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Database updated August 2011

Attorneys at Law

Rachel M. Kane, M.A., J.D.

B. Special or Charging Lien

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§ 319. Agreement creating lien

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7 Am. Jur. 2d Attorneys at Law Summary

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Attorneys at Law
Rachel M. Kane, M.A., J.D.

Correlation Table

Summary

Scope:

This article discusses the nature, status, and purpose of the office of attorney at law; judicial supervision of the legal profession; the attorney-client relationship; the privileges and disabilities of attorneys; liability for malpractice; compensation of attorneys; and attorneys' liens.

Federal Aspects:

This article discusses federal constitutional issues arising from the regulation of attorney advertising and solicitation of business by attorneys, and the federal statute providing for representation of indigent criminal defendants in federal court. There is also a brief discussion of the federal statute establishing the Legal Services Corporation.

Treated Elsewhere:

Argument and conduct of counsel at trial, see Am. Jur. 2d, Trial §§ 405 to 595
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Practice before the Patent and Trademark Office, see Am. Jur. 2d, Patents §§ 51 to 68
Practice before United States Courts of Appeals, see Am. Jur. 2d, Federal Courts §§ 527 to 532
Practice before United States District Courts, see Am. Jur. 2d, Federal Courts §§ 549 to 555
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American Jurisprudence Proof of Facts (AMJUR-POF)

American Jurisprudence Pleading and Practice Forms Annotated (AMJUR-PP)

American Jurisprudence Trials (AMJUR-TRIALS)

Code of Federal Regulations (C.F.R.)

Federal Procedure (FEDPROC)

Federal Procedural Forms (FEDPROF)

United States Code Annotated (U.S.C.A.)

Uniform Laws Annotated (ULA)

Primary Authority

18 U.S.C.A. § 401(2)

18 U.S.C.A. § 3006A

20 U.S.C.A. §§ 1681 to 1688

28 U.S.C.A. § 530B

28 U.S.C.A. § 2412

42 U.S.C.A. §§ 1981, 1981a, 1982, 1983, 1985, 1986, 1988, 2000bb et seq., 2000cc, 2000d et seq., 2996b, 7604, 13981

42 U.S.C.A. § 2996b

Fed. R. App. P. 46

A.L.R. Library

A.L.R. Index, Admission to Bar

A.L.R. Index, Attorney or Assistance of Attorney

A.L.R. Index, Attorneys' Fees

A.L.R. Index, Attorneys' Liens

A.L.R. Index, Character and Reputation

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A.L.R. Index, Disbarment of Attorney

A.L.R. Index, Discipline and Disciplinary Actions

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A.L.R. Index, Law Clerk

A.L.R. Index, Malpractice by Attorney

A.L.R. Index, Mistake

A.L.R. Index, Moral Turpitude

A.L.R. Index, Omissions

A.L.R. Index, Paralegal

A.L.R. Index, Sanctions

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Am. Jur. Legal Forms 2d §§ 157:1 et seq. (Judgments)

Am. Jur. Legal Forms 2d §§ 223:1 et seq.

Am. Jur. Pleading and Practice Forms, Attorneys at Law §§ 5 et seq.

Am. Jur. Pleading and Practice Forms, Contempt §§ 11 et seq.

Federal Procedural Forms, L. Ed. §§ 1:1 et seq. (Actions in District Court)

Federal Procedural Forms, L. Ed., Class Actions §§ 11:1 et seq. (Class Action)

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Primary Authority

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42 U.S.C.A. § 2996b

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A.L.R. Index, Attorney or Assistance of Attorney

West's A.L.R. Digest, Attorney and Client 1, 144, 288, 311, 32(1)) to 32(15)), 622

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7 Am. Jur. 2d Attorneys at Law § 1

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I. Introduction

Topic Summary Correlation Table References

§ 1. Definitions

West's Key Number Digest

West's Key Number Digest, Attorney and Client 14

In its broadest sense, the term "attorney" denotes merely an agent or substitute, a person appointed by another to act on his or her behalf, and, when used in this sense, the term "attorney" may refer to a nonlawyer representative of another; in common usage, however, the title "attorney" is understood to be synonymous with "attorney-at-law" or "lawyer" and denotes one who is schooled in the law and is qualified to act for suitors or defendants in legal proceedings.[FN1] A person acting professionally in legal formalities, negotiations, or proceedings, by the warrant or authority of his or her client is an attorney at law within the usual meaning of the term.[FN2]

