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LEGAL ETHICS ONE

THE ATTORNEY-CLIENT RELATIONSHIP

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THE ATTORNEY-CLIENT RELATIONSHIP

INTRODUCTION

This book is directed toward defining and explaining the scope of the attorney-client relationship. As part of its discussion on the attorney-client relationship the book will deal with such topics as client confidentiality, conflict of interest, fiduciary responsibility, attorney fees, attorney fee agreements, withdrawal of the relationship, and termination of the attorney-client relationship.

Any discussion on professional responsibility would be incomplete if no attempt was made to explain the two types of Codes of Professional Responsibility which serve as the underpinnings for the attorney-client relationship. In 1969 the American Bar Association promulgated its ABA Model Code. This Model Code dealt primarily with the conduct of attorneys. Several states have since patterned their Canons of Professional Responsibility on this ABA Model Code. In 1977 the ABA upgraded its rules for professional conduct and instituted the Model Rules of Professional Conduct. These Model Rules have since been adopted in the entirety or with modification by almost all of the states. Regardless of whether they have adopted the Model Code or Model Rules, the states have usually added their own individual interpretations or additions concerning the attorney-client relationship. A "disciplinary rule"

in this book is a reference to the ABA Model Code of 1969. Likewise, reference in this book to the "Model Rules" is a reference to the Model Rules of Professional Conduct that were subsequently promulgated.

Generally, it is easier for an attorney to maintain compliance with the Model Rules than with the Model Code. For a particular state, an attorney will have to comply with the professional canons of responsibility that were adopted by that particular state. A difficult situation can arise when an attorney is admitted to practice in one or more states. In such a situation, an attorney's conduct may not violate the rules of one state using the Model Rules but might violate the rules of another state that uses the Model Code. Attorneys should remember they are bound by the Canons of Professional Responsibility for every state in which they practice even if the practice is temporarily by comity.

CHAPTER 1

DUTY OF CONFIDENTIALITY

I. INTRODUCTION

The first responsibility of every attorney is to preserve any communications from the client. The heart and soul of the attorney-client relationship is that no attorney can be forced to testify against the client. Confidentiality is owed by every attorney to the client. Absent a client's consent, an attorney usually cannot reveal information relating to the representation of a client. Both ABA Model Rule 1.6 and ABA Disciplinary Rule 4-101(B) impose upon the attorney the obligation to maintain client confidences.

The rationale behind this duty of an attorney to maintain client confidences is rather straight forward. A person seeks legal advice from an attorney to handle a legal matter. A client seeking legal advice does not and should not have any reason to believe the evidence and confidences being given to the attorney can be used against the client. In most instances compelling an attorney to divulge client confidences and communications would violate the client's Sixth Amendment right to counsel. If a client's attorney could be compelled to give evidence against the client, no one would ever consult an attorney or freely discuss their case with him for fear that the content of the discussion would be divulged in court. The promotion of full and frank discourse between the client and the attorney was the basis for the ABA sustaining the duty of an attorney to maintain client

confidences. Both the Model Rules and the Model Code seek to protect the client from the risk of his attorney divulging confidential information. Without this protection, a client would risk self-incrimination every time he consulted an attorney for legal service regarding a potential criminal matter.

The duty to maintain client confidentiality necessitates an attorney-client relationship. The existence of the attorney-client relationship requires several different elements. First, the confidences in question must have been divulged in a situation where legal advice was sought from the attorney. The person must have sought legal advice in a situation that a reasonable person would presume was compatible for eliciting professional advice. No attorney-client relationship would be thought to have been created in a party setting of casual conversation, laughter and jokes. Such a meeting with the attorney is social rather than professional and not done as a consultation even though the attorney is giving an opinion on a legal matter. The creation of the attorney-client relationship requires that the meeting of the attorney with the potential client be under such circumstances that a reasonable person would consider the purpose of the meeting to be for the potential client to obtain legal advice or representation. The chance meeting at a social gathering where general examples are given and no specifics are discussed would probably give rise to the belief that the conversation was social, not business, and that no attorney-client relationship exists.

The communication given to the attorney, be it written or

oral, must be related to the subject being discussed by the attorney and potential client. The consultation must also be made in confidence. For a consultation to be confidential, a reasonable person must be able to conclude that it is a confidential communication. The most common example is a situation where legal advice is sought from an attorney when non-lawyers not employed by the attorney are present. This consultation is not a confidential communication, and there is no attorney-client privilege. When these conditions are met, the attorney-client privilege exists and the attorney-client communications are privileged.

Once a communication is privileged, it will remain so until the client waives the privilege. The privilege is usually waived by the client testifying to the content of the communication. The client can also expressly release the attorney from the obligation to maintain the client's confidentiality.

The client's conduct can waive the attorney-client privilege. Voluntarily talking about the advice or testifying about such legal advice will terminate a client's privilege. One of the most common ways for a person to lose the protection of the attorney-client privilege is for the person to sue the attorney for malpractice. In a situation where the attorney is sued by a client, the attorney-client privilege is waived to the extent necessary for the attorney to defend himself. In a malpractice action, it would be unfair for the attorney to be barred from using information he has to defend against the complaint.

In addition to information that the client gives directly to

the attorney (the communication), the attorney is duty-bound to preserve in secret confidences regarding the client even though they may not have been learned directly from the client. Canon 4 of the ABA Code of Professional Responsibility holds that a lawyer should preserve the "confidences of secrets" of his client. Disciplinary Rule 4-101(A), defines a secret as "other information gained in professional relationship that the client had requested to be held inviolate or the disclosure of which would be embarrassing or likely to be detrimental to the client." A confidence is defined as "information protected by the attorney-client privilege under applicable law." A confidence is what the attorney is told, but a secret is information the attorney gains from a different source. Confidences and secrets may not be used to the disadvantage of the client. The attorney cannot disclose this information if it is going to hurt his client.

In addition to Disciplinary Rule 4-101, the attorney should be aware of Ethical Consideration 4-5 that holds such information may not be used to the advantage of the attorney or third party unless the client consents. Not only can information not be given or disseminated if it is going to hurt the client, it cannot be used if it is going to give an advantage to the attorney or someone else without the client's consent.

The duty of the attorney to preserve the client's confidences and secrets does not preclude the disclosure of that information to the attorney's agents. Disclosure of such information to an attorney's agent is permissible because these agents are working

for the attorney and are bound by the same obligation to keep the information secret.

An attorney can discuss confidential information with co-counsels, other attorneys in the office and support staff as long as the discussion is geared toward helping the client. Sometimes an investigator working for the attorney needs to know this information in order to investigate, helping the attorney who in turn will use that information to help the client. Such a disclosure is not considered a violation. The client can place limits on any disclosure of the client's information. The client can tell the attorney, "Under no circumstances tell anyone. You know, and you alone will know." Once the client has placed specific limitations on the release of confidential information, the attorney cannot disseminate that information to anyone outside those limits. In the face of such a limiting proviso, the attorney should not communicate that information to the people in the office. Moreover, a mere rumor in the office that serves no benefit to the client can get the attorney in trouble even if it is not a violation of a client confidence.

The general rule is that unless there is reason to divulge a client confidence to an agent, the attorney should not do so. In the absence of a client's direct prohibition not to disclose information to anyone, if there is a reason for someone in the attorney's office to know a client's confidence, the attorney can divulge the information to the extent necessary for the recipient to assist the attorney in servicing the client's legal matter.

There is a difference in the way confidences and secrets are treated between the two ABA Acts. Attorneys should understand these differences in planning their conduct. In a state that uses the ABA Model Code, Disciplinary Rule 4-101 applies. Disciplinary Rule 4-101, imposes an ethical duty to maintain the secrecy of all information protected by the attorney-client privilege and all information that is not protected by the privilege that the client asks be kept in confidence or that would harm or embarrass the client if revealed.

In contrast, the ABA Model Rule which is adopted by most states is actually much broader. The Model Rules impose upon attorneys an ethical duty to preserve as confidential any information that relates to the representation of the client, regardless of whether or not it is privileged, regardless of whether or not the client asks it to be kept in confidence and regardless of whether or not revealing it would harm or embarrass the client. Under the Model Rules, the attorney is basically forbidden to divulge privileged client information, however obtained, without the client's consent. The ABA Model Rule is much broader and can expose an attorney to liability for inadvertent conduct that would not be applicable under the earlier Model Code. Under the Model Rules, the only way for an attorney to obtain maximum protection is for the attorney to take the high road and not speak about the client. In reality, an attorney who constantly discloses clients' business will lose clients whether or not any violation of clients' confidences occur. These are the rules that

govern the imputation to the attorney of the duty of confidentiality.

II. CORPORATE CONFIDENCES

One of the areas where attorney-client privilege comes into play quite often is that concerning a corporate client. The United States Supreme Court set forth the limitations on corporate communication in its case Upjohn Company vs. The United States, 1981, 449 US 383, where it stated that the attorney-client privilege does, in fact, apply to corporate clients as well as to individuals.

Prior to the Upjohn case, the lower courts had held that the attorney-client privilege only existed between communications of the corporate officers and their attorneys who fell within the control group of the company: the attorney-client privilege only extended to the officers and directors who actually ran the company. The Upjohn decision actually rejected the control group argument and expanded the coverage of the attorney-client privilege. The Supreme Court ruled that where the client is a corporation or other organizational entity, the attorney-client privilege applies to communications generated to secure legal advice that are between the organization's employees concerning matters within the scope of their duties and responsibilities and the organization's counsels or attorneys who are acting in a professional capacity at the direction of the organizational superiors.

Information so disclosed by the corporation is covered by the

attorney-client privilege. If an attorney is hired to represent the corporation or limited liability company or other such legal entity, the attorney can talk to anyone in the company regarding their duties and responsibilities, and the information obtained is privileged information if it is related to the subject involving the corporation and the attorney. By contrast, information that is disclosed by an employee concerning misconduct that was observed outside of his employment responsibilities is not privileged even if made to the organization's attorney. An example of non-privileged information could arise as follows: An employee observed from a window another employee drive recklessly and cause an accident. The fact that the employee related what the employee saw to the attorney would not make the statement a privileged communication because it was observed outside the scope of the employee's employment responsibilities. A corporate client cannot create a privilege when one does not exist.

Attorneys should bear in mind that a communication might be protected under the attorney-client work product rule even if it is not privileged. Under the attorney-client work product rule, information amassed by an attorney is usually not discoverable by the opposing party if the opposing party also has the ability to get the information. In the situation where an attorney has acquired non-privileged information that the other side cannot get, the opposing party might be able to force the attorney to disclose such information. This is an interesting situation.

Attorneys should always bear in mind these two conflicting

privileges whenever material in the attorney's hands is sought to be discovered. The attorney-client privilege is an absolute bar against disclosure; the work product rule extends nondisclosure to the attorney's work product under certain circumstances.

III. COMMUNICATIONS

Disputes regarding client confidences usually revolve around client communications with the attorney. What actually is a communication? The basic definition is any communication between an attorney and a client or potential client seeking legal advice where advice is given on the matter they are discussing, and it is given in confidence. There are, however, certain areas that courts have ruled are not confidential communications. Among such areas are the identity of the client and the fee arrangement between the attorney and the client. The fact that the attorney may be acting on behalf of a client is not privileged either.

Generally, the identity of the client is not a matter the attorney can normally keep concealed. The exception is where the revealing of the client's identity would expose the client to liability of some form or another. An example of this occurred a few years ago in Florida. There was a felony hit-and-run in which a person was killed. The driver of the vehicle went to his attorney. The attorney went to the D.A. and attempted to negotiate a very low plea saying, in essence, "You don't know who the driver is. We do, and my client will plead guilty to a lesser charge like manslaughter, not vehicular manslaughter." The District Attorney tried to get the attorney to release the name of the client so they

could prosecute. The prosecution threatened the attorney with obstruction of justice charges and even sought an indictment against the attorney. The attorney stood on the attorney-client privilege and refused to disclose the information. The court sided with the attorney saying that releasing the information would have exposed his client to criminal prosecution. In this situation, it was held that the disclosure of the identity of the client would be a confidential communication. The statute of limitations eventually ran out, and there has never been any prosecution on that case.

Another situation involving the revealing of client's identities has arisen where criminals, specifically drug dealers, wish pay their income taxes in absentia (in secret). Such clients would send the payment to a particular account set up by the IRS. Records were kept that payment was received, but the IRS did not know who made the payment. In the case of criminal prosecution, the criminal defendant could prove that he did pay his income tax. Sometimes this was done through an attorney, and the information was always kept confidential because the information would immediately tip the IRS and the government that this person was a drug dealer. This would make criminal prosecution much easier on the drug dealing. This practice has since been abolished, but it was one way the government did get a lot of tax money.

Another area of dispute regarding communication is over documents or intangible evidence turned over to the attorney by the corporation. In this situation the result is the same regardless of whether or not the client is a corporation. Evidence that is

discoverable in the hands of the client is equally discoverable in the hands of the attorney. If the client can be compelled to turn over that information by simply giving it to the attorney, this does not shield it from being produced. In a breach of contract suit, for example, if the defendant gave documents (such as records) relating to the breach of contract to the attorney, the defendant could not thereafter claim that because the documents are now in the hands of the attorney they are no longer discoverable. If documents are originally discoverable, giving them to the attorney does not thereafter make them nondiscoverable. In a case where the attorney receives evidence of a crime, the law is equally clear. If the attorney has evidence of the crime itself, it must be turned in. The attorney does not have to state where the attorney got the evidence.

The example most often used is where the client gives the attorney the gun that might have been used in the crime. The attorney is permitted to keep the gun for as long as necessary to run any reasonable tests that the attorney might want, but thereafter the gun must be turned over to the police. The attorney cannot be forced to disclose the name of the client; but at the same time the attorney cannot remove the serial number from the gun that might lead to the identity of the client.

The attorney cannot become a depository for crime. A client cannot give 20 pounds of cocaine to the attorney with the instruction, "Put this in your safe." The attorney would be obligated to deliver it to the authorities. In the case of

California vs. Meredith, 29 Cal.3d 682, the client told his attorney the location in a trash can of the gun used in a crime. The argument was whether or not the attorney should have disclosed this information to the court. The court held that if the attorney simply looked in the trash can and saw that it was there, he was under no duty to disclose it.

On the other hand, attorney possession requires disclosure. In re Ryder 1967, 263 F. Supp. 360, the court upheld suspension of an attorney who kept a shotgun rather than turn it over to the police for use against the client.

> "It is an abuse of a lawyer's professional responsibility knowingly to take possession of and secrete the fruits and instrumentalities of a crime. Ryder's acts bear no reasonable relation to the privilege and duty to refuse to divulge a client's confidential communication. Ryder made himself an active participant in a criminal act, ostensibly wearing the mantle of the loyal advocate, but in reality serving as an accessory after the fact."

The Court held that once the attorney took possession of the gun the attorney acquired the affirmative duty to disclose and deliver. This is a close area in the case of potential discipline for an attorney. Before proceeding, it would be wise to get an opinion from the state bar on how to proceed. In the Ryder case, however, that did not work because the attorney had the prior opinion of two judges and a state attorney before proceeding. Yet, the attorney was still suspended for 18 months. There could be serious problems when the attorney is dealing with a major crime or concealing evidence or not disclosing evidence.

The Justice Department often uses subpoenas against attorneys

in an attempt to try to find out information about their clients. This has become a favorite tactic by the U. S. Justice Department against attorneys who represent suspected major drug dealers. In response to which the ABA added rule 3.8(f) to its Model Rules in 1990. Model Rule 3.8(f) prohibits prosecutors from subpoenaing a lawyer in a criminal proceeding unless the prosecutor reasonably believes that (a) the information sought is not protected from disclosure by any applicable privilege, (b) the evidence sought is essential to successful completion of an on-going investigation or prosecution, (c) there is no other feasible alternative to obtaining the information and (d) the prosecutor obtains prior judicial approval after an opportunity for an adversarial proceeding. This is the holding of the United States First Circuit Court of Appeals in United States vs. Klubock 1987, 832 F2d 664.

An attorney is required to identify the location of a fugitive client. If he knows, an attorney must disclose the location of the client when the client is a fugitive. In such cases the attorney must disclose the location of his fugitive client to the District Attorney or the Justice Department, whichever is prosecuting.

IV. SCOPE OF THE PRIVILEGE

The duty of confidentiality is imposed upon the attorney. The holder of this privilege is the client; it is not the attorney. Therefore, the attorney cannot waive it. The attorney must invoke it whenever the attorney is being compelled to provide such information that would violate the privilege. The duty of confidentiality is not absolute. There are certain exceptions to

the attorney-client privilege which relate to communications. The privilege does not apply if the client is seeking the advice from the attorney in order to commit a crime or to aid someone to commit a crime. If the client's purpose behind contacting the attorney is to learn how to commit a crime, the communication is not confidential. If it were not so, every criminal would first discuss it with their attorney and work out a flawless plan before committing the crime. Without this limitation, the attorney would not be able to turn in such criminals. If, for example, a client came into an attorney's office and said, "I'm going to kill my wife. I want to know, however, what is my best strategy for getting off." This is a flat statement that the person intends to commit a future crime; there is no privilege. The attorney should, and in fact is required, to report the person's intent to commit a crime. While an attorney must report future intended crimes by a client, an attorney cannot and is prohibited from reporting past completed crimes. Model Rule 1.2(d) and Disciplinary Rule 1.16(a)(1) hold that an attorney cannot reveal the fraud or previous activity done by client. The attorney must withdraw from representing the client in any future work that would involve reliance upon the fraudulent actions of the client. For example, assume that an attorney discovers that a client has used the attorney's advice to prepare a fraudulent contract that cheated another party. The attorney is required to withdraw from the case and representation of the client in any matters dealing with the party whom the attorney knows is relying on that contract. The attorney, however, is not permitted

to explain to anyone, except the client, the reason behind the withdrawal.

The duty of an attorney to preserve a client's confidence does not extend to any communication that is relevant to the issue of a lawsuit by the client against the attorney. If an attorney is sued for malpractice based upon the manner in which the attorney handled a case, the attorney can introduce into evidence any communications with the client which show that the attorney did not commit the malpractice.

There is no privilege in the attorney-client relationship if the attorney had been hired by two people and those two people subsequently get into a lawsuit between themselves and one party wants to call the attorney as a witness. The attorney can be called by either party to testify as to what the other party told the attorney as part of the dual representation. The attorney is required to maintain a neutral relationship to the parties and testify for either or both parties.

The privilege does not apply in situations where the evidence relates to competency or intention of a client who has attempted to dispose of property by a will or inter-vivos transfer. Estate planning advice is an important issue although it does not come up that often. When it does it often deals with a testator or grantor's competency. The attorney is often the only person who actually has such knowledge about whether or not the person was competent at that time. The attorney is the one who would be testifying. The testimony is for the benefit of the client: to

either preserve the estate plan that the client wrote or to set aside an estate plan the client was incompetent to make. If the client is incompetent, the attorney is still helping the client by making sure an incompetent document is not probated or used to pass the estate. In both cases the attorney is still acting for the client and the courts tend to view this as an exception. It is a necessary exception, particularly in a situation where the testator is dead and the only person who can testify to his competency is his attorney. Without that testimony, all wills could basically be terminated. There would be no evidence to prove competency in order to create a will.

In the area of ethical considerations pertaining to secrets or information the attorney discovers, the client must consent to reveal the information if the client is going to be harmed by it. This is not information that the attorney learned directly from the client but from other sources. Nonetheless, it is in his possession and should not be disclosed without the client's consent. Again there is an implied authority that permits an attorney to use such information and to release it if it can be done for the benefit of the client. In fact, such has always been the case. Even in the attorney-client privilege, if it can help the client, there is a belief that it can be released unless specifically prohibited by the client.

V. FORMER CLIENTS

Many legal ethics disputes involve the relationship of an attorney with a former client. The most common area of conflicts

concerns suits against a former client by a current client. ABA Model Code, Ethical Consideration 4-6 and the ABA Model Rule 1.9(C) require an attorney to maintain the confidentiality of a client even though the person is no longer the client of the attorney. "Once the client, always a client" stands for the purpose of confidentiality. This adage is a statement of the continuing obligation which does not cease with the termination of the relationship. If a former client has imparted confidential information to the attorney, the attorney is not permitted to oppose that former client in any matter in which the confidential information might be used. The exception to this rule is where the former attorney has received permission from the former client to represent the new client against this former client after a full consultation. Model Rule 1.9(A) and ABA Code Disciplinary Rule 4-101. In Trone vs. Smith, 1980, 621 Fed.2d 994, the Ninth Circuit Court of Appeals held that when the attorney has obtained such confidential information from a former client, such information cannot be used to the former client's disadvantage without consent following a consultation.

Regardless of whether an attorney is suing the former client or simply using privileged information to the former client's disadvantage without his consent, the attorney is going to be liable for violating the Canons of Professional Responsibility unless the attorney has the client's consent, and the consent is obtained after a full consultation as covered by Model Rule 1.9(C) and Disciplinary Rule 4-101(B)(2). To the contrary, as discussed

earlier, there is no privilege of confidentiality where the attorney has an obligation to disclose such information to avoid the commission of an impending crime or the attorney is being sued by the former client or it is necessary to prove the competency of the former client in a contest of an executed estate planning document.

An attorney is not permitted to oppose a former client in a matter substantially related to the matter for which the attorney was first hired without such consent after consultation. Example: The attorney was originally hired by the former client to defend in a quiet-title action. He is thereafter barred from suing the former client in a matter involving the real property in which the title was quieted if the issue of title is involved. Where the matters are totally different, there might not be a finding of substantial relation. Whether or not an attorney-client relationship is violated is determined on a case-by-case basis. Where an attorney has been directly involved in a specific transaction, the attorney is not permitted to oppose a former client in a dispute involving the same transaction without the consent of the former client. This frequently occurs when attorneys move between law firms or withdraw from law firms and find themselves with a new client who wants to sue the old client on the same matter that the attorney had represented the old client. This can cause a lot of problems. These cases come up rather frequently simply because attorneys tend to be mobile.

VI. ATTORNEY AS WITNESS

Except as discussed above under Model Rule 3.7(A) and Disciplinary Rule 5-101(B), an attorney is not supposed to take a case in which it is reasonably expected that the attorney will be called as a witness unless his witness testimony concerns only minor or factual background in the case. This prohibition is reasonable and straight forward because the attorney wold otherwise be testifying against his client. When the proposed testimony is of a minor nature in the case, such as background information that does not affect his client's liability, the attorney can testify, but he should have the consent of the client. Example: An uncontested will. The attorney may testify to the mental capacity of the deceased. The prohibition against attorney testimony is lifted only as to those situations where the testimony concerns fact or matter that is unopposed or uncontested; the attorney is merely laying a factual basis or the issue is not being contested.

Whenever the attorney realizes that he may be called as a witness against his present or former client on a contested matter he should withdraw and cease handling the case unless the client has agreed to the attorney's testimony after full consultation and with full understanding of the implications. It is seldom a good idea for an attorney to testify on a contested fact or item against a client in the same case for which the attorney is representing the client. To do so exposes the attorney to a malpractice action even if no professional ethics are violated.

CHAPTER 2

ATTORNEY FEE AGREEMENTS

INTRODUCTION

In Britain, trial attorneys are called barristers. On their robes, barristers have a pocket in the back. The history behind the pocket is traditionally it was considered distasteful for a barrister to ask a client for money. For a barrister to discuss representing a client for a fee just wasn't done. It was not proper! In order for a barrister to be paid, he (for all barristers at that time were men), would turn his back to his client, and his client would put in the pocket the amount of compensation he felt the barrister deserved. The barrister was required to leave it to the client to decide how much money he should be paid for the work he had done. Of course, if he lost, the barrister would usually get nothing because the client of that day, as today, is generally unwilling to pay an attorney for a losing effort. To this day, barrister robes still have that little pocket in them, although today's barristers no longer rely upon the largess of their clients to determine the amount of fees they receive.

Today, under both the ABA Code of Professional Responsibility and the Model Rules of Professional Responsibility, a duty is imposed upon an attorney to reach an agreement, preferably early in the relationship, on the attorney's compensation for the services rendered. Although recommended by the ABA, it is not required that the attorney fee agreement be in writing. Many states, such as

California, have enacted specific legislation or have required under their particular Canons of Professional Responsibility that the attorney have the fee agreement in writing.

An attorney should have the fee agreement in writing both for business and professional reasons. Without a written fee agreement, it is hard to prove in a fee dispute what was or was not covered. Fee disputes harm an attorney's reputation in the community and hamper developing new business. Having a written fee agreement detailing what work is covered and the compensation that will be paid will reduce fee disputes.

There are three types of fee arrangements. There is the fee for the work done by an attorney on an hourly basis, the flat rate type done for a set total fee and the contingency fee agreement. A fee agreement is supposed to be in writing. It did not used to be, but it makes a lot of sense and most state bars do require fee agreements nowadays to be in writing. The ABA model rule 1.5(B) actually requires the fee question to be determined very early in the relationship except where the attorney already has an on-going relationship with the client. In such a case, the attorney can forego a written contract, but he really should not.

Under the ABA Code Disciplinary Rule 2106 and Model Rule 1.5(A), an attorney is subject to discipline for trying to seek an unconscionable fee. There is no definition or set standard for an unconscionable fee. As such, the unconscionability of a fee is determined on a case-by-case basis as to whether or not it offends the sensibilities of the court or fee arbitrator. The court looks at a number of different factors to determine whether or not an attorney has acted unreasonably in an effort to receive more money

than is merited for the amount of work done.

There are nine different factors that the court or state bar will study to determine whether or not the fee was unconscionable. These standards have been proposed by the American Bar Association and adopted by virtually every state in some form:

1. Time and labor actually performed by the attorney in the case is one of the first factors considered. In a situation where an attorney might charge $5,000 for three hours work, there begins to appear the inference that the fee charged by the attorney was too high.
2. The novelty and difficulty of the question involved is also a factor. The more novel and difficult a legal question, posed by a case, the more time and effort that will be required doing the legal research and preparation. It becomes more difficult for a client to find an attorney who is willing to undertake a novel or difficult area of law that could hurt the attorney's reputation in both the general and legal community if he loses. An example, could be a client seeking a product liability suit on a forklift. There are few attorneys with the experience and expertise in such types of product liability cases and they may charge a higher fee that is not unconscionable.
3. Whether or not working for this client will interfere with doing other profitable work of the attorney is important. While an attorney is working for one client, the attorney is not able to spend that time working for another client. Lost earnings are a factor to be

considered. If the attorney has no other clients (e.g. the attorney is retired), the attorney might receive less than an attorney who is fully booked because the booked attorney might be found to have the ability to have replaced the lost income by taking on additional work.

4. What other attorneys in the community charge for similar work is always compared to the attorney fee to determine if it is significantly higher than the norm. If an hourly rate is less that most of the other attorneys, the attorney has a good case to argue that he did not charge an unreasonable amount. A converse finding can be made if the attorney vastly overcharges from the norm for the same type of legal matters. In the past it was fairly common for the county bar association to publish fee agreements or fee rates that were being charged by attorneys in the area. That is no longer done because it created the idea that an attorney who charged these amounts was charging fair fees. In fact, it has been held that it violates the Sherman Anti-Trust Act for attorneys to agree on a schedule of maximum fees (just like it was against the Sherman Act to agree on minimum fees). An attorney should not rely upon any fee schedules in setting a hourly rate.

5. The amount in controversy and the results that were obtained for the client. Obviously, if the attorney won $1 million for the client and the bill is only $100,000, that is a factor in determining whether or not the fee was unconscionable. If the attorney won a judgment of

$100,000 and a bill of $75,000 is submitted, almost certainly the bill is going to be evaluated.

6. Time limitations are also a factor. If the attorney had to drop everything he was doing to handle a case that required immediate full effort, that is another factor to be considered because of the simple psychological pressure that was added to the normal preparation of a trial. Example: Cases that must be prepared and tried on short notice and the attorney was unable to get a continuance. The attorney must drop everything else to work solely on that case. In determining the validity of the fee, the psychological pressure and stress incurred in having to jump into the case right way is a legitimate factor considered in awarding a higher fee.

7. Prior relationships with the client are considered in determining the legitimacy of a fee. This is another emotional area because an attorney will often spend more time and effort on a case involving a personal relationship than the case really warrants. The attorney may be unintentionally overworking the case and thereby overcharging or not charging enough for the amount of time and effort put into the case.

8. The experience, reputation and ability of the attorney handling the case is a factor. The better qualified the attorney is, the more of a specialist, the more the attorney can legitimately charge. An attorney with two Masters Degrees, an LLM in Law, a law school degree and one in Business would legitimately be able to charge more

than an attorney with just a Juris Doctorate degree. Such an attorney would have his fees evaluated not against those of ordinary attorneys but against other tax attorneys doing the same type of work. A client would expect to pay more for a specialist than a general practitioner right out of law school.

9. The final area evaluated in determining whether or not a fee is unconscionable is whether the fee is a fixed fee (i.e. hourly or total) or a contingency fee. While a contingency fee can be higher than an hourly or fixed fee, it still cannot be so high as to shock the conscience of the court.

None of these factors are usually in themselves determinative on the issue of whether an unconscionable fee was charged. It is the cumulative effect of the factors that will determine if the attorney is charging a fee that offends the conscious of the court or the fee arbitrator.

Many states will allow the attorney to have an attorney fee lien on the property of the client. Sometimes the lien is limited to the settlement in a particular case. In some states it will be against all of the property owned by the client until there is a resolution of the bill. Usually in a lien situation the attorney must thereafter commence a suit within a specific period of time after the lien is filed or after conclusion of the case. In some states, the lien period for filing suit by an attorney is six months. In most states, in order to perfect an attorney lien, the attorney has to file a notice of lien in the case, and the lien stays in effect until the case is concluded. If the client wins

and receives a judgment, the amount of the fees claimed by the attorney will be held in trust either by the succeeding attorney or the court until a hearing determines the correct amount of fees to be awarded to the attorney asserting the lien.

Law offices have reached the twentieth century in the aspects of collecting money. The ABA Formal Opinion 338 permits a lawyer to bill his client and allows payment by credit card. Under Formal Opinion 320, the lawyer may participate in a bar association program that enables clients to finance fees through bank loans. A client may give an interest bearing note to an attorney to secure payment of fees. This was permitted in the case of Hulland vs State Bar,(1972) 8 Cal3d. 442. Criminal attorneys in particular take interest bearing notes along with titles to their client's cars to secure payment of their attorney fees. This all has to be detailed in their fee agreement. This is also discussed in the fee agreement forms.

Another area that occasionally arises in a fee agreement is whether or not the agreement has given the attorney an interest in the litigation itself, which is improper. Under the Disciplinary Rule 5-103 and ABA Model Rule 1.8(J), an attorney cannot acquire a proprietary interest in the cause of action or the subject matter of the litigation in which the attorney is representing the client. This means if an attorney is bringing an action on behalf of a client or is defending an action on behalf of a client, the attorney cannot become a party in the suit by acquiring an interest in the subject matter of the lawsuit. The rationale behind the prohibition appears on its face misplaced. It seems that if the attorney had something to gain in the case by owning an interest in

the subject matter, the attorney would be even more diligent in his prosecution. Nonetheless, that is the law, and you must comply with it.

Once an attorney enters a fee agreement with a client, the attorney is usually precluded from withdrawing from representation of that client without court approval or the consent of the client. Should a client refuse to pay attorney fees, the attorney cannot hold up services until payment is received. If the attorney is replaced by the client, the attorney cannot retain the client's files until payment for past services has been received unless an attorney lien is granted for legal fees under state law.

Any discussion of fee agreements would be incomplete without a discussion of what happens if an attorney is fired during the middle of representation of a client. If an attorney is on an hourly fee arrangement, there is no problem. The attorney would simply submits the bill for the work done up to that point, and the client is responsible to pay it. If the attorney is on a flat fee, he can collect for the reasonable value of the provided legal services. An attorney on a flat rate would not be able to collect for the full amount owed under the contract because he had not completed the work and thus did not earn all of it. The attorney would get the reasonable value of the rendered legal services based on a percentage of how far along the attorney was on the case. If the attorney was 50% along in the case, he would probably get half of the agreed fee. Courts or fee arbitrators would look at it that way or they would put an hourly fee value on the work that had been done and charge accordingly. In neither event would an attorney ever collect more than he would have received under the actual fee

agreement itself. In fact, if another attorney is hired the courts or arbitrators will reflect on the value of the amount of work the discharged attorney performed versus the amount of work that the new attorney had to do to complete the case. In the area of a contingency fee agreement where the attorney had been fired, the discharged attorney is entitled to recover the reasonable value of the provided legal services based on the percentage of the actual award. If the discharged attorney was to get 30% of the case and the case gets settled for $500,000, there is a $150,000 fee award and the value of discharged attorney's work is $50,000. The discharged attorney would never get more than the fee agreement stated. In addition the recovery is also based on the amount the other attorney is paid to complete the case.

Every fee agreement should have a clause that bestows attorney fees to the prevailing party in the event of a lawsuit. The reason for this is many states will not permit an attorney to collect attorneys fees for collecting a judgment on his own case. In such states, the attorney who wins the case against the client will not be compensated for the time spent in getting the judgment. When an attorney fee clause is in the retainer agreement, the attorney can hire another attorney to get the judgment and will not be out anything when the judgment is obtained because the client will pay the attorney fees.

Some attorneys omit this provision in the hope that in the event of a client's successful malpractice action he will not receive attorney fees. That might be a good reason to not to include the clause in the fee agreement if the attorney does not have malpractice coverage or is sloppy in the manner in which he

practices. In most instances, the clause will be of benefit to the attorney. In lawsuits against the client for failure to pay fees, the attorney will receive attorney fees if he hires another attorney to collect the judgment and if such clause is present in the agreement. The reason for this is many states will not permit an attorney to collect attorneys fees for collecting a judgment on his own case. In such states, the attorney who wins the case against the client will not be compensated for the time spent in getting the judgment. When an attorney fee clause is in the retainer agreement, the attorney can hire another attorney to get the judgment and will not be out anything when the judgment is obtained because the client will pay the attorney fees.

