In the circumstances of this case, the medical

evidence that Mirzayance planned to adduce at the NGI phase essentially would have duplicated evidence that the jury had necessarily rejected in the guilt phase. First-degree murder in California includes any killing that is "willful, deliberate, and premeditated." To prove NGI, a defendant must show that he was incapable of knowing or understanding the nature of his act or of distinguishing right from wrong at the time of the offense. Highlighting this potential contradiction, the trial judge instructed the jury during the guilt phase that "the word 'deliberate,'" as required for a first-degree murder conviction, "means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action."

When the jury found Mirzayance guilty of first-degree murder, counsel doubted the likelihood of prevailing on the NGI claim. According to the Magistrate Judge:

> The defense suspected that a jury's finding, beyond a reasonable doubt, that Mirzayance had "deliberated" and "premeditated" his killing of the victim as a practical matter would cripple Mirzayance's chances of convincing the jury later, during the sanity phase, that Mirzayance nevertheless "was incapable of knowing or understanding the nature and quality of his act and of distinguishing right from wrong at the time of the commission of the offense." Any remaining chance of securing an NGI verdict now depended (in counsel's view) on presenting some "emotional impact" testimony by Mirzayance's parents, which counsel had viewed as key even if the defense had secured a second-degree murder verdict at the guilt phase.

But, as the Magistrate Judge found, on the morning that the NGI phase was set to begin, Mirzayance's parents effectively refused to testify:

> The parents at least expressed clear reluctance to testify, which, in context, conveyed the same sense as a refusal.

Although the parties disputed this point, the parents' later actions supported the Magistrate Judge's finding that the parents' reluctance to testify amounted to refusal:

> Corroborating the Court's finding that Mirzayance's parents indicated a strong disinclination to testify at the NGI phase are the facts that (1) they did not testify later at his sentencing hearing, and (2) the reason for their choosing not to do so is that it would have been "too emotional" for them. If weeks after the guilty verdict and the withdrawal of their son's NGI plea, Mirzayance's parents' emotions still prevented them from testifying at the sentencing hearing, then surely those emotional obstacles to their testifying in the NGI phase would have been at least as potent, and probably more so.

The Magistrate Judge found that counsel made a carefully reasoned decision not to go forward with the NGI plea:

> Counsel carefully weighed his options before making his decision final; he did not make it rashly. Counsel's strategy at the NGI phase depended entirely on the heartfelt participation of Mirzayance's parents as witnesses. Moreover, counsel knew that, although he had experts lined up to testify, their testimony had significant weaknesses. Counsel's NGI-phase strategy became impossible to attempt

> once Mirzayance's parents expressed their reluctance to testify. All counsel was left with were four experts, all of whom reached a conclusion—that Mirzayance did not premeditate and deliberate his crime—that the same jury about to hear the NGI evidence already had rejected under a beyond-a-reasonable-doubt standard of proof. The experts were subject to other impeachment as well. Counsel discussed the situation with his experienced co-counsel who concurred in counsel's proposal that he recommend to Mirzayance the withdrawal of the NGI plea.

Based on these factual findings, the Magistrate Judge stated that, in his view, counsel's performance was not deficient.

Despite this determination, the Magistrate Judge concluded that the court was bound by the Court of Appeals' remand order to determine only whether "there were tactical reasons for abandoning the insanity defense." Even though the Magistrate Judge thought that counsel was reasonable in recommending that a very weak claim be dropped, the Magistrate Judge understood the remand order to mean that counsel's performance was deficient if withdrawing the NGI plea would achieve no tactical advantage. The Magistrate Judge found that "Mirzayance had nothing to lose" by going forward with the NGI phase of the trial, and thus held, under the remand order, that counsel's performance was deficient. As to prejudice, the Magistrate Judge concluded the court was similarly bound by the remand order because the Court of Appeals described the NGI defense as remaining "viable and strong." Accordingly, the Magistrate Judge found prejudice and recommended granting the writ of habeas corpus. The District Court accepted this recommendation and granted the writ.

The Court of Appeals affirmed. It first stated that the lower court had misunderstood its remand order, which it described as requiring an examination of "counsel's reason for abandoning the insanity defense," rather than as mandating that the District Court must find deficient performance if it found counsel had "nothing to lose" by pursuing the insanity defense. Nonetheless, the Court of Appeals affirmed the finding of deficient performance. According to the court, Mirzayance's "parents did not refuse, but merely expressed reluctance to testify." And because they may have been willing, "competent counsel would have attempted to persuade them to testify, which counsel here admits he did not." The Court of Appeals also "disagreed that counsel's decision was carefully weighed and not made rashly."

Furthermore, even though it had suggested that the District Court unnecessarily evaluated counsel's strategy under a "nothing to lose" standard, the Court of Appeals affirmed the District Court in large part because Mirzayance's "counsel did not make a true tactical choice" based on its view that counsel had nothing to gain by dropping the NGI defense. The court held that "reasonably effective assistance would put on the only defense available, especially in a case such as this where there was significant potential for success." The Court of Appeals also found prej-

udice because, in its view, "if counsel had pursued the insanity phase of the trial, there is a reasonable probability that the jury would have found Mirzayance insane."

We granted the petition for writ of certiorari.

III

Even if Mirzayance's ineffective-assistance-of-counsel claim were eligible for de novo review, it would still fail. *Strickland* requires a defendant to establish deficient performance and prejudice. Mirzayance can establish neither.

Mirzayance has not shown "that counsel's representation fell below an objective standard of reasonableness."

> The proper measure of attorney performance remains simply reasonableness under prevailing professional norms. Judicial scrutiny of counsel's performance must be highly deferential, and a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.

Here, Mirzayance has not shown that his counsel violated these standards. Rather, his counsel merely recommended the withdrawal of what he reasonably believed was a claim doomed to fail. The jury had already rejected medical testimony about Mirzayance's mental state in the guilt phase, during which the State carried its burden of proving guilt beyond a reasonable doubt. The Magistrate Judge explained this point:

> All counsel was left with were four experts, all of whom reached a conclusion—that Mirzayance did not premeditate and deliberate his crime—that the same jury about to hear the NGI evidence already had rejected under a beyond-a-reasonable-doubt standard of proof. The experts were subject to other impeachment as well.

In fact, the Magistrate Judge found that counsel "convincingly detailed ways in which the experts could have been impeached, for overlooking or minimizing facts which showcased Mirzayance's clearly goal-directed behavior."