The term "practice of law" includes the appearance in court representing another;[FN3] the term generally involves the rendering of services that require knowledge and application of legal principles to serve the interests of another with his or her consent.[FN4] It embraces all advice to clients and all action taken for them in matters connected with the law,[FN5] including the preparation of pleadings and other papers incident to actions and special proceedings.[FN6] The term includes representing others with regard to their causes of action for personal injury, communicating with insurance companies about claims, making representations to creditors on behalf of third parties, and advising persons of their rights and of the terms and conditions of

settlement.[FN7] The practice of law is not limited to appearances in court, but also includes giving legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are preserved.[FN8]

CUMULATIVE SUPPLEMENT

Cases:

Act regulating legislative and executive lobbying did not infringe on Supreme Court's jurisdiction to regulate lawyers or the practice of law, as the term "lobbying," as defined in the Act, did not constitute the practice of law, such that lobbyists, who might also be lawyers when engaged in lobbying activities, could be regulated and disciplined for their actions or inactions as prescribed by the Act. Florida Ass'n of Professional Lobbyists, Inc. v. Division of Legislative Information Services, 7 So. 3d 511 (Fla. 2009).

The "practice of law" includes the giving of legal advice and the preparation of legal instruments. Florida Ass'n of Professional Lobbyists, Inc. v. Division of Legislative Information Services, 7 So. 3d 511 (Fla. 2009).

The "practice of law," for purposes of determining whether a party has engaged in unauthorized practice of law, is not limited to the conduct of cases in court, but embraces the preparation of pleadings and other papers incident to actions, the management of such actions, and in general all advice to clients and all action taken for them in matters connected with the law. Government of the Bar Rule VII(2)(A); R.C. § 4705.01. Ohio State Bar Assn. v. Lienguard, Inc., 126 Ohio St. 3d 400, 2010-Ohio-3827, 934 N.E.2d 337 (2010).

The "practice of law" requires the rendering of legal services for someone else. Unauthorized Practice of Law Committee v. American Home Assur. Co., Inc., 261 S.W.3d 24 (Tex. 2008).

[END OF SUPPLEMENT]

[FN1] Jacobson v. Simmons Real Estate, 23 Cal. App. 4th 1285, 28 Cal. Rptr. 2d 699 (3d Dist. 1994) (disapproved of on other grounds by, Trope v. Katz, 11 Cal. 4th 274, 45 Cal. Rptr. 2d 241, 902 P.2d 259 (1995)).

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[FN2] National Sav. Bank of District of Columbia v. Ward, 100 U.S. 195, 25 L. Ed. 621, 1879 WL 16535 (1879).

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[FN3] Matter of Fletcher, 655 N.E.2d 58 (Ind. 1995).

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[FN4] Utah State Bar v. Summerhayes & Hayden, Public Adjusters, 905 P.2d 867 (Utah 1995).

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[FN5] Green v. Unauthorized Practice of Law Committee, 883 S.W.2d 293 (Tex. App. Dallas 1994).

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[FN6] Richland Cty. Bar Assn. v. Clapp, 84 Ohio St. 3d 276, 1998-Ohio-551, 703 N.E.2d 771 (1998).

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[FN7] Cincinnati Bar Assn. v. Cromwell, 82 Ohio St. 3d 255, 1998-Ohio-237, 695 N.E.2d 243 (1998).

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[FN8] Cleveland Bar Association v. Misch, 82 Ohio St. 3d 256, 1998-Ohio-413, 695 N.E.2d 244 (1998).

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7 Am. Jur. 2d Attorneys at Law § 2

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Attorneys at Law
Rachel M. Kane, M.A., J.D.

I. Introduction

Topic Summary Correlation Table References

§ 2. Power of state to regulate practice of law

West's Key Number Digest

West's Key Number Digest, Attorney and Client 1

A.L.R. Library

Matters Constituting Unauthorized Practice of Law in Bankruptcy Proceedings, 32 A.L.R.6th 531

Rights and Liabilities of Unaccredited Law Schools and Their Students, 5 A.L.R.6th 449

What Constitutes "Unauthorized Practice of Law" by Out-of-State Counsel, 83 A.L.R.5th 497

Handling, preparing, presenting, or trying workers' compensation claims or cases as practice of law, 58 A.L.R.5th 449

Validity of state judicial or bar association rule forbidding use of law firm name unless it contains exclusively names of persons who are or were members of that state's bar, as it applies to out-of-state law firm, 33 A.L.R.4th 404

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Am. Jur. Legal Forms 2d §§ 30:119, 30:120