II. CONTINGENCY FEE AGREEMENTS

The most common exception to the prohibition against an attorney acquiring a proprietary interest in an action he is representing is a contingency fee arrangement between the client and the attorney. An attorney can enter a contingency fee agreement even though it gives the attorney an ownership interest in the case (specifically a percentage of the judgment or settlement) if the client and attorney should prevail or settle their case. A contingency agreement actually changes the attorney from an employee of the client to a co-plaintiff. A contingent fee arrangement is where the plaintiff, who is the client of the attorney, wins an award and the payment of the attorney fees is a fixed percentage of that award after the costs and expenses of the case have been returned to the attorney. If the client does not win, then the attorney gets nothing.

In some countries, contingency fee agreements are unethical.

In the United States, there is nothing wrong with them. They are tolerated as long as the contingency fee is not considered to be unconscionable (where you get 50% of the case for doing 30 minutes work and not taking it to trial).

There is a lot of criticism about contingency fee cases, especially by doctors in the area of medical malpractice. They seem to feel that contingency fee cases tend to bolster the litigation. The other side is that the clients usually do not have the money to pay for a case to be prepared and go to trial. Without a contingency fee, most attorneys would not take a case pro bono and just accept the straight hourly fee if they win. It really doesn't work for the attorney. Example: In California it usually takes about five years to have a jury trial heard. Most attorneys cannot afford to carry a client for five years and then get paid on a straight hourly basis. The return is simply not large enough to warrant the wait. They would be better to charge a straight hourly fee for clients who will pay them up front.

There are certain cases in which contingency fee agreements are absolutely prohibited. The ABA, under its code disciplinary rule 2106 and its model rule 1.5(D)(2), makes it clear that contingency fee agreements in criminal cases are not permitted. In a criminal case the client is not going to get any money if he wins, so there is nothing the attorney can lien or claim for reimbursement. A contingency would not even apply in a criminal matter.

Another situation is in the family law area: an attorney is not permitted by ethical considerations and under model rule 1.5(D)(1) to get a contingency fee agreement. Example: In a

divorce case the spouses had property in more than one state. There was a huge disparity between what the wife said the property was worth and what the husband said it was worth. This was a community property situation, and each spouse was presumed to own a one-half undivided interest in all property that was acquired during the marriage except by gift, devise or bequest. In this situation, a contingency fee agreement would have been very proper because of the amount of money involved and the complexity of the work. An attorney, however, cannot enter into a contingency fee agreement in a family law matter. He must instead use an hourly fee or flat rate agreement.

The ABA Model Rule 1.5(C) requires a contingency fee agreement be in writing and that the fee agreement state how the fee is to be calculated, including the percentages the attorney will get if the case is settled before trial, after trial or after an appeal. Other included terms should be: what the litigation and other expenses are to be and if they are to be deducted after the recovery and whether there will be deductions for expenses that will be made before or after the contingency fee is calculated.

With any kind of fee agreement, the attorney is required to give an accounting to his client, whether it be a contingency fee agreement, an hourly fee agreement or a flat fee. There still must be an accounting to determine how everything has been paid. The point to remember is that the client is responsible for paying back to the attorney all of the court costs and litigation costs that have been advanced. That will come off the top of any settlement or award. What is left will be split according to the percentage in the fee agreement.

Contingency fee agreements have always been recognized as being necessary in the legal profession in order to open the legal system to the poor. Example: A major litigation case involving products liability can cost upwards of $200,000 dollars. The cost for such a case is far beyond the ability of nearly anyone in the country to pursue on an hourly basis.

A contingency fee arrangement works by splitting the risks and benefits of the recovery between the attorney and the client. If the client loses a contingency case, the client is only out the cost of pursuing the case. In the same vein, upon loss of a contingency fee case, the attorney loses all of the time and effort spent on the case that could have been directed toward other profit making activities. In other words, the attorney lost the opportunity of earning fees for doing work for other clients.

Many persons have suggested that states put caps on attorney contingency fees as a form of tort reform. The groups making these proposals do so with the avowed intent of reducing the number of cases filed in the courts. These groups recognize that if the attorneys cannot receive a fee equal to the potential of lost earnings attendant to taking a case, they will not take the case on a contingency fee basis. This has been the case. Whenever limits have been placed on contingency cases, the number of cases tried in those areas has dropped because attorneys reduce the number of speculative contingency cases they take and concentrate more on the cases with a guaranteed recovery or those offering an hourly or flat fee.

Whether or not an attorney should seek a contingency fee arrangement with a client depends on the viability of the case, how

long it will take to go to trial, the amount of time it will take to prepare and the financial standing of the attorney. A contingency fee case does not bring money into an office until settlement or judgment has been obtained. The attorney could wait years before getting any money from the case. For this reason, many of the largest law firms do not take contingency cases. All law firms, regardless of size, should be very selective in taking contingency cases. Sometimes it is possible for a sole practitioner to bring in one or more other attorneys as co-counsel on a contingency case. More law firms working on the case spreads both the risk and the rewards. Most attorneys, certainly most sole practitioners, lack the financial ability to handle a large contingency fee case alone. Yet many personal injury attorneys will handle relatively ordinary cases (such as auto accidents) on a contingency basis because these are relatively easy cases to develop and settle. The attorney must understand that no matter how good a case is, he should refuse unless sufficient money comes into the office to pay the bills while the case is pending. An attorney must earn a living. In the forms section of this book is a basic contingency fee agreement for use in California which can also be used with modifications to reflect the needs of various clients.

III. FLAT RATE AND HOURLY FEE AGREEMENTS

Besides contingency fee agreements, an attorney can also use a flat rate or hourly rate agreement. In a flat rate fee agreement the attorney does the work for a lump sum regardless of the amount of time spent on the case. In an hourly fee agreement, there is no cap on the total fee; the client is billed for the amount of time spent on the work.

Attorneys often require a retainer with an hourly fee agreement. The attorney may also want a retainer with a flat rate fee agreement when the payments are to be made in installments rather than in a lump sum at the start. A retainer is a deposit to assure representation by an attorney. There are two types of retainers that an attorney can obtain from a client. A refundable retainer is not earned by the attorney until the attorney has done work for the client. The rate at which the retainer is used is determined by the fee agreement. A fee agreement that charges $150 per hour will use up a $600 retainer after four hours of work by the attorney. Whenever an attorney agrees to represent a client on an hourly basis or a flat rate payable in installments, the attorney should get a reasonable retainer at the start. The fee agreement should contain a clause which requires that the client maintain a fixed minimum in the account. If the fee agreement calls for a $500 retainer, once the attorney bills for $500 of work the client should contribute $500 to the retainer account to maintain the required balance. As a result the attorney will always have a minimum amount in the retainer account to cover future work.

It is important to get a retainer at the start. If a case is not important enough for a client to come up with a retainer, the attorney should consider not taking the case. This is different from a contingency case where the attorney recognizes that he is not to be paid unless the case is won. With an hourly or flat rate fee the attorney expects to be paid regardless. If the client is unable or unwilling to pay a retainer, then the client may be unable or willing to pay the fee after the case is over. It is important to ascertain at the initial interview whether or not a

potential client is the type who will not pay the attorney after the case is over. The best way to do so is to ask for a retainer and see how the idea is received. The advantage of using retainers for an attorney is that they lessen fee disputes after the case is over. Most fee disputes occur after a case is completed and the attorney sends the final bill to the client for payment. At this point, the client no longer needs the attorney and is more likely to look for a reason to avoid paying the bill. If the bill had already been paid via a retainer, the likelihood of a fee dispute is greatly diminished. Studies show that attorneys who require their clients to pay retainers and maintain the retainers by systematic deposits have a lower number of fee disputes than attorneys who do not use retainers.

Following this section are sample attorney fee agreements: A basic hourly fee agreement for litigation, a flat fee agreement for estate planning, a flat rate fee agreement for litigation and a flat rate agreement for family law representation. These forms can be modified to meet the needs of clients in most states.

IV. FINANCIAL ASSISTANCE

A. ADVANCE COSTS

1. PROCEDURE

One area of potential ethical concern for attorneys is the rendering of financial assistance to the client during the course of litigation. Under both ABA Code Disciplinary Rule 5-103(b) and Model Rule 1.8(e) an attorney may provide a limited amount of financial assistance to a client in pending litigation. This rule is strictly construed. An attorney is permitted to advance court costs and litigation expenses on behalf of the client. This is

often done, even on a hourly basis just to get the case going and the client is billed for the fees later. The attorney is not permitted to advance funds for the client's living expenses or the payment of expenses not related to the preparation of the case.

In the matter of a contingency fee case, the attorney will usually advance the costs and expenses simply because the client does not have the ability to pay the money beforehand. Legally, the client is supposed to be responsible for repayment, but the attorney can always forgive that obligation. Model Rule 1.8(e) is realistic on this point and provides that an attorney may advance court costs and litigation expenses and may make the repayment by the client contingent on the outcome of the case. That may be the only way the attorney will get a contingency fee case because most people simply do not have the money to pay for a large case to be taken to trial. For most persons, the only way their cases will go to trial is if the attorney agrees to take it on a contingency basis. An attorney taking a contingency fee case may do so with the understanding that he may waive those expenses and costs in the event the case is lost. In exchange for taking a contingency fee case, the attorney is able to recover a lot more than he would have received on an hourly fee agreement. That is the basis of a contingency fee agreement.

Under Model Rule 1.8(e)(2), an attorney is allowed to pay the court costs and litigation expenses incurred in representing an indigent client. There was no similar provision in the old ABA code. Under both the ABA Code and the Model Rules, a lawyer is subject to discipline for rendering any other kind of financial assistance to the client in any litigation under Disciplinary Rule

5-103(B) and Model Rule 1.8. The reason for this is that state bars do not want attorneys buying cases. If the attorney starts giving money to the client to keep, he is in essence buying the case. If allowed, clients would be selling their causes of action to attorneys rather than seeking attorneys to get fair representation. As a result, medical payments, cost of living advances, etc. are illegal under the Canons of Professional Responsibility for most states.

2. TAX CONSIDERATIONS

There is a potential tax trap for attorneys advancing client costs. The Internal Revenue Service (IRS) is training auditors to examine law firms to see how advanced costs are treated. There are two methods usually used by attorneys for treating advance client costs. The IRS claims both are wrong. As a result, many law firms now find themselves facing serious tax liabilities for their tax treatment of advance client costs.

For the cash basis law firm, advance costs have usually been deducted in the year paid as ordinary business expenses. From any judgment or settlement received in the case, the law firm would take the repayment of the costs as ordinary income. While this seems reasonable, the IRS states that is the wrong method to employ as regards advance costs.

The second approach used by many law firms (that is also rejected by the IRS) is to treat such advance costs as a loan to the client. The IRS claims that advance costs are not loans to the client and therefore are not deductible to the law firm. The IRS claims that since the advance costs are not loans there is no business deduction for the advances when made, and there is no

income to the law firm when the costs are repaid to the law firm. If the client fails to pay the law firm for the advance costs, the attorney can claim the costs as a bad debt.

The IRS position is that advance costs can only be deducted on a law firm's tax return as a bad debt. The IRS will allow attorneys to come into compliance without penalty or interest by notifying the IRS of a change in accounting method within 180 days of the start of the filer's tax year. The result is that the attorney will have to report the deducted client costs for the previous tax years as income, but they can be spread over a four to six year period.

The IRS is serious in auditing attorneys concerning payments to clients. Under its Market Segment Specialization Program, the Audit Division is specifically directed to review attorney's accounting procedures for advance costs. It is envisioned that sole practitioners and small law firms will be the largest source of audits in this area.

C. ACQUIRING LITERARY OR MEDIA RIGHTS

An attorney cannot acquire literary or media rights as payment for attorney services from a client until the matter relating to those literary or media rights is entirely concluded. This prohibition is stated in Disciplinary Rule 5-104(B) and Model Rule 1.8(d). State bars do not want the attorney to be in the position of generating such publicity for the case that it will engender bad feelings or affect the client's own legal position. Consent of the client is irrelevant. The attorney is simply banned from doing it. If the attorney were to get such prior consent, it would probably show that he intentionally tried to avoid the act and it would actually work against the attorney. Such prior consent would

evidence an intentional attempt to subvert the canons of professional responsibility and lead to disciplinary action against the attorney regardless of the client's feelings on the matter.

The fact that an attorney cannot acquire media or literary rights in a case does not mean that the client should not sell those rights. Sometimes, the revenue from the sale of such rights is the only source of payment for the legal services. In the O.J. Simpson murder trial, Mr. Simpson wrote a book and put out an audio tape to help raise money for his defense. All of which was proper. The rights in the book and the tape belonged to Mr. Simpson, and the attorneys did not acquire an ownership interest in them even though the proceeds from them will be used to pay the legal fees.

There is an exception to the rules against acquiring media and literary interests from a client. This exception involves literary property in which the attorney fee consists of a share of that property when that property is not a subject of the litigation. Example: If an attorney is representing a client in a criminal matter. As part of the fee the client wants to give him an interest in a series of books he had written that were unrelated to this case. This arrangement might be permitted.

V. PAYMENT OF THE FEES

A. BY THIRD PARTIES

A potential area of conflict arises where the attorney fees are being paid by a third party. This issue often arises in an insurance situation. When an insurance company hires an attorney to handle an insured person's case, is the company or the insured the attorney's client? The question becomes: Does the attorney owe professional duty to the insurance company who pays the attorney or

to the insured? In another situation, the attorney might have been hired by a family member to represent a son or daughter or other family member. In any situation arising in this area, the attorney must comply with Model Rule 1.8(f) or ABA Code Rule 5-107(A), whichever is applicable under state law. First, the client must consent to the payor retaining the attorney. Then, after consultation with both the client and the person paying the bill, both must understand that the attorney's allegiance is to the client only. The person paying the bill must be made to understand that the person paying the bill will not interfere with the attorney's independence or representation if the attorney takes the case.

Most importantly, the person paying the bill must understand that there will not be any compromise or release of a client's confidential information to the person paying the bill without the client's consent. This is similar to the position of an insurance company because such confidential information cannot be released to the insurance company either. When all rules are met, the attorney can have proper representation of a client with the bill being paid by someone else.

B. FEE SPLITTING

Attorneys often refer cases to other attorneys. Cases are referred for several reasons. The attorney may not handle a particular type of law or he may be too busy to take a case. An attorney who takes a referred case is not permitted under the ABA rules to pay a referral fee to anyone, including an attorney who does not work on the case.

If another attorney works on the case, the attorney in charge

of the case can split fees with that attorney if he has consent of the client. In fact, an attorney is supposed to get the consent of the client before bringing any additional attorneys into the case. In a fee splitting situation, the total fee paid to all of the attorneys must still be reasonable and the client must not object. Any fee splitting must comply with the requirement of ABA Code Disciplinary Rule 2107 that the fee paid be in proportion to the actual work and responsibility done by the attorney. Under Model Rule 1.5 the split may be in proportion to the services performed or in a different proportion if the client consents and all of the attorneys agree to be responsible for the matter being handled.

NOTE: A fee agreement should comply with the law of each state in which the attorney is licensed to practice. Some states, such as California, require an attorney to state in the fee agreement whether or not he carries malpractice insurance. A sample clause could read,

"The attorney is self-insured for malpractice claims." or

"The attorney carries $_____ in malpractice insurance for errors and omissions with (name insurance company)."

Following are various fee agreements for use in California. With minor changes, they could also be used in other states in accordance with their state laws.

CALIFORNIA CONTINGENCY FEE AGREEMENT

THIS AGREEMENT, made this _____ day of _____, 199 ___, by and between _____ hereinafter called "CLIENT" and _____ _____ hereinafter called "ATTORNEY."

This agreement is required by California Business and Professions Code Section 6147 and is intended to fulfill the requirements of that section.

1. Client in consideration of services rendered and to be rendered as by Attorney to client, hereby retains Attorney to represent _____ as Attorney at Law to prosecute, defend or otherwise settle a cause of action against _____

_____

_____

and/or whomever may be liable, arising out of _____

_____

_____

on the _____ day of _____ , 199 __ at _____

_____.

2. Client empowers and authorizes Attorney to take all steps in the matter deemed advisable, namely to institute appropriate legal proceedings, conduct all necessary discovery and to take all other steps leading to settlement, trial and termination of the litigation.

3. Client promises to pay to the Attorney for the prosecution of the above-entitled matter, as an attorney's fee, the following:

A. 33 1/3% of any amount recovered, if settled, prior to commencing trial:

B. 40% of any amount recovered before trial, if there is no appeal:

C. 50% of any amount recovered after an appeal.

It is understood and agreed by the Client that the Attorney shall have and is specifically given herein a special and charging lien, for attorney fees, on any proceeds from a settlement or judgement obtained or payable in this case as a result in whole or in part of the legal work and services of the attorney.

4. It is understood and agreed that all monies expended by the Attorney in prosecution of the cause of action shall constitute an advance of costs to be paid by Client. If said costs are not paid prior to settlement or satisfaction of judgement, said costs shall be deducted from client's share of the settlement or satisfaction of judgment and paid to the Attorney. In the event sufficient funds are not recovered to reimburse Attorney for any advance of costs, then Client shall reimburse Attorney for any sums advanced and yet unpaid.

5. Attorney shall receive the above-mentioned percentage as a fee for said legal services on all money and property of any kind whatsoever that shall be obtained from any said cause of action or from the settlement thereof, from any proceeding in aid of judgment Gor decree in said action.

6. Attorney agrees to prosecute said cause upon the above basis.

7. Client acknowledges that Attorney has made no guarantee regarding the successful termination of said cause of action or matter and that all expressions relevant thereto are matters of professional opinion only.

8. Attorney acknowledges and agrees that no settlement or compromise of this matter shall be undertaken without the written approval of the Client unless pursuant to a written power of attorney executed by the Client.

9. Client agrees and promises to pay Attorney a reasonable attorney's fee in the event, Client, for whatever reason or no reason at all, effectuates a substitution of attorneys before settlement or judgment in this matter. In the event Client effectuates a substitution of attorneys after an offer of settlement has been made by the defendants in the above matter, at Attorney's option, the attorney's fees is to be the percentage set out above if said settlement offer is accepted by Client.

10. Client may discharge and substitute Attorney as Client's Attorney at any time and without cause.

11. Any proceedings in the aforementioned litigation after the trial phase of the action are not covered by the terms of this Agreement. Fees for such further proceedings (such as appeal, execution of judgment, writs, etc.) shall be negotiated between Attorney and Client before the same are commenced.

12. Should Client fail to perform his obligations under the

terms of this Agreement, Client consents to relieve Attorney as his Attorney of Record in this action or matter upon Attorney's motion to be so relieved.

13. Client agrees to maintain contact with Attorney and provide Attorney with current address and telephone numbers. Client further agrees to answer all correspondence from Attorney and participate in the Attorney's prosecution of the Client's matter.

14. In the event of litigation over the terms of this Agreement, the prevailing party shall be entitled to reasonable attorney fees and costs.

OPTIONAL

15. The attorney is self-insured for malpractice claims

OR

15. The attorney carries $_____ in malpractice insurance for errors and omissions with _____

_____.

16. The fee set forth in this Agreement is not set by law or statute and is negotiable between Attorney and Client.

IN WITNESS WHEREOF, the parties have executed this Agreement on the date first written above.

_____

Client

_____

Attorney

CALIFORNIA FAMILY LAW FEE AGREEMENT

THIS AGREEMENT, made this _____ day of _____, 199 ____, by and between _____ hereinafter called "CLIENT" and _____ _____ hereinafter called "ATTORNEY."

This agreement is required by California Business and Professions Code Section 6148 and is intended to fulfill the requirements of that section.

1. Client in consideration of services rendered and to be rendered by Attorney to client, hereby retains Attorney to represent Client through Judgment in Superior Court proceedings for dissolution of Client's marriage to _____ _____ included in the representation are all matters relating to property settlement, child custody, spousal support, child support and any other family law matters in the State of _____.

2. The following legal services that are not to be provided by Attorney under this agreement include, but are not limited to, the following: Review of Client's estate plan and drafting of a will or other estate planning documents, representation in proceedings (e.g. to enforce or modify provisions of the judgment).

Should the client later decide to utilize the Attorney to provide legal services not covered under this agreement, a separate written agreement between Attorney and Client will be executed reflecting the terms under which such additional

representation will be undertaken.

3. Client empowers and authorizes Attorney to take all steps in the matter deemed advisable, namely to institute appropriate legal proceedings, conduct all necessary discovery and to take all other steps leading to settlement, trial and termination of the litigation.

4. Client will pay to Attorney at the rate of _____ _____ Dollars ($) per hour as attorney's fees for the legal services to be provided in accordance with the terms and conditions of this Agreement. Attorney will charge the Client for the services performed on the client's behalf, in increments of one-tenth of an hour which are rounded the nearest one-tenth of any hour.

5. Client will pay to Attorney a retainer in the amount of _____ Dollars ($) to be received by Attorney on or before _____, to be applied against attorney's fees and costs incurred by client. This amount will be deposited in an interest-bearing trust account. Client authorizes Attorney to withdraw the principal from the trust account to pay attorney's fees and costs as they are incurred by Client. Any interest earned will be paid, as required by law, to the State Bar of California to fund legal services for indigent persons. The deposit is refundable. If, at the termination of services under this agreement, the total amount incurred by client for attorney's fees and costs is less than the amount of the deposit, the difference will be refunded to Client.

Whenever the deposit is entirely consumed, Client will deposit _____ Dollars ($) to be held in trust on the same terms above.

6. Attorney will charge for all activities undertaken in providing legal services to Client under this Agreement, including, but not limited to, the following: Conferences, court sessions and depositions (preparation and participation), correspondence and legal documents (review and preparation), legal research, and telephone conversations. Travel time will be charged both ways.

7. Client acknowledges that Attorney has made no promises about the total amount of attorney's fees to be incurred by Client under this agreement.

8. Client shall provide Attorney any and all collateral which the Attorney deems necessary as security, in addition to a charging lien on the proceeds from any judgment or settlement obtained as a result of the attorney's work for Attorney's fees as set forth hereinabove.

9. All court costs will be borne by the Client, and the Attorney will charge the same to the Client's account as they are incurred.

10. It is understood and agreed that all monies expended by the Attorney in prosecution of the cause of action shall constitute an advance of costs to be paid by Client. If said costs are not paid prior to settlement or satisfaction of judgement, said costs shall be deducted from client's share of the settlement or satisfaction of judgement and paid to the Attorney. In the event

sufficient funds are not recovered to reimburse Attorney for any advance of costs, then Client shall reimburse Attorney for any sums advanced and yet unpaid.

11. Attorney agrees to handle the above-entitled matter on the above-stated terms and conditions.

12. Client acknowledges that Attorney has made no guarantee regarding the successful termination of said cause of action or matter and that all expressions relevant thereto are matters of professional opinion only.

13. Attorney acknowledges and agrees that no settlement or compromise of this matter shall be undertaken without the written approval of the Client unless pursuant to a written power of attorney executed by the Client.

14. Client may discharge and substitute Attorney as Client's Attorney at any time and without cause.

15. Any proceedings in the aforementioned litigation after the trial phase of the action are not covered by the terms of this Agreement. Fees for such further proceedings (such as appeal, execution of judgment, writs, etc.) shall be negotiated between Attorney and Client before the same are commenced.

16. Should Client fail to perform his obligations under the terms of this Agreement, Client consents to relieve Attorney as his Attorney of Record in this action or matter upon Attorney's motion to be so relieved.

17. Client agrees to maintain contact with Attorney and provide Attorney with current address and telephone numbers.

Client further agrees to answer all correspondence from Attorney and participate in the Attorney's prosecution of the Client's matter.

18. In the event of litigation over the terms of this Agreement, the prevailing party shall be entitled to reasonable attorney fees and costs.

OPTIONAL

19. The attorney is self-insured for malpractice claims

OR

19. The attorney carries $_____ in malpractice insurance for errors and omissions with _____ _____.

20. The fee set forth in this Agreement is not set by law or statute and is negotiable between Attorney and Client.

IN WITNESS WHEREOF, the parties have executed this Agreement on the date first written above.

_____

Client

_____

Attorney

CALIFORNIA HOURLY FEE AGREEMENT

THIS AGREEMENT, made this _____ day of _____, 199 ____, by and between _____ _____ hereinafter called "CLIENT" and _____ _____ hereinafter called "ATTORNEY."

This agreement is required by California Business and Professions Code Section 6148 and is intended to fulfill the requirements of that section.

1. Client in consideration of services rendered and to be rendered as by Attorney to client, hereby retains Attorney to represent _____ as Attorney at Law to prosecute, defend or otherwise settle a cause of action against _____ _____ and/or whomever may be liable, arising out of _____ _____ _____ _____ _____ on the day of _____, 199____ at _____ _____.

2. Client empowers and authorizes Attorney to take all steps in the matter deemed advisable, namely to institute appropriate legal proceedings, conduct all necessary discovery and to take all

other steps leading to settlement, trial and termination of the litigation.

3. Client will pay to Attorney the sum of _____ _____ Dollars ($) per hour for attorney's fees for the legal services provided under this agreement. For any court appearance, there will be a minimum charge of _____ _____ Dollars ($). Attorney will charge in increments of one-tenth of an hour, rounded off for each particular activity to the nearest one-tenth of any hour. The minimum time charged for any particular activity will be one-tenth of an hour. Attorney will charge for all activities undertaken in providing legal services to Client under this Agreement, including, but not limited to, the following: Conferences, court sessions and depositions (preparation and participation), correspondence and legal documents (review and preparation), legal research, and telephone conversations. Travel time will be charged both ways.

Client acknowledges that Attorney has made no promises about the total amount of attorney's fees to be incurred by Client under this agreement.

4. Client will pay all "costs" in connection with Attorney's representation of Client under this agreement. Costs may be advanced by Attorney and then billed to Client unless the costs can be met out of client deposits that are applicable toward costs. Costs include, but are not limited to, court filing fees, deposition costs, expert fees and expenses, investigation costs, long-distance telephone charges, messenger service fees,

photocopying expenses, and process server fees. Attorney will obtain Client's consent before incurring any costs for consultants, expert witnesses, or investigators.

5. Client will pay to Attorney a deposit in the amount of _____ Dollars ($) to be received by Attorney on or before _____, and to be applied against attorney's fees and costs incurred by client. This amount will be deposited in an interest-bearing trust account. Client authorizes Attorney to withdraw the principal from the trust account to pay attorney's fees and costs as they are incurred by Client. Any interest earned will be paid, as required by law, to the State Bar of California to fund legal services for indigent persons. The deposit is refundable. If, at the termination of services under this agreement, the total amount incurred by client for attorney's fees and costs is less than the amount of the deposit, the difference will be refunded to Client.

Whenever the deposit is entirely consumed, Client will deposit _____ Dollars ($) to be held in trust on the same terms above.

6. It is understood and agreed that all monies expended by the Attorney in prosecution of the cause of action shall constitute an advance of costs to be paid by Client. If said costs are not paid prior to settlement or satisfaction of judgement, said costs shall be deducted from client's share of the settlement or satisfaction of judgement and paid to the Attorney. In the event sufficient funds are not recovered to reimburse Attorney for any

advance of costs, then Client shall reimburse Attorney for any sums advanced and yet unpaid.

7. Client shall provide Attorney any and all collateral which the Attorney deems necessary as security, in addition to a charging lien on the proceeds from any judgment or settlement obtained as a result of the attorney's work, for Attorney's fees as set forth hereinabove.

8. Attorney will send Client monthly statements indicating attorney's fees and costs incurred and their basis, any amounts applied toward the deposit, and any current balance owed. If no attorney's fees or costs are incurred for a particular month, or if they are minimal, the statement may be held and combined with that for the following month. Any balance will be paid in full within 30 days after the statement is mailed.

9. Attorney agrees to handle the above-entitled matter on the above-stated terms and conditions.

10. Client acknowledges that Attorney has made no guarantee regarding the successful termination of said cause of action or matter and that all expressions relevant thereto are matters of professional opinion only.

11. Attorney acknowledges and agrees that no settlement or compromise of this matter shall be undertaken without the written approval of the Client unless pursuant to a written power of attorney executed by the Client.

12. Client is informed that the Rules of Professional Conduct of the State Bar of California require the Client's informed

written consent before any attorney may begin or continue to represent the Client when the attorney has or had a relationship with another party interested in the subject matter of the attorney's proposed representation of the Client. Attorney is not aware of any relationship with any other party interested in the subject matter of Attorney's services to Client under the terms of this agreement. As long as Attorney's services for client under the terms of this agreement, Attorney will not agree to provide legal services for any such party without Client's written consent.

13. The Court may order, or the parties to the dispute may agree, that another party will pay some or all of client's attorney fees, costs, or both. Any such order or agreement will not affect Client's obligation to pay attorney's fees and costs under this agreement, nor will Attorney be obligated under this Agreement to enforce such an order or agreement. Any such amounts actually received by Attorney, however, will be credited against attorney's fees and costs incurred by Client.

14. Client may discharge Attorney at any time by written notice effective when received by Attorney. Unless specifically agreed by Attorney and Client, Attorney will provide no further services and advance no further costs on Client's behalf after receipt of the notice. If Attorney is a client's attorney of record in any proceeding, Client will execute and return a substitution of attorney form immediately on its receipt from Attorney. Notwithstanding the discharge, Client will remain obligated to pay Attorney at the agreed rate for all services

provided and to reimburse Attorney for all costs advanced.

15. Attorney may withdraw at any time as permitted under the Rules of Professional Conduct of the State Bar of California. The circumstances under which the Rules permit such withdrawal include, but are not limited to, the following: (a) the client consents, (b) the client's conduct renders it unreasonably difficult for the attorney to carry out the employment effectively, (c) the Client fails to pay attorney's fees or costs as required by his or her agreement with the attorney. Notwithstanding Attorney's withdrawal, Client will remain obligated to pay Attorney at the agreed rate for all services provided, and to reimburse Attorney for all costs advanced, before the withdrawal.

16. Although Attorney may offer an opinion abut possible results regarding the subject matter of this agreement, Attorney cannot guarantee any particular result. Client acknowledges that Attorney has made no promises about the outcome and that any opinion offered by Attorney in the future will not constitute a guaranty.

17. Any proceedings in the aforementioned litigation after the trial phase of the action are not covered by the terms of this Agreement. Fees for such further proceedings (such as appeal, execution of judgment, writs, etc.) shall be negotiated between Attorney and Client before the same are commenced.

18. Should Client fail to perform his obligations under the terms of this Agreement, Client consents to relieve Attorney as his Attorney of Record in this action or matter upon Attorney's motion

to be so relieved.

19. Client agrees to maintain contact with Attorney and provide Attorney with current address and telephone numbers. Client further agrees to answer all correspondence from Attorney and participate in the Attorney's prosecution of the Client's matter.

20. In the event of litigation over the terms of this Agreement, the prevailing party shall be entitled to reasonable attorney fees and costs.

OPTIONAL

21. The attorney is self-insured for malpractice claims

OR

21. The attorney carries $_____ in malpractice insurance for errors and omissions with _____

_____.

22. The fee set forth in this Agreement is not set by law or statute and is negotiable between Attorney and Client.

IN WITNESS WHEREOF, the parties have executed this Agreement on the date first written above.

_____

Client

_____

Attorney

CALIFORNIA FLAT RATE FEE AGREEMENT

THIS AGREEMENT, made this _____ day of _____, 199 ____, by and between _____ _____ hereinafter called "CLIENT" and _____ _____ hereinafter called "ATTORNEY."

This agreement is required by California Business and Professions Code Section 6148 and is intended to fulfill the requirements of that section.

1. Client in consideration of services rendered and to be rendered as by Attorney to client, hereby retains Attorney to represent _____ _____ as Attorney at Law to prosecute, defend or otherwise settle a cause of action against _____ _____ and/or whomever may be liable, arising out of _____ _____ _____ _____ _____ on this _____ day of _____ , 199 __ at _____ _____.

2. Client empowers and authorizes Attorney to take all steps in the matter deemed advisable, namely to institute appropriate

legal proceedings, conduct all necessary discovery and to take all other steps leading to settlement, trial and termination of the litigation.

3. Client will pay to Attorney the sum of _____ _____ Dollars ($) in consideration of legal services performed by the Attorney through the trial phase of above-described matter, if any.

4. Of the above-mentioned sum, _____ Dollars ($) shall be paid by the Client to Attorney upon the execution of this Agreement.

5. The balance of the sum of _____ Dollars ($) shall be paid by Client to Attorney in monthly installments of _____ Dollars ($) per month, commencing upon the _____ day of _____ _____, 199 _____, and continuing thereafter until paid in full.

6. Client shall provide Attorney any and all collateral which the Attorney deems necessary as security, in addition to a charging lien on the proceeds from any judgment or settlement obtained as a result of the attorney's work for Attorney's fees as set forth hereinabove.

7. All court costs will be borne by the Client, and the Attorney will charge the same to the Client's account as they are incurred.

8. It is understood and agreed that all monies expended by the Attorney in prosecution of the cause of action shall constitute an advance of costs to be paid by Client. If said costs are not

paid prior to settlement or satisfaction of judgement, said costs shall be deducted from client's share of the settlement or satisfaction of judgement and paid to the Attorney. In the event sufficient funds are not recovered to reimburse Attorney for any advance of costs, then Client shall reimburse Attorney for any sums advanced and yet unpaid.

9. Attorney agrees to handle the above-entitled matter on the above-stated terms and condition.

10. Client acknowledges that Attorney has made no guarantee regarding the successful termination of said cause of action or matter and that all expressions relevant thereto are matters of professional opinion only.

11. Attorney acknowledges and agrees that no settlement or compromise of this matter shall be undertaken without the written approval of the Client unless pursuant to a written power of attorney executed by the Client.