In the NGI phase, the burden would have switched to Mirzayance to prove insanity by a preponderance of the evidence. Mirzayance's counsel reasonably believed that there was almost no chance that the same jury would have reached a different result when considering similar evidence, especially with Mirzayance bearing the burden of proof. Furthermore, counsel knew he would have had to present this defense without the benefit of the parents' testimony, which he believed to be his strongest evidence. Counsel reasonably concluded that this defense was almost certain to lose.

The Court of Appeals took the position that the situation was not quite so dire because the parents "merely expressed reluctance to testify." It explained that "competent counsel would have attempted to persuade them to testify." But that holding is in tension with the Magistrate Judge's findings and applies a more demanding standard than *Strickland* prescribes. The Magistrate Judge noted that the parents "conveyed the same sense as a refusal." Indeed, the Magistrate Judge found that the parents "did not testify later at Mirzayance's sentencing hearing" because it "would have been 'too emotional' for them." Competence does not require an attorney to browbeat a reluctant witness into testifying, especially when the facts suggest that no amount of persuasion would have succeeded. Counsel's acceptance of the parents' "conveyance of a refusal" does not rise to the high bar for deficient performance set by *Strickland*.

Mirzayance's failure to show ineffective assistance of counsel is confirmed by the Magistrate Judge's finding that "counsel carefully weighed his options before making his decision final; he did not make it rashly." The Magistrate Judge explained all of the factors that counsel considered—many of which are discussed above—and noted that counsel "discussed the situation with his experienced co-counsel" before making it. In making this finding, the Magistrate Judge identified counsel's decision as essentially an informed decision "made after thorough investigation of law and facts relevant to plausible options." As we stated in *Strickland*, such a decision is "virtually unchallengeable."

Without even referring to the Magistrate Judge's finding, the Court of Appeals "disagreed that counsel's decision was carefully weighed and not made rashly." In its view, "counsel acted on his subjective feelings of hopelessness without even considering the potential benefit to be gained in persisting with the plea." But courts of appeals may not set aside a district court's factual findings unless those findings are clearly erroneous. Here, the Court of Appeals failed even to mention the clearly-erroneous standard, let alone apply it, before effectively overturning the lower court's factual findings related to counsel's behavior.

In light of the Magistrate Judge's factual findings, the state court's rejection of Mirzayance's ineffective-assistance-of-counsel claim was consistent with *Strickland*. The Court of Appeals insisted, however, that "'reasonably effective assistance' required here that counsel assert the only defense available." But we are aware of no "prevailing professional norms" that prevent counsel from recommending that a plea be withdrawn when it is almost certain to lose. And in this case, counsel did not give up "the only defense available." Counsel put on a defense to first-degree murder during the guilt phase. Counsel also defended his client at the sentencing phase. The law does not require counsel to raise every available nonfrivolous defense. Counsel also is not required to have a tactical reason—above and beyond a reasonable appraisal of a claim's dismal prospects for success—for recommending that a weak claim be dropped altogether. Mirzayance has thus failed to demonstrate that his counsel's performance was deficient.

In addition, Mirzayance has not demonstrated that he suffered prejudice from his counsel's performance. To establish prejudice, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." To prevail on his ineffective-assistance claim, Mirzayance must show, therefore, that there is a "reasonable probability" that he would have prevailed on his insanity defense had he pursued it. This Mirzayance cannot do. It was highly improbable that a jury, which had just rejected testimony about Mirzayance's mental condition when the State bore the burden of proof, would have reached a different result when Mirzayance presented similar evidence at the NGI phase.

IV

Mirzayance has not shown that the state court's conclusion that there was no ineffective assistance of counsel "was contrary to, or involved an unreasonable application of, clearly established Federal law." In fact, he has not shown ineffective assistance at all. The judgment of the Court of Appeals is reversed, and the case is remanded with instructions to deny the petition.

Lee v. United States

137 S. Ct. 1958 (2017)

Chief Justice ROBERTS delivered the opinion of the Court.

Petitioner Jae Lee was indicted on one count of possessing ecstasy with intent to distribute. Although he has lived in this country for most of his life, Lee is not a United States citizen, and he feared that a criminal conviction might affect his status as a lawful permanent resident. His attorney assured him there was nothing to worry about—the Government would not deport him if he pleaded guilty. So Lee, who had no real defense to the charge, opted to accept a plea that carried a lesser prison sentence than he would have faced at trial.

Lee's attorney was wrong: The conviction meant that Lee was subject to mandatory deportation from this country. Lee seeks to vacate his conviction on the ground that, in accepting the plea, he received ineffective assistance of counsel in violation of the Sixth Amendment. Everyone agrees that Lee received objectively unreasonable representation. The question presented is whether he can show he was prejudiced as a result.

I

Jae Lee moved to the United States from South Korea in 1982. He was 13 at the time. His parents settled the family in New York City, where they opened a small coffee shop. After graduating from a business high school in Manhattan, Lee set out on his own to Memphis, Tennessee, where he started working at a restaurant. After three years, Lee decided to try his hand at running a business. With some assistance from his family, Lee opened the Mandarin Palace Chinese Restaurant in a Memphis suburb. The Mandarin was a success, and Lee eventually opened a second restaurant nearby. In the 35 years he has spent in the country, Lee has never returned to South Korea. He did not become a United States citizen, living instead as a lawful permanent resident.

At the same time he was running his lawful businesses, Lee also engaged in some illegitimate activity. In 2008, a confidential informant told federal officials that Lee had sold the informant approximately 200 ecstasy pills and two ounces of hydroponic marijuana over the course of eight years. The officials obtained a search warrant for Lee's house, where they found 88 ecstasy pills, three Valium tablets, $32,432 in cash, and a loaded rifle. Lee admitted that the drugs were his and that he had given ecstasy to his friends.

A grand jury indicted Lee on one count of possessing ecstasy with intent to distribute. Lee retained an attorney and entered into plea discussions with the Government. The attorney advised Lee that going to trial was "very risky" and that, if he pleaded guilty, he would receive a lighter sentence than he would if convicted at trial. Lee informed his attorney of his noncitizen status and repeatedly asked him whether he would face deportation as a result of the criminal proceedings. The attorney told Lee that he would not be deported as a result of pleading guilty. Based on that assurance, Lee accepted the plea and the District Court sentenced him to a year and a day in prison, though it deferred commencement of Lee's sentence for two months so that Lee could manage his restaurants over the holiday season.

