Chapter 3

The Attorney-Client Relationship

1. Establishing and Ending the Relationship

1.1 Undertaking Representation

Rest. (2d) 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.

Model Rules of Professional Conduct

Rule 6.2: Accepting Appointments

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;

(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686 (Minn. 1980)

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

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.

1.2 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.

1.3 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. (2d) 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)

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.

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. (2d) 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)

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 depo-

sition 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 touchstones 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 con-

fidences. 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 up-

on 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. Attorney as Agent

3.1 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: Current Clients: Specific Rules

(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.

Rest. (2d) of the Law Governing Lawyers

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

As between client and lawyer:

(1) A client and lawyer may agree which of them will make specified decisions, subject to the requirements stated in §§ 18, 19, 22, 23, and other provisions of this Restatement. The agreement may be superseded by another valid agreement.

(2) A client may instruct a lawyer during the representation, subject to the requirements stated in §§ 22, 23, and other provisions of this Restatement.

(3) Subject to Subsections (1) and (2) a lawyer may take any lawful measure within the scope of representation that is reasonably calculated to advance a client's objectives as defined by the client, consulting with the client as required by § 20.

(4) A client may ratify an act of a lawyer that was not previously authorized.

§ 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.

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, appar-

ent 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 pri-

vate 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.

3.2 Clients with Diminished Capacity

Model Rules of Professional Conduct

Rule 1.14: Clients with Diminished Capacity

(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. (2d) 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).

4. 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.

Rule 1.8: Current Clients: Specific Rules

(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 NONREFUNDABLE 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 maintaining 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 nonrefundable 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 (1996)

O'Connor J.

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 subsequent 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 ex-

pressions 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)

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.

5. 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.