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ETHICAL CONSIDERATIONS FOR CATASTROPHE LITIGATORS

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I. INTRODUCTION

PERHAPS MORE THAN any other group of lawyers, those who litigate personal injury and death claims are forced to solve an intimidating array of ethical problems. Although some of these ethical problems are common to all trial lawyers, they are most pervasive in cases with profound injuries or death.

One can readily find adequate literature that aids certain groups of lawyers in anticipating and appreciating ethical problems unique to their practice. For example, readings for criminal defense lawyers, prosecutors, or tax lawyers are fairly common.¹ But one finds precious little in the way of collections for personal injury lawyers. Perhaps, in some small way, this paper will add to that body of writing.

One of the pervasive truths about professional ethics is that a lawyer who tries to anticipate and avoid ethical problems may sacrifice his tactical position as a conse-

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¹ See J. BURKOFF, *CRIMINAL DEFENSE ETHICS: LAW AND LIABILITY* (1986); B. GERSHMAN, *PROSECUTORIAL MISCONDUCT* (1985); B. WOLFMAN & J. HOLDEN, *ETHICAL PROBLEMS IN FEDERAL TAX PRACTICE* (2d ed. 1985).

quence.² Each lawyer must decide whether the pull of the adversary system is so strong that the tactical advantages gained by potentially unprofessional conduct constitute a professional obligation. This paper is dedicated to those practitioners who are seeking answers.³

II. FEE CONTRACTS

Numerous reasons exist for failure to collect an earned fee. One reason is failure to have an adequate and professionally responsible fee contract.⁴ The time to think carefully about the fee contract is when the contract is first formed, not after the case is over. A fee contract is not binding just because the client signs it. The attorney has an obligation to explain the contract fully.⁵ The unique circumstances surrounding personal injury representation indicate that more than ordinary care must be taken to insure that the client fully understands all ramifications of the fee contract.

² Pepe, *Professional Responsibility in Pretrial Discovery — A Tale of Two Cities*, 64 MICH. B.J. 298, 302 (1985).

[T]he lawyers who aspire to travel the high road often feel they must abandon it in order to protect their clients Only when a code of ethics and procedural rules are clear in their goals and enforced can the attorney who wishes to act professionally do so without the risk of undue prejudice to his client.

Id.

³ Throughout this Article the references to the Model Code of Professional Responsibility (MODEL CODE) and to the Model Rules of Professional Conduct (MODEL RULES) are references to the versions propounded by the American Bar Association. Each reader is encouraged to compare the ABA versions with the version existent in the jurisdiction of concern, and each reader is forewarned that any conclusion reached in this Article may be inapposite in a jurisdiction with a rule substantially different from the ABA model.

⁴ Some of the following comments about fee contracts are taken from an earlier article entitled Steele, *Creating a Fail-Safe Fee Contract*, TRIAL LAW. F., Vol. 23, No. 1, 1988, at 27.

⁵ MODEL CODE EC 2-19 (1981). EC 2-19 states that "[a] lawyer should be mindful that many persons who desire to employ him may have had little or no experience with fee charges of lawyers, and for this reason he should explain fully to such persons the reasons for the particular fee arrangement he proposes." *Id.* As to the need for an attorney to avoid suppressing any facts about the fee contract, see *High Point Casket Co. v. Wheeler*, 182 N.C. 459, 109 S.E. 378, 383 (1921).

A. Identity of Parties

Setting forth the identity of the contracting parties is basic to the formation of any contract.⁶ Clients usually are seeking the services of a particular lawyer. These clients may become very dissatisfied if they later discover that another attorney in the firm is handling the case. It may appear to the client that the lawyer with whom he thought he had contracted has handed off the matter to some other, likely unknown, lawyer in the firm. Lawyers cannot legitimately expect clients to understand the close working relationship between lawyers associated with one another on a case. Therefore, if the contracting lawyer may be joined by other lawyers as the case progresses, the client and the contracting lawyer should acknowledge this possibility at the outset with a clear statement in the contract.

An interesting corollary problem also exists. Suppose a badly injured client desires an attorney with particular experience and chooses attorney X. As mentioned above, the client might reasonably believe that the contract is with X, when in fact the contract is with X's firm. This misconception could have been avoided if the contract had been properly drafted and explained when it was presented to the client. Continuing with this scenario, if the contract does *not* adequately alert the client to the fact that the contract is with X's firm, what will be the result if X leaves the firm prior to the completion of the client's case? Obviously, the client will likely choose to move his file with X, and clearly he has the right to do so.⁷ Whether the client has any obligation to pay a fee, however calculated, to the abandoned law firm will turn on the question of whether the client has a contract with that firm. We can assume that the firm drafted the contract and that the firm is more sophisticated than the client. Therefore, we can also assume that any ambiguities as to whether the firm or

⁶ See 3 A. CORBIN, CORBIN ON CONTRACTS § 601, at 608 (1960).

⁷ L. WOLFRAM, MODERN LEGAL ETHICS 545 (1986). "It is now uniformly recognized that the client-lawyer contract is terminable at will by the client." *Id.*

attorney X was the contracting party may be construed in the client's favor, and the firm may lose its fee.⁸ From the firm's perspective, equally disturbing is the argument that the contract with the firm is one for a unique personal service, and therefore cannot be assigned.⁹ If the client discharges the firm because the firm, in the absence of the departed lawyer, can no longer confer the personal service in the unique fashion the client contracted for, is the firm entitled to a fee?

A related matter is that of spouses as contracting parties. Frequently both spouses will have a cause of action, even though the damages to one spouse may be the dominant factor in the case. Although the damages to one spouse may be dominant, the fee contract should include *both* spouses as contracting parties. The problem is even more acute if minors are involved. Under these circumstances, the contract must clearly identify both spouses as separate, individual clients *and* identify both spouses jointly as representatives for their minor children.

Courts have held that a contract to pursue a personal injury matter to "recovery" includes by implication the obligation to appeal an adverse judgment for no additional fee, because an appeal is implicit in the process of "recovery."¹⁰ Therefore, if the contracting lawyer does *not* intend to appeal, or if he intends to establish a different fee for appellate services, these matters must be made explicit in the contract.

Because tax law can play a crucial role in any major personal injury case, an unwary and unsophisticated client might reasonably rely upon his personal injury trial attorney for tax advice. Therefore, in order to avoid the very realistic possibility of a justiciable claim for malpractice, a personal injury trial lawyer would be wise to place a clause

⁸ For a discussion of calculating fees when a client discharges a lawyer, see *infra* notes 41-86 and accompanying text.

⁹ See 4 A. CORBIN, CORBIN ON CONTRACTS § 865 (1951).

¹⁰ See Annotation, *Construction of Contingent Fee Contract As Regards Compensation for Services After Judgment or on Appeal*, 13 A.L.R.3d 673 (1967).

in his contracts disclaiming any obligation to render tax advice and obligating the client to use personal discretion in the matter of obtaining a tax adviser.

B. *Attorney's Fees*

More than any other part of the contract, attorney's fees are of interest to both the client and the lawyer. Although not commonly done, it might be a good idea to initiate the topic of contingent fees in the contract with an expression by the client and the lawyer of the fact that recovery for the injury is tenuous and not presumed. Some older cases indicate that a contingent fee contract is justifiable only in cases in which recovery is not automatic.¹¹ The size of the contingent fee charged in each case depends upon numerous factors.¹² Both local market forces and the lawyer's experience and reputation undoubtedly play a major

¹¹ A few cases have taken the position that a contingent fee may not be justified unless there is at least some doubt about the chances of recovery. See *City of Moraine v. Baker*, 34 Ohio Misc. 77, 297 N.E.2d 122 (Montgomery County Ct. C.P. 1971); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1521 (1986) [hereinafter ABA Informal Op. 1521] (stating that a contingent fee should not be charged if the client is in a position to pay a fixed fee, unless the client is first offered an option to pay a fixed fee and selects contingent fee) summarized in [Manual] Law. Man. on Prof. Conduct (ABA/BNA) 419 (Nov. 12, 1986); see also MODEL CODE EC 2-20.

¹² See MODEL RULES Rule 1.5 (1983). Rule 1.5 provides:

A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

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

Id.

role in determining the amount of the fee charged.¹³ From the standpoint of the courts, the amount of work required of the lawyer and the amount of risk of nonpayment assumed by the lawyer are major factors.¹⁴ Lawyers who habitually err on the high side in their fee contracts, with the thought of later reducing the fee if a lower figure seems justified, should beware. The mere charging of an excessive fee violates the rules of professional conduct.¹⁵

American Bar Association (ABA) Informal Opinions suggest that if a client is able to pay a fixed fee, a contingent fee should not be charged unless the client is first given the option to select a fixed fee.¹⁶ The ABA seems to imply that a fixed fee is inherently preferable to a contingent fee, especially for wealthy clients.¹⁷ Imagine a high income client who has a moderate whiplash injury in a case where the chances of recovery are very good. Assume that this client prefers a fixed fee. How will the lawyer set the amount of the fixed fee? There seems to be no reason to assume that the factors establishing the calculus for a fixed fee are different from the factors establishing the calculus for a contingent fee, except one: the lawyer assumes no risk if the fee is fixed. Consequently, we might reasonably expect the fixed fee that is ultimately collected in our hypothetical case to be somewhat smaller

¹³ See Steele, *Pricing Behavior of Attorneys*, 42 TEX. B.J. 285 (1979), reprinted in 14 FORUM 1060 (1979), and in HOW TO DETERMINE AND SET PROPER ATTORNEYS FEES (1978) (State Bar of Texas publication).

¹⁴ Consequently, a contingent fee that is grossly disproportionate to the amount of work reasonably foreseeable to obtain a result is an excessive fee. *Anderson v. Kenelly*, 37 Colo. App. 217, 547 P.2d 260, 261 (1975); see also *In re Kennedy*, 472 A.2d 1317, 1322 (Del.) (attorney violated Model Code DR 2-106(A) by assessing a fee of 50% of a disability check), cert. denied, 467 U.S. 1205 (1984).

¹⁵ MODEL CODE DR 2-106(A). DR 2-106(A) provides: "A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee." *Id.* (emphasis added). Note that this language was not carried forward into Model Rule 1.5. *But cf.* MODEL RULES Rule 1.5(a) (stating that "[a] lawyer's fee shall be reasonable," but not indicating whether reasonableness should be determined as of the time the fee is initially agreed upon or the time the fee is actually billed).

¹⁶ See ABA Informal Op. 1521, *supra* note 11; MODEL CODE EC 2-20.

¹⁷ MODEL CODE EC 2-20. EC 2-20 provides: "[A] lawyer generally should decline to accept employment on a contingent fee basis by one who is able to pay a reasonable fixed fee" *Id.* (emphasis added).

than a contingent fee would be, because the lawyer has assumed no risk with the fixed fee. But, whenever a lawyer assumes no risk because his fee is fixed, the client assumes a corresponding obligation to pay because the fee is fixed! Thus, the ABA's seemingly implicit notion that a fixed fee may be fairer than a contingent fee seems to lose some of its appeal.

Once the contract is clear and precise as to the fee formula, the next drafting problem is to clarify precisely when the fee is payable. As might be expected, the rule of thumb is that the lawyer gets paid when the client gets paid.¹⁸ Prior to the advent of the structured settlement, few would have quarreled with this rule of thumb. Structured settlements, however, have rearranged all of this.

Because of a structured settlement's characteristics, additional contract clauses conditioned on a possible structured settlement must be placed in the fee contract if the case is of major proportions. In essence, there must be two contracts in one: (1) a contract to cover both fees and payment if lump sum settlement results, and (2) another contract to cover fees and payment if the eventual settlement is a structured one. Extreme care must be used in drafting structured settlement clauses because courts are unsettled on the issue of excessive fees in structured settlement cases.¹⁹ The apparent reason for the ambiguity

¹⁸ See, e.g., *Cardenas v. Ramsey County*, 322 N.W.2d 191, 193 (Minn. 1982) (finding that the word "recovered" in a contingent fee contract means "received" in that the attorney is entitled to one-third of each payment his client receives under the structured settlement as and when he receives it).

¹⁹ Extended value calculation has been held excessive by several courts. See, e.g., *Florida Bar v. Gentry*, 475 So. 2d 678 (Fla. 1985) (attorney's fee was excessive because the structured settlement was not reduced to present value). Present value calculation has been approved provided the client contracted for that method of calculation. See *Godwin v. Schramm*, 731 F.2d 153, 158 (3d Cir.) ("It may be . . . that contingent services are susceptible of determination by experts and reducible to present value. If so, computation of counsel fees on such a basis may not violate the [FTCA] . . ."), *cert. denied*, 469 U.S. 882 (1984). In other cases, the present value calculation has been rejected as excessive and actual cost has been used instead. See *Wyatt v. United States*, 783 F.2d 45, 47 (6th Cir. 1986) ("[I]t is clear to us that absent the submission of any contrary evidence the present value of the structured settlement in this case was, in fact, the cost of that settlement, namely, what it took in money to produce the agreed settlement pay-

and lack of agreement about fees in structured settlements is probably due to the fact that most structured settlements are negotiated privately on a case-by-case basis. Thus, the courts have not been presented with significant opportunities to examine this new settlement modality.

The terms of the fee contract may turn out to be very persuasive with the court. Courts may view the terms of the contract as persuasive in a structured settlement case because of the appealing argument that because the contract is clear and precise, and because the client agreed with the lawyer to those contract terms in advance, the contract terms should bind both parties and not be declared excessive.²⁰ *Perez v. Pappas*²¹ is a perfect example. In *Perez* the lawyer for the plaintiff renegotiated his fee after a settlement was reached, in part because the settlement was structured. The Supreme Court of Washington noted that structured settlements often do not readily lend themselves to the customary calculations of contingent fee agreements. Therefore, an attorney and client may have to reconsider the calculation of fees if a structured settlement is reached.²² The court went on to comment that lawyers who seek to renegotiate their fee contracts must bear in mind the common law rule that the attorney/client relationship is a fiduciary one, and that the renegotiation of contracts will be very carefully

ments over the entire period involved."'). The courts in both of these Federal Tort Claims Act (FTCA) cases stressed that the terms of the fee contract as written were significant to the decision.