Lee quickly learned, however, that a prison term was not the only consequence of his plea. Lee had pleaded guilty to what qualifies as an "aggravated felony" under the Immigration and Nationality Act, and a noncitizen convicted of such an offense is subject to mandatory deportation. Upon learning that he would be deported after serving his sentence, Lee filed a motion to vacate his conviction and sentence, arguing that his attorney had provided constitutionally ineffective assistance.

At an evidentiary hearing on Lee's motion, both Lee and his plea-stage counsel testified that "deportation was the determinative issue in Lee's decision whether to accept the plea." In fact, Lee explained, his attorney became "pretty upset because every time something comes up I always ask about immigration status," and the lawyer "always said why are you worrying about something that you don't need

to worry about." According to Lee, the lawyer assured him that if deportation was not in the plea agreement, "the government cannot deport you." Lee's attorney testified that he thought Lee's case was a "bad case to try" because Lee's defense to the charge was weak. The attorney nonetheless acknowledged that if he had known Lee would be deported upon pleading guilty, he would have advised him to go to trial. Based on the hearing testimony, a Magistrate Judge recommended that Lee's plea be set aside and his conviction vacated because he had received ineffective assistance of counsel.

The District Court, however, denied relief. Applying our two-part test for ineffective assistance claims from *Strickland v. Washington*, the District Court concluded that Lee's counsel had performed deficiently by giving improper advice about the deportation consequences of the plea. But, "in light of the overwhelming evidence of Lee's guilt," Lee "would have almost certainly" been found guilty and received "a significantly longer prison sentence, and subsequent deportation," had he gone to trial. Lee therefore could not show he was prejudiced by his attorney's erroneous advice. Viewing its resolution of the issue as debatable among jurists of reason, the District Court granted a certificate of appealability.

The Court of Appeals for the Sixth Circuit affirmed the denial of relief. On appeal, the Government conceded that the performance of Lee's attorney had been deficient. To establish that he was prejudiced by that deficient performance, the court explained, Lee was required to show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Lee had "no bona fide defense, not even a weak one," so he "stood to gain nothing from going to trial but more prison time." Relying on Circuit precedent holding that "no rational defendant charged with a deportable offense and facing overwhelming evidence of guilt would proceed to trial rather than take a plea deal with a shorter prison sentence," the Court of Appeals concluded that Lee could not show prejudice. We granted certiorari.

II

The Sixth Amendment guarantees a defendant the effective assistance of counsel at "critical stages of a criminal proceeding," including when he enters a guilty plea. To demonstrate that counsel was constitutionally ineffective, a defendant must show that counsel's representation "fell below an objective standard of reasonableness" and that he was prejudiced as a result. The first requirement is not at issue in today's case: The Government concedes that Lee's plea-stage counsel provided inadequate representation when he assured Lee that he would not be deported if he pleaded guilty. The question is whether Lee can show he was prejudiced by that erroneous advice.

A

A claim of ineffective assistance of counsel will often involve a claim of attorney error "during the course of a legal proceeding"—for example, that counsel failed to raise an objection at trial or to present an argument on appeal. A defendant raising such a claim can demonstrate prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

But in this case counsel's "deficient performance arguably led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself." When a defendant alleges his counsel's deficient performance led him to accept a guilty plea rather than go to trial, we do not ask whether, had he gone to trial, the result of that trial "would have been different" than the result of the plea bargain. That is because, while we ordinarily "apply a strong presumption of reliability to judicial proceedings," "we cannot accord" any such presumption "to judicial proceedings that never took place."

We instead consider whether the defendant was prejudiced by the "denial of the entire judicial proceeding to which he had a right." When a defendant claims that his counsel's deficient performance deprived him of a trial by causing him to accept a plea, the defendant can show prejudice by demonstrating a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."

The dissent contends that a defendant must also show that he would have been better off going to trial. That is true when the defendant's decision about going to trial turns on his prospects of success and those are affected by the attorney's error—for instance, where a defendant alleges that his lawyer should have but did not seek to suppress an improperly obtained confession.

Not all errors, however, are of that sort. Here Lee knew, correctly, that his prospects of acquittal at trial were grim, and his attorney's error had nothing to do with that. The error was instead one that affected Lee's understanding of the consequences of pleading guilty. The Court confronted precisely this kind of error in *Hill*. Rather than asking how a hypothetical trial would have played out absent the error, the Court considered whether there was an adequate showing that the defendant, properly advised, would have opted to go to trial. The Court rejected the defendant's claim because he had "alleged no special circumstances that might support the conclusion that he placed particular emphasis on his parole eligibility in deciding whether or not to plead guilty."

Lee, on the other hand, argues he can establish prejudice under Hill because he never would have accepted a guilty plea had he known that he would be deported as a result. Lee insists he would have gambled on trial, risking more jail time for whatever small chance there might be of an acquittal that would let him remain in the United States. The Government responds that, since Lee had no viable de-

fense at trial, he would almost certainly have lost and found himself still subject to deportation, with a lengthier prison sentence to boot. Lee, the Government contends, cannot show prejudice from accepting a plea where his only hope at trial was that something unexpected and unpredictable might occur that would lead to an acquittal.

B

The Government asks that we, like the Court of Appeals below, adopt a per se rule that a defendant with no viable defense cannot show prejudice from the denial of his right to trial. As a general matter, it makes sense that a defendant who has no realistic defense to a charge supported by sufficient evidence will be unable to carry his burden of showing prejudice from accepting a guilty plea. But in elevating this general proposition to a per se rule, the Government makes two errors. First, it forgets that categorical rules are ill suited to an inquiry that we have emphasized demands a "case-by-case examination" of the "totality of the evidence." And, more fundamentally, the Government overlooks that the inquiry we prescribed in *Hill v. Lockhart* focuses on a defendant's decisionmaking, which may not turn solely on the likelihood of conviction after trial.

A defendant without any viable defense will be highly likely to lose at trial. And a defendant facing such long odds will rarely be able to show prejudice from accepting a guilty plea that offers him a better resolution than would be likely after trial. But that is not because the prejudice inquiry in this context looks to the probability of a conviction for its own sake. It is instead because defendants obviously weigh their prospects at trial in deciding whether to accept a plea. Where a defendant has no plausible chance of an acquittal at trial, it is highly likely that he will accept a plea if the Government offers one.