12. Client may discharge and substitute Attorney as Client's Attorney at any time and without cause.

13. Any proceedings in the aforementioned litigation after the trial phase of the action are not covered by the terms of this Agreement. Fees for such further proceedings (such as appeal, execution of judgment, writs, etc.) shall be negotiated between Attorney and Client before the same are commenced.

14. Should Client fail to perform his obligations under the terms of this Agreement, Client consents to relieve Attorney as his Attorney of Record in this action or matter upon Attorney's motion

to be so relieved.

15. Client agrees to maintain contact with Attorney and provide Attorney with current address and telephone numbers. Client further agrees to answer all correspondence from Attorney and participate in the Attorney's prosecution of the Client's matter.

16. In the event of litigation over the terms of this Agreement, the prevailing party shall be entitled to reasonable attorney fees and costs.

OPTIONAL

17. The attorney is self-insured for malpractice claims

OR

17. The attorney carries $_____ in malpractice insurance for errors and omissions with _____

18. The fee set forth in this Agreement is not set by law or statute and is negotiable between Attorney and Client.

IN WITNESS WHEREOF, the parties have executed this Agreement on the date first written above.

_____

Client

_____

Attorney

FLAT ESTATE PLANNING FEE AGREEMENT

THIS AGREEMENT, made this _____ day of _____, 199 ____, by and between _____ _____ hereinafter called "CLIENT" and _____ hereinafter called "ATTORNEY."

This agreement is required by Business and Professions Code Section 6148 and is intended to fulfill the requirements of that section.

1. Client in consideration of services rendered and to be rendered as by Attorney to client, hereby retains Attorney to represent Client as Attorney at Law to render tax advice and to draft whatever estate planning documents that the Client wishes to fulfill his estate planning goals. Specifically, the Client wants the Attorney to prepare a revocable trust, durable power of attorney and living will declaration.

2. Client empowers and authorizes Attorney to take all steps in the matter deemed advisable, namely to receive and review all legal documents of the Client.

3. Client will pay to Attorney the sum of _____ _____ Dollars ($) in consideration of legal services performed by the Attorney under the terms of this agreement.

OPTIONAL

4. The fee for the legal services shall become immediately

due and payable upon receipt of the Client of the estate plan.

OPTIONAL

Of the above-mentioned sum, _____ Dollars ($) shall be paid by the Client to Attorney upon the execution of this Agreement.

5. The balance of the sum of_____ Dollars ($) shall be due from the Client upon receipt by the Client of the Client's completed estate plan. A payment plan may be set up consisting of monthly installments of _____ Dollars ($) per month, commencing upon the _____ day of _____,199 _____ and continuing thereafter until paid in full.

5 or 6. Client shall provide Attorney any and all collateral which the Attorney deems necessary as security for Attorney's fees, as set forth hereinabove.

6 or 7. All court costs will be borne by the Client, and the Attorney will charge the same to the Client's account as they are incurred.

7 or 8. Client will pay all "costs" in connection with Attorney's representation of Client under this agreement. Costs may be advanced by Attorney and then billed to Client unless the costs can be met out of client deposits that are applicable toward costs. Costs include, but are not limited to, court filing fees, deposition costs, expert fees and expenses, investigation costs, long-distance telephone charges, messenger service fees,

photocopying expenses, and process server fees. Attorney will obtain Client's consent before incurring any costs for consultants, expert witnesses, or investigators.

8 or 9. Attorney agrees to handle the above-entitled matter on the above-stated terms and condition.

9 or 10. Client may discharge and substitute Attorney as Client's Attorney at any time and without cause.

10 or 11. Should Client fail to perform his obligations under the terms of this Agreement, Client consents to relieve Attorney as his Attorney of Record in this action or matter upon Attorney's motion to be so relieved.

11 or 12. Client agrees to maintain contact with Attorney and provide Attorney with current address and telephone numbers. Client further agrees to answer all correspondence from Attorney and participate in the Attorney's prosecution of the Client's matter.

12 or 13. Attorney will prepare the necessary deed to transfer real property into the trust as one piece of real property. Client is responsible for the recordation of transfer of other real property into the trust.

13 or 14. In the event of litigation over the terms of this Agreement, the prevailing party shall be entitled to reasonable attorney fees and costs.

OPTIONAL

15 OR 16. The attorney is self-insured for malpractice claims

OR

15 OR 16. The attorney carries $_____ in malpractice insurance for errors and omissions with

_____.

16 or 17. The fee set forth in this Agreement is not set by law or statute and is negotiable between Attorney and Client.

IN WITNESS WHEREOF, the parties have executed this Agreement on the date first written above.

_____

Client

_____

Attorney

CHAPTER 3

DISQUALIFICATION TO SERVE AS ATTORNEY

I. INTRODUCTION

There are two questions facing any attorney when a client comes into the office. The first question is rather straight forward and obvious: Does the attorney or law firm want to take the case? Unless the answer is "yes," there is no reason to continue to the next question. The second question is sometimes more obscure: Can the attorney or law firm take the case? There are certain situations when an attorney cannot take a specific type of case or a specific person or entity as a client. There are times when an attorney or law firm is specifically disqualified from acting as an attorney for certain clients. When an attorney represents a client, for which the Canons of Professional Responsibility mandate automatic disqualification, the attorney may be disciplined and any judgment obtained by the attorney may be set aside. Such improper representation of a client may result in a malpractice award against the attorney in addition to disciplinary action by the state bar.

Disqualification of an attorney involves whether or not the attorney has acquired confidential information from a client that may be used against that client by another client of the attorney. The issue of disqualification does not require that the two clients of the attorney be engaged in litigation against each other. The issue is the possibility that an attorney may give one client confidential information received from another client.

A key factor in disqualification is whether or not confidential information has been given to the attorney. Where the information given to the attorney is not expected to be confidential, an argument for the disqualification of the attorney based on such information being given to an opposing client is seriously eroded. The Second Circuit of Appeals in Allegart vs. Perot 1977, 565 F.2d. 246 held that unless a former client had a reasonable belief that information given to an attorney would not be given to another client, the former client could not object to the attorney's representation of the other client. In this case, the former client was aware that information being furnished to the attorney was going to be given to other clients of the attorney. The Court was simply holding that since the client was aware of this fact when furnishing the information, the client was manifesting he had no expectation of confidentiality. A similar position was taken by the Ninth Circuit in Christensen vs. United States Dist. Court 1988, 844 F.2d 694. The Ninth Circuit denied a disqualification motion against a law firm representing a management group that operated a corporation. The law firm had acquired information from the corporation through its representation of the management group as it operated the corporation. There was now a lawsuit between the corporation and the management group. The court found there was no expectation of confidentiality for the information exchanged between the corporation and the law firm as it related to the management group.

Where a current or former client is able to show that

information given to the attorney was of a confidential nature, the issue of disqualification of the attorney immediately arises. To address that situation, the courts have developed several tests and state bars have adopted rules of professional conduct which are hereinafter discussed.

II. DISQUALIFICATION OF A LAW FIRM

An interesting area under the conflict-of-interest purview is that of the imputed disqualification. Disqualification occurs in this area not because of what an attorney may have done but because of what another attorney in the office may have done. Under the imputed disqualification doctrine Disciplinary Rules 5-105 of the Model Code and Model Rule 1.10 mandated that if an attorney in a law firm is disqualified from representing a client, all of the attorneys in that firm are disqualified from representing that client. Under this imputed disqualification rule, the disqualification extends to the entire firm.

The word "firm" dictates not only the private law office but attorneys who work for corporate legal departments or legal services firms or legal staffs of labor unions or governmental law departments. Wherever the attorneys work together and would be able to share the same information. Simply sharing office space is not sufficient to make a relationship between several attorneys of a firm. In determining whether or not a firm relationship exists, the areas that are determinative are:

a. Do the attorneys hold themselves out as doing business as a single unit such as a partnership, corporation, or

limited liability company?

b. Do the attorneys frequently consult with each other, as opposed to other attorneys in general? An attorney meeting other attorneys for lunch occasionally does not particularly make a firm relationship. In contrast, attorneys meeting every day and during business hours creates a different impression.

c. Do the attorneys refer cases among each other?

d. Do the lawyers associate within the group to work jointly on cases?

These are areas that have been considered to be important in determining whether or not there is actually a firm relationship. This has been discussed in the 1990 draft of the Restatement of Law Governing Lawyers, section 203.

The issue of imputed disqualification also arises where an attorney moves to a new law firm that seeks to sue a former client of the attorney. ABA Model Rule 1.9(b) states that a law firm may not represent a client in a legal matter if it has an attorney in the firm who has represented the opposing party in the same or substantially related matter and the attorney had acquired information that was protected under Model Rules 1.6 and 1.9(C) unless the former client consents to the consultation. Example: Attorney Smith leaves law firm ABC where he had represented client Jones. He goes to work for law firm DEF. Law firm DEF cannot sue Jones in any lawsuit that relates to the matter that was being handled by attorney Smith even though another DEF attorney would be handling the case. This disqualification can be waived by former client Jones. In reality, it is rare for a former client to give

permission to represent an opposing party.

Whereas Model Rule 1.9 deals with disqualification of a lawyer's new firm, Model Rule 1.10(b) deals with disqualification of the lawyer's former firm. Under Model Rule 1.10(b), the attorney's previous firm is disqualified from representing a client in a suit against a former client if:

1. It is a matter that is substantially related to one in which the previous firm had previously represented the former client.
2. There are attorneys remaining in the previous firm who have access to the information that was supplied to the attorney who left.

Example: Attorney Jones left firm A and joined firm B. Attorney Jones had represented client Smith. When attorney Jones left firm A, he left all of his files regarding client Smith with firm A. Since those files have been left with firm A and are still available to firm A, that firm is privy to information protected under rules 1.6 and 1.9(C). As a result, firm A is precluded from instituting any lawsuits against former client Smith that are substantially similar or related to the matters in which attorney Jones had represented Smith. If attorney Jones had taken all that information upon leaving, the firm would not have any of this privileged information in its possession and would be permitted to take the lawsuit in question against former client Smith.

Such disqualification can be waived, but it becomes difficult and technical as to where the information is and who has it. It also becomes appropriate to prove whether or not the attorneys

actually had that information at one time. If attorney Jones had taken that information when leaving firm A, but attorneys for firm A had reviewed the confidential information, the firm still would be disqualified even though it no longer had the physical evidence of the confidential information. It is really a matter of whether or not the former firm has or had access to this confidential information. If the law firm has or had such access to the confidential information, it is barred from suing the former client. If the former law firm does not have such information or knowledge available to it, the law firm is not disqualified from maintaining a suit and representing an opposing party against the former client. The determination of disqualification of the law firm really depends upon whether or not this information is or has been available to it.

III. GOVERNMENT ATTORNEYS

Disqualification issues have arisen in relation to attorneys who have been government employees or who are entering government service from private practice. In addition to the Model Rule of Professional Responsibility and the Model Code of Professional Responsibility, there is also the Federal Ethics in Government Act, 18 U.S.C. Section 207-208, that governs federal employees who have left government service. This act governs what type of work certain federal employees, such as attorneys, can do for a number of years after they have completed federal service. Just as a private person has a right to expect that its attorney will not use confidential information obtained in the attorney-client

relationship against the interest of the client, the government, including state and federal agencies, has the right to expect their former attorneys to preserve their confidential information under Model Rule 1.11.

Both Model Rule 1.11(a) and Disciplinary Rule 9-101 preclude an attorney leaving government service and entering private practice from taking a case in a "matter" on which the attorney had participated both "personally and substantially" while working for the government. The government, the same as any former client, can consent to the attorney taking the case, but as a practical matter the government virtually never gives such consent.

A former government attorney is precluded from taking only those matters he had previously handled. Model Rule 1.11(d) defines "matter" as being that which involves "any judicial or other proceeding, application, request for a ruling or other determination, contract, claim or controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties." By "personally and substantially" is meant actual work done by the attorney that was material to the case development and not of a minor, casual, trifling or supervisory manner.

Once a former government attorney is disqualified from working on a case against the government under Model Rule 1.11(a) and Disciplinary Rule 9-101, all of the attorneys associated with the firm are also disqualified unless:

A. The disqualified lawyer is "screened off" from the

attorney or attorneys in the firm who are handling the case. This provision is to assure that the disqualified attorney is not in position to communicate with the attorney or anyone else actually handling the case and therefore be able to communicate the confidential information.

B. The disqualified attorney must not receive any portion of the fee earned in the case. Model Rule 1.11 states the disqualified attorney's compensation cannot be "directly related. . . to the fee in the matter in which the attorney is disqualified." The scope of this provision is to prevent the disqualified attorney from directly benefiting from the representation and thereby creating a monetary incentive for the attorney to violate the professional duty to maintain the client confidences.

C. Written notice is required to be given to the government so that it can assure the compliance of the above requirements.

If the above requirements are met to the satisfaction of the government or to the court, a law firm with a disqualified attorney may undertake representation of a client in a case involving the government.

The use of a disqualified attorney who has information obtained while working for the government is covered by Model Rule 1.11(b); the Model Code does not have an applicable provision. An attorney who, while working for the government, receives confidential information about a person must not after leaving government service represent a client in an action against that person where that confidential information may be used. The information applicable in this situation is limited to only that

information which has actually been received by that attorney. There is no imputation of knowledge or information to the attorney which might be known or in the hands of other government attorneys. Model Rule 1.11(e) defines confidential information as that information which the government had obtained and which is not available to the public and which the government either has a privilege not to reveal or is prohibited by law from revealing. If an attorney is disqualified, then all of the attorneys in the firm are likewise disqualified from taking the case unless the former government attorney is screened off from the case and is not apportioned any part of the fee earned in the matter.

An interesting variation of the above occurs when a private attorney enters government service. Under Model Rule 1.11(c)(1), when a private attorney enters government service, he is prohibited from participating in any matter which he had substantially and personally participated in private practice. This prohibition does not apply when the attorney is the only one authorized by statute to act for the government in that matter. There is no similar requirement under the ABA Model Code.

Example: An attorney prepared an environmental report for a client and then went to work for the County Counsel's Office. The attorney would normally be disqualified from working on the report because of the prior relationship with the former client. If the attorney was the only attorney assigned environmental matters, the attorney could still handle the matter.

IV. CONFLICT WITH EXISTING CLIENT

A. SUCCESSIVE REPRESENTATION

There is a duty of undivided loyalty owed by every attorney to a client. By its very nature, an attorney's duty of loyalty cannot be divided without incurring the ethical obligation to withdraw from further representation of one of the parties. Canon 6 of the ABA's Canons of Professional Ethics published in 1908 originally defined an attorney-client conflict of interest as existing when: "a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend that duty to the other client whose interest requires him to oppose." The context of this position has been restated in the Model Rules under Rule 1.7 "A lawyer shall not represent a client if the representation .... will be directly adverse to another.." and Rule 1.9 "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter. The ABA Model Code of Professional Responsibility Disciplinary Rule 5-101 similarly states, "Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of the client will be or reasonably may be affected by his own financial, business, property or other personal interests."

An attorney's duty to maintain client confidences survives the termination of the attorney-client relationship under both Model Code Ethical Consideration 4-6 and Model Rule 1.6. The extent of the scope of this duty has been defined by case law. In T.C. Theater Corp. vs. Warner Bros, Pictures, Inc. 1953, 113. F. Supp.

265, a substantial relationship test was first proposed to insure the protection of client confidences. The court stated that the finding of a substantial relationship between the cases of the two clients creates an irrebuttable presumption that the attorney had received confidential client information during the former client's representation.

In a situation where there has been successive representation of clients with potentially adverse interest, the greatest threat to the imposed duty of loyalty is that of the loss of client confidentiality. In the situation where a former client seeks to have an attorney disqualified from serving as counsel to a successive client in litigation adverse to the interests of the former client, the governing test is whether there is a "substantial relationship" between the antecedent and current representations.

The "substantial relationship test" is a balancing test between the freedom of the succeeding client to be the client of choice and the interest of the former client to insure that client confidences previously disclosed in the attorney-client relationship will not be used against the former client to the advantage of the succeeding client. In such a situation, it is assumed by the courts that access to the privileged information by the attorney is presumed and as such disqualification is mandatory and will in fact extend to the entire firm of the prior attorney. Rosenfeld Const. Co. vs. Superior Court 1991, 235 Cal. App.3d 566. In Henriken vs. Great Am. Sav. & Loan 1992, 11 Cal.App.4th 109, the

court stated, "Where an attorney is disqualified because he formerly represented and therefore possesses confidential information regarding the adverse party in the current litigation, vicarious disqualification of the entire firm is compelled as a matter of law." There is a split among the Second, Seventh and Ninth Federal Circuits concerning application of the substantial relationship test.

The Second Circuit in Government of India vs. Cook Indus. 1978, 569 F.2d 737 held that for disqualification to occur the issues present in both of the clients' cases must be so similar in nature that they are essentially identical. The Second Circuit requires a "patently clear" relationship between the issues of the cases of the past and current clients handled by the attorney before ordering a disqualification. Under this test, the court may permit an attorney to represent a new client who may be pursing a legal action against a former client if the prior representation of the former client had no "substantial relationship" to the existing matter being handled by the attorney.

The Seventh Circuit has created a three-part test to determine if the past and prior representations are "substantially related." In Westinghouse Elec. Corp. vs. Gulf Oil Corp. 1978, 588 F.2d. 221 the court held that to determine the representations were substantially related, the court should:

1. Make a factual reconstruction of the scope of the prior legal representation. The court should determine what the attorney was retained to do for the client and what the

attorney actually did in the representation.

2. Make a determination as to whether it is reasonable to infer that confidential information claimed to have been given to the attorney is the type which would have been given to a lawyer representing a similar client in such a matter.
3. Make a determination as to whether the claimed confidential information is relevant to the pending litigation between the past and former clients.

By using this test, the Seventh Circuit believes a court will be able to determine whether or not there is a substantial relationship between the two cases. This test was considered acceptable by the Fifth Circuit also in Duncan vs. Merrill Lynch, Pierce, Fenner & Smith 1981, 646 F.2d 1020.

The Ninth Circuit has developed its own tests for substantial relationship. In Trone vs. Smith 1980, 521 F.2d 994 the court adopted a more liberal definition than either the Second or Seventh Circuits. The Ninth Circuit held that "a substantial relationship is present if the factual contexts of the two representations are similar or related." The Ninth Circuit does not require an identical or nearly identical relationship of the issues as does the Second Circuit. Nor does the Ninth Circuit require a court to make the separate determinations of the Seventh Circuit's test. The Ninth Circuit approach is gaining prominence in the nation because it is the easiest to understand and follow. Under the Ninth Circuit approach, an attorney is disqualified from representing a client against a former client in any action similar or related (even though not identical) to the previous representation of a client

without that other client's consent.

B. DUAL REPRESENTATION

Where an attorney's conflicting representations are occurring simultaneously, both the attorney's loyalty and the governing test are different. In this situation, a substantial relationship test is different in that confidentiality is not the issue but rather attorney loyalty becomes the operative element. The courts traditionally have a more stringent test on conflicts arising from dual representation than that of succeeding representation. It is understood that even though simultaneous representations may have nothing in common with the actions currently ongoing between the attorney's clients and no risk exists that confidences from one client can be used against the other client, nonetheless, disqualification is required. In fact, in nearly every instance dual representation of adverse clients will result in per se or automatic disqualification. An attorney's duty to dual representation was covered in Developments in the Law: Conflicts of Interest in the Legal Profession, 94 Harv.L.Rev. 1296-1302. "With rare and conditional exceptions, the lawyer may not place himself in a position where a conflicting interest may, even advertently, affect, or give the appearance of affecting, the obligations of the professional relationship..."

The rationale behind the automatic disqualification of an attorney for dual representation is grounded on two ideas. The first is that an attorney should avoid the appearance of impropriety. Even though no client confidences may be at risk

through dual representation of clients (such as the attorney actually not representing either client in a suit against the other) the appearance of impropriety exists so as to bring disrepute upon the legal profession. The second reason is more practical in its basis, the preservation of loyalty. It is felt that once a client learns that the attorney is representing the opposing party, even on an unrelated matter, the client's confidence and level of trust in the attorney has been compromised. The mandatary rule requiring the disqualification of an attorney based upon dual representation is founded on the belief that an attorney cannot serve two masters. Jeffry vs. Pounds 1977, 67 Cal.App.3d 6 defined an attorney's duty not to engage in dual representation as follows:

> "A law client is likely to doubt the loyalty of a lawyer who undertakes to oppose him on an unrelated matter. Hence his decisions condemn acceptance of employment adverse to a client even though the employment is unrelated to the existing representation....
>
> The strictures against dual representation of antagonistic interests are far broader, they arise without potential breaches of confidentiality....
>
> So inviolate is the duty of loyalty to an existing client that not even by withdrawing from the relationship can an attorney evade it."

Truck Ins. Exch, vs. Fireman's Fund Ins. Co, 6 Cal.App.4th 1050 referred to the dual representation rule as the "hot potato" rule. The court stated:

> "The principle precluding representing an interest to others of a current client is based not on any concern with the confidential relations between attorney and client but rather on the need to assure the attorney's undivided loyalty and commitment to the client."

The court stated the effect of the disqualification rule was to cure dual representation conflicts by the rule itself severing the relationship with the pre-existing client. The court was specific in stating that the disqualification could not be avoided by an attorney unilaterally dropping a client.

The California Supreme Court laid down the attorney duty of loyalty in its decision, Anderson vs. Eaton 1930, 211. Cal.113, as being as follows:

> "One of the principal obligations which binds an attorney is that of fidelity, maintaining inviolate the confidence reposed in him by those who employ him, and at every peril to himself to preserve the secrets of his client. This obligation is a very high and stringent one. It is also an attorney's duty to protect his client in every possible way and it is a violation of that duty for him to assume a position adverse or antagonistic to his client without the latter's free and intelligent consent given after full knowledge of all the facts and circumstances. By virtue of this rule an attorney is precluded from assuming any relation which would prevent him from devoting his entire energies to his client's interests. Nor does it matter that the intention and motives are honest. The rule is designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting interests, or be led to attempt to reconcile conflicting duties, or be led to attempt to reconcile conflicting interest, rather than to enforce to their full extent the rights of the interest which he should alone represent."

Under the duty of loyalty, an attorney is forbidden to engage in any act that would interfere with the attorney's duty to dedicate all energies to the client's interest.

C. EVALUATIONS FURNISHED TO THIRD PARTIES

A question of disqualification may arise in the situation where the attorney is asked by the client to make an evaluation of

the client's affairs and to furnish that evaluation to a third party. This situation often arises in the sale or transfer of real estate where the seller asks the attorney to give a title opinion to the buyer. The situation also arises where the attorney is asked to give an opinion of the debts and strengths of a business to an accounting firm for inclusion in the annual report. Under these fact scenarios, the determining factor is that the client is the person or entity whose affairs are being evaluated, not the affairs of a third party.

Model Rule 2.3 has been adopted to govern the above situation. There is no applicable provision under the ABA Model Code. Under Model Rule 2.3, an attorney is permitted to evaluate a client's affairs and report them to a third party when:

(1) The attorney has a reasonable belief that the evaluation of the client's affairs is compatible with the fiduciary duties owed to the client, and

(2) The attorney releases such information to the third party only after consultation and informed consent of the client.

The ordinary rules of confidentiality, to the extent not needed to be invaded in connection with the report of an evaluation to be given to a third party, remain in effect against the attorney under Model Rule 2.3(b). Since it is the client who authorizes the attorney's release of a report or evaluation to a third party, the client has complete authority to limit the scope of the evaluation or the sources of information to be used by the attorney in making the evaluation. The attorney should describe any material limitations that were encountered in making the report. An attorney making a client evaluation to be furnished to a third party may owe that party a duty of due care. The attorney may be liable for

negligence to that third party for having negligently prepared a report on the client's affairs upon which the third party relied and acted to that party's detriment.

D. LEGAL MALPRACTICE CLAIMS

A conflict of interest may be created between an attorney and a client if a legal malpractice claim, indemnity claim or claim for sanctions is asserted against the attorney arising as a result of representation of the client. The person or entity bringing the disqualification action can be the client, an adversary or even a third person. An adversary may bring the disqualification motion as a tactical aspect of the case. In Schenck vs. Hill, Lent & Troescher 1986, 530 N.Y.S.2d 486, an attorney was disqualified by an adversary because a claim for contribution in legal malpractice had been filed against the attorney. The claim against the attorney may be based upon potential liability or actual liability.

Various types of relief can be sought against the attorney which would create a conflict: Damages as in United States vs. Birrell 1968, 286 F.Supp. 885, discipline as in The Florida Bar vs. Ward 1985, 472 So.2d 1159, or disqualification as in Castell vs. Kemp 1985, 332 S.E.2d 528 and Cook vs. Cook 1983, 559 F.Supp. 216.

A recent case in which the prosecution had the criminal defendant's attorney disqualified occurred in New York by the Federal prosecutors against John Gotti. In that case, the prosecution had the defendant John Gotti's attorney disqualified because the prosecution stated that it might call the defendant's attorney as a witness even though the defendant wanted to retain the attorney to represent him.

A legal malpractice claim, whether potential or actual in

nature, creates a conflict between the attorney and the client. In this situation, a loss of confidence can occur in the client's mind in addition to an impairment of the attorney's independent judgment. In any situation where a claim is being asserted against the attorney, the attorney may develop a defensive attitude. As a result, the attorney may become more interested in protecting himself from a monetary or disciplinary judgment than protecting the interest of the client. The attorney may no longer be an aggressive advocate for the client but rather may become more timid or cautious in his representation. It is recognized that the potential conflict of interest caused by a malpractice claim is a legitimate ground for an attorney to seek withdrawal from a client's representation, Bailey vs. Martz 1986, 488 N.E.2d 716.

In almost all cases, it is better for the attorney to withdraw from a case once a claim for malpractice has been filed related to the representation of the client. Even if the client consents to the continued representation, it is usually not a good idea. From the point of time that the claim is filed against the attorney, all subsequent acts and representations by the attorney will be subject to greater scrutiny to assure that the attorney has adequately represented the client. Normal tactical decisions may be challenged and claimed as having been taken to protect or limit the attorney's liability and not for the benefit of the client. In this situation, every decision subsequently taken by the attorney that fails to yield a benefit might be used against the attorney in furtherance of the malpractice claim. It is a better practice for an attorney to withdraw from a case once a malpractice claim has been filed against him.

CHAPTER 4

ATTORNEY AS AN ADVOCATE

I. INTRODUCTION

The American system of justice has been labeled that of an adversary system. The adversary system is based upon both parties to a dispute presenting their arguments before an independent trier of fact and having a decision rendered. The adversary system is not the only method of justice used in the world. In China, the defendant's attorney is assigned not to represent the defendant but the state's interest. The Chinese attorney's duty is to explain to the defendant what he has done wrong and to teach the defendant how to obey the law in the future. While a Chinese attorney may argue for leniency in the sentence for a defendant, the attorney does not argue that the defendant did not commit the act alleged. The Chinese system is entirely different from that used in the United States; yet it covers nearly five times the number of citizens as that of the United States system.

The judicial systems in the Western World, however, use some form of an adversary system. The American system is derived from the English Common Law. Today, most of the law in Europe, South America and India is based upon the Napoleonic Code. The major difference between the English Common Law and the Napoleonic Code is the presumption of guilt or innocence. Under the English system, a defendant is presumed innocent until proven guilty beyond a reasonable doubt. The Napoleonic system is the opposite. In the

Napoleonic system, the defendant is presumed guilty until the defendant proves otherwise. It is recognized by those countries using the Napoleonic system that it is usually more difficult to prove a non-fact than a fact. It is often harder to prove that some one did not say or do something that to prove that the person actually said or did it. The Napoleonic system utilizes more preliminary hearings and greater care is made in filing a charge than in the English system because of this burden on the defendant to prove his innocence.

The adversary system is premised upon the fair and equal ability of each side to be able to develop a case and to present their position and contentions to an impartial adjudicator of the facts. The Model Code's Ethical Consideration 7-19 states, " An adversary presentation counters the natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known. . ." In the adversary system critical importance is placed upon the impartiality of the judge. The judge does not search for the law or marshall the facts. For a judge to do so (in addition to the judge's responsibility to apply the law to the facts presented while determining their accuracy and significance) would destroy the impartiality of the judge, the very hallmark of the adversary system.

II. DUTY TO THE ADVERSARY SYSTEM OF JUSTICE

In order for the adversary system to function as it is designed, an attorney is required to represent the client zealously to the limits permitted under the law. The very purpose of the

attorney is to present all of the arguments, contentions and beliefs of the client to the trier of the action so that full and complete consideration can be made on them before a decision is rendered. Model Code Ethical Consideration 7-19 defines the duty of a lawyer to the adversary system as follows:

> "Our legal system provides for the adjudication of disputes governed by the rules of substantive, evidentiary and procedural law. An adversary presentation counters the natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known. The advocate, by his zealous preparation and presentation of facts and law, enables the tribunal to come to the hearing with an open and neutral mind and to render impartial judgments. The duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law."

Rule 3 of the Model Rules states that a lawyer, "should act with commitment and dedication to the interest of the client and with zeal in advocacy upon the client's behalf." The comment under Rule 3 makes it clear that the duty to represent a client zealously extends only to proper measures, " a lawyer is not bound to press for every advantage that might be realized for a client" but rather "may take whatever lawful and ethical measures are required to vindicate a client's cause."

It is the very basis of the adversary system that the attorney acts as an advocate. The very purpose of such active advocacy is to keep the decision maker's mind open so that an impartial judgment may be rendered on both the facts and the law. An attorney must limit advocacy to lawful and legitimate means. The attorney should not, in representing a client, engage in abusive practices such as ignoring local customs or the exercise of professional judgment in

areas that do not affect the client matter. Where an attorney's personal feelings, scruples or morals will effect the representation of a client, the attorney should seek withdrawal from the matter.

III. PRESENTING POSITIONS AND EXPEDITING LITIGATION

An attorney is an advocate for the client and therefore must present defenses and positions for the benefit of the client. An attorney's advocacy, however, does not extend to filing a frivolous action or raising a frivolous defense in a proceeding. Under both Disciplinary Rule 7-102(A)(1),(2) and Model Rule 3.1, an attorney can be disciplined for taking a frivolous position on an issue in a proceeding. Federal Rules of Civil Procedure, Rule 11 permits a judge to impose sanctions against an attorney for filing pleadings and motions. Ethical Consideration 7-4 under the Model Code states:

> "The advocate may urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail. His conduct is within the bounds of the law, and therefor permissible, if the position is supported by the law or is supportable by a good faith argument for an extension, modification, or reversal of the law. However, a lawyer is not justified in asserting a position in litigation that is frivolous."

An attorney can be disciplined by fines or disciplinary actions up to disbarment for taking a frivolous position.

Discovery abuse is one of the greatest sources of frivolous complaints against attorneys. Under both Disciplinary Rule 7-102(A)(1) and Model Rule 3.4(d), an attorney may not make a frivolous discovery request, Roadway Express, Inc. vs. Piper 1980, 447 U.S. 752. Nor may an attorney refuse to take reasonable steps

to comply with a proper discovery request made by the opposing party. Under Federal Rules of Civil Procedure section 37(b), an attorney who abuses discovery procedures may be subject along with the client for fines and other sanctions.

The accepted definition of a frivolous position is one that cannot be supported by a good faith argument under the existing law and that cannot be supported by a good faith position for changing the law. An action or position taken solely to harass and maliciously injure another person is by its very nature frivolous, under Disciplinary Rule 7-102(A)(1). Under the Model Rule 3.1, an attorney is not subject to discipline for taking a frivolous position by not fully substantiating all the facts prior to taking a position or before uncovering all evidence for the position or even by taking a permitted position while possessing the belief that it will not ultimately prevail.

A specific exception to the frivolous position prohibition exists in the criminal defense area. Under Model Rule 3.1, a criminal defense attorney may conduct a defense in such a manner as to require each element of the crime to be proven beyond reasonable doubt without being found to have taken a frivolous position even if there is no real doubt about the defendant's guilt. Example: Trial of a bank robber caught on camera identifying himself and robbing the bank. The defense could plead the defendant not guilty and require the prosecution to prove the person on the screen was the defendant even though the only real purpose in doing so is to delay the trial in the hope of getting a plea bargain. In a non-

criminal case, the attorney could not unreasonably take a position with the only purpose being to delay the proceeding.

Under Model Rule 3.2, a duty is imposed upon an attorney to expedite litigation consistent with the interest of the client. The exception to this rule is Model Rule 3.1, where a criminal attorney may insist on the proving of every element of a crime even if it needlessly delays or prolongs a trial. There is no comparable rule under the Model Code; however, Disciplinary Rule 7-102(A)(1) holds that an attorney can be disciplined solely for taking a position to harass or annoy others. Under the Model Code, a delay taken just to harm the other party may subject the attorney to discipline.

The duty to expedite a matter is balanced against the attorney's duty to protect a client's interest. Under Model Rule 3.2, an attorney is not permitted to take an improper delay merely to permit the client to reap financial or other benefits. The most common example of improper delay is that of an attorney who pursues an appeal without merit merely to delay and postpone the time when the client will have to pay the judgment.

IV. DUTY OF CANDOR TO THE COURT

The adversary system only works when the parties before a court act honestly and in accordance with the rules. Attorneys are bound to act with honesty and candor when dealing with the court. In furtherance of these obligations, attorneys have specific duties imposed upon them, the violation of which will expose them to discipline. Under both Disciplinary Rule 7-102(A)(2) and (5) and Model Rule 3.3(a)(1), an attorney can be disciplined for knowingly

making a false claim in bad faith. An attorney is precluded from participating in the falsification of evidence or offering evidence the attorney knows is false. While an attorney has a duty to act zealously for the client's benefit, an attorney nevertheless under Model Rule 3.3(c) can refuse to use evidence which the attorney reasonably believes is false. Where an attorney discovers that a client intends to testify falsely or has testified falsely in an ongoing case, he has a duty to either persuade the client to recant the false testimony if already given and if not given then seek to withdraw or not to testify falsely. Under Model Rules 1.6(a) and 3.3(b), the duty to reveal fraud or perjury ceases at the end of the proceeding. After that point, the attorney is absolutely prohibited from taking any action which might disclose the client's past fraud or perjury.