²⁰ For a complete discussion arguing for valuation under the actual cost method, and emphasizing the importance of the terms of the fee contract itself, see Pryor, *Methods In Determining Fees In Structured Settlement Cases*, 49 TEX. B.J. 68 (1986). For a review of recent cases, most of which reject all calculations other than actual costs, see Annotation, *Propriety and Effect of "Structured Settlements" Whereby Damages Are Paid in Installments Over a Period of Time, and Attorneys' Fees Arrangements in Relation Thereto*, 31 A.L.R.4th 95 (1984).

²¹ 98 Wash. 2d 835, 659 P.2d 475 (1983) (en banc).

²² *Id.* at 835, 659 P.2d at 478. The court stated: "Oftentimes, structured settlements do not readily lend themselves to the usual course of calculating fees pursuant to contingent fee agreements. Therefore, when a structured settlement is reached, the attorney and client may have to reconsider and discuss the calculation of fees." *Id.*

scrutinized.²³

Renegotiation of the contract and its consequent close scrutiny can be avoided entirely if plaintiffs' lawyers adopt a practice of maintaining two standard forms of fee contracts instead of only one. One standard form would be the contract now used by most lawyers, except that its use would be limited to cases in which no reason to anticipate the use of structured settlement existed. The second or "new" standard form contract would contain all of the structured settlement clauses necessary to clearly and explicitly set forth the agreement of the parties as to all aspects of the potential structured settlement, such as agreements as to timing of fee payment and the value of the fund from which contingency will be calculated. This two-contract proposal has several advantages. For example, the lawyer will not be required to explain or delete structured settlement clauses in a contract that he uses with a client in a smaller case. This will save time and possible disappointment for the client. Another advantage is that the very existence of a contract which is written especially for structured settlement cases is ample evidence that the client and the lawyer carefully considered their respective contractual rights and obligations.

III. REPRESENTING MULTIPLE CLIENTS JOINTLY

Frequently, multiple clients with the same interests seek joint representation from a single lawyer. For example, several victims of a single tort or all defendants in a single case may seek joint representation. In many of these situations there is a "lead" client who may very well have some previous connection with the lawyer. The client, at least to some degree, is responsible for bringing the other clients along. Realistically, in such a situation a lawyer probably has a reason to favor the interests of the "lead" client over the interests of the other clients in the group. Such a conflict of interests may be subtle; or it may not be

²³ *Id.* at 835, 659 P.2d at 479.

so subtle. Lawyers must pay careful attention to Rule 1.7(b) of the Model Rules of Professional Conduct (Model Rules), which prohibits a lawyer from representing a client if representing that client *may* materially limit the lawyer's loyalties to other clients in the group.²⁴ Model Rule 1.7(b)(2) provides that "when representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved."²⁵ Explanation of the risks requires full disclosure of the risks involved.²⁶ The danger of conflict of interest is inherent in any joint representation of multiple clients.

Settlement of cases where multiple clients are involved presents even further difficulties. Model Rule 1.8(g)²⁷ and Model Code of Professional Responsibility (Model Code) Disciplinary Rule (DR) 5-106²⁸ require a lawyer to advise each of the multiple clients of the *aggregate* amount of the settlement and of the participation of each client therein.

Few cases discuss the ethical principles involved in

²⁴ MODEL RULES Rule 1.7(b).

²⁵ *Id.* Rule 1.7(b)(2).

²⁶ *Acheson v. White*, 195 Conn. 211, 487 A.2d 197, 199 n.5 (1985) (requiring an attorney to explain in detail the risks and foreseeable pitfalls that may arise, so that the client is able to understand that it might be preferable for him to have independent counsel).

²⁷ MODEL RULES Rule 1.8(g). Rule 1.8(g) provides:

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

Id.

²⁸ MODEL CODE DR 5-106. DR 5-106 provides:

A lawyer who represents two or more clients shall not make or participate in the making of an aggregate settlement of the claims of or against his clients, unless each client has consented to the settlement after being advised of the existence and nature of all the claims involved in the proposed settlement, of the total amount of the settlement, and of the participation of each person in the settlement.

Id.

jointly representing multiple clients. DR 5-106 was held to be adequately specific, and therefore, constitutional, by the Supreme Court of Minnesota in *In re Charges of Unprofessional Conduct Against N.P.*²⁹ An example of an attorney scrupulously obeying the rules can be found in *In re Guardianship of Lauderdale*,³⁰ in which the attorney discussed the aggregate settlement with all of the adult clients and with the guardian *ad litem* for the minors, and then made a recommendation for apportionment of the aggregate settlement that was accepted by all.

A Texas case, *Quintero v. Jim Walter Homes, Inc.*,³¹ invalidated an aggregate settlement because it violated DR 5-106.³² The facts are quite unique. The Quintero family hired attorney Gonzalez to file a law suit because Jim Walter Homes failed to provide them with a house of good, workmanlike quality.³³ Gonzalez, after obtaining the Quinteros' permission, associated attorney Gandy to try the case. Gandy tried the case and obtained a \$78,000 judgment in favor of the Quinteros.³⁴ Incredibly, without knowledge of Gandy's judgment, Gonzalez proceeded to negotiate an aggregate settlement with Jim Walter Homes on behalf of 349 of his clients, including the Quinteros, for \$1.8 million. Gonzalez calculated that the Quinteros would receive approximately \$14,000 from that aggregate settlement.³⁵

Needless to say, the Quinteros preferred the \$78,000 judgment obtained by Gandy. Consequently, the Quinteros proceeded to bring an action to set aside the aggregate settlement that Gonzalez negotiated with Jim Walter Homes. The court supported the contention of the Quinteros that Gonzalez violated DR 5-106 by not dis-

²⁹ 361 N.W.2d 386, 389, 394 (Minn.), *appeal dismissed*, 476 U.S. 926 (1985).

³⁰ 15 Wash. App. 321, 549 P.2d 42 (1976).

³¹ 709 S.W.2d 225 (Tex. Ct. App. 1985).

³² *Id.* at 229.

³³ *Id.* at 227.

³⁴ *Id.*

³⁵ *Id.*

cussing the aggregate settlement with his clients.³⁶ Because Gonzalez failed to fully inform the Quinteros of the settlement before obtaining their consent, the court invalidated the aggregate settlement and ordered the \$78,000 judgment in favor of the Quinteros to be enforced.³⁷

Although the problems of jointly representing multiple clients are seldom litigated, it is apparent that joint representation is a trap for the unwary. This trap is made all the more appealing by the fact that such representation usually enhances the size of the eventual recovery and hence enhances the fee. Nevertheless, attorneys must be extremely wary when they face a multiple client opportunity. One innovative attorney attempted to alleviate some of the potential problems by having all clients in the group agree in advance that the majority would control decisions about whether to accept a settlement.³⁸ Eventually, a settlement offer was submitted to the clients and a clear majority of them voted to accept it. Unfortunately for the lawyer, a few of the dissenting clients sued to set the settlement aside.³⁹ The court held that the advance agreement to allow majority control of settlement decisions was void and a violation of the attorney's obligation to each of his clients as set forth in DR 5-106.⁴⁰

³⁶ *Id.* at 229. The court stated that "[t]he Quinteros were not informed of the nature and settlement amounts of all the claims involved in the aggregate settlement, nor were they given a list showing the names and amounts to be received by the other settling plaintiffs." *Id.*

³⁷ *Id.* at 231.

³⁸ *Hayes v. Eagle-Picher Indus. Inc.*, 513 F.2d 892 (10th Cir. 1975).

³⁹ *Id.* at 893.

⁴⁰ *Id.* at 894-95. The court stated:

We hold that the arrangement presented allowing the majority to govern the rights of the minority is violative of the basic tenets of the attorney-client relationship in that it delegates to the attorney powers which allow him to set not only contrary to the wishes of his client, but to act in a manner disloyal to his client and to his client's interests.

Id.

IV. TERMINATION OF THE ATTORNEY/CLIENT RELATIONSHIP

By undertaking to represent a client, an attorney impliedly agrees to serve throughout the duration of the case.⁴¹ On the other hand, clients can terminate an attorney at any time for *any* reason.⁴² Clients are provided this extraordinary option because of the need for confidence and trust in an effective attorney/client relationship.⁴³ The fact that an attorney is retained under a contingency fee contract in no way affects the client's right to discharge him at will.⁴⁴

Although a client has the right to discharge a lawyer at will, if the discharge is not legally justifiable, the client must pay the lawyer some measure of damages. Similarly, if a lawyer withdraws from the representation for legally justifiable reasons, the lawyer is entitled to some measure of payment for services rendered. That the attorney withdraws, as opposed to being discharged by the client, does not determine whether the attorney is precluded from receiving compensation for his services.⁴⁵ Thus, determining whether the attorney/client relationship was terminated with or without a legally justifiable cause is the first step in deciding the amount of compensation to which an attorney is entitled. Courts tend not to distinguish between rights to compensation created by wrongful discharge and rights to compensation created by

⁴¹ 1 S. SPEISER, ATTORNEYS' FEES § 4:10 (1973) (citing *Fairchild v. General Motors Acceptance Corp.*, 254 Miss. 261, 179 So. 2d 185 (1965)).

⁴² *Plaza Shoe Store, Inc. v. Hermel, Inc.*, 636 S.W.2d 53, 58 (Mo. 1982). Attorneys employed under a contingent fee contract who were discharged without cause before settlement or judgment, and who had rendered legal services, were limited to recovery of the reasonable value of services rendered, not greater than the contract fee and payable only upon occurrence of the contingency. *Id.*

⁴³ *Rosenberg v. Levin*, 409 So. 2d 1016, 1021 (Fla. 1982). The fact that the client may not rely entirely on good faith efforts of the attorney dictates that clients be given greater freedom to change legal representatives than might be tolerated in other employment relationships. *Id.*

⁴⁴ 1 S. SPEISER, *supra* note 41, § 4:32 (citing cases from the District of Columbia, California, Kentucky, Louisiana, Missouri, Nebraska, and Washington).

⁴⁵ See generally Annotation, *Circumstances Under Which Attorney Retains Right to Compensation Notwithstanding Voluntary Withdrawal From Case*, 88 A.L.R.3d 246 (1978).

legally justifiable withdrawal.⁴⁶

A. *Conduct that Justifies Attorney's Withdrawal*

Guidelines for justifiable withdrawal are established in the rules of professional responsibility.⁴⁷ Reasons for withdrawal include the following: (1) continuation of the

⁴⁶ See, e.g., *Reed Yates Farms v. Yates*, 172 Ill. App. 3d 519, 526 N.E.2d 1115, 1124-25 (1988) (holding that quantum meruit recovery is applicable to situations involving discharge of an attorney without cause, as well as those involving the attorney withdrawing for good cause).

⁴⁷ See MODEL RULES Rule 1.16. The rule provides:

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

(1) the representation will result in violation of the rules of professional conduct or other law;

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

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(2) the client has used the lawyer's services to perpetrate a crime or fraud;

(3) the client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

(4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) other good cause for withdrawal exists.

(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

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

Id.; see also MODEL CODE DR 2-110(B)-(C) (the language of DR 2-110(B)-(C) is similar to that of Model Rule 1.16).

employment will result in the attorney violating rules of professional responsibility; (2) the lawyer's health makes the representation unreasonably difficult; (3) the client fails to fulfill his obligations to the lawyer; and (4) the client insists upon services that the lawyer considers repugnant.⁴⁸ The courts have recognized other justifications for withdrawal. These reasons include: (1) conduct on the part of the client that degrades or humiliates the attorney;⁴⁹ (2) retention by the client of any additional counsel who are personally or professionally objectionable to the attorney originally retained;⁵⁰ and (3) lack of cooperation.⁵¹

A client's refusal to accept a settlement offer does not justify withdrawal.⁵² The Model Rules require that an attorney "abide by a client's decision to accept or to reject a settlement offer."⁵³ If, however, in addition to refusing a settlement offer, the client has also engaged in conduct that might "independently justify withdrawal," then it is possible that the attorney's right to compensation will not

⁴⁸ See MODEL CODE DR 2-110(B)-(C); MODEL RULES Rule 1.16.

⁴⁹ See, e.g., *Fishman v. Conway*, 57 So. 2d 605 (La. Ct. App. 1952) (client made herself most obnoxious to her attorneys and to the court, she indicated plainly that she was dissatisfied with the attorney's service, and she wrote a letter to the grievance committee charging that the attorneys were attempting to take her belongings from her).

⁵⁰ See, e.g., *Tenney v. Berger*, 93 N.Y. 524 (1883) (client retained additional and professionally objectionable counsel without the original attorney's knowledge or consent). Note, however, that the mere retention of other counsel by the client does not justify the first attorney's withdrawal. *Seasongood v. Prager*, 146 A.D. 833, 131 N.Y.S. 771 (App. Div. 1911).

⁵¹ See, e.g., *Hancock v. Mutual of Omaha Ins. Co.*, 472 A.2d 867 (D.C. 1984) (client left telephone calls and letters unanswered and made no arrangement to pay attorney for past services).

⁵² Many courts have considered the issue of the relative rights of the parties when a client refuses to accept a settlement offer. Although the client's refusal to accept the settlement may be foolish, the courts uniformly hold that the refusal is not in the nature of a breach of contract. If an attorney withdraws because his client refuses to accept a settlement offer, the attorney is not entitled to a fee. *Bernard v. Moretti*, 34 Ohio App. 3d 317, 518 N.E.2d 599 (1987); see also *May v. Seibert*, 164 W. Va. 673, 264 S.E.2d 643 (1980).