But common sense (not to mention our precedent) recognizes that there is more to consider than simply the likelihood of success at trial. The decision whether to plead guilty also involves assessing the respective consequences of a conviction after trial and by plea. When those consequences are, from the defendant's perspective, similarly dire, even the smallest chance of success at trial may look attractive. For example, a defendant with no realistic defense to a charge carrying a 20-year sentence may nevertheless choose trial, if the prosecution's plea offer is 18 years. Here Lee alleges that avoiding deportation was the determinative factor for him; deportation after some time in prison was not meaningfully different from deportation after somewhat less time. He says he accordingly would have rejected any plea leading to deportation—even if it shaved off prison time—in favor of throwing a "Hail Mary" at trial.

The Government urges that, in such circumstances, the possibility of an acquittal after trial is "irrelevant to the prejudice inquiry," pointing to our statement in *Strickland* that "a defendant has no entitlement to the luck of a lawless decisionmaker." That statement, however, was made in the context of discussing the pre-

sumption of reliability we apply to judicial proceedings. As we have explained, that presumption has no place where, as here, a defendant was deprived of a proceeding altogether. In a presumptively reliable proceeding, "the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like" must by definition be ignored. But where we are instead asking what an individual defendant would have done, the possibility of even a highly improbable result may be pertinent to the extent it would have affected his decisionmaking.

C

"Surmounting Strickland's high bar is never an easy task," and the strong societal interest in finality has "special force with respect to convictions based on guilty pleas." Courts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences.

In the unusual circumstances of this case, we conclude that Lee has adequately demonstrated a reasonable probability that he would have rejected the plea had he known that it would lead to mandatory deportation. There is no question that "deportation was the determinative issue in Lee's decision whether to accept the plea deal." Lee asked his attorney repeatedly whether there was any risk of deportation from the proceedings, and both Lee and his attorney testified at the evidentiary hearing below that Lee would have gone to trial if he had known about the deportation consequences.

Lee demonstrated as much at his plea colloquy: When the judge warned him that a conviction "could result in your being deported," and asked "does that at all affect your decision about whether you want to plead guilty or not," Lee answered "Yes, Your Honor." When the judge inquired "how does it affect your decision," Lee responded "I don't understand," and turned to his attorney for advice. Only when Lee's counsel assured him that the judge's statement was a "standard warning" was Lee willing to proceed to plead guilty.

There is no reason to doubt the paramount importance Lee placed on avoiding deportation. Deportation is always "a particularly severe penalty," and we have "recognized that 'preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence.' " At the time of his plea, Lee had lived in the United States for nearly three decades, had established two businesses in Tennessee, and was the only family member in the United States who could care for his elderly parents—both naturalized American citizens. In contrast to these strong connections to the United States, there is no indication that he had any ties to South Korea; he had never returned there since leaving as a child.

The Government argues, however, that a defendant "must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." The Government contends that Lee cannot make that showing because he was going to be deported either way; going to trial would only result in a longer sentence before that inevitable consequence.

We cannot agree that it would be irrational for a defendant in Lee's position to reject the plea offer in favor of trial. But for his attorney's incompetence, Lee would have known that accepting the plea agreement would certainly lead to deportation. Going to trial? Almost certainly. If deportation were the "determinative issue" for an individual in plea discussions, as it was for Lee; if that individual had strong connections to this country and no other, as did Lee; and if the consequences of taking a chance at trial were not markedly harsher than pleading, as in this case, that "almost" could make all the difference. Balanced against holding on to some chance of avoiding deportation was a year or two more of prison time. Not everyone in Lee's position would make the choice to reject the plea. But we cannot say it would be irrational to do so.

Lee's claim that he would not have accepted a plea had he known it would lead to deportation is backed by substantial and uncontroverted evidence. Accordingly we conclude Lee has demonstrated a "reasonable probability that, but for his counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.

The judgment of the United States Court of Appeals for the Sixth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice THOMAS, with whom Justice ALITO joins except for Part I, dissenting.

The Court today holds that a defendant can undo a guilty plea, well after sentencing and in the face of overwhelming evidence of guilt, because he would have chosen to pursue a defense at trial with no reasonable chance of success if his attorney had properly advised him of the immigration consequences of his plea. Neither the Sixth Amendment nor this Court's precedents support that conclusion. I respectfully dissent.

I

A

The Court and both of the parties agree that the prejudice inquiry in this context is governed by *Strickland v. Washington*. The Court in *Strickland* held that a defendant may establish a claim of ineffective assistance of counsel by showing that his "counsel's representation fell below an objective standard of reasonableness" and, as relevant here, that the representation prejudiced the defendant by "actually having an adverse effect on the defense."

To establish prejudice under *Strickland*, a defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland* made clear that the "result of the proceeding" refers to the outcome of the defendant's criminal prosecution as a whole. It defined "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." And it explained that "an error by counsel does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment."

The parties agree that this inquiry assumes an "objective" decisionmaker. That conclusion also follows directly from *Strickland*. According to *Strickland*, the "assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like." It does not depend on subjective factors such as "the idiosyncrasies of the particular decisionmaker," including the decisionmaker's "unusual propensities toward harshness or leniency." These factors are flatly "irrelevant to the prejudice inquiry." In other words, "a defendant has no entitlement to the luck of a lawless decisionmaker." Ibid. Instead, "the assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision."

When the Court extended the right to effective counsel to the plea stage, it held that "the same two-part standard" from *Strickland* applies. To be sure, the Court said—and the majority today emphasizes—that a defendant asserting an ineffectiveness claim at the plea stage "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." But that requirement merely reflects the reality that a defendant cannot show that the outcome of his case would have been different if he would have accepted his current plea anyway. In other words, the defendant's ability to show that he would have gone to trial is necessary, but not sufficient, to establish prejudice.

The Hill Court went on to explain that *Strickland*'s two-part test applies the same way in the plea context as in other contexts. In particular, the "assessment" will primarily turn on "a prediction whether," in the absence of counsel's error, "the evidence" of the defendant's innocence or guilt "likely would have changed the

outcome" of the proceeding. Thus, a defendant cannot show prejudice where it is "inconceivable" not only that he would have gone to trial, but also "that if he had done so he either would have been acquitted or, if convicted, would nevertheless have been given a shorter sentence than he actually received." In sum, the proper inquiry requires a defendant to show both that he would have rejected his plea and gone to trial and that he would likely have obtained a more favorable result in the end.