The duty of candor has been reiterated in Disciplinary Rule 7-102 and Model Code Rule 3.3. Ethical Consideration 7-37 in the Model Code states in part: "A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no place in our legal system." The making of false statements to the court is prohibited under Disciplinary Rule 7-102(A)(5) and Model Rule 3.3(a)(1). Part of the duty of candor owed by an attorney is the obligation under Disciplinary Rule 7-106(B)(1) and Model Rule 3.3(a)(3) to disclose controlling authority that is directly adverse to the attorney's position if the opposing attorney has not disclosed it.

V. DISCLOSURE OF FACTS AND CONTROLLING AUTHORITY

Attorneys have long been under the requirement not to deceive the court or to permit the court to act on a misunderstanding of either the facts or law in a case. Attorneys have and remain under the obligation to correct such misconceptions by the court or tribunal. The 1908 Canons of Professional Ethics (CPE) promulgated Canon 22 that read in part:

> "The conduct of the lawyer before the court and with other lawyers should be characterized by candor and fairness. It is not candid or fair for the lawyer knowingly to misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a textbook, or with knowledge of its invalidity to cite as authority a decision that has been overruled, or a statute that has been repealed, or in argument to assert as a fact that which has not been proved, or in those jurisdictions where a side has the opening and closing arguments to mislead his opponent by concealing or withholding positions in his opening argument upon which his side intends to rely....

Model Code Disciplinary Rule 7-106(B) restated Canon 22 of the CPE as follows:

> "In representing a matter to a tribunal, a lawyer shall disclose:
>
> (1) Legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client which is not disclosed by opposing counsel."

No attorney can take advantage of the other party by knowingly relying upon a mistake of fact or law by the court or tribunal.

In furtherance of his obligation to maintain candor with a tribunal or court, an attorney is prohibited from knowingly making a false statement of material fact under both Disciplinary Rule 7-102(A)(5) and Model Rule 3.3(a)(1). Normally, an attorney is not

required to have personal knowledge of the facts which serve as the basis for the pleadings. Usually, an attorney is permitted to rely upon the representations of the client or other persons as the basis from which the pleadings are created. When an attorney seeks to base a pleading upon the attorney's own declaration or affidavit, the attorney is required under Comment to Model Rule 3.3 to possess actual knowledge of the facts stated therein or a reasonable belief based upon diligent inquiry as to their truthfulness.

An attorney usually has no duty to inform the court or tribunal as to the existence of facts that are harmful to the attorney's stated position or contention. Under the comment to Model Rule 3.4, it is the presumption in the adversary system that it is the duty of the other side to raise the existence of such harmful facts. Normally, it is assumed that if such facts have not been raised by the opposing side it was the trial tactic of the other side not to raise those facts. That an injustice may result is regrettable, but that is how the system is designed to function. The exception to the above rule against being required to volunteer harmful facts exists in an ex parte proceeding. By its very nature, an ex parte hearing is without the presence of the other party at a time that the attorney is attempting to obtain affirmative relief. In the ex parte situation, the opposing party or the opposing attorney is not in court to present his case and position. Under Model Rule 3.3(d), an attorney in an ex parte proceeding must inform the court or tribunal of material facts known to the

attorney. There is no precise counterpart rule in the Model Code; the closet rule is Disciplinary Rule 7-106(B), supra. The purpose behind the mandatory disclosure is to assure that the court or tribunal is not tricked into granting an order which is not proper. An example of the codification of this requirement is the treatment of California grand juries regarding indictments. Under California law, a district attorney seeking a grand injury indictment must present whatever exculpatory evidence that the district attorney has to the grand jury at the same time. Most states have not extended this requirement to their grand juries and the district attorney can continue to get an indictment without disclosing any exculpatory evidence.

Another area where an attorney may be forced to disclose harmful facts is where the disclosure is necessary to prevent the client from engaging in a crime or fraud. In such an instance, it is viewed that the silence of the attorney would be tantamount to assisting the client in the crime or fraud. Model Rule 3.3(a)(2) specifically requires the disclosure. Under the Model Code there is no specific requirement that an attorney disclose such intended crime or fraud of a client but Disciplinary Rule 7-102(A)(3), does require an attorney to reveal that which the law requires him to reveal: by case law that includes intended fraud or crimes by the client. This duty imposed under Model Rule 3.3(b) even superseded the requirement of the attorney to maintain client confidences to the extent necessary to prevent the intended fraud or crime by the client from being committed.

VI. TREATMENT OF WITNESSES

In every trial there will be witnesses, and there have been rules adopted to govern the duties of attorneys toward the witnesses. Canon 22 of the CPE reads as pertains to witnesses:

> "It is unprofessional and dishonorable to deal other than candidly with the facts in taking the statement of witnesses, in drawing affidavits and other documents, and in the presentation of cases."

The most important obligation imposed upon an attorney is not to counsel or assist a witness knowingly to testify falsely. An attorney is not permitted to coach a witness. By coaching it is not meant seeking to refresh a witness's memory or recollection of the facts by exploring the basis of the witness's knowledge or pointing out discrepancies in the recollection by proper means. The attorney is forbidden from teaching or instructing the witness as to what to state in the testimony before the court.

As a practical matter, no attorney should ever put a client on the stand without first having been interviewed. The attorney should always be aware of what the witness will be testifying and the extent of that testimony. An attorney should always prepare the witness for the examination which will be undertaken by the opposing attorney. A potential witness should always be evaluated prior to use on such factors as knowledge, memory, demeanor and bias. A witness must have the ability to recall and recollect the facts before the court. An attorney should examine a witness prior to putting the witness on the stand so as to be able to evaluate not only the strengths of the witness's testimony but its

weaknesses as well. With a complete knowledge of a witness' intended testimony, the attorney can prepare to bolster and strengthen the weak areas of it and be able to respond to an anticipated attack thereupon.

An attorney cannot coach a witness. That is black letter law. The definition of what constitutes coaching is written in less bolder type. The issue becomes even greyer when the witness is the attorney's own client. The attorney has an affirmative duty to educate the client on the law. It is an open question on when the advice on the law becomes improper coaching as to the content of the potential testimony. The accepted line between legal advice and impermissible coaching centers around whether the circumstances or facts show that the attorney knew or intended for the client to testify falsely. Utilizing this test, an attorney's advice is reviewed to determine if the attorney properly helped the client organize and relate relevant facts helpful to his case along with preparing for the anticipated cross-examination. Where the attorney counseled or assisted the client to prepare, develop or create testimony known or reasonably suspected to be false, the attorney is subject to discipline.

Just as an attorney interviews the attorney's own witnesses, the attorney should attempt to interview the witnesses of the opposing side as well. Interview of an opposing party or opposition witness in a civil case is relatively simple. All states have adopted formal discovery procedures for interviewing parties and witnesses. These procedures include depositions, requests for

admissions and interrogatories. In the formal discovery procedure the attorney for the other side is notified of the request and has the opportunity to be present at any depositions or may have the opportunity to review any document or interrogatory answers before they are submitted. In many case, an attorney would like to meet with an adverse witness without the opposing attorney having to be appraised of it. There are specific limitations which govern when an attorney may meet with an opposing witness.

An attorney is never permitted to meet with an opposing party who may be a witness without the presence or consent of the opposing counsel. Disciplinary Rule 7-104(A)(1) and Model Rule 4.2 forbid communicating about a matter with a person whom the attorney knows is represented by counsel except when specifically authorized by law unless that counsel consents to the communication. Under Model Rule 4.2, an attorney is further prohibited from engaging in an ex parte communication with an opposing party's employees who have managerial responsibility for the party or "with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization." The above defined employees are treated as the alter ego of the party and therefore, as with the party, cannot be interviewed with the consent of the party's attorney.

When a party does not have an attorney, there is no opposing attorney with which to communicate. An attorney can speak directly with an unrepresented opposing party without fear of discipline. In

interviewing or dealing directly with an opposing party, an attorney is never permitted to threaten an opposing party with criminal prosecution in an attempt to gain an advantage in a civil matter. An attorney should always be careful to assure that nothing that has been said or done will constitute a threat of criminal prosecution against the opposing party.

An attorney can interview adverse witnesses except for managerial employees of an adverse party or expert witnesses who are considered employee's of the opposing party's attorney without giving notice to the opposing attorney.

VII. REPRESENTING THE GUILTY CLIENT

There are limits to the proper advocacy of a client under the American adversary system. The American Bar Association has taken the position that it would be improper for an attorney to take a retainer from individuals engaged in illegal conduct so as to be available to defend the individuals if they were to be arrested. The Comment under Model Rule 1.2 is that an attorney may not aid a client engaging in activities which are illegal or a client avoiding being caught for engaging in those activities. The Comment makes it clear that the client's issue of the attorney's advice does not by itself subject the attorney to discipline. The attorney must be aware of the fact that the advice is being misused and still continue to represent the client.

A question that has been raised many times: Is it proper to represent a guilty client? From a practical side nearly 80% of all cases which go to trial result in a criminal conviction. If

representing such clients resulted in a disciplinary action being taken against the attorney, there would soon be no criminal attorneys whatsoever. There is no violation of ethical or professional responsibility for an attorney to take a criminal case, even a "guilty" client. The simple plea of "not guilty" is not legally viewed as a fact of innocence but rather an allocation of proof. By making the plea, the attorney is requiring the prosecution to prove beyond a reasonable doubt the charge stated. Furthermore, under Model Rule 3.1, an exception to the presentation of a frivolous defense exists as to criminal matters. A defense attorney in a criminal matter, "may nevertheless so defend. . . as to require every element of the case be established." An attorney's entry of a "not guilty" plea is merely viewed as a call on the prosecution to establish all of the elements of the crime for which the defendant is charged.

Society considers it both just and proper for attorneys to represent even the most heinous of criminals. The approval of this representation does not derive from compassion for the criminal. Instead, the approval derives from the foundational belief of this country that justice would not long survive if guilt or innocence was decided by attorneys rather than judges and juries. The American system of justice has been premised on the belief that no one is legally guilty beyond a reasonable doubt of a crime until found guilty by a judge or jury following a fair trial regardless of how much evidence is present.

Under Model Rule 1.2(c) an attorney is required to inform all

potential criminal clients if he has a policy against representing clients whom he feels are guilty. Under Model Rule 6.2, an attorney has a duty to accept appointments from a court to represent unless there is "good cause' for rejecting the appointment. Good cause under the Model Rule has been expanded to cover not only such ill feelings against the client as to preclude effective representation but also to any unreasonable financial burden that might affect the attorney as a result of such imposed representation.

There are instances when an attorney is simply unable to represent a client fairly, whom the attorney feels is truly guilty. This can cause severe ethical problems to the attorney. Model Code Ethical Consideration 2-30 states:

> "A lawyer should decline employment if the intensity of his personal feeling, as distinguished from a community attitude, may impair his effective presentation of a prospective client."

Under this situation, the attorney can refuse acceptance of a client. To satisfy this requirement, mere repugnance of the crime charged or with the defendant will not in itself be sufficient to support such disqualification of a client. The attorney must possess such inimical feelings against the potential client as to legitimatize and have reasonable potential of prejudicing the client's case and thus violate the attorney-client relationship of absolute loyalty.

A different standard of professional ethics applies for an attorney seeking to withdraw from representing a client once the representation has been accepted. The standard obligation of an attorney to act zealously for the client's interests applies once

the representation is undertaken. Once an attorney undertakes the representation of a client, it becomes difficult to withdraw simply because the attorney becomes confident of the client's guilt. An attorney is precluded under both Disciplinary Rule 7-106(C)(4) and Model Rule 3.4(e) from stating an opinion on the guilt of the client or on the merit of the client's defense. The rationale for this is rather clear. If an attorney was permitted to withdraw based upon his stated opinion of the client's guilt, such a statement or withdrawal would be used as evidence of the client's ultimate guilt in the client's trial.

VIII. THE PROSECUTION AS AN ADVOCATE

Just because an attorney may become a prosecutor does not mean that the attorney is no longer bound by the same code of professional ethics as private attorneys. The prosecutor, should be held to a higher standard of professional ethics. Model Code Ethical Consideration 7-13 defines a prosecutor's role as being as follows:

> "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of government powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from

> those of a lawyer in private practice: the prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecution's case or aid the accused."

This position was restated in Comment to Model Rule 3.8. In prosecuting a case, a prosecutor is required both under Disciplinary Rule 7-103(A) and Model Rule 3.8(A) not to prosecute a case not supported by probable cause. Under Model Rule 3.8(b), a prosecutor is required to use reasonable efforts to assure that a defendant is advised of his Constitutional right to counsel, the procedure for obtaining counsel and given a reasonable opportunity to obtain such counsel. There is no Model Code counterpart to Model Rule 3.8(b). Under ABA Standard for Prosecution Function 3-2.7, a prosecutor should advise police regarding legitimate police functions and the Constitutional responsibilities attendant to the practice of their profession.

Under Model Rule 3.8(c), a prosecutor is precluded from taking advantage of an unrepresented client by seeking a waiver of important pretrial rights. Among such rights that should not be waived by an unrepresented client is that of a preliminary hearing. The Model Code has no such counterpart rule.

A prosecutor is required by the United States Supreme Court in Brady vs. Maryland 1963, 373 U.S. 83 to disclose all material information to the charge. Under both Disciplinary Rule 7-103(B) and Model Rule 3.8(d), a prosecutor is required to provide a defendant with all information and evidence known to the prosecutor

which tends to negate the guilt of the defendant or mitigate the degree of the defense. In addition to disclosure of such information prior to conviction, the prosecutor has a continuing duty to disclose all unprivileged information which would tend to mitigate punishment at the sentencing phase under the Model Code, the Model Rules and ABA Standard for the Prosecution Function 3-6.2. In United States vs. Bagley 1985, 473 U.S. 667, the Supreme Court extended the Brady disclosure requirement to impeachment as well as exculpatory evidence. In addition, under Imbler vs. Pachtman 1976, 424 U.S. 409, a prosecutor has a duty to disclose information which raises doubt on the correctness of a conviction to the appropriate authority.

Normally, prosecutorial misconduct will at most result in a new trial. In certain instances prosecutorial misconduct may result in the dismissal of all or some criminal charges. In United States vs. Banks 1974, 374 F.Supp.321, the court dismissed charges against a leader of the American Indian Movement after stating that the prosection's "incidents of misconduct formed a pattern throughout the course of the trial, which leads me to the belief that this case was not prosecuted in good faith or in the spirit of justice. The waters of justice have been polluted. . ." In making its decision to dismiss, the court noted that a prosecutor had offered testimony that was directly contradicted by a document in his possession.

In People vs. Bloom 1988, 201 Cal.App.3d. 1479, 247 Cal.Rptr.854, the Court summarized the history and authority for the duty of a prosecutor to furnish discovery in California:

> "Some thirty-odd years ago the California Supreme Court made clear that on a proper showing of materiality and

> relevance a defendant was entitled to compel production of evidence in the hands of the prosecution (People vs. Riser 1956, 47 Cal.2d 566, 588-586). In the words of Justice Traynor, "absent some governmental requirement that information be kept confidential for the purposes of effective law enforcement, the state has no interest in denying the accused access to all evidence that can throw light on issues in the case, and in particular it has no interest in convicting on the testimony of witnesses who have not been rigorously cross-examined and as thoroughly impeached as the evidence permits" (Id., at p. 586). This entitlement grows out of defendant's right to due process: "the basis for requiring pretrial production material in the hands of the prosecution is the fundamental principle that an accused is entitled to a fair trial." (Cash vs. Superior Court 53 Cal.2d 72,75). In order to ensure a defendant obtains discovery even in the absence of constitutional mandate or statutory authorization. (People vs. Memro 1985, 38 Cal.3d 658,677,214 Cal.Rptr. 832.)...
>
> "In short, while a mere desire by a criminal defendant to inspect all the information obtained by the People in their investigation cannot compel discovery, any information which may throw light on the issues in the case should not be denied the accused. Information, to be discoverable, need not necessarily be relevant to the ultimate issues of the accused's guilt or innocence. The defendant also has the right to discover evidence by which he may be rigorously cross-examined and impeach the witnesses against him." (People vs. Johnson 1974, 38 Cal.App.3d 228, 235, 113 Cal.Rptr.303 citations omitted.)...
>
> "As for plausible justification for the need for the discovery this "requisite showing may be satisfied by general allegations which establish some cause for discovery (other than a fishing expedition in the People's evidence)" Pitchess, supra, 11 Cal.3d at page 537, 113 Cal.Rptr. 897)... There is no requirement that defendant will actually find what he hopes to find: otherwise he would not be put in a Catch 22 position of being required to prove that which he is attempting to prove... It is implicit in Cash vs. Superior Court, supra, 53 Cal.2d 72, 346 p.2d. 407, that proof of the existence of the item sought is not required"; People vs. Chapman 1959, 522 Cal.2d.95,98, 338 P.2d 428; cf. Riser, supra, 47Cal.2d. at p.587,305 P.2d.1)"

The California Supreme Court case of People vs. Memro, 1985, 38 Cal.3d 658, 214 Cal.Rptr. 832 contains another excellent summary of the basic principles of the law of criminal discovery. The case

makes it clear that the standard for measuring discovery rights of the accused is that an accused is entitled to any pretrial knowledge of any unprivileged evidence, or information that might lead to the discovery of evidence, if it appears reasonable that such knowledge will assist him in preparing his defense. Thus, not only admissible evidence but also information that may lead to such evidence is discoverable on a mere showing that it will assist in preparing a defense.

The Court at page 677 of Memro, states:

> "... A brief review of the law of discovery in criminal cases is helpful in resolving this claim".
>
> "The power of a trial court to provide for discovery in criminal cases exists even in the absence of constitutional mandate or enabling legislation." Reynolds vs. Superior Court 1974, 12 Cal.3d. 834, 117 CalRptr. 437) Such power is among those inherent in every court to develop rules of procedure aimed at promoting the orderly ascertainment of the truth. Joe Z. vs. Superior Court. supra, 3 Cal. 3d at pp. 808-808, 91 Cal.Rptr. 594)".
>
> "The exercise of these powers is consistent with the fundamental proposition that (the accused) is entitled to a fair trial and an intelligent defense in light of all relevant and reasonably accessible information." Pitchess vs. Superior Court 1974, 11 Cal.3d. 531. 535, 113 Cal.Rptr. 897. As Chief Justice Traynor once noted," in the absence of a countervailing showing by the prosecution that the information may be used for an improper purpose, discovery is available not merely in the discretion of the court, but as a matter of right." Traynor, Ground Lost and Found in Criminal Discovery 1964, 39 N.Y.U.L. Rev 228,244 (hereafter Traynor). Thus, it is established that an accused is entitled to any...pretrial knowledge of any underprivileged evidence, or information that might lead to the discovery of evidence, if it appears reasonable that such knowledge will assist him in preparing his defense. (Emphasis added)... Ballard vs. Superior Court 1966, 64 Cal.2d 159, 49 Cal.Rptr. 302 quoting Traynor op. cit. supra 39 N.Y.U.l.Rev at p.244.)"
>
> "Finally it is noteworthy that one legitimate goal of discovery is to obtain information for possible use to impeach or cross examine an adverse witness"... (Foster vs. Superior Court 1980, 107 Cal.App.3d 218,227, 165 Cal.Rptr.701). As this court observed almost 30 years ago, "absent some governmental requirement that information be kept confidential

> for the purposes of effective law enforcement, the state has no interest in denying the accused access to all evidence that can throw light on issues in the case, and in particular it has no interest in convicting on the testimony of witnesses who have not been rigorously cross-examined and as thoroughly impeached as the evidence permits." People vs. Riser 47 Cal.2d 566, 586, 305 p.2d1)".

Under Federal Civil Rights Law, a district attorney is immune against a civil rights suit for what he does in court. In Imbler vs. Pachtman, 424 U.S. 409, a district attorney had allegedly used perjured testimony to obtain a murder conviction against an innocent man and thereafter fought to keep him on death row. After the federal court released the man from prison, he immediately sued the prosecutor alleging violation of his federal civil rights. The U.S. Supreme Court disposed of the suit by holding that a prosecutor has complete immunity for what the prosecutor does in court.

The Ninth Circuit followed Imbler in Blevins vs. Ford 572 F.2d 1336 wherein it granted full immunity in a lawsuit against a prosecutor for allegedly falsifying evidence and suborning perjury. The same result occurred in the 2nd Circuit in Lee vs. Williams 617 F2d 230. There appears to be no duty imposed upon prosecutors to take the basic steps to assure no perjured or false evidence is used in court. Certainly, it appears that no civil liability attaches for such use in court. Even so, it has long been held that where a district attorney exceeds the scope of his office, he can be sued. Lewis vs. Brautigan 1955, 227 F.2d 124. The Ninth Circuit held in Robichaud vs. Ronan 1965, 351 F.2d 533, that a prosecutor performing police activities is not immune from a civil suit. While activities engaged in by a prosecutor for the purpose of a case for trial are privileged, police gathering activities by a prosecutor are not so privileged. Joseph vs. Patterson 1989, 795 F2d. 549.

Several federal courts have stated that civil rights actions possibly could be maintained against a prosecutor who engages in a

conspiracy out of court to use perjured testimony. Gilmore vs. Gold 1986, (E.D.N.Y.) 632 F. Supp. 684, San Filippo vs. U.S. Trust, 737 2d 246. These courts express in dicta that the cause of action derives not from what was done in court but rather the out-of-court actions by the prosecutor.

In Brown vs. Borg 1991, 91 D.A.R. 14893, the Ninth Circuit Court of Appeal held that a defendant's rights are violated by the withholding of exculpatory evidence. This is a good case for the premise that exculpatory evidence must be disclosed. The Court held:

> "The proper role of the criminal prosecutor is not simply to obtain a conviction, but to obtain a fair conviction, Brady vs. Maryland 337 U.S. 83. It was to insure that defendants are not subjected to unfair trials that the limits on prosecutorial conduct evolved. Accordingly, when exculpatory evidence is withheld, attention focuses on its effect on the defendant's right to due process, the prosecution's intentions are irrelevant. United States vs. Agurs 427 U.S. 97. The prejudice to a defendant's right to a fair trial is even more palpable when the prosecutor has not only withheld exculpatory evidence but has knowingly introduced and argued false evidence. This circuit has acknowledged that "a prosecutor's presentation of tainted evidence is viewed seriously and its effects are exceedingly scrutinized." United States vs. Polizzi, 801 F.2d 1543. A new trial is required "if there is any reasonable likelihood that the false evidence could have affected the judgment of the jury. The Supreme Court held: 'It is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.'
>
> The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, is implicit in any concept of ordered liberty..."

In 1991, the United States Supreme Court in Burns vs Reed 114 l.Ed 2d 547 permitted a prosecutor to be sued personally for depriving a woman of her civil rights. The prosecutor advised police officers to hypnotize the woman in order to get her to confess to attempted murder. The prosecutor had an officer testify at a probable cause hearing about the confession and deliberately

concealed from the court the fact that the woman had been hypnotized when she confessed and later denied everything when not under hypnosis. In Burns, the prosecutor was held to be absolutely immune for what he had done in court but was held to have only qualified immunity for what he did out of court. The plaintiff was permitted to maintain a civil action against the prosecutor for the alleged civil rights violations. The Court held:

> "It is incongruous to allow prosecutors to be absolutely immune from liability for giving advice to the police but to allow police officers only qualified immunity for following that advice. Ironically, it would mean that the police, who do not ordinarily hold law degrees, would be required to know the clearly established law, but prosecutors would not.
>
> Almost any action by a prosecutor, including his direct participation in purely investigatory activity could be said in some way related to the ultimate decision whether to prosecute, But we have never indicated that absolute immunity is that expansive. Rather, as in Imbler, we inquire whether the prosecutor's actions are closely related to the judicial process."

In permitting the lawsuit in Burns, the Supreme Court clarified the law that a prosecutor who engages in investigatory activity does not have absolute immunity for his conduct. The Court held as follows:

> "We note that one of the most important checks, the judicial process, will not restrain out-of-court activities that occur prior to the initiation of a prosecution, such as providing legal advice to the police. This is particularly true if the suspect is not eventually prosecuted. In those circumstances, the prosecutor's action is not subjected to the "crucible of the judicial process."

The Supreme Court in Burns made clear that a prosecutor could be sued for any of his investigatory actions that violate a person's civil rights even though the results of the investigation are subsequently admitted into court. In Burns, even though the prosecutor had used the evidence in court that he had obtained as a result of his illegal advice to the police during the investigation, the prosecutor could still be sued for giving that advice.

CHAPTER 5

RELATIONS WITH THE OPPOSITION

I. SEXUAL OR FAMILIAL RELATIONSHIPS

One area in conflicts of interest is where attorneys on both sides of a case are related to each other, either by marriage (husband and wife) or a parent-child relationship. There have been cases in California where criminal convictions have been set aside because the defense attorney and the prosecuting attorney were having an affair. In such cases, the attorneys always have stated that their relationship had no affect on the case, but nonetheless it does create the appearance of impropriety. Model Rule 1.8(i) holds that when attorneys are related they cannot oppose each other in a case without the consent of their respective clients. This disqualification is not imputed to the related attorney's respective law firms but only to themselves when they face each other head-to-head. If, for example, the husband works for firm ABC and the wife works for firm DEF, unless the husband and wife were appearing head-to-head there is no disqualification even if another attorney from ABC appears against the wife. The rationale for this position is obvious. If opposing attorneys are closely related to each other, they are going to be meeting and talking about the case.

In handling the case, there is the potential that there may be

a lot of emotional and personal affairs of the attorneys dragged into the case to the detriment of one or both of the clients. An attorney who is the parent of the opposing counsel may be reluctant to vigorously attack the case in order to avoid embarrassing the opposing counsel. In a husband-and- wife opposing attorney situation, their opposition could certainly have an effect on their marital relationship. If the wife took the aggressive nature of her husband as a personal attack, it may force him not to be as aggressive as he would have otherwise. All these factors have been considered in adopting this rule. It simply is not a good idea to have related spouses or family members appearing against each other in court for the same reasons the ABA adopted this rule. The coverage and thus the disqualification mandated by ABA Model Rule 1.8(i) is limited to the following attorneys: a father and a son or daughter, a mother and a son or daughter, brothers and sisters and a husband and wife.

In another instance, some states have gone so far as to enact laws to expand this reasoning to attorneys that are having an affair with each other. Such states probably have or will extend the disclosure requirements to opposing attorneys who have had affairs and broken them. It is quite possible for an attorney today to be representing a criminal defendant and the prosecuting attorney to be a person with whom the defense attorney once had an affair. One attorney could still be very angry with the other attorney. The anger between the attorneys could work to the detriment of the criminal defendant. The reverse of the situation

is that the two attorneys broke their relationship amicably. The defense therefore could take advantage of their past relationship to get a very attractive deal for the client. In either case, the defendants are not being treated equally. In one case the defendant would be getting worse treatment than a normal defendant and in the other case the defendant would be given better treatment than the ordinary defendant.

II. DUTIES TO THE OPPOSING PARTY

An attorney is expected to do everything possible for the benefit of the client. This is the basis of the attorney-client relationship. Nonetheless, there are limitations imposed on an attorney as to the extent of that representation. The limitations have been created to assure a full and fair trial and access to the courts by both parties.

A. ACCESS TO EVIDENCE

There is an absolute duty imposed on attorneys not to obstruct the other party's access to evidence. Under Model Rule 3.4(a) and Disciplinary Rules 7-102(A)(3) and 7-109(A), (B), an attorney is not permitted to alter, destroy, or conceal a document or other item unlawfully having evidentiary value. An attorney is also precluded from advising or assisting a person from doing any of the above. This prohibition is a basic tenet in the practice of law. The judicial process would be seriously impaired if parties were allowed to destroy evidence.

Just as an attorney cannot obstruct access to evidence under Model Rule 3.4(a) and Disciplinary Rule 7-109(B), an attorney

cannot advise, cause or assist a person from hiding or fleeing a jurisdiction to avoid testifying in a case. An attorney is permitted in a very narrow area to advise certain persons not to give information voluntarily to an opposing party when:

1. The person is a client, relative, employee or agent of client, and
2. The attorney has a reasonable belief that the person's interest will not be harmed by not voluntarily giving the information or statement to the opposing party.

Under this provision, an attorney can advise a relative or employee of a client not to speak with the opposing party unless a valid deposition has been set for the person. The prosecution in a criminal case often violates this prohibition. Often the prosecution attorneys, either directly or through their investigatory agents, tell their witnesses that they do not have to speak with the defense. This is no different from a defense attorney telling a potential witness he has the right to leave the state without speaking with the prosecution. If the defense does it, there is no doubt that the defense attorney will be liable for discipline even if the potential witness never leaves the jurisdiction. A prosecuting attorney has, as yet, never been sanctioned for advising a witness not to speak with the defense. Nevertheless the argument is valid. Advising a prosecution witness of the right not to speak with the defense hinders the defense in preparing the case.

A situation can be envisioned arising in a criminal case where

a prosecution witness refuses to speak with the defense on advice of the prosecution. The defense can attack the witness for bias using this advice. The defense can base an appeal on this advice by showing that as a result of it the defense was unable to prepare the case effectively. The prosecution would claim that it was merely advising the witness of a right, but in reality that is not a defense against discipline. The effect of the advice was to hinder the defense, and the testimony of a witness was improperly effected. When a prosecution witness refuses to speak with the defense, the defense can rely upon the provided statements of the prosecution which are not geared to finding evidence for the defense. The only time the defense could interview the witness would be at trial when it is too late to complete discovery on information that might be used to exonerate the defendant.

B. FALSIFYING EVIDENCE AND USE OF PERJURED TESTIMONY

Both Model Rule 3.4(b) and Disciplinary Rule 7-102(A)(6), (7) absolutely forbid an attorney from using false evidence. An attorney is subject to discipline for offering evidence that the attorney knows is false. Under Model Rule 3.3(c), an attorney is permitted to refuse to use evidence which the attorney reasonably believes is false. The Model Code does not have a provision that permits an attorney not to use evidence the attorney believes is false.

In addition to not using false evidence, an attorney must not counsel or assist a witness to testify falsely. An attorney is not permitted to coach a witness. "Coaching" does not mean seeking to

refresh a witness's memory or recollection of the facts by exploring the basis of the witness's knowledge or showing discrepancies in recollection by proper means. The attorney is forbidden from teaching or instructing the witness on what to say. In the case In re Eldridge 880, 82 N.Y. 161, the court held:

> "The duty is to extract the facts from the witness, not to put them into him, to learn what the witness does known, not to teach him what he ought to know."

When a criminal client has or intends to testify falsely, the attorney is placed in a difficult situation. The defendant has two compelling constitutional rights that give the client the right to testify falsely. The client has the right under the Sixth Amendment of the U.S. Constitution to expect to receive effective assistance of counsel. At the very minimum, this means that the attorney would not do anything to jeopardize a defense being prepared for the client that would include using perjury. The United States Supreme Court in the case Nix vs. Whiteside 1986, U.S. 157 held that a client has a constitutional right to testify on the defendant's behalf. To add further confusion to the attorney, the Canons of Professional Responsibility generally require an attorney to preserve client confidences, causing further conflict in the situation where perjured testimony is to be used.

The generally accepted approach when a client intends to testify falsely or has testified falsely and the attorney discovers it is to:

1. Persuade the client to recant the false testimony, if already given, and if not given then not to testify

falsely, or

2. If the client refuses to follow the above advice, the attorney should seek to withdraw.

If the attorney is not permitted to withdraw when the client refuses to recant (to agree not to testify falsely) the Model Rules and Model Code differ concerning the next step. Under Model Code Disciplinary Rule 7-102(B)(1) and ABA Defense Function 4-7-7, the attorney is not permitted to reveal the fraud because of the duty of confidentiality. In contrast, Model Rule 3.3(a)(4) requires the attorney to inform the court of the perjury even if it results in a mistrial. In Nix vs. Whiteside, supra, the court held that an attorney reporting perjury by a client does not deny the client effective assistance. A defendant does not have the right to expect that an attorney will knowingly participate in the perpetuation of a fraud upon a court.

Under Model Rules 1.6(a) and 3.3(b), the duty to reveal fraud or perjury ceases at the end of the proceeding. Under these rules, if an attorney discovers the fraud or perjury after the case is over, he is not permitted to disclose it to the court. After a defendant is acquitted, if he admits to the attorney that the testimony given at trial was false and he in fact committed the crime, the attorney is nevertheless precluded from informing the court. If the case was not over or if an appeal was pending, the attorney would still be under the obligation of the Model Rules to report the fraud or perjury.

C. PAYING WITNESSES

Both Disciplinary Rule 7-109(C) and Model Rule 3.4(b) prohibit an attorney from paying a witness as an inducement to getting the person's testimony. If attorneys were permitted to pay witnesses indiscriminately then justice would depend not on the truth of the case but upon who could buy the most credible witnesses. There are certain payments to or for the benefit of witnesses which are permitted and do not violate the Canons of Professional Responsibility.

An attorney is permitted to pay for the ordinary expenses of a witness to attend and testify at court or at a deposition with the client reimbursing the attorney. Under Disciplinary Rule 7-109(C)(1), included in such expenses are incidental expenses along with reasonable expenses for travel, hotel and meals. Under Disciplinary Rule 7-109(C)(2), an attorney is permitted to pay reasonable compensation for a witness's loss of time in appearing for trial or a deposition. Many states, such as California, have codified this provision by requiring an attorney to pay witness fees based upon mileage and a daily fee of around $50 when a subpoena is issued to get a person's attendance at trial or deposition. The most common form of witness payment is that of expert fees. Disciplinary Rule 7-109(C)(3) permits an attorney to pay reasonable fees to experts for their preparation of a report or for testifying at court.