⁵³ MODEL RULES Rule 1.2(a). The rule provides in part that "[a] lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter." *Id.*

be affected if he withdraws.⁵⁴ *Ambrose v. Detroit Edison Co.*⁵⁵ is a useful example. In *Ambrose*, the court found circumstances that justified the attorney's withdrawal, although the withdrawal in part resulted from the client's refusal to accept a settlement offer. The court focused on the "total lack of communication" between the client and the attorneys, as well as the client's uncooperative attitude. For example, the client refused to elect between receiving payment of benefits from the defendant based solely on the life of the client or, alternatively, payment based on both the lives of the client and his wife.⁵⁶ Additionally, the trial judge concluded that the heart of the problem was the client's desire to "get back at" the defendants. Apparently the client also had grown so accustomed to the litigation that he would miss it if the suit settled. Consequently, the court held that the client's "irrational" refusal to settle, combined with the additional circumstances, provided the attorneys with good cause to withdraw and preserved their right to a fee.⁵⁷

B. *Right to Compensation If Client Discharges Attorney Without Cause or Attorney Withdraws with Cause*

Jurisdictions differ as to determining proper compensation for an attorney discharged without cause. Most states have adopted either the contract rule or the modern rule.⁵⁸ According to the contract rule, an attorney is entitled to the entire contingent fee if the client wrongfully discharges him.⁵⁹ The modern rule, on the other hand, limits the attorney's recovery to the reasonable value of his services rendered prior to the discharge.⁶⁰

⁵⁴ *May*, 164 W. Va. at 673, 264 S.E.2d at 646.

⁵⁵ 65 Mich. App. 484, 237 N.W.2d 520 (1975).

⁵⁶ *Id.* at 484, 237 N.W.2d at 523.

⁵⁷ *Id.* at 484, 237 N.W.2d at 524.

⁵⁸ Note, *Client Discharging Attorney Without Cause Pursuant to a Contingency Fee Agreement: Limited in Missouri to Quantum Meruit Not to Exceed the Contract Fee—Upon Occurrence of the Contingency*, 51 UMKC L. REV. 373 (1983) [hereinafter Note, *Client Discharging*].

⁵⁹ *Id.* at 373.

⁶⁰ *Id.*

Commentators suggest that the justification for the contract rule, which allows the attorney to collect his entire contingent fee, is tied to the policy underlying the contingent fee itself.⁶¹ Because the contingent fee arrangement is perceived as the "poor man's key to the courthouse door,"⁶² some commentators believe that protecting the attorney's economic interest provides an incentive for attorneys to utilize the contingent fee modality, thereby making the judicial system available for all.⁶³ Not all commentators believe that attorneys are motivated to use the contingent fee modality out of concern for clients who could not otherwise afford an attorney's services. Perhaps attorneys adopt this fee structure because it is economically advantageous for them to do so, and because the public has come to expect attorneys to employ this fee structure.

Other justifications for the contract rule include the following ideas: (1) valuing an attorney's services is so difficult that it is impossible to value partially completed legal work; (2) attorneys' services are not easily divisible because many services are rendered before formal legal actions or court proceedings are initiated; (3) the parties agreed upon the full contract price as the value of the services, and no other rational measure of damages is available; and (4) the client should be charged the full fee so that he does not profit from his own breach.⁶⁴

The modern rule, which limits fee recovery to quantum meruit, is followed in at least nineteen jurisdictions.⁶⁵

⁶¹ Note, *Attorney's Right to Compensation When Discharged Without Cause From a Contingent Fee Contract* — *Covington v. Rhodes*, 15 WAKE FOREST L. REV. 677, 680-82 (1979) [hereinafter Note, *Attorney's Right*].

⁶² *Id.* at 681.

⁶³ *Id.* at 682.

⁶⁴ Note, *An Attorney Discharged Without Cause Under a Contingent Fee Contract is Limited to Quantum Meruit Recovery, and Recovery is Dependent Upon the Client's Ultimate Recovery in the Underlying Action*, 41 CIN. L. REV. 1002, 1004 (1972) (now titled U. CIN. L. REV.).

⁶⁵ Annotation, *Limitation to Quantum Meruit Recovery, Where Attorney Employed Under Contingent Fee Contract is Discharged Without Cause*, 92 A.L.R.3d 690, 694-96 (1979). The jurisdictions that limit recovery to quantum meruit are Alaska, Arizona, California, Connecticut, District of Columbia, Georgia, Illinois, Indiana,

The premise of this modern rule is that the right to discharge an attorney is of little value if the cost of exercising that right is prohibitive, such as when the client is required to pay the full fee contracted at the outset of the relationship.⁶⁶ The modern rule has been praised for providing clients more freedom in substituting counsel and for promoting confidence in the legal profession.⁶⁷ The rule has been criticized, however, because it hinders the attorney's ability to calculate the risks involved in setting the contingent fee.⁶⁸

Growing acceptance of the modern rule has added several issues to the analysis of fees and the withdrawn or discharged attorney. For instance, when should a discharged attorney receive his fee? The decisions fall into two camps. The approach taken by California courts is that a discharged attorney's claim does not accrue until the contingency in the contract actually occurs.⁶⁹ Several theories support this approach. First, it is unfair to impose on the client an absolute obligation to pay the original attorney regardless of the outcome of the litigation,⁷⁰ particularly in light of the fact that the attorney initially assumed the risk of not collecting a fee at all.⁷¹ An additional supporting theory is that the result ultimately obtained by the client is a significant factor in determining the reasonable value of the discharged attorney's services.⁷² On the other hand, the approach of New York

Kentucky, Louisiana, Michigan, Minnesota, Nebraska, New Jersey, New York, Pennsylvania, Virginia, Washington, and West Virginia. *Id.*

⁶⁶ Note, *Attorney's Right*, *supra* note 61, at 680 (citing *Fracasse v. Brent*, 6 Cal. 3d 784, 789, 494 P.2d 9, 12, 100 Cal. Rptr. 385, 388 (1972)).

⁶⁷ *Rosenberg v. Levin*, 409 So. 2d 1016, 1022 (Fla. 1982). The court held that an attorney who is discharged without cause is entitled to quantum meruit, but the recovery must be limited to the maximum contract fee, otherwise the client is penalized for discharging the attorney and the attorney receives more than he bargained for in the original contract. *Id.* at 1017.

⁶⁸ Note, *Client Discharging*, *supra* note 58, at 378.

⁶⁹ *Id.* at 379-80; see also *Fracasse*, 6 Cal. 3d at 791, 494 P.2d at 14, 100 Cal. Rptr. at 390.

⁷⁰ *Fracasse*, 6 Cal. 3d at 792, 494 P.2d at 14, 100 Cal. Rptr. at 390.

⁷¹ *Id.*

⁷² *Id.*

courts is that a discharged attorney's claim accrues upon discharge.⁷³ This viewpoint assumes that the value of the original attorney's services is remotely, if at all, related to the results obtained by the replacement attorney.⁷⁴ According to this view, because the client rescinded the contract, the contingency aspect of the contract also was rescinded.⁷⁵

Another question posed by the modern rule is how the reasonable value, or quantum meruit, of the attorney's services is to be valued. No uniform method is utilized to arrive at a "reasonable" fee in the event of discharge under the modern rule. Often the terms of the contract are considered in determining the amount of recovery.⁷⁶ Other factors include special skills the attorney may have employed, the complexity of the case, the size of the case in terms of dollars, the caliber of the services provided, the fees generally charged for similar work, the time spent on the case, and the success achieved.⁷⁷

In *Salem Realty Co. v. Matera*,⁷⁸ the Massachusetts Supreme Court recognized the possibility that an attorney who had rendered substantial performance prior to being discharged might recover the full contingent fee.⁷⁹ The court stated that in deciding whether or not to award the full amount the following factors should be weighed: (1)

⁷³ *Paulsen v. Halpin*, 74 A.D.2d 990, 427 N.Y.S.2d 333, 335 (App. Div. 1980) (an attorney may sue immediately after the contract is terminated and the court will look to the totality of the circumstances to determine a reasonable fee for the attorney).

⁷⁴ *Tillman v. Komar*, 259 N.Y. 133, 134, 181 N.E. 75, 76 (1932) (the court recognized the client's right to cancel the contract with his attorney, but upon cancellation the contract fails and the attorney may sue for the reasonable value of his services).

⁷⁵ *Fracasse*, 6 Cal. 3d at 804, 494 P.2d at 23, 100 Cal. Rptr. at 399 (Sullivan, J., dissenting) (the dissent's reasoning was that the attorney bargained for limited risks under the contract that the case might be unsuccessful, but did not bargain for the risk that his client might discharge him and select an incompetent attorney).

⁷⁶ I S. SPEISER, *supra* note 41, § 4:36.

⁷⁷ *Salem Realty Co. v. Matera*, 10 Mass. App. Ct. 571, 410 N.E.2d 716, 719 (1980), *aff'd*, 384 Mass. 803, 426 N.E.2d 1160 (1981).

⁷⁸ 384 Mass. 803, 426 N.E.2d 1160 (1981).

⁷⁹ *Id.* at 803, 426 N.E.2d at 1161.

the bad faith of the terminating client; (2) the extent of the lawyer's performance left incomplete; (3) the cost to the client for the legal services necessary to complete the finished work; (4) the conduct of the attorney; and (5) the wording of the agreement.⁸⁰

Another method of determining reasonable compensation is to apportion the fee from a single contingent fee contract between the original attorney and the new attorney. Should the fee generated by the contingency not be sufficient to satisfy the quantum meruit claims of both the original and existing counsel, the use of a pro rata formula to distribute the fee between the two lawyers may be appropriate.⁸¹ Certainly the notion of apportioning the fee from a single contract protects the client from paying double fees.

C. *Discharge With Cause or Withdrawal Without Cause*

Both an attorney discharged by a client who has legally adequate cause to discharge and an attorney who withdraws without legally adequate cause forfeit any right to compensation, according to the prevailing rule.⁸² Two recent cases suggest that courts may be softening this position. In the first case, a Texas court awarded a fee representing the value of services rendered by an attorney who was discharged with legally adequate cause.⁸³ The conduct that justified the discharge included being rude and impatient with the client, postponing the trial without the client's knowledge or consent, and missing appointments.⁸⁴ In the second case, the West Virginia Supreme Court of Appeals, after finding that the attorney withdrew because the client refused to accept a settlement recommendation, permitted the attorney to recover the value of

⁸⁰ *Id.*

⁸¹ *Spires v. American Bus Lines*, 158 Cal. App. 3d 211, 204 Cal. Rptr. 531, 533 (1984).

⁸² 1 S. SPEISER, *supra* note 41, § 4:10; *see also* *Staples v. McKnight*, 763 S.W.2d 914 (Tex. Ct. App. 1988).

⁸³ *Rocha v. Ahmad*, 676 S.W.2d 149 (Tex. Ct. App. 1984).

⁸⁴ *Id.* at 155.

the services to the date of withdrawal.⁸⁵ In this particular case, the client was not prejudiced by the attorney's withdrawal and the court concluded that forfeiture of all compensation was too severe a penalty for the attorney to pay.⁸⁶

V. INVESTIGATION

Not all lawyers are personally involved with the investigation of claims. All lawyers, however, recognize the importance of investigation, and some lawyers occasionally direct the investigative efforts of others. Undeniably, the rules of professional responsibility do not focus on the topic of investigation. This fact is attributable to the often repeated complaint that the rules inadequately treat some aspects of practicing law. Nevertheless, the rules address two parts of investigation: contact with adverse parties and surreptitious recording of conversations.

A. *Contact with Adverse Parties*

Both the Model Code and Model Rules prohibit a lawyer from having any *ex parte* communication with an opposing party who is represented by counsel.⁸⁷ Although the wisdom of these rules appears to be self-evident, every litigator knows that they become problematical when a

⁸⁵ May v. Seibert, 164 W. Va. 673, 264 S.E.2d 643, 644 (1980).

⁸⁶ *Id.* at 673, 264 S.E.2d at 647. The court determined that the client was not prejudiced by the attorney's withdrawal because within a few months the client accepted a settlement at the same amount originally obtained by the first attorney. *Id.*

⁸⁷ MODEL CODE DR 7-104(A)(1); MODEL RULES Rule 4.2. The Disciplinary Rule states:

During the course of his representation of a client a lawyer shall not:

(1) 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.

MODEL CODE DR 7-104(A)(1). Rule 4.2 states: "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." MODEL RULES Rule 4.2; see also Annotation, *Attorneys' Dealing Directly With Client of Another Attorney as Ground for Disciplinary Proceeding*, 1 A.L.R.3d 1113 (1965).

case is in the investigative stage. For example, the rules may limit the opportunity to obtain information from employees or agents of adverse parties. Without the consent of the plaintiff's attorney, can a lawyer for the defendant contact a plaintiff's employees to investigate the extent and nature of any preexisting disability the plaintiff might have? Can a lawyer contact the spouse of a represented party? The rules leave us without guidance. The few pertinent court decisions concern institutional clients such as corporations. Those cases hold that employees of represented institutions may be contacted *ex parte* as long as the employees do not hold managerial positions that give them the authority to speak for and bind the institution.⁸⁸

Note that the practice is altogether different if the opposing part is *not* represented. No rules of professional responsibility limit *ex parte* contact with an unrepresented adverse party.⁸⁹ Thus, investigation, or even negotiation with an unrepresented opposition party, may proceed apace. DR 7-104(A)(2) expressly prohibits a lawyer from giving legal advice to an unrepresented adverse party.⁹⁰

⁸⁸ See Annotation, *Right of Attorney to Conduct Ex Parte Interviews With Corporate Party's Nonmanagement Employees*, 50 A.L.R.4th 652 (1986).

⁸⁹ Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 733-34 (1977).

⁹⁰ MODEL CODE DR 7-104(A)(2). DR 7-104(A)(2) states:

During the course of his representation of a client a lawyer shall not . . . [g]ive advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interest of his client.

Id.; see MODEL RULES Rule 4.3. Rule 4.3 states:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Id. See also MODEL RULES Rule 8.4. Rule 8.4 states:

It is professional misconduct for a lawyer to: (a) violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

As a practical matter, it may be quite difficult to engage in some forms of investigation without giving legal advice. The same holds true for most forms of negotiation that involve contact with the opposing party.