To the extent *Hill* was ambiguous about the standard, our precedents applying it confirm this interpretation. In *Premo v. Moore*, the Court emphasized that "strict adherence to the *Strickland* standard" is "essential" when reviewing claims about attorney error "at the plea bargain stage." In that case, the defendant argued that his counsel was constitutionally ineffective because he had failed to seek suppression of his confession before he pleaded no contest. In analyzing the prejudice issue, the Court did not focus solely on whether the suppression hearing would have turned out differently, or whether the defendant would have chosen to go to trial. It focused as well on the weight of the evidence against the defendant and the fact that he likely would not have obtained a more favorable result at trial, regardless of whether he succeeded at the suppression hearing.

The Court in *Missouri v. Frye*, took a similar approach. In that case, the Court extended *Hill* to hold that counsel could be constitutionally ineffective for failing to communicate a plea deal to a defendant. The Court emphasized that, in addition to showing a reasonable probability that the defendant "would have accepted the earlier plea offer," it is also "necessary" to show a "reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." In short, the Court did not focus solely on whether the defendant would have accepted the plea. It instead required the defendant to show that the ultimate outcome would have been different.

Finally, the Court's decision in *Lafler v. Cooper* is to the same effect. In that case, the Court concluded that counsel may be constitutionally ineffective by causing a defendant to reject a plea deal he should have accepted. The Court again emphasized that the prejudice inquiry requires a showing that the criminal prosecution would ultimately have ended differently for the defendant—not merely that the defendant would have accepted the deal. The Court stated that the defendant in those circumstances "must show" a reasonable probability that "the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed."

These precedents are consistent with our cases governing the right to effective assistance of counsel in other contexts. This Court has held that the right to effective counsel applies to all "critical stages of the criminal proceedings." Those stages include not only "the entry of a guilty plea," but also "arraignments, postindictment interrogation, and postindictment lineups." In those circumstances, the

Court has not held that the prejudice inquiry focuses on whether that stage of the proceeding would have ended differently. It instead has made clear that the prejudice inquiry is the same as in *Strickland*, which requires a defendant to establish that he would have been better off in the end had his counsel not erred.

B

The majority misapplies this Court's precedents when it concludes that a defendant may establish prejudice by showing only that "he would not have pleaded guilty and would have insisted on going to trial," without showing that "the result of that trial would have been different than the result of the plea bargain." In reaching this conclusion, the Court relies almost exclusively on the single line from *Hill* that "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." For the reasons explained above, that sentence prescribes the threshold showing a defendant must make to establish *Strickland* prejudice where a defendant has accepted a guilty plea. In *Hill*, the Court concluded that the defendant had not made that showing, so it rejected his claim. The Court did not, however, further hold that a defendant can establish prejudice by making that showing alone.

The majority also relies on a case that arises in a completely different context, *Roe v. Flores-Ortega*. There, the Court considered a defendant's claim that his attorney failed to file a notice of appeal. The Court observed that the lawyer's failure to file the notice of appeal "arguably led not to a judicial proceeding of disputed reliability," but instead to "the forfeiture of a proceeding itself." The Court today observes that petitioner's guilty plea meant that he did not go to trial. Because that trial "never took place," the Court reasons, we cannot "apply a strong presumption of reliability" to it. And because the presumption of reliability does not apply, we may not depend on *Strickland*'s statement "that a defendant has no entitlement to the luck of a lawless decisionmaker." This point is key to the majority's conclusion that petitioner would have chosen to gamble on a trial even though he had no viable defense.

The majority's analysis, however, is directly contrary to *Hill*, which instructed a court undertaking a prejudice analysis to apply a presumption of reliability to the hypothetical trial that would have occurred had the defendant not pleaded guilty. After explaining that a court should engage in a predictive inquiry about the likelihood of a defendant securing a better result at trial, the Court said: "As we explained in *Strickland v. Washington*, these predictions of the outcome at a possible trial, where necessary, should be made objectively, without regard for the 'idiosyncrasies of the particular decisionmaker.' " That quote comes from the same paragraph in *Strickland* as the discussion about the presumption of reliability that attaches to the trial. In other words, *Hill* instructs that the prejudice inquiry must presume that the foregone trial would have been reliable.

The majority responds that *Hill* made statements about presuming a reliable trial only in "discussing how courts should analyze predictions of the outcome at a possible trial," which "will not always be necessary." I agree that such an inquiry is not always necessary—it is not necessary where, as in *Hill*, the defendant cannot show at the threshold that he would have rejected his plea and chosen to go to trial. But that caveat says nothing about the application of the presumption of reliability when a defendant can make that threshold showing.

In any event, the Court in *Hill* recognized that guilty pleas are themselves generally reliable. Guilty pleas "rarely" give rise to the "concern that unfair procedures may have resulted in the conviction of an innocent defendant." That is because "a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case." Guilty pleas, like completed trials, are therefore entitled to the protections against collateral attack that the *Strickland* prejudice standard affords.

Finally, the majority does not dispute that the prejudice inquiry in *Frye* and *Lafler* focused on whether the defendant established a reasonable probability of a different outcome. The majority instead distinguishes those cases on the ground that they involved a defendant who did not accept a guilty plea. According to the majority, those cases "articulated a different way to show prejudice, suited to the context of pleas not accepted." But the Court in *Frye* and *Lafler* (and *Hill*, for that matter) did not purport to establish a "different" test for prejudice. To the contrary, the Court repeatedly stated that it was applying the "same two-part standard" from *Strickland*.

The majority today abandons any pretense of applying *Strickland* to claims of ineffective assistance of counsel that arise at the plea stage. It instead concludes that one standard applies when a defendant goes to trial (*Strickland*); another standard applies when a defendant accepts a plea (*Hill*); and yet another standard applies when counsel does not apprise the defendant of an available plea or when the defendant rejects a plea (*Frye* and *Lafler*). That approach leaves little doubt that the Court has "opened a whole new field of constitutionalized criminal procedure"—"plea-bargaining law"—despite its repeated assurances that it has been applying the same *Strickland* standard all along. In my view, we should take the Court's precedents at their word and conclude that "an error by counsel does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment."