The most important restriction on the payment of witnesses by an attorney is that the payment can never be contingent upon the content of the testimony or the outcome of the case. To have the

payment contingent upon witness content or outcome of the case would give the witness a pecuniary interest in the case. The witness would then have a financial reason for giving testimony favorable to the client. To avoid creating this potential conflict or bias, the prohibition against tying a witness's payment to benefit of the testimony was established.

D. COMMUNICATION WITH OPPOSING PARTY

1. WHEN NOT REPRESENTED BY COUNSEL

Not all parties or persons have attorneys to represent their interest. When an attorney is dealing with a party or person not represented by counsel, the attorney is governed by Disciplinary Rule 7-104(A)(2) and Model Rule 4.3. The attorney is absolutely precluded from giving advice to the person except to advise about getting an attorney. Disciplinary Rule 7-104(A)(2) states that an attorney representing an opposing client may not:

> "Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such other person are or have a reasonable possibility of being in conflict with the interests of his client."

In addition, the attorney must not state or do any act which creates an impression with the person that the attorney is impartial. Often a person misunderstands the attorney's role in the action. The attorney must take whatever steps that are reasonably necessary for the person to understand that the attorney is representing an interest in opposition to that person's or entity's interest in the case.

The above situation often arises in the area of automobile

accidents. Many persons involved in auto accidents will represent themselves in their dealings with the insurance companies. The attorney for the insurance has no choice but to negotiate directly with the people or to oppose them directly in court. While such contact is permissible and even required in some contexts, the attorney for the insurance company may not give legal advice to the persons that will create an impression that the attorney is impartial or protecting their interests. This is a higher duty than the attorney would have if the people were represented by an attorney.

Opposing attorneys can discuss the law between themselves and give each other advice or recommendations on how to proceed in a case. Such conduct or communication is not permitted when a party is not represented by an attorney.

2. WHEN REPRESENTED BY COUNSEL

Under Disciplinary Rule 7-104(A)(1) and Model Rule 4.2, an attorney will not communicate about a matter with a person whom the attorney knows is represented by counsel, unless that counsel consents to the communication. Disciplinary Rule 107(A)(1) reads as follows:

> "During the course of his representation of a client a lawyer shall not:
>
> > (A) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so."

Under Model Rule 4.2, an attorney is prohibited from engaging in an

ex parte communication with an opposing party's executive employees or,

> "with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

The question often arises as to whom this duty applies. For the purposes of this rule, corporations and associations are considered persons and thus covered by this rule.

When it is known that a corporation or association is represented by counsel, an attorney needs that counsel's consent before communicating or contacting a person:

(a) Who has current managerial responsibility for the corporation or organization,

(b) Whose conduct may be imputed to the organization for the imposing of criminal or civil liability, or

(c) Whose statements may constitute an admission by the organization.

A corporation can be found liable for an act or omission committed by any employee in the scope of his employment. The ABA's position is that an attorney should not engage in ex parte communication with such employees involved in the act of omission being litigated. In contrast to interviewing current employees, no consent is needed under ABA Formal Opinion 91-359 1992 before an attorney can speak with a former employee of the organization.

Direct communication without counsel's consent is permitted with a person represented by an attorney when the communication is

authorized by law or when the communication does not relate to the subject of the representation. There are very few such instances permitted. In addition, Lewis vs. S.S. Baune 1976, 534 F.2d 1115 held that there is no prohibition against opposing parties meeting alone together without their attorneys in an attempt to settle a case.

An example of communication authorized by law is the Freedom of Information Act in California. Under California law, a freedom of information request is made to a governing board or agency having the information. Anyone can make that request and it is not considered a part of discovery. Therefore an attorney can make the request directly from the agency on the part of a client, even if a suit is pending against the agency. The rational is that if this information must be provided to anyone upon request, there can be no prohibition of an attorney, even one suing the agency, in requesting it.

E. THREATENING CRIMINAL PROSECUTION

An attorney is not permitted to threaten an opposing party with criminal prosecution in an attempt to gain an advantage in a civil matter. Disciplinary Rule 7-105(A) reads as follows:

> "(A) A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter."

The issue that arises under this Rule is whether or not an attorney's conduct was an explicit or implied threat to engage in criminal prosecution of the opposing party.

It has been suggested by several bar associations that the

following statements by an attorney to the opposing party or opposing attorney may constitute a threat of criminal prosecution and are thus unethical:

(1) A letter threatening "to seek assistance through law enforcement and legal avenues," or

(2) A statement that criminal action will be taken unless the matter is settled.

It has also been suggested that an attorney cannot even advise or allude to an opposing party that a criminal offense has occurred if the purpose of the advice is to advance the attorney's civil claim against the opposing party.

There is a duty not to pursue a criminal case against a civil party. If, however, the attorney's client reports an alleged criminal offense without or against the advice of the attorney, there is no ethical violation by the attorney. Moreover, an individual does not lose the right to report a criminal offense merely because an attorney has been hired.

The other aspect of this prohibition is that it applies only when the purpose is solely to obtain an advantage in a civil case. Example: The attorney for a spouse seeking child custody may report the other spouse to authorities for child abuse. It is true that a reason for making the report is to get child custody, but if the child is actually being abused or tortured the report is proper to prevent such acts from continuing. Another example: In a 1995 California case, a husband was charged in Federal Court for theft of community property assets. The couple were in a dissolution of

marriage, and the husband had been ordered not to transfer assets out of California. The husband violated the order and transferred $1.9 million into a Swiss bank account in his father's name. The husband was reported to the U.S. Attorney for theft of property across state lines. The husband claimed that the wife's attorney used criminal prosecution to gain a civil advantage. Both of these examples, dramatize that a key word in 7-105(A) is "solely." There was no violation of the restriction because in each instance there was a separate independent reason for reporting the alleged criminal activity not related to the civil matter in controversy between the parties.

III. RELATIONS WITH OPPOSING ATTORNEY

There are basic rules of conduct that govern the relations between opposing attorneys. The violation of such basic rules will expose an attorney to discipline. The rules cover such diverse areas as abuse of discovery, trickery at trial and violation of court rules and orders. There is an implicit duty imposed upon all attorneys to act with candor and frankness with both the court and other attorneys.

An attorney is not permitted by both Disciplinary Rule 7-106(A) and Model Rule 3.4(c) knowingly to violate a procedural rule, evidence rule, court rule or court order. Disciplinary Rule 106(A) reads as follows:

> "(A) A lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling."

While an attorney is required to obey a court order, the attorney may openly refuse to obey an order if the purpose is to make a good faith challenge to the validity of the order or ruling. In the case In re Tamblyn 1985, 695 P.2d 902 an attorney was ordered to produce documents for an in-camera examination. The attorney sought a delay on the order while she was in appellate review. The trial judge refused, and the attorney advised the client not to comply while the matter was being pursued on appeal. The Appellate Court held that an attorney may advise a client in good faith not to obey a court order while the issue is being appealed without facing discipline proceedings.

The most common complaint involving actions between attorneys is discovery abuse. Under both Disciplinary Rule 7-102(A)(1) and Model Rule 3,4(d), an attorney may not make a frivolous discovery request. Nor may an attorney refuse to take reasonable steps to comply with a proper discovery request made by the opposing party. In addition, under Federal Rules of Civil Procedure section 37(b), an attorney who abuses discovery procedures may be subject along with the client for fines and other sanctions. In the case Roadway Express, Inc. vs. Piper 1980, 447 U.S. 752, the United States Supreme Court held that federal courts have the inherent authority to sanction attorneys personally for the expenses, attorney fees and damages incurred by opposing parties as a result of the attorney's bad faith refusal to comply with legitimate discovery requests. The most frequent complaint of this type is where one

attorney asks the opposing party to produce documents. In most cases, when documents are requested, the responding party must identify each document that is being submitted in response to each request. Sometimes a document satisfies more than one request, in which case it must be so stated. The purpose for this requirement is to prove that the documents have been produced. As such, the defense will not be able to claim that a document has not been produced when it has, and the prosecution cannot hide important documents by inserting them out of order and in response to improper responses. Many states, such as California, will sanction an attorney with attorney fees and costs incurred in any motion to compel compliance with a motion to identify a document produced where the document is not clearly described.

An attorney has a duty of honesty owed not only to the court but to the opposing party and opposing attorney as well. Under both Disciplinary Rule 7-102(A)(2) and (5) and Model Rule 3.3(a)(1), an attorney can be disciplined for knowingly making a false claim in bad faith. Disciplinary Rule 7-102(A)(2), (5) and (7), reads as follows:

> "(A) In his representation of a client, a lawyer shall not:
>
> (2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.
>
> (5) Knowingly make a false statement of law or fact.
>
> (7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

These rules had their origin in Canon 22 of the 1908 ABA Canons of Professional Ethics (CPE). Canon 17 of the CPE defined the duties owed opposing counsel as follows:

> "Clients, not lawyers, are the litigants. Whatever may be the ill-feeling between clients, it should not be allowed to influence counsel in their conduct and demeanor toward each other or toward suitors in the case. All personalities between counsel should be scrupulously avoided. In the trial of a cause it is indecent to allude to the personal history or the personal peculiarities and idiosyncrasies of counsel on the other side. Personal colloquies between counsel which cause delay and promote unseemly wrangling should also be carefully avoided."

In furtherance of the duty of honesty, the ABA implemented Canon 22 of the CPE on candor and fairness which reads in part:

> "The conduct of the lawyer before the court and with other lawyers should be characterized by candor and fairness.
>
> It is not candid or fair for the lawyer knowingly to misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a textbook; or with knowledge of its invalidity to cite as authority a decision that has been overruled, or a statute that has been repealed; or in argument to assert as a fact that which has not been proved, or in those jurisdictions where a side has the opening and closing arguments to mislead his opponent by concealing or withholding positions in his opening argument upon which his side intends to rely...
>
> A lawyer should not offer evidence which he knows the court should reject in order to get the same before the jury by argument for its admissibility, nor should he address to the judge arguments upon any point not properly calling for determination by him. Neither should he introduce into an argument, addressed to the court, remarks or statements intended to influence the jury or bystanders."

The duty of candor has been reiterated in Disciplinary Rule 7-102 and Model Code Rule 3.3. Ethical Consideration 7-37 in the Model Code states in part: "A lawyer should not make unfair or derogatory

personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interferes with the orderly administration of justice and has no place in our legal system." The making of false statements to the court is prohibited under Disciplinary Rule 7-102(A)(5) and Model Rule 3.3(a)(1). Part of the duty of candor owed by an attorney is the obligation under Disciplinary Rule 7-106(B)(1) and Model Rule 3.3(a)(3) to disclose controlling authority that is directly adverse to the attorney's position if the opposing attorney has not disclosed it. Disciplinary Rule 7-106(B) reads as follows:

> "In representing a matter to a tribunal, a lawyer shall disclose:
>
> (1) Legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client which is not disclosed by opposing counsel."

It seems strange that opposing counsel can be required to disclose authority for the other side. The purpose of this is to assure that the judge is given all relevant authority upon which to make a decision. The unintended effect is to create a procedure to help minimize legal malpractice. As long as the authority is brought before the court, even by opposing counsel, there is no malpractice because they had the authority before it when its decision was made. An argument by the losing client that his attorney should have cited the authority is true, and this might be grounds for having the attorney-fee bill reduced. If the authority, however, was ultimately brought before the court, albeit by opposing attorney, and adequately argued, there might not a basis for an

action for malpractice on the grounds that the attorney did not undertake sufficient preparation.

In addition to the presentation in court, attorneys are normally bound by ethical considerations to act with courtesy to each other out of court. Ethical Consideration 7-38 for the Model Code created such a duty and reads as follows:

> "A lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, settings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of his client. He should follow local customs of courtesy or practice, unless he gives notice to opposing counsel of his intention not to do so. A lawyer should be punctual in fulfilling all professional commitments."

The above requirement is grounded more in hope than fact. In order for a court to impose discipline for acts of discourtesy committed by an attorney, the conduct must be of a nature that it probably was not only discourteous but acted to delay or hinder the prosecution of the action. An attorney who denies a continuance without a good reason with the sole intention of harassing the opposing party and forcing an unnecessary motion possibly could be sanctioned.

In the final analysis, the defining of the duty owed to opposing counsel can be summarized as being the minimum needed to assure the functioning of the adversary system in a prompt, just and impartial manner. Conduct by an attorney which affects any of these elements is a violation of an ethical rule if not also a violation of a disciplinary rule as well.

CHAPTER 6

THE ATTORNEY AND THE MEDIA

I. INTRODUCTION

An innate conflict exists between the right of the press to cover the trial of a matter, be it civil or criminal in nature, and the right of the parties to the action to have the matter decided fairly. It is now universally acknowledged that too much pre-trial publicity can affect the outcome of a case. The courts have increasingly become concerned with regulating not only what happens in the courtroom but also what happens outside the court to minimize the effects of pre-trial publicity on a case. It has always been hard to get an impartial jury. In the old west, it was even harder. When Kern County, California was incorporated in the 1870's, it had only 11 registered voters. As such, Kern County had trouble empaneling a jury at all without even considering the issue of juror knowledge of the case. California and many of the states in the old west, to empanel juries, adopted the procedure where the bailiff would go out in the street and select 12 jurors for the panel. In many old western movies, we see the judge ordering the sheriff to empanel a jury for a quick trial, and that is how the sheriff did it.

Mark Twain probably gave the most concise and clear comment ever written on the American custom of selecting an impartial jury in his novel, Roughing It:

"When the peremptory challenges were all exhausted, a jury of

> twelve men was impaneled, a jury who swore that they had neither heard, read or talked about nor expressed an opinion concerning a murder which the very cattle in the corrals, the Indians in the sage-brush and the stones in the street were cognizant of!. . .
>
> The verdict rendered was "Not Guilty." What else could one expect?
>
> The jury system puts a ban upon intelligence and honesty, and a premium upon ignorance, stupidity and perjury. It is a shame that we must continue to use a worthless system because it was good a thousand years ago. In this age, when a gentleman of high social standing, intelligence and probity swears that testimony given under solemn oath will outweigh, with him, street talk and newspaper reports based upon mere hearsay, he is worth a hundred jurymen who will swear to their own ignorance and stupidity, and justice would be far safer in his hands than in theirs. Why could not the jury be so altered as to give men of brains and honesty an equal chance with fools and miscreants? Is it right to show the present favoritism to one class of men and inflict a disability on another in a land whose boast is that all its citizens are free and equal? I am a candidate for the legislature. I desire to tamper with the jury law. I wish to alter it as to put a premium on intelligence and character and close the jury box against idiots, blacklegs and people who do not read newspapers."

Mr. Clemens' analysis is as accurate today as when written in 1872. It does seem a strange idea, if not absolutely silly, to have to empanel a jury with persons whose best reason for being on the panel is that they are so dissociated with the world that they do not know what is going on in it. Nonetheless, the practice in today's judicial system is to attempt to empanel one that is the most ignorant of the facts in the case as possible.

It is without serious debate that the right of a party to have a matter decided by an untainted and unbiased jury is the crux of the American system of law. In the modern world, however, it has become increasingly more difficult to get a jury totally unaware of the facts in a notorious case. Today, the television and newspapers

report immediately every aspect of a newsworthy case, virtually anywhere in the world. The average citizen will often be exposed to the facts of the case long before the case has reached the point in which a jury is ready to be empaneled. As a result, in small communities especially, it is impossible to empanel a jury in which the jurors have not heard the basics of the case. In most instances, courts have by necessity modified their jury empaneling procedures. Where once a juror would have been excused for knowing the facts of the case, jurors in high profile cases are kept on the panel as long as they state that they can evaluate the evidence solely upon what they hear in court without relying on their out-of-court information.

Before a jury is empaneled courts will (in the high profile cases) impose gag orders on the attorneys. In many states cameras are not permitted in a courtroom without the judge's consent. It is not uncommon for judges to attempt to regulate the press in its pre-trial coverage to limit any perceived poisoning effect which the coverage may have on the jury pool. The necessity of imposing gag orders seems redundant in view of the disciplinary and model rules governing attorney out-of-court statements. It is due to the uneven enforcement of the rules by the disciplinary agencies that prompt many judges specifically to impose a gag order. In Levine vs. United States 1985, 764 F.2d 590,the Ninth Circuit struck down a district court's gag order. The Ninth Circuit held that the gag order as written was overbroad in that it forbade the attorneys from making statements, "upon the merits to be resolved by the

jury." The court recognized that uncontrolled statements by attorneys constitute a serious threat to a fair trial but that the gag order, as written, covered both permitted and impermissible speech. The court stated that a gag order which meets the Stuart test will rarely be overturned. In this case, however, the gag order failed that test.

The use of gag orders can have the unintended effect of freeing attorneys to speak on areas in which the judge has not ordered silence. In such cases, it has been speculated that as to those areas which are not included in the gag order, the attorney may speak even if the area is otherwise barred by an ethics rule. The basis for this belief is that the state disciplinary rule is founded on the belief of a fair trial, and the judge is best able to determine how disclosures should be handled when issuing a gag order. It is thought that the judge's ruling on the gag order should therefore supersede the state ethics rule sought to accomplish the same result. Many judges today avoid this conflict by specifically ordering attorneys not to speak on the case and to obey all ethics rules prohibiting out-of-court statements.

In an effort to assure that a jury once empaneled will not be prejudiced by out-of-court sources of information, many judges will sequester their juries in high profile cases. The sequestering of juries has caused many people to question its wisdom when lay people see a criminal defendant out on bail but the jury in custody, possibly for months on end. Sequestering is based upon the fear of jury contamination by exposure to out-of-court information

or speculation regarding the trial. In short, it is usually the result of the judge's fear that the jurors have neither the ability nor the honesty to refrain legitimately from speaking on a case or reading about a case despite their sworn word not to do so.

II. REGULATION OF THE PRESS

The British system of regulating information to the press is quite different from the American system. In Britain there is no First Amendment Freedom of the Press. The news media in Britain is only allowed to cover a trial to the extent permitted by the individual courts. Generally, courts in Britain have the power to impose gag orders on the press that no witnesses be identified and that no portions of their testimony be reported until the conclusion of the trial. Such is not the case in the United States. The final difference between American and British courts is that television is not permitted in British courts whereas in American courts television coverage has become almost routine.

Restrictions on the press in a criminal case are important because the press usually has the effect of helping one side or the other. Trial presentations for televised cases are generally accepted to be different because everyone's actions are open for view by the entire world. There are situations where either or both sides to an action will want the press (usually television) excluded from the courtroom. The law as to whether or not the press can be excluded or limited in their coverage of a trial is still in the process of development.

In Nebraska Press Ass'n vs. Stuart 1976, 427 U.S. 539, the

United States reversed a state court order prohibiting the press from reporting on the confessions made by a defendant and other facts which the court felt were "strong implications" of the defendant's guilt. The Supreme Court employed the "clear and present danger test" to determine if the prior restraint on press coverage was warranted. The Court considered whether or not "the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." The Supreme Court developed a test which it employed to determine if such clear and present danger existed to the defendant's right to receive a fair trial. The Supreme Court required the trial court to consider the following:

A. The nature and extent of pretrial coverage,

B. Whether or not other measures would be likely to mitigate the effects of unrestrained pretrial publicity, and

C. How effectively a restraining order would operate to prevent the threatened danger.

In applying the test, the Supreme Court found that the order was overbroad and that other measures could have been taken to protect the defendant's right to a fair trial other than a complete ban of reporting. As such, the trial court's order was stricken.

In Richard Newspapers vs. Virginia 1980, 448 U.S. 555, reaffirmed its holding in Stuart. The Court recognized the historical importance of public trials to the nation and its relationship to the function of American government both for fact-finding and as proof of fairness in the American system of justice.

The Court recognized that in special cases, it may be necessary to bar press access to a trial. In these situations, the burden is on the state to prove under the test set forth in Stuart that the exclusion is proper.

An important and permissible, albeit rare imposition of prior restraint on the press, is an order limiting the use of information obtained through discovery in a civil suit by the defendant press. In Seattle Times Co. vs. Rhinehart 1984, 476 U.S. 20, a newspaper was sued by a spiritual group based on a series of articles written about the group. The newspaper obtained membership information from the group through discovery. The plaintiffs obtained a protective order to prevent disclosure of the list. The newspaper appealed against the order prohibiting publication of the information. The Supreme Court upheld the order citing three reasons:

(1) A party to litigation has no First Amendment Right to information obtained by discovery. The press does not acquire greater rights in information obtained through state regulated trial discovery methods than any other person. A protective order enforceable against a lay person would be just as enforceable against the press.

(2) The press would have obtained the information but for the civil litigation. A protective order is a proper device for preventing persons from filing suits or continuing actions merely to gain access to the other party's information for disclosure purposes. Without a protective order, party's can legally blackmail the other side into

settlement by threatening to release sensitive information.

(3) There is no prior restraint because the press is able to use whatever information that it discovers outside the discover process.

Seattle Times remains one of the most important First Amendment cases involving the media. The case states the premise clearly that the press cannot publicly disclose information outside of court discovered in a civil suit that is subject to a protective order. This case took away a significant amount of the press' ability to avoid civil suits by threatening to publish discovered information regardless of whether or not it was related to a case.

Because American courts cannot regulate what the press wishes to print, televise or broadcast in many instances, state bars have enacted ethics rules to govern how attorneys can relate with the media. By limiting attorney access to the media, the state bars have attempted to regulate the media indirectly by limiting their access to the information necessary to develop a story. While the press argues that such restrictions on attorneys impair their rights to develop stories under the First Amendment Freedom of the Press, the state bars take the position that their restrictions are necessary to assure the right of the parties to a fair trial and due process.

III. REGULATION OF ATTORNEYS

Both the Model Code and the Model Rules have provisions designed to regulate attorneys in their relations with the Media.

In the real world, such prohibitions against engaging in pretrial publicity are often overlooked or ignored by the courts. The regulations of such attorney statements depend in large part on whether the underlying action is criminal or civil in nature.

A. CRIMINAL MATTERS

In a criminal matter, both the prosecution and the defense are governed by the same rules of professional ethics. In the real world the advantage received from pre-trial publicity almost always goes to the prosecution. Winning a case in the minds of the public is of little value to the defense when the case is lost in the minds of twelve jurors. The prosecution on the other hand starts out with the unrecognized but very real advantage that many people inwardly believe that the defendant had to have done something wrong in order to be charged. Disciplinary Rule 7-107(B) reads as follows:

> "A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of trial or disposition without trial, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:
>
> (1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.
>
> (2) The possibility of a plea of guilty to the offense charged or to a lesser offense.
>
> (3) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.
>
> (4) The performance or result of any examinations or tests or

the refusal or failure of the accused to submit to examinations or tests.

(5) The identity, testimony or credibility of a prospective witness.

(6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.

These prohibitions were restated and clarified in Model Rule 3.6. Under Model Rule 3.6, attorneys in a criminal case are forbidden from making out-of-court statements that have "a substantial likelihood of materially prejudicing" the trial. Under Rule 3.6(b) a statement by an attorney is presumed to have a "substantial likelihood of material prejudice" in a criminal case when it refers to:

1. The character, credibility, reputation or criminal record of a defendant, suspect or witness in the case.

2. The expected testimony to be given by a witness.

3. The identity of a prospective witness.

4. The results of any examinations or tests.

5. The comment upon the refusal of a person to submit to a test or examination.

6. The contents of a confession or existence thereof.

7. The possibility of a plea bargain or an opinion of the guilt or innocence of a person.

In Gentile vs. State Bar of Nevada 1991, 111 S.Ct. 2720, the United States Supreme Court upheld the provisions of Rule 3.6(a) against a challenge that they violated the attorneys right of free speech under the Constitution by requiring attorneys to keep silent on the above matters. Generally, an attorney, be it prosecution or defense, who releases a statement covering any of the above

proscribed items will be subject to discipline. As with most rules, there are exceptions and an exception to Model Rule 3.6(b) is Model Rule 3.6(c). Model Rule 3.6(c) creates a "safe harbor" for specific kinds of statements from disciplinary action. Under Model Rule 3.6(c), an attorney is permitted to state the following without elaboration and not be subject to any discipline for having made the statement:

(1) The general nature of the defense that the defense will be asserting.

(2) The general nature of the charge against the defendant.

(3) Information contained in the public record.

(4) The identity of the accused and if the accused is at large. Any information which can be useful in capturing the accused, and if the accused has been arrested. The basic facts regarding the arrest that has occurred.

An attorney whose statements go beyond these areas may be subject to discipline. As stated in Gentile vs. State Bar of Nevada (supra), the United States Supreme Court upheld the provisions of Rule 3.6(a) against a challenge that they violated the attorneys right of free speech. In the same case, however, a different majority of justices held that Model Rule 3.6(c) was unconstitutional as a result of vagueness. The Supreme Court held that Model Rule 3.6(c) was so ambiguous as to be of no use in guiding an attorney as to what is permissible and impermissible under the Rule. As such, it becomes attendant to review a state's safe harbor provision carefully under Rule 3.6(c) in accordance with the Supreme Court's decision when attempting to determine if

such out-of-court statements are permitted.

In Chicago Council of Lawyers vs. Bauer 1975, 522 F.2d 242, the Seventh Circuit decided the First Amendment issues regarding the imposition of restrictions against attorneys. In Stuart (supra), the standard for restrictions on the press was held to be that of clear and present danger to the right of the defendant to receive a fair trial. In Bauer, the court held that restrictions against attorneys on their right to free speech should be predicated upon a "serous and imminent threat of interference with the fair administration of justice". The Court rejected the Model Code's prohibition for attorney's comment's which created " a reasonable likelihood of interference with a fair trial" as overbroad. The court reasoned that the serious and imminent threat is the best standard to impose upon attorney's out-of-court statements because they are in the best position "to act as a check on the government by exposing abuses or urging action." Bauer's "serious and imminent threat standard" is today's generally accepted standard for the governing of an attorney's out-of-court statements as evidenced by the adoption of Model Rule 3.6.

The prosecution, by virtue of the fact that it determines what charges are filed against a defendant, in many instances controls the trial publicity in a case. It is not uncommon, albeit a dubious practice, for a prosecutor to tip the press of an arrest and sometimes even to stage the arrest before the cameras, all to generate bad publicity for the defendant. Early one morning in 1987 in Kern County, California, a local attorney was arrested on

the charge of solicitation of murder as he was about to begin opening statements in a criminal matter for a client. The sheriff's deputies making the arrest were surrounded by television and newspaper people who had been tipped on the arrest. The attorney could have been arrested at any time, but it was intentionally decided to do so in this manner to generate the most pre-trial publicity against the defendant.

The prosecution has a distinct advantage in any criminal case. Most people still believe that a person would not be charged with a crime unless the person actually committed it. The presumption of innocence while valid in the courtroom does not generally permeate through the court of public opinion. The more bad publicity that a prosecution can give a defendant the greater the feeling of guilt which the average person will have towards the defendant. While it is true that pretrial publicity may result in a change of venue, the amount of negative pretrial publicity necessary for a change of venue has steadily increased over the years as a result of the growth of the information age. Some judges have now gone so far as to count the number of instances of pretrial statements made by both the prosecution and the defense. If the number of such statements are relatively equal, these judges have held there is no prejudice because the defense statements balanced the prosecution statements. This policy is rather simplistic in its approach in that the judges have not taken into account the relative weight given the public regarding pretrial statements. Generally, the public tends to believe and favor the prosecution more than the

defense, which is often perceived as simply trying to beat the rap. Basing a prejudice on the number of pretrial statements alone is not a particularly favored approach to determine pretrial bias on the part of a community.

The Model Rules impose special requirements upon the prosecution to control the out-of-court statements of persons associated with it. Model Rule 3.8(e) especially cautions prosecutors to exercise particular care to prevent people associated with it (ostensibly the police) from making out-of-court statements that the prosecution is prohibited from making under Rule 3.6. In reality, many prosecutors totally ignore Rule 3.8(e) and permit the police to make unfettered statements to the press with the intent of generating negative bad press against the defendant.

A case directly in point is that of the 1995 criminal trial of O.J. Simpson. Months before the jury was empaneled, there were serious and often erroneous leaks to the press of prosecution evidence. Most of the evidence leaked to the press came from the government and was false. Included among the false evidence released by the government was the statement that the prosecution had a ski mask with Mr. Simpson's blood on it. This statement was false because there was no ski mask. Despite the false nature of the leak, the prosecution took no steps to correct the false impression created in the public that such strong evidence existed. It was not until Mr. Shapiro requested all evidence, including the ski mask, in open court, that the prosecution finally admit

publicly that no such ski mask existed. Another extremely damaging element of pretrial publicity was the police department release of Nicole Simpson's 911 phone call years earlier against Mr. Simpson. It is, to be fair, unclear whether the District attorney's office authorized the release. From the point of view of a fair trial, however, that is irrelevant. If the release of the tape has the effect of prejudicing the jury pool so that Mr. Simpson could not get a fair trial, he was being denied his constitutional right of due process by the government, the District Attorney's Office and the police department.

It is clear, however, that under the holding of the U.S. Supreme Court's Brady vs. State of Maryland 1978, 373 U.S. 83, the prosecution in the Simpson case had a duty to turn the 911 tape over to the defense. The police department released the tape ostensibly to comply with a Freedom of Information request. This was the first time in California history under a Freedom of Information request that the police released evidence in a criminal case about to go to trial without first speaking to the District Attorney's Office. Whether the intent to cause Mr. Simpson to suffer damaging pre-trial publicity was present or not, the effect of the release of the tape was to poison the jury pool against Mr. Simpson. The 911 tape of an incident years earlier was played on television and radio several times daily for the next several weeks and sporadically afterward. It is not hard to envision that many of the rejected jurors for the Simpson trial were rejected, in part, for having heard this tape. The resulting jury panel for the

Simpson trial may not have been the type of panel which would have served the trial had the 911 tape not been released prior to the sequestering of the jury panel.

As proof of the wisdom behind the restrictions on attorney statements one need only look to the Simpson case. Following the initial prosecution leaks, the defense began a media campaign to counter the stream of inaccurate reports being leaked to the press. The Simpson case became "The Case of the Century" simply because of the multitude of leaks and press conferences before a gag order was imposed. At no other time in American jurisprudence have there been so many free-wheeling press conferences and unstopped leaks as in this case.

B. IN CIVIL MATTERS

In a civil case, the attorneys for both sides are governed by the same ethical standards. Under the Model Code Disciplinary Rule 7-107(G), attorneys in a civil case are forbidden from making an out-of-court statement involving specific aspects of the case. Disciplinary Rule 7-107(G) reads as follows:

> "A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication and that relates to:
>
> (1) Evidence regarding the occurrence or transaction involved.
> (2) The character, credibility or criminal record of a party, witness, or prospective witness.
> (3) The performance or result of any examination or test or the refusal or failure of a party to submit to such.
> (4) His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative

rule.

(5) Any other matter reasonably likely to interfere with a fair trial of the action.

The Model Code permits an attorney to make a public statement on any of the above matters without facing discipline as long as he limits the statement to a quotation from a public record or reference thereto. His comment is proper as long as he does not add to or summarize a public record. The rational behind this exception is that the attorney is not making a personal comment but is merely parroting information contained in the public records that any person can read directly as opposed to hearing it verbatim from the attorney.

Another exception against an attorney comment on a civil case is under Disciplinary Rule 7-107(I). Under this rule, the above restrictions do not apply when the lawyer is "replying to charges of misconduct publicly made against him or from participating in proceedings of legislative, administrative or other investigative bodies." In the real world, this is the section that relieves most attorneys from discipline for their out-of-court statements. Once an attorney is accused of public misconduct, usually in the handling of the case, the attorney can reply to those personal charges even if it means making an otherwise improper statement under Disciplinary Rule 7-107(G). This situation often comes about with opposing counsels publicly charging each other with improper conduct in the handling or presentation of their case. The result is that the first attorney charged with such misconduct responds by making the otherwise improper statements and counter charging the

other attorney in public with misconduct for having made the original charge. The attorney making the original misconduct charge can now make otherwise improper statements because he is responding to public misconduct charges made against him.

In Chicago Council of Lawyers vs. Bauer (supra), the Seventh Circuit decided the First Amendment issues regarding the imposition of restrictions against attorneys under Disciplinary Rule 7-107(g) in a civil case. In Bauer, the court held that the above restrictions are unconstitutional when they prohibit speech which does not pose "a serious and imminent threat" to a fair trial. The Seventh Circuit expressly rejected the Model Code's prohibition against attorney's comments that created "a reasonable likelihood of interference with a fair trial," stating they were overbroad. Bauer's "serious and imminent threat standard" is today's generally accepted standard for the governing of an attorney's out-of-court statements.

The Model Rule 3.6 is an attempt to codify the rationale and reasoning put forth in Bauer. An important element of Model Rule 3.6 is its applicability in a civil case when the case is being tried by a jury.

CHAPTER 7

TRUST ACCOUNT

The easiest and surest way for an attorney to become subject to discipline is to mismanage the client trust account. In every state trust complaints and violations are taken seriously by the state bar disciplinary organizations. There are two reasons for the serious regulation and disciplining of attorneys for trust account irregularities. The first reason is that no attorney should be misusing his clients' trust funds. To do so is a clear violation of the fiduciary duties owed to the clients. The second reason is that trust account violations are extremely easy to prove. An attorney trust account is a paper generator. There are the monthly statements and cancelled checks from which the state bar can reconstruct the history of the account without any assistance from the attorney.

There is a high possibility that any attorney mismanagement of the trust account will be discovered. The attorney should bear in mind that most states require the banks in which the accounts are located to notify the state bar whenever they suspect mismanagement by the attorney. One real example of this occurred as follows: The attorney received a draft in settlement of a case. The attorney deposited the draft into his trust account and wrote a check to his client. A draft is not the same as a check. A draft is not (under federal banking law) credited to an account until it has been

collected. In the past this bank had treated the draft as a check and credited it immediately. This time it did not do so. As a result several of the attorney's trust account checks bounced. In addition, other trust account checks were being paid with other clients' money. The draft did clear, and the bank apologized to the attorney because its past policy of treating drafts as checks had caused the attorney to believe that it would continue to do so. The attorney's real problems began because the state law required the bank to report all problems with the trust account to the state bar, even when the problems are generated by mistakes of the bank. The state bar investigated even though the draft problem was corrected, and discovered a dozen minor irregularities in accounting, none of which cost clients any money. Nevertheless, the attorney's trust account was placed under direct supervision of the state bar.