*W.T. Grant Co. v. Haines*⁹¹ more than adequately presents these issues.⁹² W.T. Grant, a mercantile company, had been investigating the activities of several employees, among them Mark Haines.⁹³ Haines was in charge of store leases.⁹⁴ Grant decided to file suit against Haines and other employees, claiming various acts of fraud against the interests of the company.⁹⁵ On the same morning that its lawyers filed suit in federal court, Grant officials called the employees to a meeting.⁹⁶ When the employees arrived, they were told that the meeting was cancelled. Immediately thereafter, company attorneys interrogated Haines, who did not know that the suit had been filed. During the interrogation Haines made numerous statements against his interests and was fired at the close of the interrogation.⁹⁷

Haines moved to have the case against him dismissed on the grounds that when the Grant attorneys interrogated him, they violated DR 7-104(A)(1), which prohibits

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Id. Sometimes, adjustors or investigators are used to negotiate as well as to investigate. Note that both DR 1-102(A)(2) and Model Rule 8.4 prohibit a lawyer from violating the rules through an agent. Clearly, however, not all adjustors operate as agents of lawyers. Obviously, an independent lay person adjustor is not bound by the rules of professional responsibility.

⁹¹ 531 F.2d 671 (2d Cir. 1976).

⁹² For a more thorough analysis of these issues and of the *Grant* case, see Pene-gar, *The Five Pillars of Professionalism*, 49 U. PITT. L. REV. 307, 348-55 (1988).

⁹³ *Grant*, 531 F.2d at 673.

⁹⁴ *Id.* at 672.

⁹⁵ *Id.* at 672-73.

⁹⁶ *Id.* at 673.

⁹⁷ *Id.* at 674.

communication with represented adverse parties.⁹⁸ Haines admitted that he was not literally within the scope of DR 7-104(A)(1) because he was not represented by counsel during the interrogation. Haines argued (not without logic perhaps) that because the Grant lawyers purposely failed to advise him that a suit had been filed and had lured him to a meeting so that he might be conveniently interrogated, the type of harm sought to be avoided by DR 7-104(A)(1) had in fact occurred. The court rather casually dismissed Haines' argument, stating that he was a sophisticated businessman, hardly deserving of the kind of consideration the court might afford a befuddled widow under the same circumstances.⁹⁹

Undeterred, Haines presented a second argument to the court. He claimed that the Grant attorneys violated DR 7-104(A)(2), which prohibits giving legal advice to an unrepresented adverse party, because they gave him advice during the course of the interrogation.¹⁰⁰ Because the Grant lawyers spoke with Haines at the interrogation about waiving some of his rights, the court concluded that they did violate DR 7-104(A)(2).¹⁰¹ Ironically, the court also concluded that the violation would not disqualify the lawyers from continuing to represent Grant.¹⁰²

Grant is more than just an interesting example of the interplay of the rules about contact with adverse parties. The case demonstrates how difficult it can be to conduct an investigation or a negotiation without giving legal advice. Furthermore, *Grant* may be seen as a case that trivializes the rules to some extent. Some, at least, would argue that the facts in *Grant* are much more compelling than indicated by the result reached by the court.

⁹⁸ *Id.*; see *supra* note 87 for the text of DR 7-104(A)(1).

⁹⁹ *Grant*, 531 F.2d at 674.

¹⁰⁰ *Id.* at 675; see *supra* note 90 for the text of DR 7-104(A)(2).

¹⁰¹ *Grant*, 531 F.2d at 675.

¹⁰² *Id.* at 677. "The business of the court is to dispose of litigation and not to act as a general overseer of the ethics of those who practice here unless that questioned behavior taints the trial of the cause before it." *Id.*

B. *Surreptitious Recording of Conversation*

The second aspect of investigation that the rules of professional conduct address is the surreptitious recording of a party to a conversation. Legally, any party to a conversation may clandestinely record the conversation. For a lawyer to do so, however, raises the specter of Canon 9 of the Model Code, which states that "[a] lawyer should avoid even the appearance of professional impropriety."¹⁰³ One can imagine numerous strategic reasons for a lawyer to secretly record a conversation. The reasons may range from recording client interviews in order to avoid taking notes during the interview to recording hostile witnesses or suspected perjurers for future impeachment. In fact, one makes a pivotal value choice in concluding that clandestine recording by a lawyer violates Canon 9 per se. The contrary value choice is that in many cases clandestine recording promotes the central concepts of truth and justice far more than the appearance of impropriety damages these concepts. Indeed, it was not until the Nixonesque days that jurisdictions began to hold clandestine recording unethical.

The first major step in the process of declaring clandestine recording professionally unethical came in 1974 with ABA Formal Opinion 337, which prohibits an attorney from recording a conversation without the prior knowledge or consent of all parties involved.¹⁰⁴ Other jurisdictions quickly followed suit.¹⁰⁵ As might be expected, the courts began to take similar positions. *National Life & Acci-*

¹⁰³ MODEL CODE Canon 9.

¹⁰⁴ ABA Comm. on Ethics and Professional Responsibility, Formal Op. 337 (1974) [hereinafter ABA Formal Op. 337], *reprinted in* ABA STANDING COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, FORMAL AND INFORMAL ETHICS OPINIONS: FORMAL OPIONS 316-348, INFORMAL OPINIONS 1285-1495, at 94 (1985). Opinion 337 states that "no lawyer should record any conversation, whether by tape or other electronic device, without consent or prior knowledge of all parties to the conversation." *Id.*

¹⁰⁵ See, e.g., State Bar of Texas Comm. on Interpretation of the Code of Professional Responsibility, Op. 392 (1978), *reprinted in* 41 Tex. B.J. 580 (1978), (overruling Texas Opinion 84 (1953), *reprinted in* 16 Tex. B.J. 703 (1953)).

*dent Insurance Co. v. Miller*¹⁰⁶ is a useful example. The insurance company in *National* denied coverage on the theory of application fraud. Consequently, the principal issue in the case involved what the claimant said, or did not say, to the insurance agent at the time the application for insurance was taken. The lawyer for the claimant suspected that the insurance agent was a liar. To prove it, the lawyer for the claimant instructed the claimant to place a telephone call to the insurance agent from the lawyer's office and clandestinely recorded the call. The agent told the truth during the phone conversation. Later, the recorded conversation was used at trial as impeaching evidence.¹⁰⁷

Thus, the facts in *National* clearly present two value choices. One choice is that the lawyer's conduct has the appearance of impropriety and therefore should be condemned as a breach of professional ethics. Perhaps the evidence acquired as a result of the lawyer's unethical conduct also should not be used. Another possible choice is that the claimant's resourceful lawyer gained justice for a client by exposing perjury and deceit. The court admitted the evidence in *National*, but soundly condemned the lawyer's conduct.¹⁰⁸

The viewpoint that clandestine recording is so reprehensible that it should be avoided, although it may be a very effective or possibly the only effective investigative tool in some cases, is not frivolous or without foundation. Our system of justice does not always maximize truth over competing values. Some of our rules of evidence tend to sacrifice truth for the appearance of fairness, as is the case

¹⁰⁶ 484 So. 2d 329 (Miss. 1985), *appeal dismissed sub nom.* American Gen. Life & Accident Ins. Co. v. Miller, 108 S. Ct. 2007 (1988).

¹⁰⁷ *Id.* at 331-32.

¹⁰⁸ *Id.* at 338. The court held that "[a]n attorney's actions in secretly tape recording conversations with adverse parties cannot be condoned." *Id.*; see also *In re An Anonymous Member of the S.C. Bar*, 283 S.C. 369, 322 S.E.2d 667 (1984) (adopting ABA Formal Op. 337, *supra* note 104, and also holding that Model Code DR 1-102(A)(4) is violated whenever an attorney misrepresents his identity on the phone).

with the rule of attorney/client confidentiality. Likewise, some of our most enshrined procedures, such as an accused's right of confrontation and the privilege against self-incrimination, sacrifice the truth for the appearance of propriety. Adopting the view that clandestine recording of conversations is unethical, however, opens other doors. For example, is it therefore unethical for a lawyer to instruct an insurance adjustor to record clandestinely on video tape a claimant performing strenuous activity? Could the lawyer in *National* have ethically instructed his client to engage the lying insurance agent in a "private" face-to-face conversation while an eavesdropper was stationed clandestinely nearby? These and other similar tactics must be addressed by those who feel strongly that clandestine recording is a gross ethical impropriety.

VI. THE REPERCUSSIONS OF SUBROGATION CLAIMS

The rights of an injured plaintiff to proceeds from a third party tortfeasor are affected by the rights of various subrogees, including workers' compensation carriers, hospitalization carriers, and physicians. While some subrogees intervene in the suit and are represented by counsel, other subrogees do not intervene and rely, explicitly or implicitly, upon the injured plaintiff's attorney to protect their interests. Some subrogees perfect legally binding liens, while others simply hope to be paid, and still others place the plaintiff's attorney on notice of their interest. Because the subrogees present themselves in such a variety of configurations, a plaintiff's lawyer may be involuntarily subjected to a serious conflict of interest dilemma. Need we be reminded that a lawyer owes the injured plaintiff the duty of *undivided* loyalty?¹⁰⁹

¹⁰⁹ MODEL RULES Rule 1.7. Rule 1.7 states:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that

A. *Effect of Subrogation Claims*

This discussion explores the effect of subrogation claims on an attorney's ethical obligations to an injured client. Statutes and court decisions in many states impose a duty on plaintiffs' attorneys to protect the interests of subrogees. What are the ramifications for the injured plaintiff and for the subrogees? What are the ramifications if the injured plaintiff's attorney voluntarily accepts some obligation to protect the subrogee's claim?

Efforts of workers' compensation carriers to present subrogation claims in third party litigation provide a useful medium to explore the impact of subrogation on the relationship between the injured plaintiff, the plaintiff's attorney and the subrogee.¹¹⁰ Our analysis is facilitated if we presume a case in which the value of the employee's injury considerably exceeds the limits of available recovery from the third party tortfeasor. In that instance, the injured employee will recover less than a reasonable assessment of the actual value of the injury. As a logical

client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Id.

¹¹⁰ When an employee in the course of his employment sustains an injury as a result of negligence by a third party, all states recognize the employee's right to bring a common-law tort action against the third party. Atleson, *Workmen's Compensation: Third Party Actions and the Apportionment of Attorney's Fees*, 19 BUFFALO L. REV. 515 (1970). In addition to the possibility of recovery from the third party tortfeasor, the injured employee is entitled to workers' compensation benefits. The rationale, however, of subrogation statutes is to avoid double recovery by the employee without granting immunity to the third party. 2A A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 74.00 (1988). Although the procedures vary, statutory mechanisms in many states subrogate the workers' compensation carrier to the injured employee's recovery from the third party tortfeasor. Furthermore, a substantial majority of states now require that the workers' compensation carrier pay a portion of the employee's attorney's fees out of the carrier's share of the recovery from the third party tortfeasor. *Id.* § 74.32(a).

deduction, we might suppose that because the injured employee recovers less than the actual value of the injury, the subrogees should discount their claim to subrogation in a somewhat similar ratio. Under these circumstances, the plaintiff's attorney is in a position to negotiate freely between the plaintiff and the subrogees to the end that all fairly share an admittedly inadequate recovery. Otherwise, settlement, which is a "desirable" result, might be impossible. If the plaintiff or any of the subrogees insist on a full value recovery, the incentive for all other claimants to accept less than full value is greatly diminished, if not destroyed altogether. Consequently, the role the attorney plays in these circumstances appears to fit rather comfortably within the guidelines established in Model Rule 2.2.¹¹¹

The appearance of propriety and fairness is not so obvious if the scenario is changed. Assume that the injured employee, for personal reasons, insists on settling the claim against the third party tortfeasor for far *less* than its reasonably predicted collectable value. In that case, what

¹¹¹ MODEL RULES Rule 2.2. The rule provides:

(a) A lawyer may act as intermediary between clients if:

(1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's consent to the common representation;

(2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

(3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

is the position of the attorney? Clearly, the attorney continues to have a duty to negotiate a settlement, particularly if so instructed by the injured client. But how does the attorney deal with subrogees? Is it appropriate to approach subrogees in an attempt to convince them to discount the value of their claims solely because the plaintiff, for personal reasons, does not desire to pursue the litigation to its full economic value? At this point the conflict of interest gremlin appears. One might argue that a lawyer cannot adequately represent the desire of an injured plaintiff to close out the litigation for less than full value while simultaneously representing the desire of subrogees to recover full value of monies previously paid.

The potential for conflict of interest between the injured plaintiff and the subrogees is defined by the relationship between the plaintiff's lawyer and the subrogees. If the plaintiff's lawyer owes no duty to the subrogees because they are not clients, then there is either no conflict or the conflict is quite minimal. On the other hand, if the plaintiff's lawyer does owe a duty to the subrogees, then the conflict of interest is apparent. Furthermore, the degree of conflict will be directly proportional to the extent of the plaintiff's lawyer's duty to those subrogees.

Inextricably, statutes creating subrogees' liens determine the extent of the plaintiff's attorney's duty to the subrogees.¹¹² For example, statutes in twenty-six jurisdictions require an injured employee to give the compensation carrier notice of a proposed settlement and require that the carrier consent to the settlement.¹¹³ In a more

¹¹² Apparently, all but two states have adopted statutes subrogating compensation carriers to the recovery by an injured employee from a third party tortfeasor. Only West Virginia and Georgia have no subrogation statutes. Consequently, in those states, the employee is permitted to retain both compensation benefits and the full damages from the third party tortfeasor. See *Liberty Mut. Ins. Co. v. Georgia Ports Auth.*, 155 Ga. App. 940, 274 S.E.2d 52, 53 (1980) (employer had no subrogation rights under Longshoremen's and Harbor Workers' Act); *Jones v. Appalachian Elec. Power Co.*, 145 W. Va. 478, 115 S.E.2d 129, 135 (1960) (recognizing that there is no right of reimbursement to the employer when an injured party brings suit against a third party).

¹¹³ 2A A. LARSON, *supra* note 110, § 74.17-(a) n.2. The states are Alaska, Ari-

direct sense, the Federal Employee's Compensation Act was amended in 1975 to explicitly place a duty on the plaintiff's attorney to satisfy the subrogation interest of the United States prior to distribution of any recovery from a third party tortfeasor.¹¹⁴ Under the terms of that statute, an attorney for an injured plaintiff who distributes funds against which the government has a lien is liable to the United States for conversion.¹¹⁵ Thus, it seems reasonable to postulate that a plaintiff's attorney has a correlative attorney/client relationship with subrogees. Admittedly, the attorney/client relationship may be somewhat stronger if the attorney's duty to the subrogee "client" has been created by statute rather than arising from some conduct on the attorney's part that caused the subrogee to rely on that attorney as a matter of good faith. However, the difference between the extent of duty created by statute and the extent of duty created by a lawyer's own conduct seems hardly deserving of the quibble.