III

Applying the ordinary *Strickland* standard in this case, I do not think a defendant in petitioner's circumstances could show a reasonable probability that the result of his criminal proceeding would have been different had he not pleaded guilty. Petitioner does not dispute that he possessed large quantities of illegal drugs or

that the Government had secured a witness who had purchased the drugs directly from him. In light of this "overwhelming evidence of guilt," the Court of Appeals concluded that petitioner had "no bona fide defense, not even a weak one." His only chance of succeeding would have been to "throw a 'Hail Mary' at trial." As I have explained, however, the Court in *Strickland* expressly foreclosed relying on the possibility of a "Hail Mary" to establish prejudice. *Strickland* made clear that the prejudice assessment should "proceed on the assumption that the decision-maker is reasonably, conscientiously, and impartially applying the standards that govern the decision."

In the face of overwhelming evidence of guilt and in the absence of a bona fide defense, a reasonable court or jury applying the law to the facts of this case would find the defendant guilty. There is no reasonable probability of any other verdict. A defendant in petitioner's shoes, therefore, would have suffered the same deportation consequences regardless of whether he accepted a plea or went to trial. He is thus plainly better off for having accepted his plea: had he gone to trial, he not only would have faced the same deportation consequences, he also likely would have received a higher prison sentence. Finding that petitioner has established prejudice in these circumstances turns *Strickland* on its head.

IV

The Court's decision today will have pernicious consequences for the criminal justice system. This Court has shown special solicitude for the plea process, which brings "stability" and "certainty" to "the criminal justice system." The Court has warned that "the prospect of collateral challenges" threatens to undermine these important values. And we have explained that "prosecutors must have assurance that a plea will not be undone years later," lest they "forgo plea bargains that would benefit defendants," which would be "a result favorable to no one."

The Court today provides no assurance that plea deals negotiated in good faith with guilty defendants will remain final. For one thing, the Court's artificially cabined standard for prejudice in the plea context is likely to generate a high volume of challenges to existing and future plea agreements. Under the majority's standard, defendants bringing these challenges will bear a relatively low burden to show prejudice. Whereas a defendant asserting an ordinary claim of ineffective assistance of counsel must prove that the ultimate outcome of his case would have been different, the Court today holds that a defendant who pleaded guilty need show only that he would have rejected his plea and gone to trial. This standard does not appear to be particularly demanding, as even a defendant who has only the "smallest chance of success at trial"—relying on nothing more than a "Hail Mary"—may be able to satisfy it. For another, the Court does not limit its holding to immigration consequences. Under its rule, so long as a defendant alleges that

his counsel omitted or misadvised him on a piece of information during the plea process that he considered of "paramount importance," he could allege a plausible claim of ineffective assistance of counsel.

In addition to undermining finality, the Court's rule will impose significant costs on courts and prosecutors. Under the Court's standard, a challenge to a guilty plea will be a highly fact-intensive, defendant-specific undertaking. Petitioner suggests that each claim will "at least" require a "hearing to get the facts on the table." Given that more than 90 percent of criminal convictions are the result of guilty pleas, the burden of holding evidentiary hearings on these claims could be significant. In circumstances where a defendant has admitted his guilt, the evidence against him is overwhelming, and he has no bona fide defense strategy, I see no justification for imposing these costs.

4. Malpractice in Criminal Cases

Ang v. Martin

114 P. 3d 637 (Wash. 2005)

Owens, J.

We are asked to determine whether plaintiffs in a malpractice action against their former criminal defense attorneys were properly required to prove by a preponderance of the evidence that they were actually innocent of the underlying criminal charges. The Court of Appeals concluded that, as an element of their negligence claim, plaintiffs were required "to prove innocence in fact and not merely to present evidence of the government's inability to prove guilt." We affirm the Court of Appeals.

Facts

Psychiatrist Jessy Ang and his wife Editha jointly owned Evergreen Medical Panel, Inc., a company that provided the Washington State Department of Labor and Industries with independent medical examinations of injured workers. As a result of Dr. Ang's contact with a target of a governmental task force investigating social security fraud, Dr. Ang himself became a person of interest. In February 1994, the task force executed a search warrant on Dr. Ang's office and seized copies of two sets of signed tax returns that reported conflicting amounts of income. The Angs were arrested in April 1996, following the execution of a search warrant at their residence. A year later, the Angs were indicted on 18 criminal counts, including conspiracy to defraud the United States, bank and tax fraud, and filing false statements.

The Angs retained defendants Richard Hansen and Michael G. Martin for flat fees of $225,000 and $100,000, respectively. Attorneys Hansen and Martin engaged in a round of plea negotiations prior to trial, but the Angs rejected the plea bargain. The case proceeded to a jury trial before Judge Tanner in federal district court in December 1997. On the fifth day of trial, just prior to the conclusion of the government's case, Hansen and Martin recommended that the Angs accept another proffered plea, one that the Angs viewed as the least attractive of any agreement previously presented. After Dr. Ang was allegedly told that Mrs. Ang could face sexual assault in prison, the Angs agreed to plead guilty to two of the 18 counts.

The Angs then engaged attorney Monte Hester to review the plea discussions and provide a second opinion. Hester concluded that the government had not met its burden of proof and that the plea agreement provided the Angs with no material benefit. Retaining Hester and Keith A. MacFie to represent them, the Angs successfully moved to withdraw the pleas, which Judge Tanner had never formally accepted. In September 1999, the matter again proceeded to trial before Judge Tanner, with the Angs waiving their right to a jury. Although the government offered another plea bargain prior to trial, one requiring no plea on Dr. Ang's part, a misdemeanor or felony for Mrs. Ang, and a $500,000 fine, the Angs rejected the plea and were acquitted on all 18 counts.

The Angs, along with Evergreen Medical, filed the present legal malpractice action against Hansen and Martin in May 2000 in Pierce County Superior Court. The complaint stated claims for legal malpractice and for violations of the Washington Consumer Protection Act. The trial court denied the defendants' motion for summary judgment, and a jury trial began in November 2001. The trial court instructed the jury that the Angs had to prove by a preponderance of the evidence that they were innocent of the underlying criminal charges. On January 11, 2002, responding to the initial two questions on a special verdict form, the jury found that the Angs had not "proven by a preponderance of the evidence they were innocent of all the criminal charges against them." As to the verdict form's third question, asking whether "any of the defendants had been negligent," the jury made a finding of negligence against Martin only.

The plaintiffs appealed, but the Court of Appeals affirmed. This court granted the plaintiffs' petition for review.

Issues

Where a legal malpractice suit stems from the representation of clients in a criminal prosecution, must plaintiffs who were acquitted of the criminal charges prove their actual innocence of the crimes, or does their acquittal satisfy the innocence element of their malpractice action?