A trust account is required whenever the attorney takes possession and control of the property or money which belongs to a client. The attorney, who is holding property belonging to the a client, is governed by both the common law rules of agency and partnership and also the more restrictive state bar rules. In many states, a state bar disciplinary action for mismanagement of a trust account does not relieve the attorney of liability or prosecution under the state's civil or criminal law. There is a trend among the states to merge the common law rules and the attorney disciplinary rules on trust account mismanagement. In any event, the point to remember by that satisfying common law rules

will not automatically satisfy the disciplinary rules and vice versa.

Nearly every state has adopted rules requiring an attorney to establish an Interest on Lawyers Trust Accounts (ILOTA). Under the ILOTA Act, the attorney is required to open an interest bearing trust account for clients' funds. In most ILOTA states, the attorney is required to deposit all short-term client funds in that account. Client funds to be held for long periods of time may be deposited in a separate account in each client's name. Some states require all client funds to be deposited in the ILOTA account regardless of the length of time it is to be held. The interest from an ILOTA account is to be paid to the state bar, not to the attorney or to the clients. This interest is used by most state bars to fund legal service programs for the poor or disadvantaged. In California, the state bar pays the monthly fees for the ILOTA account. In most states the attorney pays the service fees. No service fees are ever charged against the client trust funds.

The attorney trust account is a different bank account from any other account of the attorney. It must be separate and identifiable as a trust account from any general office, payroll or personal account of the attorney. The account should be labeled "Client Trust Account" although some attorneys use the designation "Clients Funds" or "Clients Special Account". Whatever name is used must be printed on the checks to give notice to the world that the funds are trust funds. The following problem arose when an attorney did not have any label printed in the check: The attorney was sued

and had a prejudgment writ of attachment issued. The attorney had a trust account but did not have the check labeled. The plaintiff did not know that the account was a trust account because no label was used. The plaintiff thought it was the attorney's personal account and therefore attached it. The attachment was later set aside but only after it caused a great deal of problems for the attorney and the attorney's clients.

The trust account should always be in a local FDIC or FSLIC insured institution. Such accounts are insured up to $100,000 per account. In the last few years, many savings and loans and some banks have failed. The depositors were protected only in those banks which were federally insured. If the attorney wishes to use a non-insured bank, consent should be obtained from the client. Unless the bank is chosen by the client, the attorney will probably be liable for the loss of client funds if a non-insured bank goes under. Use of a bank in a foreign country is extremely dangerous because the account might not be insured, or be insured in non-American dollars or even be subject to government freeze. It might be easier to get money into a country that to get it out. A law school student's wife owned an apartment house near the Acropolis in Athens, Greece. At that time, it was against Greek law to take money out of the country. They had to have the rent paid outside the country in a complicated procedure.

Having a federally insured client trust account is not enough. The attorney can not exceed the amount of federal insurance. Many attorneys found themselves in serious problems as a result of the

failed savings and loans institutions. To the extent their deposits in the trust accounts exceeded the insured limits, the attorneys were responsible to fund the difference. The alternative is simple: have as many client accounts as necessary to have all client funds insured. For example, an attorney with $600,000 in client funds can have one insured account. In this account, the first $100,000 will be insured and the remaining $500,000 will be uninsured. In contrast, he could have six separate client trust accounts of $100,000 each, all insured.

In terms of managing the clients' trust accounts, the same situation applies. All the checks should be kept in the checkbook until the managing attorney signs them and takes them out himself. This is one of the main areas of malpractice liability. Failure to maintain good trust account records is one of the leading causes of discipline for attorneys. Often there is a situation where an attorney commingles the trust account with the office operating account. Trust accounts must be kept totally separate from personal and office managing accounts. Only a few carefully selected individuals can draw on these accounts: the attorney managing the trust account and perhaps the other partners in the law firm who are related to that particular account or client. It is important that you do not have lay persons (legal secretaries) able to write checks. The checks should be prepared by an attorney. If in fact they are prepared by a lay person, like a legal secretary or office manager, they should remain in the book until the attorney signs them and takes them out himself. This

prevents the lay person from taking the check outside the book and forging or altering it in any fashion. These are basic procedures to prevent serious liability before the state bar. The trust statements must be reconciled monthly. Where the attorney does not prepare the reconciliation, the attorney must personally review the reconciliation. In most states the state bar will be notified by the bank of any suspicions regarding improper actions. It is much better for the attorney to catch any potential problem before a suspicion is reported to the state bar.

Many states require that the attorney keep the trust fund records for several years, usually five. In some states there is no statute of limitations for a disciplinary complaint as opposed to a civil or criminal complaint. In these states, records should be keep forever, or at least until retirement. In addition, it is a good idea to keep the records for at least six years for federal tax purposes. Most state bars permit their disciplinary agencies to conduct surprise inspections on the client trust accounts. This means the state bar can invade the office and demand access to the trust records at any time. If the records are not available immediately, that alone is grounds for discipline.

When a firm merges or goes out of business, an attorney may wish to make photo copies of the records for safe storage. An attorney who merely works for a firm that goes out of business might not be able to have access to firms records after it closes.

The best way to get into trouble regarding a trust account is to commingle it with the attorneys personal funds. The only funds

permitted in a trust account are the funds belonging to the clients or funds which are in dispute. Under the law, once an attorney does work for which payment is to be made, the attorney must send a bill to the client. If the client does not object to the bill, the attorney is then permitted to withdraw the amount to pay the bill from the client's trust funds. If the client objects to the bill, the portion in dispute is to remain in the account. Some attorneys keep the money they are owed in the trust account in an effort to keep it free from creditors attachment. The problem with this is that the creditors can then seek an accounting of the assets in the trust account. This results in an invasion of the clients's privacy and therefore is a separate ethical violation by the attorney.

Occasionally, some attorneys place employee payroll taxes in the trust account. This is an improper act because the payroll taxes should be in separate account. To combine the accounts simply makes the accounting more difficult and permits the IRS and state taxing board to seize the entire account for unpaid taxes. The attorney then has the very difficult task of getting the clients money back from the government.

An attorney, with very specific exceptions, must always pay the money in a client's trust account to the client upon request. An attorney is permitted to delay the distribution until all checks and drafts drawn against the account have been paid or cleared. The attorney should never take a chance and make a distribution based upon a deposit of a check or draft until that check or draft has

cleared. If a distribution is made prior to the clearing of a check or draft that is subsequently dishonored, the attorney has made a distribution with other clients' money. In essence, the attorney has given the client money that is not the client's. If the client cannot return the money, then the attorney will be surcharged for the money and remain liable for its repayment.

In discussing trust account responsibility, the attorney must understand the difference between checks and drafts and how they relate to the banking industry. Checks are normally presumed good and are automatically accepted for deposit, unless rejected, within a certain number of banking days after deposit, usually seven. The attorney can call the bank after that time and determine if the check cleared and disburse funds from that check if it cleared. In contrast, a draft is not automatically accepted under any circumstances.

A draft is credited to the trust account only when it has actually been paid or the bank upon which it is drawn guarantees payment to the attorney's bank. This can cause some problems if a draft has been used as a settlement in a case. An insurance company normally will not authorize payment of a settlement draft until the signatures on the settlement documents have been verified. There can be a delay of several days to weeks before the draft is ultimately credited to the attorney's trust account. In the meanwhile, the bank might notify the state bar of the delay in the draft approval, which might engender a state bar audit of the trust fund.

Concern about when checks can be drawn does not exist when a cashier's check is used. A cashier's check is usually as good as cash and is issued against clear funds by the bank. The attorney can issue checks against a cashier's check immediately after its deposit. A cashier's check is similar to a money order in this respect. Payments of cashier's checks can be stopped by the bank upon the request of the person purchasing it only if it is lost or stolen. Otherwise it will be paid.

A potential area of controversy exists where the attorney endorses a check on behalf of a client. It is fairly common for an attorney to be granted a power of attorney to sign a client's name on all releases, checks and drafts. This can cause a severe problem when the client subsequently claims he did not understand that such a right was being granted. The burden will be one the attorney has to prove: that the client was fully aware of the scope and purpose of the power of attorney. This issue usually comes up when the attorney signed a settlement for the client and the client subsequently attempts to have it set aside or the attorney is being sued for malpractice in settling without discussing the settlement with the client.

The trust account includes all money belonging to the client. Included in this are funds advanced by the client for costs, non-earned fees, and settlement payments.

Reimbursements for costs that the attorney had advanced do not have to be paid into the trust account because they are owed to the attorney. Payment for services already performed are not deposited

into the trust account because to do so will commingle the account. If a client's check covers both earned and unearned fees, the check should be deposited into the account with the earned share being immediately paid to the attorney.

The attorney is required to render accounting to the client regarding money in the trust account. This accounting should take place, at the very least, every month that there is a transaction affecting the trust account. Remember, no withdrawal from the client trust account should take place without first sending the client a statement outlining the reason for the withdrawal. If the client does not object, then the withdrawal can go forward.

One area that often causes problems with attorneys is reporting to federal or state taxing agencies on the payment relations with clients. Attorneys, as with other professionals, are required to report to the IRS all large cash deposits by clients that are over $10,000. In addition, many states also require reporting to the local law enforcement. The rationale for the reporting is both to avoid tax evasion and to assure there are no unreported kidnappings or bribes occurring. Many transactions involving foreigners must be reported to the IRS to assure that appropriate taxes have been withheld. Failure to make the required reporting may expose the attorney to personal liability for any unpaid taxes by the client.

Another sore point concerns the criminal attorney. Prosecutors, both federal and state, are using the RICO statutes to seize payments made to criminal attorneys claiming that the money

is the fruit of a criminal activity and thus seizable. Many criminal attorneys have been sanctioned for failure to turn over their financial records believing that such records would be used against their clients.

An unfortunate situation occasionally occurs when money is found to exist in a trust account without adequate explanation. As such, no one knows who owns the money. This usually occurs when the managing attorney or bookkeeper dies without having adequately explained the accounting system. If the amount of money is large enough, there is the presumption that the attorney was hiding funds in the trust account to avoid taxes. There are two ways of handling this situation. The money could be paid into the court or a separate trust account established for it. If no claim is ever made, it would probably be paid to the state bar. Whatever procedure is adopted it should be cleared with the state bar which will, of course, result in state bar supervision of the trust account for a period of time.

Trust accounting usually involves two ledgers. The "general ledger" is the term applied to the total of all the individual client trusts accounts handled under one major bank account. In addition to the general ledger, there must be a client ledger to reflect the individual accounts which make up the general client trust account. If the attorney has five clients for whom the attorney is holding trust funds, the general ledger will contain the total of the five individual trust accounts.

The attorney must also maintain a client ledger to break down

the general account into the five separate accounts for the clients. The monthly statement from the bank is on the general ledger. The balance of the general ledger account must equal the total balance of all of the individual client accounts included in the general ledger account. If there is a dispute between the general account statement and the attorneys total of the individual trust accounts, a reconciliation must take place to find out the reason. Until that is done, the attorney is subject to discipline. Usually, the difference in accounting is the monthly service charge that might be subtracted from the account and that the attorney must contribute out of his own pocket.

Any attorney with employees should get fidelity bond insurance for the office. This would protect the attorney from loss due to embezzlement by any employee from the trust account. The average attorney would consider this a waste of money because no one would ever hire an employee whom they could not trust. This is the prime requisite for embezzlement. The embezzler must be trusted in order to get into the position to embezzle funds.

A classic example as to how embezzlement occurs in a law office took place with a medium sized firm in Bakersfield California. The office manager had worked for the firm for 15 years, gradually assuming the duties and responsibilities of the position. As office manager, the woman was responsible for bookkeeping and writing small checks on the office account. She would also prepare checks for payment to clients from the trust account for signature by the attorney. With complete control and

access to the check books she was able to juggle the accounts for several years. The office manager embezzled over $250,000. She was caught simply by a fluke. The office manager was running an errand when a client came in to get a check. The attorney wrote the check himself and did not tell the office manager because, after all, it was not her business. The office manager did not know that a check had been written and she did not transfer money from another account to cover it. When the check bounced, the attorney checked the records and found out what was happening. The office manager was prosecuted and found guilty of embezzlement. She was sentenced to a couple of years but was out in a few months. While ordered to make restitution, she never did. The attorney did not have a fidelity bond and therefore had to pay the clients out of his own pocket. The worst part, from the attorney's perspective, was the notoriety that cost him several clients.

The IRS is especially interested in how attorneys handled their trust accounts. In fact, the IRS has implemented special auditing procedures for attorneys andf their trust accounts as set forth in its training publication TPDS Market Segment Specialization Program. An interesting note is that the IRS states on the cover that publication that it is not to be cited as authority for setting or sustaining a technical position even though it is a training instrument. In other words, the IRS will use the document when it supports their position but will not recognize it when it goes against their position. While this position may appear sound to the IRS, in the legal world most

federal courts and the Tax Court will find the IRS bound by its interpretation of tax law as propounded in this publication.

The purpose of this publication is to train the IRS agents how to audit and investigate attorneys who maintain large client trust funds. Although not expressly stated, it can be assumed that if information is discovered leading to criminal prosecution of a client from the audit of the attorney's trust account, the IRS will gladly turn it over to the U.S. Attorney.

MARKET SEGMENT SPECIALIZATION PROGRAM ATTORNEYS

This program was designed specifically for training purposes only. Under no circumstances should the contents be used or cited as authority for setting or sustaining a technical position.

DEPARTMENT OF THE TREASURY **Training 3149-102(4-93)**
INTERNAL REVENUE SERVICE **TPDS 83183A**

SELECTION OF RETURNS

BMF FILED RETURNS

One potential source of examinations was returns field with the Fresno Service Center. A request was made of the local Computer Audit Specialists for a sorting of those BMF returns filed which showed an industry code indicating legal services (industry code 8111). High activity code returns were found generally to be those of relatively large, well-established firms. It was found that sole-proprietorships utilized a different industry code (7617) and that a sort on this code was not possible, since the data was not entered when the returns were initially processed by Fresno Service Center. It was deemed more productive both from a yield standpoint as well as from a compliance standpoint to concentrate on smaller firms. Internal controls tend to be much more stringent in a large corporation than in a sole proprietorship or closely held corporation.

For the 1990 tax year, information may be secured from the Individual Return Transaction File (IRTF) utilizing from the code RTVUE on the IDRS. Available data includes certain Schedule C line item entries. This information may be used to select returns which appears to have audit potential prior to the actual receipt of a tax return. Information pertaining to Schedule C filers is currently available on business returns is anticipated to be available in January of 1992.

GENERAL INFORMATION

There are approximately 7,000 practicing attorneys in San Diego, County. Many are engaged as employees, but a large number are self-employed, partners, or shareholders. The businesses with one person having the majority of internal control have the most audit potential. It wad found that attorney-employees of large firms had substantially less opportunity to manipulate the books than the sole-proprietor or shareholder. Inspection of some returns disclosed obvious areas of adjustment not in line with the assigned DIF scores. Therefore, the assigned DIF score should not be taken as a reliable indicator of adjustment potential. Those returns that look very clean on the surface can yield high adjustments if there are funds bypassing the general account. It is very helpful to obtain transcripts for at least three years to ascertain any unusual changes in income and taxes paid before initiating an examination.

Certain areas of attorney specialization are more productive than others. The personal liability area produces adjustments through the advanced client costs adjustment (see later discussion), since, by nature of the specialty, significant client costs may be advanced prior to settlement. Criminal attorneys may have access to cash receipts than most other attorneys. Here CTR's are most

helpful in determining the existence of cash receipts form clients. Real estate attorneys may receive an ownership or a second deed of trust for services rendered. Immigration attorneys are also in a position to receive cash for services.

The formula for auditing these returns is simply good use of regular audit techniques: a thorough pre-contact analysis, a fully prepared initial interview, an in-depth inspection of the taxpayer's income records, and judicious use of third-party contacts to verify or refute the taxpayer's assertions.

BANK ACCOUNTS

Most legal practices use a general operating agreement and one or moire trust accounts. IOn addition, there may be separate accounts used for payroll, savings, or investment activity. Only the trust accounts have features which are unique to attorneys and will be discussed in detail. An explanation will be given of how the account should be handled.

Trusts accounts should be sued for all funds received or held by an attorney for the benefit of clients. The attorney is the trustee of the account and has the power to distribute funds on the client's behalf. In California, the administration of trust accounts is determined by statute under the Business and Professions Code. There are also guidelines set under the Rules of Professional

Conduct of the State Bar Association, Trust funds are required to be placed in interest-bearing accounts, and typically checking accounts are used. These accounts are under the control of the attorney and are labelled "Trust Account" "Attorney/Client Trust Account" "Client's Funds Account" or some similar title. The earnings on trust funds must either be paid to the State Bar Association or to the client. Therefore, the bank accounts show either the identification number of the Bar Association or the client.

Whether the funds are placed in a general trust account or into a separate trust account for the benefit of one client is determined solely by the attorney. There two types of trust accounts are explained below:

1. General Trust Account

This account included trust funds received on behalf of many and may be the only trust account maintained by an attorney. According to the Business and Professions Code, "Funds that are nominal in amount or are on deposit for a short period of time are to be placed in an unsegregated account on which the interest is paid to the State Bar."

Interest on this account is remitted directly by the bank or other financial institution to the State Bar. The Bar distributes the interest income to programs that

provide free legal services to the poor. Automatic debits appear on the bank statements for the interest which is being paid to the Bar. This is generally done monthly but must be done at least quarterly. This type of trust account is commonly used by personal liability attorneys. The attorney could be working on many cases that take several years to resolve. When the case is settled, the award is deposited into this account. Checks are then written to cover expenses, to the attorney to cover his fees and case related costs, and the remainder goes to the client. Funds are distributed promptly, resulting in very little interest being earned.

2. Segregated Trust Account

This is used if the attorney determines that a separate account should be set up for a specific client. This is strictly a practical consideration and is done at the attorney's discretion. The State Bar advises that a separate account should not be set up unless at least fifty dollars *$50.00) will be armed by the account.

This type of account may be used for the proceeds of property sold in a divorce or an estate. The amount could be significant, and the funds may not be distributed mmediately. The interest should then go to the client rather than to the State Bar.

> Finding the specific trust accounts can be difficult. The attorney should be asked in the initial interview about the location of all trust accounts and whether he is the trustee of any accounts. The IRP printouts may reveal trust accounts under the attorney's name. An EINAD may disclose other names and identification numbers under which the attorney has bank accounts.

Interest earned on the pooled trust accounts funds and paid to the State Bar is not taxable to the clients, the attorney or the State Bar. However, interest earned on the segregated funds is taxable to the clients for whose benefit they were established (Revenue Ruling 87-2, 1987-1 C.B/.18). Refer to pages 31 and 32 for the related deferral of income issue.

The attorney should be able to provide an accounting of any amounts in the trust accounts. The Rule of Professional; Conduct state that the attorney must:

> Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the member or law firm and render appropriate accounts to the client regarding them, preserve such records for a period of no less than five years after appropriate distributions of such funds or properties; and comply with any order for an audit of such records issued pursuant to the Rules of Procedure of the State Bar.

The California State Bat does not presently conduct random audits

of its member's trust accounts. The accounts are examined only if a complaint is received. The Bar is currently considering issuing specific requirements for rerecord keeping and initiating random audits of trust accounts. These proposals, if approved, will be opened to public comment and voted upon by the Board of Governors of the California State Bar Association.

CLIENT TRUST ACCOUNTS

Most attorney will have one or more trust accounts under their control (see section on "Bank Account") These should be reviewed in conjunction with the regular business accounts and personal accounts. Adjustments to taxable income most frequently arise when an attorney diverts funds from a trust account to a personal account or defers income by allowing fees to remain in the trust account.

1. **Unreported Income**

   When an attorney received a settlement on a case, the entire amount is deposited into the trust account. The settlement check is generally made out in the names of the attorney and the client. It is then the attorney's responsibility to distribute the proceeds. Frequently, the attorney is required to write a check to himself to cover his fees and the case costs. This occurs when a case is taken on a contingency basis.

   It is important to ascertain whether the fees have been included in income. Some attorneys either cash the checks

or deposit them directly into personal or investment accounts. If they determine taxable income by totalling deposits made into the general operating accounts, these fees are omitted from income.

Inspecting the endorsements on checks written to the attorney from trust accounts is one important auditing procedure. These checks all represent income or expense reimbursements. Special attention should be given to all checks that are deposited into accounts other than the general operating account or are cashed. In addition, funds may be withdrawn directly through the use of an ATM card. This was observed in one audit. The funds never entered taxable income even though they were used for personal expenditures.

2. **Deferral of Income**

After a case has been settled, the attorney may attempt to defer earned income by allowing fees to remain in the trust account until the next year. Once the settlement is received, the attorney's fee is determinable and available and should be included in income. An effective audit step is to analyze funds remaining in the trust account at years end by source. This is important if there is a large balance. Determine whether any of the funds in the account represent fees which have been earned on settled cases.

NON-CASH SOURCES

There are a number of sources of non-cash income that an attorney may have, depending on his specialty or the particular work he does for his client. An attorney who does real estate work may accept a second or third trust deed on a client's property in exchange for the legal fees. A client may also quitclaim a partial or entire interest in a property in exchange for legal fees. An attorney can also be paid for his services through a sale or purchase escrow of the client. Examination of the client ledger cards will many times lead to these situations.

For example, one attorney borrowed a large sum of money from one of his corporate clients. The loan was reduced and financially paid off by the performance of legal fees. The attorney showed the loan on his books but not the subsequent income. When no loan repayments were noted, the lender was contacted. They confirmed the loan and scheduled the credits against the outstanding balance earned by services rendered.

An attorney who renders services to set up partnerships or corporations may accept an interest in the entity in exchange for legal services. Again, an examination of client cards may show this or you may request verification of basis for partnerships shown on the attorney's return.

OTHER GROSS INCOME AUDIT AREAS

Unreported income was discovered in the audit of a bankruptcy attorney. All attorney fees in Chapter 13 cases are disbursed by a

U.S. Bankruptcy Trustee under court orders. It is not necessary for the attorney to bill clients in these cases since all fees and their disbursements are determined by the Courts. It was discovered that the Trustee does not issue Forms 1099.

SUMMARY

When an attorney attempts to hinder the audit by claiming attorney-client privilege, we can give him a list of the court cases and state the following facts:

1. Generally the privilege must be claimed by the client and the right must not have been previously waived. Any disclosure of privileged communication to a third party or consent of disclosure result in waiver of the right. If the client has no knowledge of the request or asks that the privilege be invoked, the attorney may claim the privilege.
2. The privilege protects the disclosure of confidential communications between the client and attorney.
3. As a general rule, the identity of an attorney's client and the nature of his fee arrangement is not confidential communications.
4. A summons prepared by the IRS in good faith will be enforced.
5. The burden is on the claimant.

CHAPTER 8

USING PARALEGALS

I. INTRODUCTION

To many people the sign of a successful attorney is the size of the attorneys staff. This includes the expected secretary, occasional receptionist, optional file clerk and appreciated paralegal. The paralegal is a relatively new concept in the legal profession. The best way to describe the paralegal is a cross between a legal secretary and an attorney. The traditional legal secretary is specially trained to provide the unique secretarial services needed by an attorney. The most important attribute of a legal secretary is the ability to understand and complete the standard legal forms needed in a practice and to understand the procedures and requirements of legal drafting so that documents of the attorney can be properly typed.

The role of a paralegal is an extension of the legal secretary. The paralegal should possess all of the knowledge of the legal secretary and is taken to the next level. To be most effective, a paralegal should be performing work that could otherwise only be done by the attorney. By their very nature, paralegals improve the cost efficiency of an office and improve the client's access to professional competent legal services.

An attorney's understanding of when and how to use a paralegal effectively in the attorney's practice is often of critical

importance in the operation of a well run and successful practice.

II. ADVANTAGES OF USING A PARALEGAL

By their very nature and training, paralegals can be used in any area of the law and contribute to the successful operation of a legal practice. Statistics show that nearly two-thirds of paralegals work in the field of litigation. Use of paralegals in litigation, especially civil litigation, is hardly surprising since most attorneys also practice in this area.

The main advantage behind the use of a paralegal is that the legal housekeeping chores of a case can be turned over to a legally trained person. This relieves the attorney of mundane and time consuming tasks so that the attorney can turn his attention to the larger tasks facing the practice.

A properly used paralegal will alleviate the pressure on the attorney through the proper delegation of authority. For example, in the litigation area, a paralegal is usually used in discovery matters. The paralegal often assembles the discovery material which the attorney decides should be produced, makes the appropriate copies and performs the service. This is a very time consuming activity which does not justify the attorney's normal hourly rate yet is far too important to be left to the average legal secretary.

Probably the most common use of a paralegal is to prepare tentative motions and responses for the attorney. Much litigation drafting is boiler plate in that standard points and authorities are used. Answers to complaints can be a specific denial or a

general denial. The paralegal can prepare for the attorney's review a rough draft of the proposed legal pleading. The attorney will almost always make changes to the document, but it will take less time to change the paralegal document into one acceptable to the attorney than it would take if the attorney drafted it from scratch. This gives the attorney more time to work on other cases.

Probably the least appreciated aspect of a paralegal is that he provides the attorney with an alternative body. In litigation this is extremely important, especially when in court. It has become commonplace for an attorney to have a paralegal alongside at trial. The paralegal will take notes on what the attorney is saying and what the other attorney has said. The truly astute paralegal will prepare suggested questions for the attorney on the matters which have taken place. It is human nature for the attorney in court to be concentrating on the case as he has prepared it. The paralegal, because of the detachment, will often give a fresh perspective on the case and see things which the attorney has missed. In addition, if something important develops and the attorney cannot get a continuance, the attorney can immediately send the paralegal out to attend to it. An example of this once occurred in a case involving the quieting of title of an oil and gas lease. The opposing attorney sought a temporary restraining order claiming that the issue of title had been settled as a collateral matter in action in another state. The attorney felt that was untrue but even a temporary delay would cost the client dearly. The attorney sent the paralegal to get a copy of the other

state's decision while he remained to argue the motion. The paralegal went to an attorney's office across the street and called the attorney who handled the action in the other state. The court's judgment in the other state was faxed to the paralegal who took it to the attorney. Upon presentation to the court, the attorney was able to defeat the restraining order. Without the paralegal, the attorney's client would have had the restraining order on the property for 10 days until the hearing on the preliminary injunction.

Another area for use of a paralegal legal is legal research and the maintenance of the law library. A law library may be the most costly yearly expense of a law firm. Yet, unless it is kept up to date, it quickly loses its value to the attorney and becomes a liability. Many treatises and legal form books have weekly or monthly supplements. These supplements must be put in the books in an orderly fashion. If a supplement is missed or put in the book out of order, the book becomes unreliable. It is dangerous to use a treatise that does not have all of the updates. One of the most common complaints of judges is that the attorney's research has been incomplete and their authorities have been overruled by subsequent case law.

Many legal secretaries fail to understand the importance of maintaining a law library. It is not uncommon for the secretaries to leave a stack of supplements in a law library for someone else to install. The reason for this is that it takes a great deal of time to place the supplements in the books and many secretaries

simply do not know how to do it. It is not uncommon for an attorney to use a treatise in a library and to see both the new supplement and the page to replace it side by side. It takes a person with a grasp of the importance of legal research and a knowledge of how it should be done to do it. One of the prime purposes of a paralegal is to do legal research on topics directed by the attorney. As such, the paralegal will want the library maintained to the maximum to make the paralegal's legal research the best possible. This is added impetus for the paralegal to maintain the library.

III. DOCKET MANAGEMENT

An important task of a paralegal is given to manage the attorney's docket and calendar. The most common cause of malpractice actions against attorneys is missing filing deadlines and statutes of limitations. The maintenance of a good docket and calendar system is mandatory for any litigation law office. Despite its importance, docket and calendar management is both repetitive and boring. For those reasons it is necessary to have a competent, well-trained individual who understands and appreciates the importance of good docket management.

The paralegal, in addition to the attorney, should monitor the calendaring of expiration dates for statutes of limitations, discovery deadlines, tax return dates (for all probate estates and clients for which the lawyer prepares returns) and all hearing dates. The paralegal, as a result of his legal education, can tell when and what documents should be prepared in response to particular scheduled motions. The paralegal is a safety check to

remind the attorney that responses are due to be filed in a timely fashion. Avoiding one major malpractice case is worth a paralegal's salary in the savings of lost clients, bad publicity and a court judgment.

IV. ATTORNEY SUPERVISION

In response to the explosion of the use of paralegals in the legal profession the American Bar Association has created a Standing Committee on Legal Assistants to manage and regulate their use in the legal profession. The ABA has adopted the following definition of a legal assistant, which includes paralegals:

> "Persons who, although not members of the legal profession, are qualified through education, training, or work experience, are employed or retained by a lawyer, law office, governmental agency, or other entity in a capacity or function which involves the performance, under the direction and supervision of an attorney, of specifically-delegated substantive legal work, which work, for the most part, requires a sufficient knowledge of legal concepts, such that, absent the legal assistant, the attorney would perform the task."

Just as the ABA certifies laws schools, its standing committee certifies paralegal and legal assistant programs to assure a minimum legal standard of competency.

Model Rule 5.3 specifically requires that attorneys oversee their legal assistants. It reads as follows:

> "Rule 5.3 Responsibilities Regarding Nonlawyer Assistants.
>
> With respect to a nonlawyer employed or retained by or associated with a lawyer.
>
> (a) A partner in a law firm shall make reasonable measures giving reasonable assurance that the person's conduct is compatible with professional obligations of the lawyer.
>
> (b) A lawyer having direct supervisory authority over

> the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.
>
> (c) A lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
>
> (1) the lawyer orders, or, with the knowledge of the specific conduct, ratifies the conduct involved, or
>
> (2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Model Rule 5.5(b) states that an attorney is not permitted to "assist a person who is not a member of the bar in the performance of an activity that constitutes the unauthorized practice of law." However, the comment promulgated under the rule makes it clear that it does not apply to paralegals working under the direction of an attorney. Specifically it states that the rule," does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them so long as the lawyer supervises the delegated work and retains responsibility for the work."

V. LIMITATIONS OF USE OF PARALEGALS

While paralegals can do a lot for an attorney, they cannot do everything. The Model Code of Professional Responsibility was adopted by the American Bar Association in 1969 and was replaced with the Model Rule of Professional Responsibility in 1983. All states have adopted one or the other act, with modifications, as their rules for governing the legal practice of their attorneys.

Paralegals are not members of the bar. They are not subject to the same legal sanctions for unethical conduct, disbarment or suspension which can be imposed against attorneys. Nonetheless, the attorney hiring or using the paralegal is responsible for the unethical conduct of the paralegal. The preliminary statement of the Model Code imposes that duty as follows:

> "Obviously the Canons, Ethical Considerations, and Disciplinary Rules cannot apply to nonlawyers; however, they do define the type of ethical conduct that the public has a right to expect not only of lawyers but also of their nonprofessional employees and associates in all matters pertaining to professional employment. A lawyer should ultimately be responsible for the conduct of his employees and associates in the course of the professional representation of the client."

The Model Rules, adopted in 1983, went even further in defining the attorney obligation to oversee and manage the paralegals used in the practice. The Comment to Model Rule 5.3 reads in pertinent part:

> "A lawyer should give assistants appropriate instruction and supervision concerning the ethical aspects of their employment. . . and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional responsibility."

As stated above, all states have adopted either the Model Code or the Model Rules for governing attorneys in their state. They are required to supervise and are responsible for the actions of their paralegals.

There are certain matters which paralegals are not permitted to undertake even if their attorney attempts to delegate such authority to act in those areas. The Model Code, Canon 3

specifically bars paralegals from acting "in matters involving professional judgment. Where this professional judgment is not involved, nonlawyers "...may engage in occupations that require a special knowledge of law in certain areas." Ethical Consideration 3.5 goes further to state: "A lawyer often delegates tasks to...lay persons. Such delegation is proper if the lawyer maintains a direct relationship with his client, supervises the delegated work, and has complete professional responsibility for the work product."

Probably the greatest concern that the legal profession has with the use of paralegals is the maintenance of clients' confidences. Clients know that an attorney cannot divulge their communications or information without being sanctioned, possibly to the extent of losing their license. With the use of paralegals, a concern exists because paralegals have no license to lose. In an attempt to address such client concerns, Canon 4 of the Model Code and its Ethical Considerations were adopted. Ethical Consideration 4-2 states, "It is a matter of common knowledge that the normal operation of a law office exposes confidential professional information to nonlawyer employees... This obligates a lawyer to exercise care in selecting and training his employees so that the sanctity of all confidences and secrets of his clients may be preserved". Furthermore, Ethical Consideration 4-4 states, "A lawyer should endeavor to act in a manner which preserves the evidentiary privilege. . .He should avoid professional discussions in the presence of persons to whom the privilege does not extend."

The professional limitations on paralegals not exercising

professional judgment still permit them to do a great deal for the attorney. Paralegals are permitted to interview witnesses, communicate with clients (including conducting interviews), conduct investigations, speak with court personnel, perform legal research, draft preliminary pleadings. Such conduct does not violate any professional Canon, Rule, or Ethical Consideration as long as the paralegal acts under the direct supervision of the attorney. The Attorney cannot turn over case management or client communication to the paralegal.