B. *State Court Opinions*

1. *Texas and Tennessee*

Opinions from several state courts demonstrate the inextricability of the attorney's duty to the subrogee. Texas courts hold that the "first money" recovered by an injured employee belongs to the subrogated compensation carrier, and until that subrogation is paid in full, the employee has no right to any proceeds from a third party tortfeasor.¹¹⁶ Consequently, an attorney who has notice

zona, Arkansas, California, Colorado, Connecticut, District of Columbia, Florida, Hawaii, Illinois, Indiana, Louisiana, Maine, Michigan, Minnesota, Mississippi, Nebraska, New Hampshire, New York, North Carolina, Oklahoma, Oregon, South Carolina, Utah, Vermont, and Virginia. *Id.*

¹¹⁴ 5 U.S.C. § 8132 (1982) ("No court, insurer, attorney or other person shall pay or distribute to the beneficiary or his designee the proceeds of such suit or settlement without first satisfying or assuring satisfaction of the interest of the United States.").

¹¹⁵ *Green v. United States Dep't of Labor*, 775 F.2d 964, 970 (8th Cir. 1985).

¹¹⁶ *Prewitt & Sampson v. City of Dallas*, 713 S.W.2d 720, 722 (Tex. Ct. App. 1986) (quoting *Fort Worth Lloyds v. Haygood*, 151 Tex. 149, 156, 246 S.W.2d 865, 869 (1952)).

of a carrier's lien and who disburses the entire recovery to a client is subject to liability for conversion.¹¹⁷ In a Tennessee case, the court used the statutory attorney's fees that the subrogee owed the plaintiff's attorney as the carrot with which to bootstrap the attorney into an implied obligation and duty toward the subrogee. In that case, *Aetna Casualty & Surety Co. v. Gilreath*,¹¹⁸ the court reasoned that an employee's attorney has an implied duty to recognize the employer's lien, and to distribute any recovery proceeds in accordance with the rights of all the parties.¹¹⁹ Of course, the Tennessee court may have overlooked the fact that disbursement of the proceeds "in accord with the rights of all parties" is a matter of judgment whenever a case is settled.¹²⁰ How is an attorney for an injured employee to exercise that judgment without an inevitable conflict between the interest of the employee client and the interest of the subrogee "client"?

2. Rhode Island

Just how extreme the conflict between the attorney's obligation to the injured employee and the attorney's obligation to the subrogee can be is demonstrated in the Rhode Island case of *Commercial Union Co. v. Graham*.¹²¹ In *Graham* all parties apparently agreed that the compensation carrier was subrogated in the amount of \$31,765 to the claim of a widow against a third party tortfeasor. Nevertheless, after recovering the \$31,765 from the third

¹¹⁷ See *id.* at 722.

¹¹⁸ 625 S.W.2d 269 (Tenn. 1981) (worker's compensation carrier brought action to recover statutory subrogation from attorney who represented the claimant in a third-party action).

¹¹⁹ *Id.* at 274.

It . . . follows that the statute imposes an implied duty upon the part of the employee's attorney to recognize the employer's lien, when known to him, and when no other attorney represents the employer's subrogation interest, [and] in the event of a recovery . . . to disburse the proceeds of such recovery in accord with the rights of all parties declared therein.

Id.

¹²⁰ *Id.*

¹²¹ 495 A.2d 243 (R.I. 1985).

party tortfeasor by settlement, the widow's attorney placed the money in escrow rather than directly paying the compensation carrier. The attorney's actions forced the compensation carrier to sue the widow and the escrow account for judgment according to its subrogation rights.¹²² Ultimately the court held that the widow's attorney breached his duty to the compensation carrier by causing the compensation carrier to pursue its claim against the escrow account.¹²³ As a consequence, the court relieved the compensation carrier from paying any portion of the attorney's fees and expenses that the widow was forced to pay in the case. Thus, the principal client, the widow, was unable to recoup any portion of the fees and expenses that produced the fund for the subrogee because the lawyer violated what the court envisioned as a duty to the subrogee.¹²⁴ These facts appear to demonstrate, rather conclusively, that at least the potential for a serious conflict of interest exists between the injured employee and the various subrogees who are always at the periphery of any major personal injury occurrence.

3. *Minnesota*

At least one jurisdiction has recognized the burden placed upon a plaintiff's attorney and adopted a much more sympathetic approach. In *Great American Insurance Co. v. Spoden*,¹²⁵ the Supreme Court of Minnesota held that an attorney for an injured worker does not acquire a duty to a subrogated compensation carrier without proof "which shows a tacit understanding or implied contract between the carrier, attorney, and client (perhaps speaking through the attorney) to the effect that the subroga-

¹²² *Id.* at 244.

¹²³ *Id.* at 246-47.

¹²⁴ *Id.* The court stated that "[t]he benefits that would normally accrue to the compensation carrier because of the efforts of the employee's attorney have been nullified by the attorney's conduct in precipitating significant subsequent action by the carrier to recover the money due it." *Id.* at 247.

¹²⁵ 316 N.W.2d 740 (Minn. 1982).

tion interest will be protected.”¹²⁶ Showing considerable insight in reaching this decision, the court commented that “mere notice” of the subrogee’s claim would not be sufficient to impose a duty upon an attorney because it feared that such a holding would dilute a firm’s duty of loyalty to its clients.¹²⁷ Clearly, this case is an uncompromising recognition of the fact that an attorney for an injured worker faces an inherent conflict of interest when significant subrogation is involved.

Similar issues related to nonstatutory subrogation claims by health care providers have been analyzed in several ethics opinions. Applying reasoning similar to that in *Great American*, the ABA declared in Formal Opinion 163 that an attorney does not have a duty to inform a plaintiff’s doctor and hospital, who wish to seek attachment, that he is holding the plaintiff’s money.¹²⁸ Formal Opinion 163 was grounded on the attorney’s duty not to divulge what is learned about the client through the confidential relationship.¹²⁹ Again, such reasoning is a recognition of the conflict of interest between the worker and the subrogated compensation carrier.¹³⁰

¹²⁶ *Id.* at 743.

¹²⁷ *Id.* The court stated:

Mere notice of a subrogee’s claim is nevertheless not sufficient to impose a duty in tort upon the attorneys. The firm’s duty of loyalty to its client would be unreasonably diluted were we to hold that notice alone compels an attorney to act on behalf of a nonclient carrier claiming an interest in the client’s recovery.

Id.

¹²⁸ ABA Comm. on Professional Ethics and Grievances, Formal Op. 163 (1936) [hereinafter ABA Formal Op. 163], reprinted in AMERICAN BAR ASSOCIATION OPINIONS ON PROFESSIONAL ETHICS 433 (1967). The Formal Opinion states:

The attorney for a plaintiff in a personal injury action should not advise the plaintiff’s doctor and hospital of the fact that a settlement of the case has been made and that he holds his client’s money and will continue to hold it for a short while so they may attach it if the client refuses to pay their reasonable charges.

Id.; see also Maryland State Bar Ass’n Comm. on Ethics, Op. 75 (1986), summarized in [Manual] Law Man. on Prof. Conduct (ABA/BNA) 901:4304 (Nov. 12, 1986).

¹²⁹ ABA Formal Op. 163, *supra* note 128.

¹³⁰ Note that ABA Formal Op. 163 places a duty on the attorney to notify the compensation carrier if the attorney has made prior assurances to the compensation carrier. *Id.*

4. *South Carolina*

A member of the South Carolina Bar inquired as to his duty to a health care provider after both he and the client signed a request for the release of the client's records. The release stated that the attorney and client would "protect [the doctor's] interest in this matter."¹³¹ The ethics committee opined that the attorney was obligated to hold the settlement proceeds for a short specified period of time and notify the doctor of any recovery. The committee reasoned that the client's signed request constituted consent to the attorney's disclosure of the information.¹³² South Carolina's solution enables the attorney to avoid participating in a fraud or misrepresentation without violating the client's confidence.

VII. SETTLEMENT CONDITIONED ON WAIVER OR REDUCTION OF ATTORNEY'S FEE

Occasionally, attorneys or other agents for defendants or for subrogees resort to the tactic of offering to settle or otherwise compromise claims in consideration for an agreement from the plaintiff's attorney to reduce the fee to which the plaintiff's attorney is entitled from those defendants or subrogees. Examples of this tactic take several forms. For instance, a defendant who is legally liable for both the plaintiff's damages and plaintiff's attorney's fees may offer to pay somewhat more in damages and somewhat less in attorney's fees. This scenario also occurs when a subrogee is obligated to pay the plaintiff's attorney a fee in return for a benefit received, such as recovering the subrogation from the third party tortfeasor or relieving the subrogee from liability for future medical payments.¹³³ If the plaintiff's attorney will forego or re-

¹³¹ South Carolina Bar Advisory Comm. on Ethics, Op. 14 (1981), summarized in [Manual] Law Man. on Prof. Conduct (ABA/BNA) 801: 7903 (Sept. 19, 1984).

¹³² *Id.*

¹³³ See *Settlement Offers Conditioned Upon Waiver of Attorney's Fees: Policy, Legal and Ethical Considerations*, 131 U. PA. L. REV. 793 (1983) (discussing subrogation as it occurs in litigation under the Civil Rights Attorney's Fees Awards Act of 1976, 42

duce the fee owed by the subrogees, then the subrogees may offer to forego their claims entirely.

An attorney must report all settlement offers to the client.¹³⁴ If the offer is one of the types described above, the attorney must report to the client that a somewhat larger sum is available to the client if the attorney will accept a smaller fee from the offeror. Obviously, this places the attorney in a conflict of interest with the client. What should the attorney advise the client to do? Should he advise the client to reject the offer and risk receiving a lesser sum ultimately? Or should the attorney magnanimously agree to accept less so that the client may reap a benefit?

Implicitly, the rules of professional responsibility recognize a lawyer's absolute right to recover his or her fee, even if it is to the detriment of a client's interest. For example, the rules permit an attorney to reveal a confidence

U.S.C. § 1988 (Supp. IV 1986). Somewhat different considerations apply whenever the problem presents itself within the context of the Attorney's Fees Award Act, because offers to compromise in consideration for a reduction of attorney's fee liability arguably constitute a subversion of the will of Congress).

¹³⁴ See MODEL CODE EC 7-7. EC 7-7 states:

In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer. A typical example in civil cases, it is for the client to decide whether he will accept a settlement offer or whether he will waive his right to plead an affirmative defense. A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal, but is for the client to decide what plea should be entered and whether an appeal should be taken.

Id.; see also MODEL RULES Rule 1.2(a). Rule 1.2(a) states:

A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d), and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

Id.

to the extent reasonably believed necessary to collect his fee.¹³⁵ Another example of the rules protecting an attorney's fee is the approval of liens in order to protect the fee.¹³⁶ An attorney is under no ethical obligation to waive fees in order to benefit a client.

Let us reconsider the scenario in which a subrogee offers to forego a subrogation claim in return for having the plaintiff's attorney forego or reduce the fee owed by that subrogee. The consequence of this offer is to provide the client with a double recovery. The plaintiff receives compensation from both the tortfeasor and the subrogee. Clearly, the client has no legal right to double recovery. In fact, the very purpose of subrogation statutes is to prevent just such double recovery.¹³⁷ Therefore, if the plaintiff's attorney refuses the subrogee's offer, the client is not denied any money to which he is legitimately or legally entitled. Although the plaintiff's attorney is obligated to report such an offer to the plaintiff, the plaintiff's attorney is not obligated to acquiesce to such an offer.

Unfortunately, this somewhat legalistic argument fails to add significantly to the comfort of a lawyer who must discuss these settlement offers with a client. This situa-

¹³⁵ MODEL CODE DR 4-101(C)(4). DR 4-101(C)(4) provides that "[a] lawyer may reveal . . . [c]onfidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct." *Id.*; see also MODEL RULES Rule 1.6(b)(2). Rule 1.6(b)(2) states:

A lawyer may reveal such information to the extent the lawyer reasonably believes necessary . . . to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Id.

¹³⁶ MODEL CODE DR 5-103(A)(1). DR 5-103(A)(1) states that "[a] lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, except that he may . . . [a]cquire a lien granted by law to secure his fee or expenses." *Id.*; see also MODEL RULES Rule 1.8(j)(1). Rule 1.8(j)(1) states that "[a] lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may . . . acquire a lien granted by law to secure the lawyer's fee or expenses" *Id.*

¹³⁷ 2A A. LARSON, *supra* note 110, § 74.00.

tion is made worse by the reasonable suspicion that such offers are made by subrogees or by defendants precisely to place a plaintiff's attorney in a conflict of interest situation with his client and to cause great discomfort between the attorney and client. At least one ethics committee considered such offers egregious enough to ban them as unethical conduct per se. In Formal Opinion 94,¹³⁸ the New York Bar Association Committee on Professional and Judicial Ethics made it unethical for defense counsel to offer a settlement conditioned on waiver of statutory fees that arise under statutes affecting civil rights or civil liberties. Unfortunately, the Opinion does not address offers made by defense counsel in the context of other types of cases.

VIII. ATTORNEY'S RIGHT TO AGREE TO REJECT CLIENTS OR CASES

With the minor exception of criminal cases, attorneys have the right to accept or to reject clients at will.¹³⁹ Furthermore, a lawyer has the right to place limitations upon the scope of services to be performed.¹⁴⁰ Nevertheless, according to Model Code DR 2-108(B) it is unethical for a lawyer to agree to restrict his practice as part of the consideration for a particular settlement offer.¹⁴¹ It is also

¹³⁸ New York City Bar Ass'n Comm. on Professional and Judicial Ethics, Formal Op. 94 (1980), summarized in [Manual] Law Man. on Prof. Conduct (ABA/BNA) 801:6318 (1984). The Opinion states:

In actions arising under civil rights and civil liberties statutes which provide for an award by the court of attorneys' fees to successful plaintiffs even upon the settlement of the case, defense counsel may not condition such settlement on the waiver of plaintiff's statutory attorneys' fees and may not attempt to negotiate the fees awarded under such statutes at the same time that he is negotiating the settlement of the merits.