Analysis

Essential Elements of Legal Malpractice Claims against Criminal Defense Counsel. A plaintiff claiming negligent representation by an attorney in a civil matter bears the burden of proving four elements by a preponderance of the evidence:

> (1) The existence of an attorney-client relationship which gives rise to a duty of care on the part of the attorney to the client; (2) an act or omission by the attorney in breach of the duty of care; (3) damage to the client; and (4) proximate causation between the attorney's breach of the duty and the damage incurred.

The fourth element, proximate causation, includes "cause in fact and legal causation." Cause in fact, or "but for" causation, refers to "the physical connection between an act and an injury." In a legal malpractice trial, the "trier of fact will be asked to decide what a reasonable jury or fact finder in the underlying trial or 'trial within the trial' would have done but for the attorney's negligence." Legal causation, however, presents a question of law: "It involves a determination of whether liability should attach as a matter of law given the existence of cause in fact." To determine whether the cause in fact of a plaintiff's harm should also be deemed the legal cause of that harm, a court may consider, among other things, the public policy implications of holding the defendant liable. In "criminal malpractice" suits, two elements related to proximate causation have been added. In *Falkner v. Foshaug*, the Court of Appeals "concluded that postconviction relief is a prerequisite to maintaining a criminal malpractice suit and proof of innocence is an additional element a criminal defendant/malpractice plaintiff must prove to prevail at trial in his legal malpractice action."

The trial court in the present case thus instructed the jury as follows on the elements of the Angs criminal malpractice claims:

> To prove their legal malpractice claims, the plaintiffs bear the burden of proving by a preponderance of the evidence each of the following:
>
> First, that there is an attorney-client relationship giving rise to a duty owed by a defendant to a plaintiff;
>
> Second, that plaintiffs have obtained a successful challenge to their convictions based on their attorneys failure to adequately defend them;
>
> Third, that plaintiff was innocent of the crimes charged;
>
> Fourth, that there is an act of omission by a defendant that breached the duty of care of an attorney;
>
> Fifth, that a plaintiff was damaged; and
>
> Sixth, that a breach of duty by a defendant is a proximate cause of a plaintiff's damages.

The Angs assigned error to this instruction, contending that their undisputed acquittal of the criminal charges met not only the additional element of postconviction relief but also the innocence requirement.

By successfully withdrawing their guilty pleas and receiving an acquittal on all charges, the Angs unquestionably received the equivalent of postconviction relief, but contrary to their contention, they did not thereby satisfy the innocence requirement. The Angs mistakenly claim that they were simply required to prove legal innocence, not actual innocence." Legal guilt or innocence is that determination made by the trier of fact in a criminal trial," whereas "actual guilt is intended to refer to a determination in a civil trial, by a preponderance of the evidence, that the defendant engaged in the conduct he was accused of in the prior criminal proceeding." But the *Falkner* court referred explicitly to the "actual innocence

requirement" and at no point equated the innocence requirement with legal innocence. Plainly, a requirement of legal innocence would have been redundant alongside the additional, unchallenged requirement of postconviction relief and would have necessitated a confusing overlay of standards of proof, requiring the malpractice jury to consider whether the Angs had proved by a preponderance of the evidence that they would not have been found guilty beyond a reasonable doubt in the underlying criminal trial.

Moreover, proving actual innocence, not simply legal innocence, is essential to proving proximate causation, both cause in fact and legal causation. Unless criminal malpractice plaintiffs can prove by a preponderance of the evidence their actual innocence of the charges, their own bad acts, not the alleged negligence of defense counsel, should be regarded as the cause in fact of their harm. Likewise, if criminal malpractice plaintiffs cannot prove their actual innocence under the civil standard, they will be unable to establish, in light of significant public policy considerations, that the alleged negligence of their defense counsel was the legal cause of their harm. Summarizing the policy concerns, the *Falkner* court observed that, "requiring a defendant to prove by a preponderance of the evidence that he is innocent of the charges against him will prohibit criminals from benefiting from their own bad acts, maintain respect for our criminal justice systems procedural protections, remove the harmful chilling effect on the defense bar, prevent suits from criminals who may be guilty, but could have gotten a better deal, and prevent a flood of nuisance litigation."

In the alternative, the Angs argue that, if a plaintiff's actual guilt or innocence has any place in a criminal malpractice suit, the issue should be raised as an affirmative defense, not as an element of the plaintiffs cause of action. The Angs find support in *Shaw II*, the only decision adopting the actual innocence requirement and shifting to the criminal malpractice defendant "the burden of proof by a preponderance of the evidence as to the actual guilt of the plaintiff." As respondent Martin explained, however, "the criminal defendant/malpractice plaintiff is in a far better position to bear the burden of establishing innocence," since, unlike his defense attorney, he "knows if he is actually innocent," "was, presumably, present or involved in the underlying events which led to the criminal charges," "has unlimited access to the information about his own acts necessary to prove innocence," "would know what, if any, inculpatory facts he withheld from his lawyer," and would have the "opportunity to accept a plea, potentially an Alford plea which could preserve his malpractice claim, before all facts and witness testimony have been developed or are known to his or her attorney." We find this practical analysis persuasive and thus decline to adopt the minority position of *Shaw II*.

In sum, we conclude that the Angs were properly required to prove by a preponderance of the evidence that they were actually innocent of the underlying criminal charges. We therefore affirm the Court of Appeals.

Conclusion

We conclude that, as plaintiffs in a criminal malpractice action, the Angs were properly required to prove by a preponderance of the evidence that they were actually innocent of the underlying criminal charges. We find no persuasive reasons for this court to follow the minority position and shift the burden to the defendant attorneys to prove that their former clients were actually guilty of the charged crimes.

SANDERS, J. (dissenting).

I dissent because the malpractice standard for criminal cases should be the same as civil. There is no reason to invite malpractice in criminal cases by heightening the plaintiff's burden to prove postconviction relief and actual innocence. In every situation a client should rightfully expect competent legal representation.

We have clearly stated the standard for legal malpractice:

> To establish a claim for legal malpractice, a plaintiff must prove the following elements: (1) The existence of an attorney-client relationship which gives rise to a duty of care on the part of the attorney to the client; (2) an act or omission by the attorney in breach of the duty of care; (3) damage to the client; and (4) proximate causation between the attorney's breach of the duty and the damage incurred.