With the above exceptions, a paralegal is not permitted to engage in any activity which involves professional judgment on the part of an attorney. This limitation is defined rather broadly to mean that a paralegal may not render legal advice or counsel to a client. The paralegal can take and relay a client's questions to the attorney but may not render his own opinion or answers to those questions. An interesting exception to this limitation has developed regarding court appearances by paralegals. Some states, but not all or even a majority, permit paralegals to appear in court. Such states usually limit the court appearances to uncontested cases or administrative law cases. Usually the written consent of the client must be obtained prior to the paralegal's appearance. Even if written consent is not required, it should be obtained from a malpractice standpoint.

VI. PARALEGAL ASSOCIATIONS

There are numerous state and regional paralegal associations and two major national associations: the National Federation of

Paralegal Associations (NFPA) and the National Association of Legal Assistants, Inc, (NALA).

The NFPA is an association composed of both state and local paralegal associations. The NFPA has adopted an "Affirmation of Professional Responsibility" which declares that its paralegals should strive to maintain the highest standards of professional competence and ethical conduct. Its members agree to preserve client communications and confidences and to "demonstrate initiative in performing and expanding the paralegal role in the delivery of legal services within the parameters of the unauthorized practice of law statutes."

The NALA has adopted both a Code of Ethics and Model Standards and Guidelines for Utilization of Legal Assistants. The NALA Code of Ethics states that its members shall be governed by the ABA's Code of Professional Responsibility. The Code also prohibits its members from engaging in the unauthorized practice of law by such acts as accepting cases, setting fees or giving legal advice. The guidelines of the NALA set minimum qualifications for its members and recommend how its members should be used in a law office. The NALA has developed a two day examination for certification as a Certified Legal Assistant.

An attorney who seeks to hire a paralegal should, as with any other employee, consider the paralegal's training and education and any certification and membership in reputable paralegal organizations before making an offer of employment.

CHAPTER 9

SPECIALIZATION OF THE PRACTICE

I. INTRODUCTION

This chapter deals with the attorney choosing what areas of law he will emphasize in his practice. The term specialization is different in use from the legal specialization certification discussing in Chapter 10. Devotion herein is directed towards the practical considerations attendant on the attorney deciding specific areas of law to which to devote his practice. This is a fundamental decision often overlooked by the attorney.

Following World War II the American Bar Association recognized that attorneys were tending to specialize to an increasing extent. In acknowledgement the American Bar Association created in 1953 its Committee on Specialization and Specialized Legal Education. Since the first steps in recognizing legal specialists, ABA specialist programs have been instituted in a number of states including Arizona, California, Colorado, Florida, North Dakota, New Mexico and Texas.

Most law schools do not prepare the attorney for opening an office and getting involved in the regular practice of the legal profession. There are law schools which offer courses on law office management and a few that even require them. For the most part, the average law school graduate has no idea in what area of law he

intends to practice at the beginning of his career. The result of this lack of knowledge can be frustrating to the attorney and seriously affect the direction of his legal practice. Many attorneys feel trapped in legal practices and continue in the fields they initially chose because they have developed expertise in a field even though they derive little or no personal satisfaction from the practice of that type of law.

To develop a flexible legal practice requires a conscious desire on the part of the attorney to do so. The knowledgeable law student will begin laying the basics for such a practice in law school by taking a wide variety of law courses along with clerking to get a flavor of a broad area of law. Unfortunately, that usually does not happen. Most law students take the required courses in law school and the elective courses are chosen in areas that the student perceives as lucrative. He gives little consideration to whether or not he wants to practice in that specific discipline for the rest of his legal career. Many law students have never clerked in law school or did so in an office that practices only one or two specialties. The average law student fails to develop the necessary depth of basic understanding in the practical aspects of the law that allows him to choose a particular field of practice upon admission to the bar.

Traditionally new attorneys entered public service for a few years after graduating law school. They often joined the district attorney's office, county counsel's office, federal government or

other governmental service. The advantage was that the new attorneys were able to develop their skills over a period of time while getting paid and learning what areas they intended to practice after leaving public employment. Most of the new attorneys not entering government service joined private law firms for several years to develop their legal skills. Unfortunately government employment for attorneys has been curtailed. The last 20 years have spawned an unprecedented number of new attorneys, resulting in serious competition for all entry level jobs in both private and government sector. For the first time in the history of American law, more new attorneys are entering sole practice than are entering government service or joining an existing law firm. The clear result is a large number of newly trained attorneys without practical background.

Over half of all new businesses fail within the first five years. Such is not necessarily true for the professions, but that does not mean they are successes. An attorney who operates his legal practice in a sloppy manner or who chooses to practice in an area of little local demand will not be a marked success. A survey by the California State Bar shows that nearly 60% of its attorneys earn less than $40,000 per year with a large number earning in the $20,000 to $30,000 range. One of the prime factors determining the earnings of the attorneys is the type of law they practice and whether or not they specialize.

II. CHOOSING THE INITIAL FIELDS

A. LOCATION

For the attorney just opening an office, there often is little choice in the type of law which must be practiced. Until the attorney develops a name and a reputation in a community, he must usually take whatever case comes into the office. The attorney must always bear in mind that he is required to handle all cases at the standard of an expert in the field.

Location of the office often is as important as the choice of the type of practice. An attorney who is a specialist in taxation may find little in that field if the practice is located in a small rural community. The demand for expertise may not be there. On the other hand, an attorney experienced in oil and gas law might find a real demand for such expertise in a community which is centered around the oil and gas industry. Likewise, an attorney versed in the agricultural law might not find a niche in a major city. Success of an office often depends greatly on the location of the office in connection with the type of law practiced.

Before an attorney opens up an office he should consider how the legal expertise that he brings to the area will be received. It is not uncommon for competent attorneys to move into a area and not be a success. If the potential clients do not need the type of law the attorney practices, the attorney will not be used.

From a marketing standpoint, a new attorney should review the local phone book to ascertain the number of attorneys present in the area and the types of law which they practice. If it turns out

that the attorney can successfully fill a needed niche, he should consider it. One of the worst things that an attorney who is specializing can do is pick an area where there is little demand on a local level. Occasionally, an attorney can achieve such fame and notoriety that clients outside of the area will come to utilize their services. Usually such attorneys are high profile successful criminal attorneys or highly successful civil litigators. The attorney just opening a practice without such fame and fortune cannot reasonably expect to develop such a successful practice immediately.

B. RESPONSE TO OTHER FACTORS

1. PAYING BILLS

Being the best attorney in town does not do the attorney any good if the attorney practices in a field that no one needs. The attorney must select an area of law that will generate business in an acceptable amount. There are a few attorneys born to wealthy families who became attorneys for other reasons (such as entering politics), but most attorneys became attorneys to earn a good living.

Most attorneys want to practice in an area that will earn them a good living. The reason for this is not centered in greed but practical reality. Many attorneys have graduated from law school with a huge student loan debt. In fact, the average student loan debt is between $30,000 and $65,000. In addition, if married and each have student loans, the debts may well exceed $125,000. The

problem arises in that debts for student loans cannot, except for rare instances, be discharged in bankruptcy. They must be paid or the attorney will have his credit rating impugned and still have the liability for the debt.

The importance of having to earn money immediately in order to pay debts is the prime motivating factor for attorneys to develop a successful practice quickly. As a result, attorneys often choose areas of practice initially with the idea of paying their debts and not with the idea of developing career satisfaction. The attorneys thereafter can find themselves in what they may consider a dead-end practice.

One of the most stable areas of law is family law. In California, for example, over 60% of all civil filings are related to family law. The practice of family law includes divorce, property settlement and child custody. In family law cases, the attorney cannot take a contingency fee; so he will never have the potential of a huge fee award. A good family law attorney will earn a good living. The draw back with family law is the emotional trauma attendant with its practice. In every contested case, emotion usually will play a larger role than reason. Family law attorneys often have a higher rate of ulcers and attorney burnout than other types of attorneys.

Another stable field of law is the area concerning drunk driving. In recent years many states have adopted legal limits of alcohol. A person operating a vehicle while over the legal limit of

alcohol will be found guilty of a separate offense. Many states have adopted laws calling for the immediate suspension of a driver's license when a person fails an alcohol intoxication test. The result of these laws is that more drunk driving and license suspension cases are being taken to trial. While the laws make it easier for a district attorney to get a conviction, they open the possibility of plea negotiations on sentences. In many cases the value of the attorney to the client is not in beating the ticket but in the negotiation of the sentence.

Bankruptcy is an area to which new attorneys often gravitate. Being a statutorily created field, it is an area that new attorneys can enter with minimum exposure for malpractice. Nearly everything done in a bankruptcy case is under the direction of the bankruptcy judge and the trustee. An attorney receiving permission from the trustee and judge for all major acts can limit quite significantly any exposure for malpractice. In addition, Chapter 7 and Chapter 13 bankruptcies are relatively easy to do and yield a good source of income.

One type of practice for a new attorney (usually a loss leader) is will drafting. Many attorneys will charge a minimal amount of $50 to draft a Last Will and Testament for a client. The cost for doing the will usually has no basis for the time the attorney must spend interviewing the client and preparing the will. To charge more for the will usually costs the attorney a client because the client will discover that another attorney would have

done the will cheaper. In addition, many states have adopted statutory will forms sold in stationary stores, in which the testator simply fills in the blanks and executes it in front of witnesses. Such statutory wills are valid everywhere if properly executed in the state where signed.

Attorneys have traditionally done cheap wills in the hope that they will handle the probate of the estate. This has become a potential source of malpractice liability for the attorney. In some states attorneys have been found liable for malpractice for not suggesting a probate avoidance vehicle, such a revocable trust, rather than a will. An attorney will be governed by the standard of an attorney practicing in that particular field. Most estate planners will discuss probate avoidance with a client before executing a will. If a new attorney does not do so, he might be subject to the costs incurred in probating the estate if the heirs of the estate can prove the testator would have executed an estate plan to avoid probate if the attorney had suggested it. The CLE program's course on Estate Planning II discusses probate avoidance vehicles.

The point for an attorney to bear in mind is that while paying bills is important, care must nonetheless be taken to avoid or lessen exposure for malpractice liability. The attorney should never feel trapped in a particular area of law since now it is possible to easily enter the two fields of law just discussed.

2. FORTUNE AND LUCK

Luck or fortune can play a major role in an attorney's selection of a field of law. Ever so often an attorney will come across a case related to the type of law that the attorney has previously practiced or the attorney feels is interesting. The attorney must decide whether to take the case or not. Taking the case may change the attorney's career by changing the direction of his practice.

There are many attorneys who have become specialists in certain areas of the law simply because they initially took one case which spawned others of a similar nature. A successful attorney, for example, is a civil attorney who initially took one of the first cases on toxic shock syndrome involving women. The result has been that the attorney has been handling those cases only and has become, solely by accident, one of the top attorneys in the United States on the topic. Had the first client never entered the attorney's office, he would have been a successful attorney in general civil law but never would have attained the scope of financial success he has since reached.

III. DEVELOPING EXPERTISE IN NEW FIELDS

Most attorneys enter what can best be described as de facto specialization. This means that the attorneys enter a private practice based upon the areas of law they already know. Most attorneys remain transfixed in these areas initially chosen for their entire career. This is the natural human trait of intransigence. Most people, including attorneys, will stay in the

same position or do the same work, regardless of how unrewarding or unsatisfying, as long as they can earn enough money to pay their bills. Few people are willing to change careers or risk loss of a paycheck by pursuing something new. This makes choosing the right legal field at the beginning of the practice or the ability to easily acquire new proficiency and expertise in other legal fields desirable.

The Canons of Professional Responsibility require that an attorney maintain his competency in the legal fields in which the attorney practices. An attorney practicing his first bankruptcy case is held to the same standard of legal competency as an attorney who has specialized for years in that type of case. This has forced attorneys recently graduated from law school to practice only in fields in which they actually took law school courses. In response to malpractice claims against attorneys who have not had sufficient training in areas of law in which they practice, many states (39 as of January 1995) have imposed continuing legal education (CLE) requirements. It is belived that within 10 years, all states will require CLE programs for their attorneys.

For most states, the number of CLE hours an attorney is required to complete each year varies from 10 to 15 hours per year. The purpose behind mandatory CLE is to compel attorneys to maintain a certain level of competency. The side effect of a CLE program is the development of some good programs that provide a means for attorneys who do not practice in a particular area to acquire the

competent legal skills to do so. The best CLE course is written and prepared by a competent attorney practicing in the specialty. The course covers all of the issues and procedures to be faced by an attorney in ordinary cases in that field. A CLE course does not take the place of a treatise, but a good course does serve as an excellent introduction into a legal field and the basic procedures to be followed. The best types of CLE courses present the specialty concisely and clearly and allow an attorney to enter into that field immediately.

This CLE program is such a program. The attorney is offered a variety of courses that will meet a state bar's continuing legal education requirements. This CLE program along with its individual courses are written from the standpoint of a practicing attorney helping other attorneys to practice in their field, and its books are designed with forms to help the reader develop a form library for his practice. This CLE program is designed to assist an attorney in the development of an attorney's practice by fostering his ability through the use of practical forms and recommended procedures involved in several different specialties.

This CLE program proves to be the most economical and efficient means for an attorney to develop skills in a legal area. An attorney who never handled a bankruptcy case could take a CLE course and become adept in the field. CLE courses provide attorneys with the means, for the first time, to acquire post law school education and expertise sufficient to shift the scope of

their practice into other fields.

IV. BECOMING A SPECIALIST UNDER STATE LAW

A general practitioner of law can practice in any area of the law just as a general practitioner in the medical field may handle any area of medicine. As in medicine, an attorney can specialize in one or more areas of law. An attorney can only call himself a specialist in a particular area of law if it is permitted under the code of professional responsibility adopted in a state.

Several states, such as Arizona, California, Colorado, Florida, North Dakota, New Mexico and Texas, have adopted programs where their attorneys can obtain specialist certification in designated fields. Once the attorney has obtained a specialist designation, the attorney can then advertise as a specialist in the field. Not all states have adopted a specialization program. Nevada does not have a specialist program as of January 1995 and requires all of its attorneys in their advertisements to state that Nevada does not certify attorneys as specialists.

California was the first state to adopt a specialization program (February 1973) and officially finalized its rules and regulations in 1974. California's initial specialization program covered the fields of criminal law, taxation and worker's compensation. In 1976, the program was expanded to provide specialist certification for the areas of bankruptcy, probate, labor and family law as well. The California program awards a specialist certification based on a minimum amount of continuing

legal education, a minimum amount of practice in the specialty field and the successful completion of a written examination. In California a certified specialist must be recertified every five years. Once an attorney is certified as a specialist, he can advertise as a specialist in the field and even state that he is so certified by the State Bar of California.

The ABA's Standing Committee on Specialization based its 1987 Model Standards for Specialty Areas on the California system. Arizona's certification plan is based upon the California model but limits its certification to criminal law, tax law and workman's compensation. Colorado's program is also based on the California Model but its fields in the pilot plan are in tax, securities and labor laws. The Texas system also follows California's except its fields of specialization were initially in criminal law, family law and labor law.

Several states have adopted a specialist program different from that of California or the ABA. In New Mexico an attorney desiring to become a specialist must have devoted a significant amount of his practice within the pervious five years to the specialty is sought. After receiving the designation, the attorney must maintain a minimum of the same amount of practice in that field. The New Mexico plan is a self-designation plan. Under the plan, the attorney is given the option of selecting one to three areas of law for which the attorney will be designated an expert as covered in New Mexico Sup.Ct. Rule 32.

Florida has adopted a specialization program that is between that of California and New Mexico. In Florida the attorney is required to requalify for specialist certification every three years and must complete 30 hours of continuing legal education in every area for which specialization is sought. The attorney can choose up to 3 areas of specialization from the following list: admiralty, appellate practice, antitrust, bankruptcy, corporation and business law, criminal law, estate planning and administration, family law, international law, environmental law, consumer law, labor law, patent trademark and copyright, real property law, taxation, trial practice, workman's compensation, administration and governmental law, registered general practice, and personal injury and wrongful death.

The purpose behind specialization is not to make it easier for an attorney to attract clients but rather to improve the competence of the legal profession. Specialization is a means by which an attorney can reduce the potential for legal malpractice. A specialist in a field will be more familiar with the field and more competent than a general practitioner. The specialist will be less likely to make procedural or substantive errors.

V. CONCLUSION

Specialization has a dramatic impact on the attorney-client relationship. The more an attorney specializes in a particular field, the more likely it is that the attorney will only have a client on a one-time basis. Even if the attorney does not receive

specialist certification, if the attorney tends to emphasize certain areas of law, the attorney may not be receptive or the client may not want the attorney to handle a matter for which the attorney does not specialize or emphasize.

In states where the specialist attorney is required to devote a significant amount of time to the specialist areas, the attorney may not be able to take clients with problems related to other fields. The result of this is a specialist may be forced to send former clients to other attorneys. He may not be able to take the client's case under the state bar rules because he does not meet the minimum state bar requirements to maintain specialist certification in a new area.

In conclusion, it is important for an attorney to choose a legal field of practice initially. Moreover, the attorney will find that subsequent movement into another field is now relatively easy. At one time it was both difficult and dangerous for an attorney to attempt to practice in a field in which the attorney never received law school training. This is no longer the case. Today the law develops so quickly that there are fields of law (such as computer law or literary law) that did not exist 10 years ago and may not even be taught. Attorneys should never feel trapped in a particular field of law. Today with the availability of CLE programs, it is possible to enter new fields of law relatively easily.

CHAPTER 10

CONTINUING LEGAL EDUCATION AND CERTIFICATION

CONSTRUING LEGAL EDUCATION

Traditionally once a person became licensed as an attorney, he was under no obligation to get continuing legal education as a requirement to keep that license. It has long been understood or implied that an attorney's own practice will maintain his competency to handle the area in which he normally practices. In the last 20 years most states (39 states as of January 1995) have adopted some type of continuing legal education program. Both the ABA Code of Professional Responsibility Ethical Consideration 6-2 and the Model Rule of Professional Responsibility 1.1 require attorneys to take reasonable steps to maintain their competency in their areas of practice. Where there is an established peer review program (CLE), the attorney should consider using it.

For most states the number of CLE hours the attorney is required to complete each year varies between 10 to 15. In some states (such as California and Colorado), the attorney is given the option to complete a minimum number of hours each three years. In California it is 36 hours, and in Colorado it is 45 hours that must be completed within a three-year period. All CLE states permit the attorney to wait until the end of the compliance period and then quickly complete the courses. Most law schools do not require a

student to take a course in bankruptcy, worker's compensation, admiralty or advanced estate planning. After being admitted to a bar, an attorney wishing to practice in such areas would not be competent. Returning to law school to gain that competency is not feasible because that would interfere with the attorney's practice. The best alternative is to take a good CLE course written and prepared by a competent practicing attorney. The course covers all of the basic problems and procedures to be faced by an attorney. In the majority of cases the attorney can enter practice in the new field quickly and competently.

The potential value of a CLE course is that it offers the attorney the opportunity to learn immediately enough to enter practice competently in a field to which the attorney had not previously been exposed. There are many areas in law school that are optional to the law student. There are courses which an attorney will not have taken in law school. An attorney can enter practice in such a new specialty through a competent CLE program. Most states have adopted a CLE requirement to help attorneys enter a new field in a competent manner.

This CLE program offers the attorney a variety of courses that will meet and exceed the requirements for a state bar's continuing legal education program. This CLE program contains a broad spectrum of courses that are written by practicing attorneys for the areas in which they have practiced. The CLE program is heavily laden with the actual forms that the attorneys themselves use in

their practice. The CLE program's compendia of individual courses is written from the standpoint of a practicing attorney helping other attorneys practice, and its books include acceptable and legal forms to help an attorney develop a basic form library for his practice in an inexpensive manner.

The design of this CLE program is different from many other CLE courses, which are basically lecture and case oriented. The program assists in the development of an attorney's practice by fostering the attorney's ability using practical forms and recommended procedure. The attorney is able to enter the field immediately and start earning money.

A practical example of the benefit of the use of a CLE program is in the field of estate planning. An attorney, who had not engaged in estate planning prior to taking the CLE course, should after taking a CLE course, have both the forms and the information necessary to become a confident practitioner in that area.

The main criticism lodged against some CLE courses is that they may not be needed, that an attorney practicing in a particular area on a day-to-day basis is going to keep up-to-date on that area of law anyway. If an attorney is going to go into another area, he is not going to run and buy a CLE course before taking a case in that area. In reality the attorney is going to go the local law library and read the particular treatises. Finally, even though an attorney takes a CLE course, there is no guarantee that he learned enough to be a competent attorney in all aspects of

that field's law. Just because an attorney has taken that course does not mean that he will not be sued for malpractice simply because the attorney has taken a CLE course.

These criticisms may all be true. Two responses, however, qualify the use of CLE courses:

1. The reader has the opportunity to be better trained if he studies and applies the CLE course. Better trained means a better product.
2. The state bars require CLE.

An area of criticism for mandatory CLE programs is in the special courses that attorneys are required to take in legal ethics. Virtually all states now test applicants on professional ethics in some fashion before licensing them to practice law. All attorneys have already taken an examination on professional responsibility in order to become an attorney. All attorneys and the average lay person know what basic standards are for professional responsibility and ethics: the moral difference between right or wrong. A commonly voiced attorney complaint against mandatory CLE ethics courses is that attorneys would rather spend their mandated time on CLE courses that are going to help in their practice directly and in earning money. Very few attorneys are ever going to have a problem with legal ethics.

Moreover, any time an attorney should have a question on legal ethics or what should be done, the attorney should call the state bar and ask for an opinion. By receiving state bar expertise the

attorney will not run afoul of the canons of professional responsibility. An honest mistake might lead to a private reprimand, but no attorney has ever been suspended or disbarred for an innocent or good faith violation of the canons of professional responsibility.

Two particular CLE courses have engendered animosity and antagonism. These are the requirements of a few states (such as California) that the attorney must take a minimum number of hours in (1) substance abuse and (2) eliminating bias in the profession. These requirements are of little benefit to most attorneys. A sole practitioner would have no other attorneys working with him, so there is generally no bias for him to eliminate of the operation of the law firm. Most attorneys do not use alcohol or drugs; so to take a course on eliminating bias or substance abuse would be of little benefit to an attorney. That is not to say that courses would not raise the consciousness of attorneys, but little would be accomplished in terms of the attorney being able to practice law more efficiently and ably. Many states, such as California, require their attorneys to take these courses. It does help to understand the profession and to help in legal ethics and to remind attorneys of their duty to report attorneys who are suspected of being impaired. Many attorneys, however, believe it would be better to spend that time and money on CLE courses to assist them in their actual practice.

II. SPECIALIST CERTIFICATION

A controversial issue in the legal practice today is legal specialist certification. Many states have created certification programs for certain areas of law. There are other states (such as Nevada in 1995) that are considering adopting a lawyer specialization program. There are both benefits and drawbacks in the adoption of such programs.

The basic questions attorneys have with these programs concern which areas of law will involve specialty certification and how the program will be administered. Most states that have adopted specialization programs apply them to a limited number of legal disciplines. Most states limit specialization to just one particular area of law on the state's approved list, and an attorney must certify he practices more than 50% of his time in the specialty he lists. An attorney is usually not permitted to have more than one specialty.

As discussed in Chapter 9, 39 states (as of January 1995) have adopted a specialization program for their attorneys. Attorneys are permitted to advertise as specialists in designated areas if they meet the state requirements. The core requirement for nearly all specialization programs is that the attorney must have taken and completed a required amount of hours of continuing legal education in the field for which the certification is sought. Once the certification is obtained, the specialist is usually required to take a certain number of continuing legal education hours in that field every year to maintain the certification.

One intended effect of a certification program is requiring an attorney wishing certification to complete a continuing legal education program. It is believed the attorney will be better able to preserve, maintain and improve his professional competence. There are different types of certification plans; yet they all are based upon the plan adopted in California, New Mexico or Florida.

A. CALIFORNIA

In California the attorney must actually take a tough examination in order to obtain specialist designation. California's certification plan has to be approved by the state Supreme Court as to categories and is, as most legal matters affecting attorneys, administrated by the state bar. A written test is given. If the attorney passes, he can advertise as a specialist. Few attorneys actually complete the requirements to become a certified specialist.

B. NEW MEXICO

Another type of certification procedure is known as the self-designation certification plan used in New Mexico. The attorney simply notifies the state bar that he spends at least 60% of his practice is a particular area of law and has done so for the preceding 5 years. The attorney must continue to receive continuing legal education in that area to maintain that specialty. There are 62 fields of specialization in New Mexico, including general practice. An attorney can specialize in any of those areas, but is limited to practicing in that area because the

attorney is required to devote at least 60% of his practice to that field.

C. FLORIDA

A cross between the formal certification procedure of California, which involves a test, and the self-identification policy in New Mexico is the plan adopted by Florida. The certification is monitored by a board, usually under the state bar and with court approval. The attorney designates himself as a specialist in no more than three of 24 specialty areas, and in addition as a general practitioner. To qualify for this specialty designation, the attorney is required to have five years in practice and show substantial experience in the specialty area during three out of the last five years. He must continue to receive continuing education in these designated areas. The specialization certificate must be renewed every five years and is contingent upon satisfying the CLE requirements for maintaining that specialization. An attorney who has an LLM degree in a particular specialty area may be presumed to meet the minimum standards for the specialization requirements. Florida also has a provision allowing any member in good standing with a state bar to obtain permission to designate himself a specialist in one to three areas listed on the approved list in. The attorney must be engaged in practice for three years, have substantial experience in that area, have accumulated at least 30 hours of approved CLE credit in each designated area, and provide references from other attorneys.

D. ABA MODEL PLAN

The ABA has its own proposal. Instead of calling it "certification as a specialist," it is called a "board recognized specialist" in an effort to avoid warranting the attorney's confidence. The ABA plan does require certification in the terms of a test or examination. The adoption of the testing requirements is left to the particular state. Many states have adopted the plan as proposed by the ABA.

The fact that an attorney usually cannot be a specialist in more than one field can work against the attorney by negatively advertising lack of experience in other fields. An example would be an attorney who advertises as a specialist in taxation. A client wanting corporate work might not use the attorney because of the inference that only tax work is done. Such a decision is like a person with a head injury going to a neurologist rather than a general practitioner even though the general practitioner would and could do the work. The fact that the attorney is usually limited to advertising as a specialist in just one area can result in loss of work unless he really practices in just that one area.

Attorneys have also voiced concern about the manner of certification. Most states require the attorney actually to take a certification exam. Any attorney can take the exam as long as the applicant certifies to the state that he meets the practice percentage for the subject (usually over 50%). For certification as a specialist, the attorney is given an examination to test his

knowledge. The significance of getting a specialist certification is important because all states have some restrictions on advertising as a specialist.

To be a specialist, an attorney should be able to prove it in some aspect either through extensive education or through an examination. The rules on specialization vary from state to state, and an attorney must comply in each state where he is admitted and advertises. Even though an attorney may have a Master of Laws in Taxation, an LLM in addition to a JD degree and consider himself a specialist, he cannot advertise as a tax specialist unless he has taken the California specialization exam in taxation. The attorney can advertise the possession of a Master's of Law in Taxation degree. Nevada, in comparison, does not have a specialization program; although it is considering implementing one. Nevada attorneys at this time cannot call themselves a specialist.

Overall specialization is good. If someone takes the time and effort and the desire to devote their entire practice or most of their practice to a particular area of law, they deserve to be recognized. The only question for the practicing attorney is which field to choose for specialization. This is especially important where the attorney already possesses a Master of Laws degree in the specialty. At this time, no state recognizes a Master of Laws in the field as an automatic certification, although such proposals have been made in the past. Here an attorney has spent a year or more getting a Master's degree and is still having to take a

certification exam like someone without such education. It probably is better for a person with a Master's degree in the field not to get the certification. He can still advertise his Master's degree, which carries with it the strong implication of being a specialist. The attorney with the Master's degree also is now free to get certification in another field. The attorney could advertise as follows: "John Smith, Master of Laws in Taxation and Certified Specialist in Corporate Law." It would not make good marketing sense for the attorney with a Master's degree to seek certification in the same field as the Master's degree if the state does not permit multiple specialties.

III. RECERTIFICATION AS AN ATTORNEY

One of the most infuriating proposals to surface within the legal profession within the last few years is the idea of recertification of an attorney. This means recurrent bar exams in order to practice law. All attorneys are aware that every time an attorney goes to another state to practice law, he is required to take a bar exam unless he is able to be admitted on motion. The attorney once again is being tested on the scope of his legal knowledge by the bar examination itself. The recertification proposal is ridiculous, but nonetheless it is being advanced as one way to assure that attorneys keep their qualifications in good order.

The proposal will probably never be adopted or even seriously

considered because of the problems in administrating it. There would be a very strong argument about equal protection and requiring recertification for all professions. What about doctors or architects? If they make a mistake, a building could fall down or a person could die on an operating table. The proposal itself is ludicrous, but in an ABA poll 32% of the attorneys who responded were in favor of some type of recertification. This shows the importance of attorneys remaining informed as to what is happening in the legal profession to assure that their rights and interests are represented.

In addition to recertification, some federal bars now require an examination before admission to practice in their federal courts. Now some district courts are considering enacting federal bar exams as well. If an attorney is presently admitted to a state bar, the attorney should be able to be admitted under the federal bar in that state without having to take an examination. This would be especially true where the attorney is already admitted to practice before the United States Supreme Court or the Federal Appellate Court for that District. It seems ludicrous for an attorney with years in practice to be required to take a bar exam to be admitted to the District Court in Rhode Island or Vermont. Yet it appears to be a strong possible future requirement.

CHAPTER 11

MALPRACTICE INSURANCE

I. INTRODUCTION

The specter of malpractice should haunt every attorney. In the back of every attorney's mind, should be the thought that he could be sued and probably would be sued for malpractice if he or anyone working for him makes a serious mistake. In the last few years there has developed a new area of law, legal malpractice, because of the huge increase in competition among attorneys. There has always been malpractice liability imposed on attorneys for their actions. What is new? There are now attorneys who specialize only in suing other attorneys for alleged malpractice. In nearly every publication, there are advertisements by attorneys whose practice is suing other attorneys. The number of malpractice lawsuits filed against attorneys has increased at progressively higher rates each year since 1990.

Malpractice suits against attorneys have been steadily increasing at an average rate of 20% per year. In the two-year period between 1978 and 1980, the number of malpractice suits against attorneys increased by 250%. While over 70% of all malpractice suits fail, they are as with any lawsuit time consuming and expensive to defend. An attorney acting as his own lawyer in a malpractice case will be losing the potential to earn money from handling others cases while defending the action. If the attorney loses the suit, he will have to pay a judgment. Many attorneys opt for the expensive protection afforded by malpractice insurance to

avoid these twin effects.

Whenever an attorney is sued for a violation of professional responsibility, the complaint will allege some area of trying a case has been violated. It is that or some irregularity involving a client's trust account. There are not too many other areas that engender malpractice liability. A third area involves procedural mistakes, such as missing of a statute of limitations.

Most states' bars have some type of client security fund. Clients who have been injured by malpractice of attorneys or who have had their client funds stolen by attorneys or their staffs can make claims for a certain amount to the State Bar. Some of the money may be recovered (paid out of the security fund). These funds are amassed by assessing attorneys' dues; so it is basically attorneys paying for other attorneys' malpractice. The attorney who did it can have a judgment taken against him for improper management and have a civil judgment as well. Model Rule 1.15 comments, "where such a fund has been established, a lawyer should participate." Actually, where such funds have been established participation is usually mandatory.

One reason for the large increase in attorney malpractice suits is that many attorneys carry malpractice insurance. As with any other insurer, a malpractice insurer is more apt to settle a marginal case than risk a higher judgment at trial. The insurer will be likely to settle the case and thereafter either raise insurance premiums or cancel the insurance altogether.

An attorney who has no malpractice insurance will suffer a

double whammy in a malpractice suit. Without an insurance policy, the attorney must hire another attorney to defend the action or defend the action himself. In either event, the defense in the action will cost the attorney dearly, win or lose. If the attorney hires a defense attorney, he will have to pay him. If an attorney conducts his own defense, he loses income because he has no time to earn a living.

If the attorney wins a malpractice case, he does not have to pay a judgment, but unless the attorney can prove that the suit was malicious or an abuse of process he cannot sue the losing plaintiff for the damages, loss of reputation and business. If the attorney has a clause in the fee agreement that awarded attorney fees to the prevailing party in a lawsuit and the attorney wins, he will get his fees if a defense attorney had been retained. Many courts will not award attorney's fees to an attorney who defends himself in a malpractice action. To get attorney fees he must hire a defense attorney. If the attorney loses the malpractice case, he must pay the client's attorney fees plus the judgment. In most states, if any money is awarded (even as part of a settlement) to a plaintiff in a malpractice action that person is the prevailing party and is entitled to attorney fees unless the settlement agreement states otherwise. It is important for an attorney to design his practice and case management procedures to minimize malpractice claims.

Most state bars and many county bars require an attorney to carry malpractice insurance if he is to participate in a lawyer referral services. In order to receive referrals from the program,

the attorney will be required to carry insurance. The attorney is foreclosed from participating in a potentially lucrative client referral program if he has no insurance.

It might seem possible that an attorney could avoid or limit malpractice liability by incorporating liquidated damages in the fee agreement or by negotiating a limitation of liability with the client. While such tactics are permitted by other professionals, they are not permitted by attorneys. Attorneys are held to higher standards of professionalism. Disciplinary Rule 6-102(a) states that a "lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice." Ethical Consideration 6-6 set forth the rational for this prohibition:

> "A lawyer should not seek, by contract or other means, to limit his individual liability to his client for his malpractice. A lawyer who handles the affairs of his client properly has no need to attempt to limit his liability for his professional activities and one who does not handle the affairs of his client properly should not be permitted to do so. A lawyer who is a stockholder in or is associated with a professional law corporation may, however, limit his liability for malpractice of his associates in the corporation, but only to the extent permitted by law.