Id.

¹³⁹ MODEL CODE EC 2-26. EC 2-26 provides: "A lawyer is under no obligation to act as adviser or advocate for every person who may wish to become his client" *Id.*

¹⁴⁰ MODEL RULES Rule 1.2(c). Rule 1.2 provides: "A lawyer may limit the objectives of the representation if the client consents after consultation." *Id.*

¹⁴¹ MODEL CODE DR 2-108(B) (1981). DR 2-108(B) provides: "In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agree-

unethical for one lawyer to request another lawyer to enter into such a restriction on future practice.¹⁴² Thus, a plaintiff's lawyer cannot accept a settlement offer from the defendant's lawyer if it includes a provision stating that the plaintiff's lawyer will forego bringing other claims against that defendant. This rule applies although the amount of the settlement offer may be significantly reduced if the plaintiff's lawyer does not agree to limit his practice. In reality, therefore, the obligation of the plaintiff's lawyer to obtain the best result (specifically, the highest settlement offer) for the plaintiff is sacrificed at the altar of some supposed obligation to unknown future clients.

A. Case Law

Case law is sparse. In *Shebay v. Davis*,¹⁴³ a law firm filed a class action against a refiner on behalf of bulk crude oil producers. The allegation was that the refiner under-reported the amount of oil actually received from the plaintiffs. As part of the eventual settlement agreement, the lawyers for the plaintiffs agreed that they would not represent any party that had a claim against the refiner regarding the mismeasurement.¹⁴⁴

One might reasonably speculate that this agreement was central to the settlement. Note that the plaintiff was a large group. This fact might lessen the impact of argu-

ment that restricts his right to practice law." *Id.*; see also MODEL RULES Rule 5.6(b). Rule 5.6(b) states: "A lawyer shall not participate in offering or making an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties." *Id.*

¹⁴² MODEL RULES Rule 5.6(b); see *supra* note 141 for the text of Rule 5.6(b).

¹⁴³ 717 S.W.2d 678 (Tex. Ct. App. 1986).

¹⁴⁴ *Id.* at 682. The agreement provided:

Cecil E. Munn and the law firm Cantey, Hanger, Gooch, Munn & Collins hereby agree that, in consideration of this Settlement Agreement, they will not represent, or in any way aid in the representation of, any individual or class of individuals for or on behalf of any claim made by any individual or any class of individuals against Permian [the refiner] . . . relating to any claim involving the alleged mismeasurement of crude oil by Permian during the Settlement Period.

Id.

ments that the attorneys made their services unavailable to potential clients by entering into the agreement. In any event, the court in *Shebay* refused to void the agreement or to criticize the attorneys involved.¹⁴⁵ In *Jarvis v. Jarvis*,¹⁴⁶ however, neither the attorney nor the client fared so well. Mrs. Jarvis retained attorney Bernis Terry to represent her in her divorce. She entered into a settlement agreement which provided, *inter alia*, that she would not hire the attorney for subsequent litigation against her former husband.¹⁴⁷

Mrs. Jarvis later sought to increase her child support and asked the court to void the agreement so that Terry could represent her.¹⁴⁸ The court granted Mrs. Jarvis' request on the grounds that the contractual restriction violated public policy since it restricted Mrs. Jarvis' right to secure the attorney of her choice.¹⁴⁹ One can assume that the reason Mr. Jarvis paid valuable consideration to Mrs. Jarvis and her attorney when the case was settled and the agreement signed was because the agreement restricted Mrs. Jarvis from securing the attorney of her choice.

Despite the language in DR 2-108(B) to the contrary, one must strain to comprehend why a competent person,

¹⁴⁵ *Id.* "The ethics of the attorneys' actions, if justifiably questioned, are for a state bar grievance committee to decide and not for this tribunal." *Id.*

¹⁴⁶ 12 Kan. App. 2d 799, 758 P.2d 244 (1988).

¹⁴⁷ *Id.* at 799, 758 P.2d at 246. The agreement provided, *inter alia*, that: Nancy L. Jarvis agrees without any reservations or limitation that she will never, under any circumstances or facts — hire, retain, or employ Bernis G. Terry or any member of any law firm he is now or is hereafter associated with, to advise or represent her in this divorce case . . . or any other litigation against Laurence M. Jarvis. This includes but is not limited to any appeal, any motion, or any hearing concerning any dispute or development of any nature in the divorce case or any other litigation. In other words, never again will Laurence M. Jarvis have to litigate any aspect of this case or any other with Bernis G. Terry representing Nancy L. Jarvis or his children.

Nancy L. Jarvis will be able to retain, employ or hire any other attorney of her choice should she desire to litigate against Laurence M. Jarvis.

Id.

¹⁴⁸ *Id.* at 799, 758 P.2d at 245.

¹⁴⁹ *Id.* at 799, 758 P.2d at 245-46.

joined by counsel of his choice, cannot enter into an agreement that restricts the practice of that counsel in the future. Lawyers are not public utilities. The rules grant a lawyer the right to refuse clients. Nevertheless, in 1968, the ABA Committee on Professional Ethics issued an Informal Opinion concluding that (1) every lawyer has a right to choose his own clients, (2) every lawyer has a duty not to interfere with the professional employment of other lawyers, (3) every client has a right to seek the services of a chosen lawyer, and (4) covenants not to litigate against the same defendant in the future are unethical because they interfere with these rights.¹⁵⁰ The Committee reasoned that covenants restricting the future practice of a lawyer also restrict his right to choose clients, and likewise, prevent his current or future clients from employing him to litigate against the beneficiary of the covenant.¹⁵¹ In the opinion of the Committee, such restrictive covenants are especially damaging to prospective clients who need legal assistance in specialized fields of law, such as catastrophic personal injury and products liability, because the number of attorneys available to represent such plaintiffs is limited.¹⁵² Surely, that assumption comes as a surprise to the thousands of qualified lawyers who actively participate in those fields!

B. *Commentators*

One commentator has presented more cogent arguments to support DR 2-108(B) than those presented by the ABA.¹⁵³ He postulated that the forbidden restrictive

¹⁵⁰ ABA Comm. on Professional Ethics, Informal Op. 1039 (1968), *reprinted in* ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, INFORMAL ETHICS OPINIONS 867-1284, at 224 (1975).

¹⁵¹ *Id.*

¹⁵² *Id.* The opinion specifically referenced "condemnation cases, products liability, personal injury actions requiring the application of medical trial techniques, the application of what is sometimes called legal medicine . . . engineering problems, family law, and corporate practice." *Id.*

¹⁵³ See *Recent Developments — Attorneys' Settlement Covenants Not to Accept Future Cases: Antitrust and Ethical Considerations*, 18 CATH. U. AM. L. REV. 412 (1969) [hereinafter *Recent Developments*]; see *supra* note 141 for the text of DR 2-108(B).

covenants bar the poor from obtaining attorneys because of the high cost of duplicating the obviously successful work done by lawyers who accept a covenant not to sue further.¹⁵⁴ The author also opined that such covenants are too tempting if the consideration is an extra payment by the defendant *directly* to the plaintiff's lawyer.¹⁵⁵ Certainly, if the consideration is payment *directly* to the plaintiff's lawyer, more than protection of the poor is at stake. Such a payment goes to the heart of the trust relationship between attorney and client.¹⁵⁶ The conflict of interest in that situation is too obvious to need further comment.

An interesting survey of lawyers in the Boston area revealed that while most attorneys intended to follow the appropriate ethical guidelines, a significant minority said they would violate DR 2-108(B).¹⁵⁷ The survey encompassed 1000 lawyers, with more than seventeen percent reporting that they would sign a settlement agreement that prohibited them from representing other plaintiffs against the settling defendant.¹⁵⁸

The prohibition against these restrictive covenants does not appear to benefit the insurance industry, the defense bar, or the plaintiff's bar. Because there is no apparent lobby with an economic motivation, one must assume that

¹⁵⁴ *Recent Developments*, *supra* 153, at 413 (because all future claimants must "duplicate the initial expenditures" in preparing their cases, this can "effectively deprive the small claimant of legitimate redress").

¹⁵⁵ *Id.* at 416.

¹⁵⁶ Both the Model Code and Model Rules prohibit a lawyer from accepting fees from other than the client without the client's consent. MODEL CODE DR 5-107(A); MODEL RULES Rule 1.8(f). Rule 1.8(f) states:

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

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

Id. DR 5-107(A) is substantially identical to Rule 1.8(f).

¹⁵⁷ Burbank & Duboff, *Ethics and the Legal Profession: A Survey of Boston Lawyers*, 9 SUFFOLK U.L. REV. 66, 87-89 (1974); see *supra* note 141 for the text of DR 2-108(B).

¹⁵⁸ Burbank & Duboff, *supra* note 157, at 88.

the motive, if not the rationale, for continuing the rules is based in abstract logic and sound social policy. This author fails to perceive the logic and sound public policy.

IX. NEGOTIATION

Because many more disputes are settled by negotiations than by trial, one might argue that being a skilled and honorable negotiator is a larger part of lawyering than being a skilled and honorable trial advocate.¹⁵⁹ Ethical trial advocacy, however, is much better understood than ethical negotiation, with little having been written about the latter.¹⁶⁰ The ethical boundaries of the relationships between negotiating lawyers are not clearly defined.

Trial advocacy would be an extremely abusive process if carefully formulated and rigidly enforced procedures and rules of ethical conduct did not govern. These rules and procedures limit the enormous potential for the abuse and exploitation of the weak by the strong that an uncontrolled adversary trial process would foster. For negotiation, however, there are no rules of procedure, and the rules of professionally responsible conduct are quite primitive. A vague operational norm that a professionally responsible lawyer should negotiate fairly does not exist. In the words of one commentator: "Another lawyer, or a layman who deals with a lawyer, should not need to exercise the same degree of caution that he would if trading for reputedly antique copper jugs in an oriental bazaar."¹⁶¹

¹⁵⁹ Note, *Private Settlement as Alternative Adjudication: A Rationale for Negotiation Ethics*, 18 U. MICH. J.L. REF. 503, 505 (1985). "Negotiated settlement is universally recognized as the preeminent and preferred alternative to trial litigation. It is somewhat surprising, therefore, to observe that few of the profession's articulated standards of conduct reach the ethical problems attending private settlement negotiation." *Id.*

¹⁶⁰ See generally Steele, *Deceptive Negotiating and High-Toned Morality*, 39 VAND. L. REV. 1387 (1986).

¹⁶¹ Rubin, *A Causerie on Lawyer's Ethics in Negotiation*, 35 LA. L. REV. 577, 589 (1985).

A. *Legal Duty to Negotiate*

Implicitly, at least, some courts have imposed a legal duty on lawyers to negotiate. These cases usually involve insurance defense counsel and their duty to the insured to negotiate in good faith. In *Netzley v. Nationwide Mutual Insurance Co.*¹⁶² the court held that failing to inform an insured of a settlement offer or failing to negotiate following such an offer goes to the issue of good faith.¹⁶³ Most ethical issues concerning negotiation, however, do not involve breach of duty to negotiate. They involve, instead, a conceal/reveal dilemma, which concerns what the ethical lawyer may conceal and reveal during a negotiation. Model Rule 1.6 provides that a lawyer must *not* reveal information relating to the representation of a client except for disclosures that are impliedly authorized in order to carry out the representation.¹⁶⁴ Thus, Model Rule 1.6 is of little assistance because it is more circuitous than expository.

Clearly an attorney has no ethical necessity to personally believe in his presentation during a negotiation.¹⁶⁵

¹⁶² 34 Ohio App. 2d 65, 296 N.E.2d 550 (1971).

¹⁶³ *Id.* at 65, 296 N.E.2d at 560. The court stated that the "showing of an offer of settlement, the absence of any reasonable negotiation of settlement following such offer, and the failure of the insurer to inform the insured of such an offer all are matters going to the issue of the good faith of the insurer." *Id.*; see also *Yeomans v. Allstate Ins. Co.*, 137 N.J. Super. 48, 324 A.2d 906 (1974).

¹⁶⁴ MODEL RULES Rule 1.6(a). The rule states that "[a] lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation" *Id.*

¹⁶⁵ See, e.g., MODEL CODE EC 7-17; MODEL RULES Rule 1.2(b). EC 7-17 states:

The obligation of loyalty to his client applies only to a lawyer in the discharge of his professional duties and implies no obligation to adopt a personal viewpoint favorable to the interests or desires of his client. While a lawyer must act always with circumspection in order that his conduct will not adversely affect the rights of a client in a matter he is then handling, he may take positions on public issues and espouse legal reforms he favors without regard to the individual views of any client.

MODEL CODE EC 7-17. Rule 1.2(b) states that "[a] lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities." MODEL RULES Rule 1.2(b).

DR 7-102(A)(5) only prohibits a lawyer from knowingly making a false statement of law or fact during a negotiation,¹⁶⁶ and DR 1-102(A)(4) only prohibits a lawyer from engaging in conduct involving deceit or misrepresentation during a negotiation.¹⁶⁷ Therefore, a negotiating lawyer is ethically free to advance claims and to assert positions that the lawyer may not personally believe justified, as long as the positions are not based on either a false statement or deceit.

Model Rule 4.1 is even more explicit in prohibiting false statements and requiring disclosure of certain material facts to third parties.¹⁶⁸ Model Rule 1.6(a) defines confidential communications; obviously, most material facts will be protected by attorney/client confidentiality under Model Rule 1.6(a).¹⁶⁹ The comments to Model Rule 4.1, however, state that certain types of statements, such as estimates of price or value or a party's intentions as to an unacceptable settlement, ordinarily are not taken as statements of material fact.¹⁷⁰ Note that the comment directly controverts the part of the rule that prohibits an attorney from knowingly making a false statement. Thus, an ethical lawyer is free to play the negotiating game as that game is generally played — with a certain amount of prevarication.