This rule does not suggest the additional requirements the majority adds to cases of criminal malpractice, namely, postconviction relief and proof of actual innocence. I see no reason to add them.

The majority cites a Court of Appeals case, *Falkner v. Foshaug*, to support additional elements. The Court of Appeals opinion *Falkner* is not binding authority, nor is case law from other jurisdictions upon which *Falkner* is based. Nor am I persuaded by its logic. Attorneys who negligently represent their clients should be responsible for any harm that results from the misconduct. It does not matter if the subject matter of the case is civil or criminal. Forcing criminal defendants to prove actual innocence does not serve any purpose except to frustrate the client's right to competent representation.

Citing a "public policy" present in the minds of the individuals in the majority, the majority argues the defendant's acts should be viewed as the cause of any harm unless he demonstrates his innocence. However, our constitution sets the "public policy" which entitles criminal defendants to adequate representation. I prefer that policy as my guide.

The issue is causation. Under our precedent, cause in fact is determined by the jury as a question of fact. Cause in fact is a minimum threshold that asks but for the lawyer's negligence would the client have been harmed. In other words, would the result be different if the lawyer had used reasonable care?

Legal causation is a subsequent inquiry, asking as a matter of law whether liability should attach. The majority argues a criminal defendant should not profit from his crimes, and hence the defense attorney should not be liable for his negligence unless the defendant first proves his own innocence. I disagree. The criminal defendant is equally entitled to competent representation, and the negligent attorney should take responsibility for his malpractice. The majority's rule simply invites malpractice since the defense attorney knows he is held to a lower standard. Proving innocence is impossible since a negative cannot be proved.

Here the Angs's defense attorneys, Michael Martin and Richard Hansen, recommended a particular plea agreement. The Angs initially agreed but later withdrew the plea on recommendation from new counsel and were acquitted on all charges at a subsequent trial. They sued their former defense attorneys and a jury found that Martin alone was negligent even though it found the Angs had not proved their innocence by a preponderance of the evidence. Since the latter consideration should be irrelevant, Martin should bear the responsibility for his negligence. I would reverse as to Martin, and remand for a trial on damages.

ALEXANDER, C.J. (concurring in dissent).

I agree with Justice Sanders that the trial court erred in instructing the jury that Jessy and Editha Ang had to prove that they were actually innocent of the crime charged in order to prevail in their legal malpractice claim against attorneys Richard Hansen and Michael Martin. For that reason, we should reverse the Court of Appeals and remand to the trial court for a new trial on the Angs' claim against Martin.

I write separately because, in my view, we should not stop with a determination that the trial court erred but should go further to indicate that the defendant attorney may raise the issue of the plaintiff's actual guilt in the criminal case as an affirmative defense. That was the position taken by the Supreme Court of Alaska in a similar case, *Shaw v. Department of Administration*. There, the court said that because plaintiffs in such actions must already bear the burden of proving that they have obtained postconviction relief from their criminal convictions, they should not have to prove their "actual innocence." The court went on to indicate, however, that the defendant may raise the issue of the plaintiff's "actual guilt" as an affirmative defense and seek to establish it by a preponderance of the evidence. Although the Alaska court did not engage in an extensive discussion of its reasons for placing the burden on the defendant to establish this affirmative defense, it did indicate that putting the burden there is consistent with the requirement that defendants establish traditional affirmative defenses that look to plaintiffs' actions such as contributory/comparative negligence and assumption of the risk. The Alaska rule makes perfect sense to me for that reason and for the additional reason that it is consonant with the traditional notion that one is presumed innocent until proven guilty beyond a reasonable doubt. Furthermore, shifting the

burden to the defendant relieves the plaintiff of the almost impossible burden of proving innocence while at the same time addressing the policy concern noted by the majority, that criminals should not benefit from "their own bad acts."

CHAMBERS, J. (concurring in dissent).

I concur in Justice Sanders' dissent but write separately to express my indignation that this court, based upon the policy of protecting lawyers, would carve out a special protection for criminal defense attorneys whose acts of professional negligence are harmful to their clients. Under this logic, it is not enough for the injured client to prove actual harm from the attorney's failure to meet professional standards; the injured client must also prove that her hands were always clean. Under this logic, why not give immunity to accountants for professional negligence unless the accountant's client can prove he or she never understated income or requested an unavailable deduction, even when the accountants' bad acts caused actual harm to their clients or society? Surely tax dodgers should not profit from their misdeeds. Under this logic, why not give immunity to health care providers who harm their patients unless the patient can prove perfect good health but for the negligence of the provider? Surely the unhealthy should not profit from their illness.

But this logic ignores the fact that professionals owe a duty to the sick as well as the healthy; to the scrupulously honest business woman as well as the one looking for the angle; to the guilty as well as the innocent. Those of us caught in the grip of the law are always entitled to competent legal representation whether or not we are totally innocent. The heart of the criminal defense lawyer's job is often not to prove absolute innocence; the irreducible core of the job is to make the state prove its case and make the best case for the defendant possible. Often the sole issue is the level of culpability and the sanction to be imposed upon the client. The government may seek multiple counts where a single count is appropriate, seek charges of a higher degree than the evidence supports, or seek a sentence disproportionate to the offense. The negligence of her lawyer may cost her client her fortune, her liberty, or her life. The "actual innocence" requirement is impractical and harmful in the area of criminal malpractice law; it creates an almost impossible burden and provides almost absolute immunity to criminal defense lawyers.

The most troubling aspect of the actual innocence requirement announced by the majority lies with its origin. It is based upon a policy to protect lawyers from lawsuits. Tort actions are maintained for a variety of reasons, including the deterrence of wrongful conduct. As a matter of basic policy, accountability, compensation, and deterrence of wrongful conduct should trump protecting lawyers from lawsuits.

Second, while it may be true that a majority of courts that have reached the issue require the plaintiff to establish actual innocence, the numbers do not appear to be great. Only Missouri, New York, Massachusetts, Alaska, Pennsylvania, California, New Hampshire, Nebraska, Illinois, Florida, and Wisconsin require either proof of actual innocence or that the conviction was set aside on postconviction relief. This is hardly a national consensus.

This court should protect the public from lawyers' misdeeds, not the other way around. A plaintiff who is not categorically innocent seeking compensation under ordinary principles of tort law faces no light burden. Such a guilty plaintiff must prove a duty, a breach of that duty, injuries proximately caused by the breach, and the amount of his damages. I see no reason to provide additional protections for lawyers.