Model Rule 1.8 restated this prohibition against an attorney attempting to limit his liability but added an exception under Rule 1.8(h). Model Rule 1.8(h) permits an attorney to make an agreement limiting his malpractice if permitted by law and the client is independently represented by counsel in making that agreement. Under Model Rule 1.8(h), an attorney cannot settle a malpractice claim with a client who is not represented by counsel without first advising the client in writing to have the settlement proposal

reviewed by independent legal counsel.

Because of the potential of huge judgments in a malpractice claim, the time involved in personally defending against such a claim, the loss of business incurred while defending oneself, and the inability to limit liability for a malpractice claim and the requirement for insurance by many state bar referral programs, a wise attorney will purchase malpractice insurance.

A. DEFENSIVE PRACTICES

Malpractice usually arises from missing important filing dates or missing important information that prejudices the client's case. The biggest concern of an attorney is missing something that cannot be cured. Attention to detail will greatly reduce this probability, but it will not alleviate it altogether. The potential will always exists.

One way to limit the potential of malpractice is in the attorney's choice of area for practice. There are some areas of law, such as bankruptcy or probate work, where it is hard to commit malpractice. Nothing is final until the court says so. The court supervises virtually everything that is being done in the case. The court review of the attorney's action discovers most mistakes and cures them before they injure the client. In some instances, an attorney can also reopen a matter, such as an estate in bankruptcy, and correct discovered errors. In a probate, the attorney will usually have the court's supervision on every major step. If the court grants permission for an attorney to act after notice to all of the heirs unless the notice deceived the heirs, their failure to

object to the action will normally relieve the attorney of any malpractice claim. In both probate and bankruptcy, it is hard to commit negligent malpractice.

Litigation is a different ballgame. An attorney can misstep positions, lose evidence, not investigate particular clues and fail to do other things that give rise to malpractice. There are many things that can happen in a litigation matter that can result in a malpractice award. To help lessen the potential for a malpractice claim, the attorney must adopt good management and filing procedures to ensure he knows continually what is expected in a case. An attorney must always be ready and able to prove that the case was handled correctly. Case and client management are discussed in great detail in their own chapter. They are mentioned here to reinforce the fact that such proper techniques will lessen the potential of malpractice.

Documentation of all written and verbal communication with a client is an important tool in avoiding a malpractice claim. Once a client loses a case, he blames his attorney. Occasionally, the client then sues the attorney. In many malpractice case, the client claims that the attorney misled him in some fashion. The client alleges that had there been no misrepresentation he would not have lost the case. The attorney is in a situation of disproving a negative act: that he did not tell the client what the client claims to have been told. There is only one way for an attorney to protect himself from such a situation: document all client communications. Attorneys should immediately following

communication send confirming letters of the conversation's content simply to prove what was discussed and agreed.

It is normal to sue attorneys for malpractice on the most flimsy excuse. If the attorney has not protected himself by keeping strong records, he will be found guilty of malpractice he did not commit. There is no doubt that many attorneys have settled malpractice claims they did not commit simply because they could not prove that they did not give the advice the client claims.

One of the best defensive practices to malpractice actions is to screen a person carefully before accepting him as a client. There are some people who will immediately sue an attorney if they lose their action. Taking anyone who enters his office as a client exposes the attorney to such individuals.

B. MALPRACTICE INSURANCE

1. GENERAL

For piece of mind and protection, an attorney should consider malpractice insurance. As a result of the plethora of malpractice suits occurring in the last few years, malpractice insurance premiums have skyrocketed. In some states, malpractice insurance is offered by insurance companies formed by attorneys themselves. Many state bars have established relationships with insurance carriers to provide insurance to their members. There are different types of malpractice policies. The first type is the "occurrence" policy. This type of policy will cover the attorney for any claims which arise from actions during the period of time the policy is in effect even if the attorney is not insured by the company at the

time the claim was made. This type of policy is not always available.

Many insurance companies now require that the attorney not only be a client at the time of the incident but also when the claim was made. The attorney must continue to be a client, paying premiums. The insurer does not want to insure a client for the potential liability of one big risk and not receive proceeds for the other years when the risks are low. There is also what is called "tail" insurance. This is particular coverage which persists after policy termination. Many insurance companies allow tail coverage only upon retirement. Some will allow tail coverage also when a client is moving to another carrier.

One type of policy seldom available nowadays is the "blanket" policy that covers the attorney for claims made when the policy is in effect. The attorney is not required to have been a client at the time the incident arose. The attorney is only required to be an attorney when the claim was filed. This type of policy was popular with new attorneys who did not have assets when starting up. A malpractice by an attorney early in the practice would collect little because the attorney had little to lose. As the practice grew and the attorney acquired assets, a blanket policy would thereafter protect the attorney for malpractice performed in the early years. Of course there was the trade-off in premiums. The insurer would charge an attorney more for the blanket policy because it was insuring for past work along with the work being conducted during the term of the policy.

Professional liability insurance is a legitimate business expense; the premiums for the insurance are tax deductible. The amount an attorney pays for premiums is based on the type of law an attorney practices. An attorney in a bankruptcy practice will pay less in premiums than an attorney in real estate litigation. Insurance companies base their premiums and coverage on the types of law and percentages of specific types of claims. Some insurers offer attorneys the option of choosing only for claims arising in certain areas of law. Example: The attorney can elect to be covered for any real estate malpractice claim but not any social security malpractice claim.

When shopping for malpractice insurance, the old adage of "buyer beware" applies. Insurance policies must be read closely along with all riders so that the attorney fully understands what he has bought. Because of an attorney's knowledge of the law and legal training, he would be less likely to win an action based upon misunderstanding of the policy than a lay person. The attorney must understand what is and is not covered by the policy.

2. BY CORPORATE COUNSELS

Most malpractice insurance is purchased by law firms. Recently corporate counsels have begun purchasing malpractice insurance as well. Three organizations now offer malpractice insurance specifically for corporate counsel: National Union Fire Insurance Company, Evanston Insurance Company by underwriting manager Sand Morahan and the American Corporate Counsel Association (ACCA).

The necessity for corporate counsel malpractice insurance is

debatable. The Corporate Counsel Institute at Northwestern University School of Law has taken the position that corporate counsels have no need for such insurance. The ACCA takes the contrary position and points out that some corporate counsel have a higher potential of risk for civil liability than corporate counsel in other areas. The ACCA's policy for corporate counsel carries the following features: coverage available up to $5 million dollars, available only if actually sued, and the coverage extends to any act performed for the company (but not to acts after policy inception).

The potential for a malpractice judgment against an attorney usually derives from the fact that corporate counsels are often not covered in a company's general liability insurance. There is usually a standard exclusion for the practice of any profession. A standard directors and officers policy may protect an attorney who is also an officer of the Board of Directors, but it may not cover an ordinary in-house attorney.

Corporate counsel may be exposed to a potential malpractice liability. A corporate attorney owes the same degree of professional competence as an attorney in the private sector. It is foreseeable that a corporation or the corporation's shareholders may sue the corporate counsel for the damages suffered as a result of any malpractice performed by the attorney. Corporate directors also are sued today by shareholders for their breaches of fiduciary duties when years ago such suits were nonexistent. The potential for corporate counsel liability is expanding, and malpractice insurance is the wave of the future.

CHAPTER 12

TERMINATION OR WITHDRAWAL FROM THE ATTORNEY CLIENT RELATIONSHIP

I. INTRODUCTION

Once the attorney-client relationship is established, it usually continues until the matters for which the attorney was retained is completed. Generally, the right of an attorney to withdraw from employment arises only from good cause. The determination of what constitutes good cause for an attorney to seek to withdraw from representing a client depends on the circumstances of each individual case. The attorney-client relationship can terminate before the completion of the matter in one of three ways:

1. The client can fire the attorney,

2. The attorney can withdraw from the case, or

3. In rare situations, the attorney can be removed as the attorney for the client by the court.

(Restatement of Law Governing Lawyers, Section 44)

Just as the client can fire an attorney, the attorney can fire the client by withdrawing from the case. Ethical Consideration 2-32 of the Model Code defines an attorney's right to withdraw from a client's case as follows:

> "A decision by a lawyer to withdraw should be made only on the basis of compelling circumstances, and in a matter pending before a tribunal he must comply with the rules of the tribunal regarding the withdrawal. A lawyer should not

> withdraw without considering carefully and endeavoring to minimize the possible adverse effect on the rights of his client and the possibility of prejudice to his client as a result of his withdrawal. Even when he justifiably withdraws, a lawyer should protect the welfare of his client by giving due notice of his withdrawal, suggesting employment of other counsel, delivering to the client all papers and property to which the client is entitled, cooperating with counsel subsequently employed, and otherwise endeavoring to minimize the possibility of harm. Further, he should refund to the client any compensation not earned during the employment."

Ethical Consideration 2-32 confirms that an attorney may withdraw from representation of a client and broadly states the steps that should be undertaken to protect the interests of the client. The following discussion addresses circumstances for withdrawal from representing a client. It also suggests when a client may discharge an attorney. Their respective rights upon termination are also presented.

II. CLIENT TERMINATION

Once an attorney has entered into a fee agreement with a client or agrees to represent the client pro bono, the attorney is precluded from withdrawing from the representation of that client unless he has either court approval or consent of the client. Should the attorney be in the position where the client refuses to pay the legal bills, he still must continue representation. If an attorney has been replaced, he cannot hold the client's files until payment has been received. In lieu of that, many states give the attorney the right to file an attorney lien on the files or a judgment or any settlement obtained in the case.

The attorney can be fired by a client at any time with or without cause. No case has ever appeared where an attorney was able

to allege that the firing of the attorney violated state or federal laws as being based on sex, race or national origin discrimination. There probably have been instances of such firings, however, due to the very personal nature of the attorney-client relationship. It is doubtful that a court would ever award sanctions against a client who fired an attorney for these reasons.

The exception to this might be a corporate client. In a corporate setting, the client is the corporation and not the individual officers or directors. A board of directors or officers might be elected who thereafter fire the attorney for such improper reasons. Under this situation, the attorney might well be able to claim discrimination. The question in this instance would be how much the attorney would thereafter be entitled to receive as compensation given the improper termination. Assume a corporation fired its attorney because of race discrimination, and the attorney was handling a contingency case wherein judgment for $100 million was obtained. The attorney might receive either the value of the services rendered or split the contingency fee with the successor counsel.

When the dismissal was for improper and illegal reasons an argument could be made that it would be unfair and inequitable for the attorney to accept less than that which the attorney was entitled under the contract. He might therefore be awarded the actual percentage of the contract not because of the contract but as damages for violation of employment laws. This issue has not yet arisen, but with federal employment law now being applied to

attorneys it is possible that an attorney might sue his client for breach of employment laws.

Another issue that has not yet been addressed by the Canons of Professional Responsibility is the relationship of a lawyer who is under contract with the government. Many state governments hire attorneys under an independent contract to provide legal services. The attorney is therefore bound to provide such services for a period of time, usually a year to 18 months. There is no mention of the right of the agency to fire the attorney or cancel the contract at any time. The questions arise as to whether or not the government can fire the attorney at any time and will it have to pay the attorney. It is the opinion of some county counsel's that the county can terminate the employment at will, but the attorney cannot. It is the feeling of other attorneys that by virtue of the unique nature of the employment relationship the county has agreed to waive the right for termination at will and instead is bound by the terms of the contract. Until this issue has been addressed by a court, there is no precedent authority. It seems that since the government has proposed the contract, it would probably be bound by it.

Normally, a client can fire an attorney at any time with or without cause. In California, that was specified in Fracasse vs. Brent 1972, 6 California 3rd 784. If the client fires the attorney for no good reason, the client is not to be held liable for breach of contract because the court construes the attorney-client relationship to be a terminable at-will contract. For purposes of

defining the attorney-client relationship, an attorney can be fired at any time with or without cause.

III. ATTORNEY WITHDRAWAL FROM FURTHER REPRESENTATION

A. INTRODUCTION

When the attorney wishes to withdraw and the client does not want him to withdraw, the attorney must seek court approval. The court generally will not permit withdrawal by an attorney if it would result in prejudicing the rights of the client in a manner that cannot be cured. Usually a withdrawal will result in some degree of prejudice against the client's interest, but the question for the court is: "Can the client recover from the effects of the withdrawal?" If so, the withdrawal motion will be granted.

Once an attorney withdraws from a case because of nonpayment, chances are good the client will not be able to find another attorney to work for free, meaning that the new attorney is aware that he will not be paid. Failure to pay attorney fees is the most common reason for withdrawals. If the client has not paid his attorney, he also is usually not participating in the case: the client does not want to be dunned to pay. Failure to assist or cooperate with an attorney to defend or prosecute the action is the reason the court usually grants the withdrawal. It is a client's duty to participate in his own case.

B. FOR LEGAL MALPRACTICE CLAIM CONFLICT

Whenever a legal malpractice claim is asserted against an attorney, he should withdraw from further representation of the client against whom it is alleged the malpractice was directed.

Whether potential or actual in nature, the very claim of legal malpractice creates a conflict between the attorney and the client. Whenever a legal malpractice is asserted against the attorney, a loss of confidence will occur in the client's mind. In addition, the attorney's independent judgment is impaired. A malpractice claim causes the attorney to develop a defensive attitude. The attorney becomes more interested in protecting and defending against a monetary or disciplinary judgment than in actively and aggressively furthering the interests of the client. A malpractice claim has the result of pitting the attorney's interest against the interest of the client. The attorney may, therefore, no longer be an aggressive advocate for the client. The potential conflict of interest caused by a malpractice claim is a legitimate ground for an attorney to seek withdrawal from a client's representation, Bailey vs. Martz 1986, 488 N.E.2d 716.

The important aspect of the legal malpractice claim is the conflict of interest issue that it raises in further representation of the client. As a result of the malpractice claim, the attorney may be subject to a disqualification motion not only by the opposing party in the action but by third parties as well. An adversary may bring the disqualification motion as a tactical aspect of the case. In Schenck vs. Hill, Lent & Troescher 1986, 530 N.Y.S.2d 486, an attorney was disqualified by an adversary because a claim for contribution in legal malpractice had been filed against the attorney.

The claim against the attorney may be based on actual

liability or actual liability or a potential liability (one being created). As a trial tactic, an opposing party points out to the court that the attorney might be liable for malpractice if a judgment is rendered against the client. This potential conflict of interest may make it inappropriate to represent the client.

It is professional for the attorney to withdraw from a case once a claim for malpractice has been filed related to representation of the client. Failure to withdraw from representation of the client in this situation may actually increase the possibility of an attorney having a malpractice judgment taken against him. Even with the client's consent, continued representation in the face of the conflict of interest created by the malpractice claim is usually not an good idea. Continued representation after the malpractice has been filed will change how subsequent representation is viewed by the court and third parties. All subsequent acts and representation by the attorney will be subjected to greater scrutiny to assure the attorney has represented the client adequately. The effect of this greater scrutiny is that normal tactical decisions may be challenged and claimed as having been taken by the attorney to limit his liability and not for the benefit of the client. Every decision subsequently taken by the attorney that fails to yield a benefit might be used against him in furtherance of the malpractice claim. It is a better practice for the attorney to withdraw from a client's case once a malpractice claim has been filed against the attorney relating to the client's representation.

C. WITHDRAWAL FOR CAUSE

1. MANDATORY WITHDRAWAL

An attorney always has the right and in some instances the requirement to withdraw from a client's representation when good cause exists. Good cause is defined in Model Code Disciplinary Rule 2-110 and Model Rule 1.16. Disciplinary Rule 2-110 states:

> "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:
>
> (1) He knows or it is obvious that his client is bringing the legal action, conducting the defense, or asserting a position in the litigation, or is otherwise having steps taken for him, merely for the purpose of harassing or maliciously injuring any person.
>
> (2) He knows or its is obvious that his continued employment will result in a Disciplinary Rule.
>
> (3) His mental or physical condition renders it unreasonably difficult for him to carry out the employment effectively.
>
> (4) He is discharged by his client.

An attorney is bound by a mandatory obligation to withdraw whenever a client insists upon the attorney conducting an immoral or unethical act. The attorney must withdraw whenever the client insists on presenting a frivolous defense. The most general reason given for seeking withdrawal is that the attorney "finds himself incapable of conducting the case effectively."

There are two specific types of mandatory withdrawal. The first type of required withdrawal involves mandatory disqualification because the attorney should never have taken the case. The second type of required withdrawal occurs as a result of

a client's actions subsequent to the attorney taking the case that makes further representation of the client improper. In both instances, once an attorney becomes appraised of the facts that mandate a withdrawal, he must immediately do so or face disciplinary action.

When an attorney discovers that he is handling a case that under the law never should have been taken, the mandatory disqualification rules require that the attorney immediately withdraw. The instances of mandatory disqualification are discussed in Chapter 3. Specific situations in which an attorney might be disqualified from representing a client are clearly numerous; only a couple are discussed here to illustrate.

An example of mandatory disqualification as a result of a client's actions: After taking a case, the attorney discovers the client has used the attorney's advice in the past to commit a crime or to commit a fraud. Model Rules 1.2(d), 1.16(a)(1) and Disciplinary Rule 2-110(B) (1) and (2) hold that the attorney cannot reveal the past fraud or the activity that was done by a client. Moreover, the attorney must withdraw from representing the client in any future work that would involve the reliance by the attorney or another party on the fraudulent actions of the client. Example: An attorney discovers that his client has used his advice to prepare a fraudulent contract which defrauded another party. The attorney is required to withdraw from the case and from representing that client in any matter dealing with any party that the attorney is aware is relying on that fraudulent contract.

Another example: The attorney's mental or physical condition has deteriorated to such an extent that he can no longer represent a client effectively (Disciplinary Rule 2-110(B)(3)). Usually this issue arises concerning a demonstrably mentally incompetent attorney. A mentally impaired attorney might not realize that he no longer possesses the faculties and abilities to handle a case. For him to continue to attempt to do so may result in damaging the client's case.

Most mandatory disqualification issues are relatively easy to decide. An attorney having doubts as to whether or not he is required to withdraw probably should withdraw to be on the safe side. Most state bars have an ethics section from which an attorney can seek an informal opinion as to whether or not he should withdraw from the case. Some states also permit an attorney to go before a judge other than the one trying the action for an opinion as to whether to withdraw or not. The ABA also publishes official opinions that cover many fact patterns and advise whether or not an attorney facing such a fact pattern should withdraw.

As long as an attorney has taken conscientious steps to determine if he had an obligation to withdraw and acted thereafter in good faith, the attorney will not be subject to professional discipline for making a work decision to stay in a case when mandatory withdrawal might have been appropriate. Although the attorney might not be subject to professional discipline for mistakenly staying instead of withdrawing, he can still be sued for malpractice by the client for any damages that such continued

representation causes.

When an attorney discovers that he should withdraw and the client does not consent to the withdrawal, then the attorney must file a motion for the withdrawal. The attorney must be careful not to disclose confidential information yet still be able to present sufficient facts to justify the withdrawal. The court may deny the motion even if the withdrawal is for good cause under Model Rule 1.116(c). In such an event, the attorney must continue to represent the client but with very little risk of discipline caused by malpractice exposure.

2. PERMISSIVE WITHDRAWAL

Both Model Rule 1.16 and Disciplinary Rule 2-110 provide situations where an attorney may but is not required to withdraw as attorney. The differences between mandatory and permissive withdrawal is primarily that of knowledge. Where an attorney knows that his representation of a client will violate a Disciplinary Rule, then withdrawal from representation is mandatory. If the attorney merely suspects that the representation will violate a Rule, the withdrawal is permissive.

In a permissive withdrawal situation, the client has not given the consent for the attorney to withdraw. The attorney usually must seek court permission to withdraw as the client's attorney. In cases involving permissive withdrawal, the attorney must take all reasonable steps to assure that the client is not unreasonably damaged as a result of the withdrawal. Both Disciplinary Rule 2-110(A)(2) and Model Rule 1.16(d) include the following:

(a) Reasonable notice of the intent to seek an order permitting withdrawal.

(b) Reasonable time to find another attorney to handle the matter.

(c) Refunding to the client all unearned attorney fees that had been advanced.

(d) Returning all paper and property to which the client is entitled.

Permissive withdrawal of an attorney is not automatic. The court will review any motion to withdraw and determine if the overall facts of the case merit it. Generally, a court will not grant a permissive motion to withdraw if it will cause the action to be unduly delayed or otherwise suffer a serious disruption (Ruskin vs. Rodgers 1979, 399 N.E.2d 623). The closer the motion of disqualification is to the trial date, the greater the possibility that the court will deny the motion.

a. FAILURE TO ASSIST ATTORNEY

The most frequent permissive withdrawal occurs in the situation where the client has not kept the attorney informed and thereby has not participated in the case. The courts tend to let the attorney withdraw because there is no benefit in forcing the attorney to proceed in a case where the client has appeared to have abandoned interest. In virtually every state in which the attorney seeks to withdraw from a case, notice must be given to the client that the attorney is requesting to withdraw from the case. Thereafter, when the client has not responded, the attorney must file a motion for permissive withdrawal with the court with appropriate notice being given to both the client and the opposing

party. Since the client does not keep the attorney informed and does not participate in the case, there is no benefit in forcing the attorney to proceed when the client appears to have abandoned interest.

b. FAILURE TO PAY ATTORNEY

There is no specific right way for an attorney to withdraw from a case under either the Model Code or the Model Rule based upon nonpayment of attorney fees. An attorney is permitted under Model Rule 1.16(b)(5) to seek permission to withdraw from a case if the representation imposes an unreasonable financial burden on the attorney. There is no similar provision in the Model Code.

The Model Rule permits the attorney to withdraw if he is not being paid and the amount of additional or projected work needed to complete the matter is so large that its non-payment will seriously affect the attorney's financial situation. Example: The client has not paid $10,000 in fees, and it is estimated that another $25,000 in fees will normally be incurred in such a matter. If the attorney is a sole-practitioner earning $50,000 per year, the loss of $35,000 in fees will jeopardize the viability of his practice. The court may grant the withdrawal. On the other hand, if the attorney is part of an international law firm and earns $300,000 per year, the court will probably deny the permissive withdrawal motion of the attorney.

IV. CLIENT'S LIABILITY FOR FEES

Regardless of whether an attorney is terminated or withdraws from the attorney-client relationship, the client still remains

liable for the payment of attorney fees for the legal services rendered by the attorney. The only issue that exists is the amount he is obligated to pay. The client's liability for payment of fees for work done will usually be based upon an hourly basis if the client had been charged on an hourly basis or on a quantum merit basis if the fee agreement was a flat fee or there was a contingency fee agreement.

When an attorney is released during the middle of representation of a client, the question becomes how much that attorney is entitled to receive as a legal fee from the client. When an attorney was retained on an hourly fee arrangement, there is no problem in calculating the legal bill. In the hourly fee situation, the attorney would simply submit the bill for the work done up to that point, and the client is responsible to pay, provided the bill is legitimate. When a contingency fee agreement or flat rate fee agreement exists between the attorney and client, the calculation of the legal bill is more complex.

In the flat fee agreement the attorney can collect for the reasonable value of the provided legal services. An attorney in a flat rate agreement would not be able to collect for the full amount owed under the contract because the attorney had not completed the work and thus did not earn all of it. The attorney would get the reasonable value of the rendered legal services based on a percentage of completion of the case. If the attorney was 50% completed, the attorney would probably get half of the agreed fee. Courts or fee arbitrators will determine the payment in that manner

or they will put an hourly fee value on the work completed and charge accordingly, In neither event would an attorney ever collect more than he would have received under the actual fee agreement itself.

If another attorney is hired, the courts or arbitrators will reflect on the value of the amount of work the discharged attorney performed versus the amount of work the new attorney has to do to complete the case. In the area of a contingency fee agreement where the attorney has been fired, the discharged attorney is entitled to recover the reasonable value of the provided legal services based upon the percentage of the actual award. If the discharged attorney had completed 30% of the case and the case is settled for $500,000, there is a $150,000 fee award, and the value of discharged attorney's work is $50,000. The discharged attorney would never get more than the original total fee agreement; in addition, the recovery is also based on the amount the other attorney is paid to complete the case.

Many states permit an attorney to claim an attorney fee lien on the property of the client. Usually, the fee lien is limited to the settlement in a particular case. In some states it will be against all of the property owned by the client until there is a resolution of it. In most lien situations, the attorney must either commence a suit within a specific period of time after the lien is filed or at the conclusion of the case in which the client receives a judgment. In some states the lien period for filing suit on an attorney is 6 months. In most states the attorney must file a

notice of lien to perfect a fee lien. The lien stays in effect until the case is concluded. If the client wins and receives a judgment, the amount claimed by the attorney lien will be held in trust either by the succeeding attorney or the court until a hearing is held to determine the correct amount to be awarded to the attorney asserting the lien.

An attorney must check the law of his state to ascertain if an attorney lien is permitted and the scope of the lien. Under the common law there was a general possessory retaining lien that allowed an attorney to keep a client's papers or assets until the attorney's legal fee was paid. Many states have replaced the retaining lien or adopted an additional "charging" or "special" lien against monies recovered by the attorney's efforts in any litigation for the client. New York permits both the retaining lien and the charging lien to be imposed by attorneys (Adan vs. Abbott 1982, 452 NYS2d 476, 114 Misc 2d 735).

Absent state statutory law, case law permits the attorney to have a lien on the proceeds of a case or on property in the possession of the client. When an attorney has a lien on the case or the property of the client, the attorney has acquired an interest in the case. Such an interest is contrary to the general rule that an attorney cannot have a personal interest in the subject matter or outcome of an action for which the attorney has been retained. The exception to this rule is an attorney lien as permitted under state law in accordance with ABA Code DR 5-103(A)(1) and ABA Model Rule 1.8(j)(1). The existence of a lien

should be determined by the law of the site of the fund or recovery against which the lien is sought to be imposed. In Gelfand, Greer, Popko & Miller vs. Shivener 1973, 30 Cal.App.3d 364, the contingent fee agreement was executed in Oklahoma but the recovery made in California. The California court applied California law in determining if a lien should apply when the fee agreement failed to mention it.

A. RETAINING LIENS

A retaining lien by its very nature attaches to all papers, documents, pleadings and other such matters that comes into the attorney's possession by reason of the attorney's services. The lien will not cover items or property the attorney acquires that are unrelated to the legal services for which the attorney was retained by the client. Example: A person gives the attorney a gift to deliver to the client. The attorney would usually not be permitted to claim a lien against the gift for any unpaid legal fees.

Many attorneys, specifically in the criminal area, insist on security for the payment of their fees. These attorneys require their clients place land, cars, and jewelry with them or get co-signors as security for payment of the attorney fees to be incurred in the case. Such is an example of the working of retaining liens. The usage in particular states requires conformity with the law of the state where the property which the lien is imposed is located.

A retaining lien usually also is only valid against property

actually in the hands of the attorney. An attorney who is not in possession of the money, papers or other property upon which the retaining lien is sought, does not have a valid lien (United States vs, Fideltity Philadelphia Trust Co, 1973, 459 F2d. 771). An attorney who has a valid retaining lien on property will lose that lien once the property leaves the attorney's possession. In Eiduson Fuel & Hardware Co. vs. Drew 1977, a New York court held that an attorney's retaining lien on a stock certificate terminated once the attorney lost possession of the certificate.

A retaining lien only attaches to the extent of services actually rendered. The retaining lien does not attach to property held by an attorney that has not yet been earned. When an attorney is given a retainer and a creditor of the client wishes to attach it, courts agree that a client cannot avoid attachment of his assets by giving them to an attorney as a retainer. Until the attorney actually earns the money that the attorney is holding, he is merely a fiduciary for the client in much the same manner as a bank. Excess money or property being held by an attorney is not subject to an attorney's retaining lien.

An attorney's retaining lien attaches to all property, papers, documents and money of a client coming into the attorney's hands during the course of the client's representation. By virtue of the lien the attorney acquires the right to retain possession of these items in order to secure payment of the fees and expenses due him as a result of the legal representation of the client.

Where the client is in need of the documents or property held

by the attorney, but is unable or refuses to pay the attorney fees, the client has two options available. The client may seek a court order through a subpoena duces tecum to require the attorney to provide the property, records or pleadings for the client's use upon the client furnishing adequate security for the payment of the legal fees: the client trades the new property as security for the property held under the retaining lien. In the situation where the client disputes the fees rather than merely being unable to pay them, the retaining lien remains until their is an adjudication on the merits and scope of the lien. In most states where there exists the retaining lien, summary proceedings are often available to adjudicate these issues. Some states have created fee arbitration boards to quickly adjudicate disputes over fees and retaining liens (Foor vs. Huntington Nat. Bank 1986, 27 Ohio App.3d 76, 499 NE2d 1297).

Not all states recognize retaining liens anymore, and there is a move throughout the United States to void retaining lien law. It is argued that retaining liens permit attorneys to engage in legalized blackmail. Consider an ongoing case in litigation. If the attorney is permitted to retain the files until payment of the legal fees, the client may lose the case by being unable to prepare for the litigation. Still, as long as a retaining lien is permitted under state law, an attorney should pursue it to assist in the payment of valid attorneys fees.

B. CHARGING LIEN

In addition to the attorney retaining lien or (in some states)

in place of it, there is the "special" or "charging" lien. The requisites for a charging lien may be imposed by state law or may arise out of an agreement between the client and the attorney. The attorney is to receive a portion of the judgment or of proceeds provided it appears that such judgment or proceeds are the security for the compensation the attorney will earn. An attorney's charging lien vests in the attorney the right to recover money from the client in a particular manner; it ensures the attorney will be compensated for the legal services rendered in obtaining the recovery for the client.

A charging lien is generally viewed as an equitable assignment to the attorney of the revenue derived from the attorney's efforts. The attorney charging lien enjoys a paramount priority over other claims. As a matter of equity, the charging lien bestows upon the attorney the right to collect costs and fees due as a result of legal representation. This right is secured by receipt of funds from a future judgment or from a separate suit.

As with any other equitable right, a charging lien is based upon the equitable principle that a plaintiff should not be allowed to receive the entire judgment derived as the result of the attorney's legal representation without paying the attorney. Because of its equitable nature, an action by an attorney against the client to enforce a charging lien does not entitle the client to a jury trial (Rosenman & Colin vs. Richard 1988, 850 F2d.57).

A charging lien is confined to the fees and costs due for the legal services provided by an attorney in a particular action in

which a judgment or settlement is obtained. Not included in the charging lien is the value of the work the attorney performed before withdrawal or the cost in time, labor and expense in seeking to be relived as the client's attorney. The lien attaches only for services that benefit the client. An attorney's labor to withdraw from a case does not directly benefit the client; therefore the lien does not attach for the value of such work. The fact that the lien does not attach for such work does not mean that the attorney cannot sue the client for the value of such work, only that settlement or judgment proceeds will not be used to secure payment for such work. The charging lien will terminate and be deemed waived as to proceeds that the attorney knowingly allows to be paid to the client or to a third party without raising any objection by virtue of the lien. The attorney cannot stand on the equitable right to have a charging lien; he must take steps to preserve the right to the lien.

C. ARBITRATION OF FEE DISPUTES

Fee disputes with a client can be handled in two ways: (1) the attorney or client can sue each other over the bill or (2) they may arbitrate. In some states, the client in a fee dispute has an absolute right to seek arbitration while in most states the attorney must consent to such mandatory arbitration. In most states the attorney can sue his client for the collection of unpaid legal fees. The client can also sue as well as arbitrate.

In the real world arbitration is usually better for the client than suing. An arbitrator often will reduce the attorney's fee from

one-quarter to as much as one-half, although one-third seems to be about the average. In an arbitration, the arbitrator is a person usually appointed by the county bar association who is also a practicing attorney. The arbitrator will look at the evidence, see how much time the attorney has spent, evaluate the nine items discussed earlier and determine how much should actually be charged. If it appears the attorney has been churning the case, the fee award is going to be reduced considerably.

The advantage that an arbitration has to a client: it is cheaper and less formal than a trial. The burden is on the attorney to prove the legitimacy of his claim, the same as in court. An arbitration is faster than a judicial action; so the matter is decided quicker. Often an arbitrator will reduce the fee by one-third which results in a good deal for the client. Arbitration can be of benefit to an attorney for the same reasons, and it tends to be more confidential. Most states (unlike California) do not require fee disputes to be reported to the state bar. The state bar will not be creating a file on the attorney based on alleged unconscionable fees.

V. SUING THE CLIENT

Unless an attorney is required by his own state law to enter binding arbitration with a client over attorney fee disputes, the attorney can sue the client for unpaid attorney fees. Suing a client is never a popular thing to do. When viewed carefully little is really lost by suing a client. When things have deteriorated to an extent that the attorney is considering suing the client, that

means he has already lost the client for all future work.

Notoriety is often cited as a reason for an attorney not to sue a client. That argument cuts both ways. If an attorney refuses to fight against charges of improper billing or malpractice by a client seeking not to pay the legal bill, the attorney is agreeing to the charges. If the charges are true, the attorney should forgive the bills and hope the client eventually stops talking and does not sue the attorney for malpractice. When the charges are not true, the attorney must sue to keep his good name.

Every fee agreement should have a clause awarding attorney fees to the prevailing party in the event of a lawsuit. Some attorneys omit this provision in the hope that in the event of a successful malpractice action the client will not receive attorney fees. That might be a good reason to not to include the clause in the fee agreement if the attorney does not have malpractice coverage or is sloppy in his manner of practice. In most instances, the clause will benefit the attorney. In lawsuits for failure to pay fees the attorney will receive attorney fees if an attorney is hired to collect for the attorney and if the suggested clause is present in the agreement. Many states will not permit an attorney to collect attorney fees for collecting a judgment on the attorney's own case. The attorney who wins the case against the client will not be compensated for the time spent in getting the judgment.

When an attorney fee clause is in the retainer agreement, the attorney can hire another attorney to get the judgment. When the

judgment is obtained, the client will pay the attorney fees.

The most important thing to remember is that an attorney cannot sue a client who is judgment proof. If the client is broke, going bankrupt or the likelihood of a recovery is slight, the attorney should not waste time suing the client. Obtaining a judgment is a waste of time and a waste of money as well.

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