¹⁶⁶ MODEL CODE DR 7-102(A)(5). The Disciplinary Rule states that "[i]n his representation of a client, a lawyer shall not . . . [k]nowingly make a false statement of law or fact." *Id.*

¹⁶⁷ MODEL CODE DR 1-102(A)(4). The Disciplinary Rule states that "[a] lawyer shall not . . . [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation." *Id.*

¹⁶⁸ MODEL RULES Rule 4.1. Rule 4.1 states that "[i]n the course of representing a client a lawyer shall not knowingly . . . make a false statement . . . or . . . fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, unless disclosure is prohibited by Rule 1.6." *Id.*

¹⁶⁹ See *supra* note 164 for the text of Rule 1.6(a).

¹⁷⁰ MODEL RULES Rule 4.1 comment. The comment states: "Under generally accepted conventions in negotiations certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category" *Id.*; see *supra* note 168 for the text of Rule 4.1.

B. *Commonly Accepted Convention*

Commonly understood conventions may be of more assistance than the rules of professional responsibility.¹⁷¹ According to generally accepted social conventions, there is no requirement to tell the truth on all occasions. Lawyers understand that an opponent is likely to play her cards close to her chest, revealing no more than necessary, at least initially.¹⁷² In fact, lying is an acceptable and almost required folkway in certain situations, such as "I'm just fine, mother" or "So nice to see you!" Consequently, lawyers need not feel uncomfortable because there is confusion and lack of agreement over a truth-telling requirement. The legal profession should not reasonably be expected to create a better solution to the conceal/reveal dilemma than the rest of society. In fact, the legal profession's solution reflects society's solution, which is that the need to tell the truth is situational.

Revealing half-truths with the motive to deceive is neither commonly accepted convention nor ethically permissible.¹⁷³ Both Model Rule 8.4(c) and DR 1-102(A)(4)-(5) expressly prohibit a lawyer from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.¹⁷⁴ Nevertheless, these rules must be construed in light of convention. Otherwise, a party represented by a lawyer would be at a disadvantage, because negotiations without a lawyer would permit half-truths to the level accepted during everyday negotiation. For example, a negotiator might state that the plaintiff is willing to settle a dispute without stating that the plaintiff has a desperate

¹⁷¹ For a more thorough discussion, see Guernsey, *Truthfulness in Negotiation*, 17 U. RICH. L. REV. 99 (1982).

¹⁷² See H. EDWARDS & J. WHITE, *THE LAWYER AS A NEGOTIATOR* 242 (1977); see also Hazard, *The Lawyer's Obligation to Be Trustworthy When Dealing With Opposing Parties*, 33 S.C.L. REV. 181 (1981).

¹⁷³ *Scofield v. State Bar of Cal.*, 62 Cal. 2d 624, 401 P.2d 217, 43 Cal. Rptr. 825 (1965) (attorneys disciplined for affirmatively making false representations to insurance companies with intent to deceive); *In re Wines*, 370 S.W.2d 328 (Mo. 1963).

¹⁷⁴ See *supra* notes 166 and 167 for the text of DR 1-102(A)(4)-(5) and note 90 for the text of Rule 8.4(c).

and immediate need for the money from the recovery. A reasonable, professionally responsible paradigm should determine how much overt deception is ethically acceptable during a negotiation. If a misrepresentation is one of fact, circumstance, or condition external to the operative facts of the case, then perhaps the misrepresentation should be allowed within some reasonable limitations. For example, "My client is prepared to go all the way in the case, if that is what it is going to take to get a reasonable recovery." On the other hand, if the overt misrepresentation of fact is one directly related to an operative element of the case, then it reasonably should not be allowed; for example, "Our investigation shows that the brakes were in good working order."

C. *What Must Be Revealed*

What are the ethical considerations that delineate what a lawyer must *reveal*? Although there is a duty to reveal during negotiation, the parameters of that duty are very difficult to determine. In *Virzi v. Grand Trunk Warehouse & Cold Storage Co.*,¹⁷⁵ the court set aside a negotiated settlement because the plaintiff's attorney did not reveal to the defendant's attorney that plaintiff had died during the settlement negotiations. The court held that the plaintiff's attorney had a duty to reveal the death of his client to the defendant's attorney prior to the final settlement negotiations.¹⁷⁶ In another case, *Stare v. Tate*,¹⁷⁷ the court reformed a property settlement contract after the wife's attorney negligently made a mathematical error in a settlement offer and the husband's attorney, realizing that the error was in favor of the husband, accepted the offer without comment. In *Kath v. Western Media, Inc.*¹⁷⁸ a court set aside a settlement because the offering lawyer relied

¹⁷⁵ 571 F. Supp. 507 (E.D. Mich. 1983).

¹⁷⁶ *Id.* at 512. The court found that the attorney owed an affirmative duty of candor and fairness to the court and to the opposing counsel, notwithstanding his duty to his client to contend with zeal for his rights. *Id.*

¹⁷⁷ 21 Cal. App. 3d 432, 98 Cal. Rptr. 264 (1971).

¹⁷⁸ 684 P.2d 98 (Wyo. 1984).

upon facts set forth in a deposition which the other lawyer knew to be false. *Roberts v. Sears, Roebuck & Co.*¹⁷⁹ demonstrates just how pervasive among the bar the failure to disclose material facts may be. In *Roberts*, the lawyer representing Sears failed to disclose to the inventor the true value of this invention.¹⁸⁰ After selling the invention to Sears, and subsequently discovering the misrepresentation, the inventor sued Sears. He ultimately collected damages based upon the lawyer's misrepresentation.¹⁸¹ It seems beyond question, therefore, that both the law and the ethics of the profession require lawyers to disclose material facts during the course of negotiation.

Some analogue between the problem of truthfulness in negotiation and the problem of perjury may exist. Only now, after years of debate and division of viewpoints, are we approaching a consensus that a client has no right to commit perjury, and certainly has no right to commit perjury with the assistance of a lawyer.¹⁸² Similarly, we may be about to approach some closure of the debate over the role of truth in negotiation. One indication can be found in the comments to the 1980 discussion draft of Model Rule 4.2 which stated that fairness in negotiation means that representations made by one party to another must be truthful.¹⁸³ Although the commentary did not survive floor debate, at least the thought was put forward as a formal proposal. After all, one has to start at the beginning.

¹⁷⁹ 573 F.2d 976 (7th Cir. 1978), *cert. denied*, 439 U.S. 860 (1979).

¹⁸⁰ *Id.* at 979.

¹⁸¹ *Id.* at 980.

¹⁸² For a thorough discussion of the role of counsel in preventing perjury, see ABA Comm. on Ethics and Professional Responsibility, Formal Op. 353 (1987) [hereinafter ABA Formal Op. 353], summarized in [Manual] Law Man. on Prof. Conduct (ABA/BNA) 901:101 (Apr. 29, 1987).

¹⁸³ MODEL RULES Rule 4.2 (Comment Draft 1980). The comment states: Fairness in negotiation implies that representations by or on behalf of one party to the other party be truthful. This requirement is reflected in contract law, particularly the rules relating to fraud and mistake. A lawyer involved in negotiations has an obligation to assure as far as practicable that the negotiations conform to the law's requirements in this regard.

X. AUTHORITY TO SETTLE

In determining the extent of an attorney's authority to settle, courts look to the law of agency.¹⁸⁴ An attorney must receive special authority to settle a client's claim.¹⁸⁵ By virtue of employment, a lawyer has apparent¹⁸⁶ or implied authority to "bind the client in procedural matters arising during the course of the action."¹⁸⁷ Thus, an attorney is without authority to settle or compromise a case without the client's consent.¹⁸⁸ Authority to settle is not acquired by the mere fact of employment.¹⁸⁹

Authority to settle can be created by written or spoken words or by conduct.¹⁹⁰ For instance, the client's actions were held to have conferred authority to settle when the client was at the courthouse, discussed the case and various settlement proposals, then listened to his attorney dictate the stipulations and consent to settlement into the record, without voicing dissent.¹⁹¹

If a client settles a case without joinder of the attorney, the client probably has breached the fee contract and the attorney probably has a cause of action for the full contractual fee.¹⁹² At the same time, however, a provision found in many contemporary fee contracts to the effect that the client does not have the *right* to settle the case without the consent of the attorney is of questionable va-

¹⁸⁴ See L. PATTERSON, *LEGAL ETHICS: THE LAW OF PROFESSIONAL RESPONSIBILITY* § 2.04, at 2-53 (1982).

¹⁸⁵ *Blanton v. Womencare, Inc.*, 38 Cal. 3d 396, 696 P.2d 645, 650, 212 Cal. Rptr. 151 (1985); Annotation, *Authority of Attorney to Compromise Action*, 30 A.L.R.2d 944, 947 n.1 (Supp. 1988).

¹⁸⁶ L. PATTERSON, *supra* note 184, § 2.04, at 2-54 (quoting RESTATEMENT (SECOND) OF AGENCY § 8 (1958)). "Apparent authority is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such person." *Id.*

¹⁸⁷ *Linsk v. Linsk*, 70 Cal. 2d 272, 449 P.2d 760, 762, 74 Cal. Rptr. 544 (1969); see also *Walker v. Stephens*, 3 Ark. App. 205, 626 S.W.2d 200, 203 (1981); *Reimer v. Davis*, 224 Kan. 225, 580 P.2d 81 (1978).

¹⁸⁸ Annotation, *supra* note 185, at 944.

¹⁸⁹ *Walker*, 3 Ark. App. at 205, 626 S.W.2d at 203.

¹⁹⁰ *Turner v. Burlington N.R.R.*, 771 F.2d 341, 345 (8th Cir. 1985).

¹⁹¹ *Owens v. Lombardi*, 41 A.D.2d 438, 343 N.Y.S.2d 978 (App. Div. 1973).

¹⁹² *Dow Chem. Co. v. Benton*, 163 Tex. 477, 357 S.W.2d 565, 568 (1962).

lidity.¹⁹³ The best possible approach in handling the issue of authority to settle is with a clause setting forth joint and mutual obligations. For example, such a clause could provide that the attorney will inform client of all offers of settlement, and client will counsel with attorney about the acceptability of all offers. This clause is preferable to one that makes it appear as if the client has forfeited his own cause of action to the attorney.

A. *Liability for Unreasonable Settlement*

As a general rule, settlement advice from an attorney that is based on "reasonably informed professional judgment" protects that attorney from any subsequent malpractice cause of action which might arise from allegations of inadequate settlement.¹⁹⁴ On the other hand, a lawyer may be liable for negligently causing a client to accept a settlement that is lower than what a properly represented client would have received.¹⁹⁵

B. *Duty to Communicate Settlement Offers*

Lawyers have an obligation to communicate settlement offers to their clients.¹⁹⁶ Obviously, Model Rule 1.2(a), which mandates that an attorney "abide by [the] client's decision whether to accept an offer of settlement," would be meaningless if the attorney was not required to inform

¹⁹³ State Bar of Texas Comm. on Professional Ethics, Ethical Opinion 330 (1966). "An attorney may not ethically take from his client in a personal injury case a power of attorney which vests in him absolute control of the case." *Id.* But cf. *Wichita Falls Elec. Co. v. Chancellor & Bryan*, 229 S.W. 649 (Tex. Civ. App. 1921) (where such a provision was upheld); LA. REV. STAT. ANN. § 37:218 (West 1988) (legislatively approving such a provision in contingent fee contracts).

¹⁹⁴ D. HORAN & G. SPELLMIRE, *ATTORNEY MALPRACTICE: PREVENTION AND DEFENSE* § 19.03 (1985).

¹⁹⁵ See, e.g., *Helmbrecht v. St. Paul Ins. Co.*, 122 Wis. 2d 94, 362 N.W.2d 118 (1985) (at divorce trial where major issues were the property division and maintenance award, attorney was not prepared to prove value of marital assets or the amount necessary for maintenance).

¹⁹⁶ *Rubenstein & Rubenstein v. Papadakos*, 31 A.D.2d 615, 295 N.Y.S.2d 876 (App. Div. 1968), *aff'd*, 25 N.Y.2d 751, 250 N.E.2d 570, 303 N.Y.S.2d 508 (1969) (failure to disclose an offer of settlement and submit to the client for acceptance or rejection is improper practice).

the client of an opportunity to settle.¹⁹⁷ The obligation to inform the client of settlement offers is so obvious that one court found that expert testimony was not necessary to establish this duty as a standard of care in a legal malpractice case against an attorney who failed to inform a client of settlement offers.¹⁹⁸ The court observed that an attorney has as "a matter of law, a duty to disclose and discuss with [the] client good faith offers to settle."¹⁹⁹

XI. ETHICS OF PRESENTING TESTIMONY

Presenting testimony, either during a deposition or during a trial, is an act performed by a witness, not by a lawyer. Each of us, however, realizes that a witness's presentation carries the footprint of some lawyer with it. Lawyers have exclusive control over questions asked of witnesses, and lawyers have considerable control over the content and the context of the witness' answers. Some aspects of presenting testimony are addressed by the rules of professional responsibility, but other important aspects are not discussed at all. There appears to be a kind of "industry standard" for some of the aspects not addressed. For example, the rules address payment of fees to witnesses, but they do not address preparing witnesses to testify.²⁰⁰ Although some industry standards regarding

¹⁹⁷ MODEL RULES Rule 1.2(a). Rule 1.2(a) states:

A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

Id.

¹⁹⁸ *Joos v. Auto-Owners Ins. Co.*, 94 Mich. App. 419, 288 N.W.2d 443 (1979) (plaintiff's allegation that his attorney breached the applicable standard of care when he failed to inform the plaintiff of settlement offers prior to trial and attorney's refusal to settle on the second day of trial when he received authorization to do so does not require supporting expert testimony).

¹⁹⁹ *Id.* at 419, 288 N.W.2d at 445.

²⁰⁰ See MODEL CODE DR 7-109(C); MODEL RULES Rule 3.4(b); *infra* notes 201-202, respectively, for the text of these rules.

preparation of witnesses for testimony exist, these standards may never have been critically examined.