Am. Jur. Pleading and Practice Forms, Appearance §§ 4 to 45

Am. Jur. Pleading and Practice Forms, Attorneys at Law §§ 81 to 89

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Buhai, Act Like a Laywer, Be Judged Like a Lawyer: The Standard of Care for the Unlicensed Practice of Law, 2007 Utah L. Rev. 87 (2007)

Kennedy et al., Professionalism: Dealing with Unprofessional Conduct in Bankruptcy, 36 U. Mem. L. Rev. 575 (2006)

Krivinskas, "Don't File"; Rehabilitating Unauthorized Practice of Law-Based Policies in the Credit Counseling Industry, 79 Am. Bankr. L.J. 51 (2005)

Pouladian & Reed, "You Are Now Free to Move About the Country": Why Bankruptcy Lawyers Should Be Free to Engage in Multijurisdictional Practice, 52 UCLA L. Rev. 937 (2005)

The responsibility of regulating lawyers is an important governmental function in the administration of justice and the responsibility has historically been reserved to the sovereign states.[FN1] Thus, a state's authority regarding an attorney's license to practice law is not preempted by the Federal Constitution, notwithstanding that the licensed attorney may also be a federal judge.[FN2]

Under the doctrine of separation of powers[FN3] the courts have inherent power to regulate admission to the practice of law by prescribing minimum levels of competency measured by the bar examination,[FN4] and to control and supervise the practice of law generally, whether in or out of court.[FN5]

The power to regulate the practice of law, including the power to admit and to discipline attorneys, is among the inherent constitutional powers of the courts.[FN6] Indeed, every state in the United States recognizes that the power to admit and to discipline attorneys rests in the judiciary.[FN7] This is necessarily so, as an attorney is an officer of the court and whether a person must be admitted or disciplined is a judicial, and not a legislative, question.[FN8] The important difference between regulation of the legal profession and regulation of other professions is that admission to the bar is a judicial function, and members of the bar are officers of the court, subject to discipline by the court.[FN9] Hence, under the constitutional doctrine of separation of powers, the court has inherent and primary regulatory power.[FN10]

The state has a substantial interest in assessing an applicant's competency to practice law,[FN11] and the legislature, under the police power, may act to protect the public interest, but, in so doing, it acts in aid of the judiciary and does not supersede or detract from the power of the courts.[FN12] Further, although a state has broad powers to regulate the practice of law within its borders, it cannot ignore the rights of individuals secured by the Constitution of the United States.[FN13]

CUMULATIVE SUPPLEMENT

Cases:

Goal of legal ethical rules is to maintain public confidence in the legal profession as well as to provide a policing mechanism for poor lawyering. Iowa Supreme Court Attorney Disciplinary Bd. v. Fields, 790 N.W.2d 791 (Iowa 2010).

The practice of law is affected with a public interest, such that it is the duty of the Supreme Court to regulate those who seek to engage in it, so that the public welfare will be served and promoted. In re Law Offices of James Sokolove, LLC, 986 A.2d 997 (R.I. 2010).

[END OF SUPPLEMENT]

[FN1] In re Peterson, 163 B.R. 665 (Bankr. D. Conn. 1994).
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[FN2] Mississippi State Bar v. Nixon, 494 So. 2d 1388 (Miss. 1986).
-

[FN3] Am. Jur. 2d, Constitutional Law §§ 277 to 287.
-

[FN4] Schware v. Board of Bar Exam. of State of N.M., 353 U.S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796, 64 A.L.R.2d 288 (1957).
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[FN5] Edelstein v. Wilentz, 812 F.2d 128 (3d Cir. 1987).
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[FN6] In re Attorney Discipline System, 19 Cal. 4th 582, 79 Cal. Rptr. 2d 836, 967 P.2d 49 (1998); In re Nolo Press/Folk Law, Inc., 991 S.W.2d 768 (Tex. 1999).
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[FN7] In re Attorney Discipline System, 19 Cal. 4th 582, 79 Cal. Rptr. 2d 836, 967 P.2d 49 (1998).
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[FN8] In re Attorney Discipline System, 19 Cal. 4th 582, 79 Cal. Rptr. 2d 836, 967 P.2d 49 (1998).
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[FN9] In re Attorney Discipline System, 19 Cal. 4th 582, 79 Cal. Rptr. 2d 836, 967 P.2d 49 (1998).
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[FN10] In re Attorney Discipline System, 19 Cal. 4th 582, 79 Cal. Rptr. 2d 836, 967 P.2d 49 (1998).
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[FN11] Scinto v. Stamm, 224 Conn. 524, 620 A.2d 99 (1993).
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[FN12] McKenzie v. Burris, 255 Ark. 330, 500 S.W.2d 357, 61 A.L.R.3d 250 (1973).
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[FN13] United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217, 88 S. Ct. 353, 19 L. Ed. 2d 426 (1967).
- As to advertising and solicitation of business by attorneys, see §§ 73, 77.
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7 Am. Jur. 2d Attorneys at Law § 3

Attorneys at Law
Rachel M. Kane, M.A., J.D.