A. *Witness Fees*

Payment of fees to witnesses is one aspect of presenting testimony expressly covered by the rules of professional responsibility. DR 7-109(C) permits paying reasonable fees to a witness for time and expenses, but prohibits paying these fees on a contingent basis.²⁰¹ Obviously, the rationale is to avoid tempting a witness to slant his testimony in the interest of recovering a fee. Curiously, Model Rule 3.4(b), the analogue to DR 7-109(C), seems to have retreated somewhat from the crisp clarity of DR 7-109(C). Model Rule 3.4(b) merely prohibits offering "an inducement to a witness that is prohibited by law"²⁰²

Use of medical consulting services is an example of an aspect of presenting testimony that is not covered by the rules of professional responsibility.²⁰³ Over the last several years, in response to the dramatic increase in cases involving medical issues, these so-called "medical consulting services" have appeared. Taken in isolation, a medical consulting service is a sensible idea: a lawyer in need of extensive medical consultations or medical evidence can obtain those services for a fee. On the other

²⁰¹ MODEL CODE DR 7-109(C). DR 7-109(C) provides:

A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case. But a lawyer may advance, guarantee or acquiesce in the payment of: (1) expenses reasonably incurred by a witness in attending or testifying, (2) reasonable compensation to a witness for his loss of time in attending or testifying, (3) a reasonable fee for the professional services of an expert witness.

Id.

²⁰² MODEL RULES Rule 3.4(b). Rule 3.4(b) provides that "[a] lawyer shall not . . . falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law" *Id.*

²⁰³ Medical consulting services offer to contract with the client for a contingent fee in return for medical evaluative services and testimony. In turn, these services hire the witnesses, paying them a flat fee.

hand, there is an unusual amount of incipient ethical issues involved in utilizing a medical consulting service.

Model Rule 5.4(a) prohibits an attorney from sharing fees with someone who is not an attorney, so the precise nature of the contractual arrangements with a medical consulting service is of utmost importance.²⁰⁴ The injured client should be the contracting party.²⁰⁵ Counseling one's client to pay the medical consulting service on a contingent basis does not automatically violate the rules of ethics, but it may, however, depending on the circumstances.²⁰⁶ For example, the rules of ethics prohibit the payment of contingent fees to witnesses.²⁰⁷ Therefore, the employees or shareholders of the consulting service cannot testify if the service company has been employed on a contingent fees basis.²⁰⁸ Additionally, if the same group of experts is used repeatedly by the consulting service, those experts may acquire a stake in the outcome of the litigation because of the frequency with which they are re-

²⁰⁴ MODEL RULES Rule 5.4(a). Rule 5.4(a) does exempt deferred compensation to a lawyer's estate or retirement plan from the general prohibition on attorney fee sharing. *Id.*

²⁰⁵ Connecticut Bar Ass'n Comm. on Professional Ethics, Informal Op. 11 (1988) [hereinafter Connecticut Informal Op. 11] *reprinted in* [1988] Nat'l Rep. on Legal Ethics & Prof. Responsibility (University Pub. of Am.) at CT:OPINIONS:52 (1988).

²⁰⁶ ABA Comm. on Ethics and Professional Responsibility, Formal Op. 354 (1987) [hereinafter ABA Formal Op. 354], *summarized in* [Manual] Law Man. on Prof. Conduct (ABA/BNA) 901:107 (Nov. 7, 1987). The states are split on this issue. *See* Connecticut Informal Op. 11, *supra* note 205 (lawyer permitted to represent clients who contract with medical consulting firm provided certain conditions are met); New Jersey Advisory Comm. on Professional Ethics, Op. 562 (1985), *reprinted in* II Nat'l Rep. on Legal Ethics & Prof. Responsibility (University Pub. of Am.) at NJ:OPINION:26-28 (1985) (lawyer may not ethically solicit, enforce, or otherwise participate in an arrangement in which the client is charged a contingent fee by a doctor who locates expert witnesses to testify at client's trial); State Bar of Texas Comm. on Professional Ethics, Op. 458 (1988), *reprinted in* [1988] Nat'l Rep. on Legal Ethics & Prof. Responsibility (University Pub. of Am.) at TX:OPINIONS:8 (1988) (an attorney who aids, assists, or permits a client to enter into a medical consulting service contract violates DR 7-109(C)).

²⁰⁷ *See supra* note 201.

²⁰⁸ *See* Connecticut Bar Ass'n Comm. on Professional Ethics, Informal Op. 14 (1986) (contingent fee payment to consulting physician), *reprinted in* [1987] I Nat'l Rep. on Legal Ethics & Prof. Responsibility (University Pub. of Am.) at CT:OPINIONS:12 (1986).

tained as expert witnesses by the consulting service.²⁰⁹ Because a lawyer's fee must be reasonable,²¹⁰ if the medical service company takes on responsibilities that the lawyer normally performs, the lawyer may violate Model Rule 1.5 if he fails to make an adjustment in his fee reflecting his reduced responsibilities.²¹¹ Furthermore, a lawyer must exercise independent professional judgment.²¹² Consequently, if the medical services company retains substantial authority over decisions concerning which and how many experts are to be used in the case, then the lawyer's independent professional judgment may be unethically impinged.²¹³

B. *Witness Preparation*

Another aspect of presenting testimony not covered by the rules of professional responsibility is preparing witnesses to testify. A quote from Marvin Frankel serves to introduce this topic:

[W]e all know that the preparation of our witnesses is calculated, one way or another to mock the solemn promise of the whole truth and nothing but. To be sure, reputable lawyers admonish their clients and witnesses to be truth-

²⁰⁹ See ABA Formal Op. 354, *supra* note 206. The Committee states: To the extent that the expert witnesses [are] used regularly by the consultant, . . . and receive substantial payments for their service as expert witnesses, they may be substantially dependent on the Consultant, particularly in light of the contract prohibition imposed by the Consultant against lawyers contacting or using the same expert witnesses in other cases without written consent of the consultant. The entire arrangement, considered as a whole, would appear to raise many of the same questions as direct payment of a contingent fee to an expert witness.

Id.

²¹⁰ MODEL RULES Rule 1.5(a) ("A lawyer's fee shall be reasonable.").

²¹¹ ABA Formal Op. 354, *supra* note 206.

²¹² See MODEL RULES Rule 2.1 (1983). Rule 2.1 states that "[i]n representing a client, a lawyer shall exercise independent professional judgment . . ." *Id.*; see also MODEL RULES Rule 5.4(a). Rule 5.4(a) provides that "[a] lawyer or law firm shall not share fees with a non-lawyer . . ." *Id.*

²¹³ See *supra* note 212; see also MODEL RULES Rule 1.7(b) ("A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person . . .").

ful, at the same time, they often take infinite pains to prepare questions designed to make certain that the controlled flow of truth does not swell to an embarrassing flood.²¹⁴

Just how far may a lawyer go in "preparing" a witness to testify and remain ethical? The rules do not tell us, except to say that a lawyer may not engage in dishonesty or deceit.²¹⁵ Although the rules are silent, the literature is not. Lawyers' libraries typically contain one or more books about trial tactics. Commonly those books teach one how to prepare a witness to testify either at trial or at a deposition.²¹⁶ At this point, an industry standard comes into play as a substitute for more formal rules. Seemingly, the industry standard is that it is ethical to acquaint a witness with courtroom layouts, to advise him to observe other trials, to improve upon his personal appearance, and perhaps each to coach his performance.

We might speculate as to why lawyers readily agree that a certain amount of witness preparation is ethical. Perhaps the reason is that preparation can enhance the ability of a witness to communicate the truth to the fact-finder, hence furthering the goals of truth and justice. If this analysis is correct, it follows that preparation which facilitates a witness in either hiding or avoiding the truth is not desirable. In the absence of rules, one cannot say that such preparation is unethical *per se*. In the context of industry standards, there are clear examples of witness preparation that encourage the witness to evade or hide the truth. Illustrations of such preparations include the following: providing the witness with coached rehearsals; coaching the witness to evade giving probing direct and relevant answers to "embarrassing" cross examination;

²¹⁴ M. FRANKEL, *THE ZEALOUS ADVOCATE* 15-16 (1978).

²¹⁵ See MODEL CODE DR 1-102(A). DR 1-102(A) states that "[a] lawyer shall not . . . [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation . . . [or] [e]ngage in conduct that is prejudicial to the administration of justice." *Id.*

²¹⁶ See, e.g., R. AARON & T. ROSNER, *HOW TO PREPARE WITNESSES FOR TRIAL* §§ 10.01-25 (1985); L. SMITH & L. MALANDRO, *COURTROOM COMMUNICATION STRATEGIES* § 1.46 (1985).

changing the personal appearance, voice, and mannerisms of a witness so that the "testifying witness" is dramatically different from the "actual person."

We might venture to hypothesize that such "preparation," which amounts to remaking the persona of a witness, is unethical because it is dedicated to confounding the fact-finder's attempt to evaluate that witness's testimony. A witness is only as effective as his veracity. Because veracity is never perfectly self-evident, a fact-finder uses the persona of a witness as an important indicator of veracity. Thus, during jury argument we often encourage the jury to observe and reflect upon the demeanor of a witness. If the persona of a witness is purposely improved through "preparation," then the same *character* of mischief is worked as if that witness was allowed to lie. Despite this simile, there are no rules against altering a witness's persona, but there are rules against coaching a witness to lie.

C. Perjury

Perhaps the truth is seldom known, but a witness knows when he intends to lie. If the lawyer shares in that knowledge and allows that witness to testify, then that lawyer is corrupting the judicial process. Zealous representation under our adversary system must not be used to achieve a result founded on deceit. ABA Formal Opinion 353 is the definitive statement on most aspects of perjury.²¹⁷ This opinion can be summarized as follows: (1) a client (or a witness) has no right to commit perjury, and if the lawyer anticipates perjury and cannot otherwise prevent it, the lawyer should reveal to the court the intention of the client (or witness) to commit perjury, and (2) if perjury is unanticipated, but *prior to the conclusion of the proceeding before the tribunal* the lawyer learns that perjury was committed before the tribunal, the lawyer must attempt to persuade the client (or the witness) to recant, and failing in that attempt the lawyer must disclose the perjurer to

²¹⁷ ABA Formal Op. 353, *supra* note 182.

the tribunal.²¹⁸

While Formal Opinion 353 helps considerably to bring an end to speculation about the proper role of counsel in policing perjury, it does have some limitations. First, the opinion is based primarily on Model Rule 3.3. Not all jurisdictions have adopted Model Rule 3.3, and some jurisdictions have adopted it with modifications. Secondly, the ABA opinion is expressly limited to perjury that occurs before a tribunal and thus neglects the serious issue of perjury occurring during a deposition. At least two cases have dealt with the subject of perjury during a deposition. Both cases held that failing to reveal perjury during the deposition process violates ethical standards.²¹⁹ Because of the extreme significance of the issues surrounding an act of perjury, lawyers should keep abreast of the ethical rules in their jurisdictions, using ABA Formal Opinion 353 as the principal guideline. Unfortunately, perjury often manifests itself unexpectedly, leaving little opportunity for reflection or for extensive research on the ethical ramifications of the perjury.

D. *Cross Examination*

Cross examination is the last aspect of presenting testimony to be discussed. Cross examination of witnesses, especially of those who are subjectively believed to be truth-tellers, is another area of law practice that is not expressly governed by formal rules, although there appears to be an "industry standard." When faced with the prospect of cross examining such a witness, a lawyer is caught between the duty to the client to be an effective advocate, and duty to the court not to corrupt the process of justice.

²¹⁸ *Id.*

²¹⁹ Committee on Professional Ethics & Conduct v. Crary, 245 N.W.2d 298, 307 (Iowa 1976) (revoking the license of an attorney who knowingly permitted his client to commit perjury in a deposition and who acted in concert to nullify a custody decree); Smith v. State, 523 S.W.2d 1, 5-6 (Tex. Civ. App. 1975) (upholding the suspension of an attorney on the jury's findings that he advised his client to lie in a deposition).

No one enjoys being in this position, but it is inevitable if one tries cases.

It seems that very few lawyers would forego entirely the opportunity to cross examine a witness solely because they believe the witness to be a truth-teller; hence the industry standard. There are several arguments favoring the ethicality of the industry standard. First, truth is only one among several competing goals of the judicial process. Fairness and the appearance of fairness are equally important goals.²²⁰ Certainly, the goal of appearance of fairness is served by the cross examination of witnesses. Furthermore, only in the rarest circumstance will cross examination of a truth-telling witness be effective. For the most part, a cross-examining attorney can rely on the factfinder's judgment and on the opposing lawyer's rehabilitation of the witness to balance even a telling cross examination.

XII. CONCLUSION

Lawyers who litigate personal injury cases must anticipate a range of ethical quandaries that require monitoring and sensitivity beyond that required of lawyers who engage in most other types of specialized law practice. Curiously, however, collections of material aimed at helping a personal injury litigator with this vast array of readily anticipated ethical dilemmas are rare.

One reason for the dearth of writing about ethical issues specific to personal injuries litigators maybe the very vastness of the subject. This vastness results from the fact

²²⁰ Corboy, *Cross-Examination: Walking the Line Between Proper Prejudice and Unethical Conduct*, 10 AM. J. TRIAL ADVOC. 1, 5 (1986).

Truth, as an absolute, is an incidental function to the adversary process. As a result, the bar developed and sanctioned techniques which include devices for blocking and limiting unqualified revelation of the truth. Our ethical standards command client loyalty and adversary zeal, but there is no concomitant, positive obligation to the absolute truth.

Id. Cf. *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416 (1966) ("The basic purpose of a trial is the determination of truth . . .").

that at one point or another during the course of a typical personal injury case lawyers on either side of the case are apt to bump into virtually any ethical dilemma known to the profession. Consequently, no active lawyer today can afford to be without material at hand to serve as a guide through perceived ethical problems.

Obviously, this paper is not exhaustive, but the hope is that it does, in some small way, help to fill a gap in literature for personal injury litigators. There is one caveat; as of yet there is no national normative rule of ethical propriety for most of the ethical problems that present themselves to the practicing lawyer. Therefore, research within the controlling jurisdiction is always necessary.

Comments