I. Introduction

Topic Summary Correlation Table References

§ 3. Nature of attorney's office

West's Key Number Digest

West's Key Number Digest, Attorney and Client 14

An attorney is not generally considered a "public officer," "civil officer," or the like, as used in statutory or constitutional provisions.[FN1] The attorney occupies what may be termed a "quasi-judicial office"[FN2] and is, in fact, an officer of the court.[FN3]
Observation: An attorney is not a court "officer" within the meaning of the statutory authority empowering a court of the United States to punish as contempt misbehavior of any of its officers in their official transactions.[FN4]

CUMULATIVE SUPPLEMENT

Cases:

As officers and commissioners of the court, attorneys are in a special relationship with the judiciary and are subject to the court's discipline. Statewide Grievance Committee v. Johnson, 108 Conn. App. 74, 946 A.2d 1256 (2008), certification denied, 288 Conn. 915, 954 A.2d 187 (2008).

[END OF SUPPLEMENT]

[FN1] National Sav. Bank of District of Columbia v. Ward, 100 U.S. 195, 25 L. Ed. 621, 1879 WL 16535 (1879).
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[FN2] Stern v. Thompson & Coates, Ltd., 185 Wis. 2d 220, 517 N.W.2d 658 (1994).
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[FN3] Powell v. State of Ala., 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A.L.R. 527 (1932).
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[FN4] Cammer v. U.S., 350 U.S. 399, 76 S. Ct. 456, 100 L. Ed. 474 (1956) (referring to 18 U.S.C.A. § 401(2)).
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Attorneys at Law
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I. Introduction

Topic Summary Correlation Table References

§ 4. Duties of office

West's Key Number Digest

West's Key Number Digest, Attorney and Client 32(1) to 32(15)

An attorney is expected to refrain from any conduct that creates an impression of dishonesty, fraud, or deceit, not only in the attorney's dealings with a client and the public in general, but also with his or her relationship with other members of the bar, including his or her own partners and associates.[FN1]
Definition: "Dishonesty," within the meaning of the rule of professional conduct, is a general term that encompasses fraudulent, deceitful, or misrepresentative behavior; it includes conduct evincing a lack of honesty, probity or integrity in principle, and a lack of fairness and straightforwardness.[FN2]

An attorney has a duty to support the constitutions and laws of the United States and the states.[FN3] Lawyers, whether they are in open court or in their offices drafting documents or taking acknowledgments, have a duty to maintain high standards of professional conduct; respect for the law and legal system, as evidenced by the attorney's words and actions, should be more than a platitude.[FN4] In addition, each attorney in the courts of the state has a duty to uphold the legal process, and neither complacency nor the search for efficiency should obscure that responsibility.[FN5] He or she must maintain a respectful and courteous attitude toward it, and obey its rules and orders.[FN6]
Observation: Before they enter full-time practice, lawyers need to understand their duties as "officers of the court" and be aware that lawyering is more than marketing; they need to learn to care about the law, about their clients, and about their own image as professionals, and they also need to adopt and continually update professional standards of behavior, take pride in their work, and push themselves to provide high-quality service routinely.[FN7] Thus, unlike a salesperson, a good lawyer's counsel is not directed to the sale of a product, but to the best interests of the client, and the personal desires of the lawyer must be subordinate to those of the client.[FN8]

CUMULATIVE SUPPLEMENT

Cases:

Plaintiff's counsel in malicious prosecution action acted improperly, when confronted with a motion for summary judgment on ground that plaintiff could not establish that the criminal proceedings terminated in his favor, in having the final judgment dismissing the criminal charges, which was agreed to by county attorney only with the stipulation of probable cause, set aside and an amended final judgment entered reflecting that criminal charges were dismissed with no stipulations; counsel was not forthcoming with district court when he moved for amended judgment. Papa John's Intern., Inc. v. McCoy, 244 S.W.3d 44 (Ky. 2008).

The law demands that all counsel foster respect and dignity for those who administer and enforce the law. Columbus Bar Assn. v. Vogel, 117 Ohio St. 3d 108, 2008-Ohio-504, 881 N.E.2d 1244 (2008).

Attorneys must advocate within the rules of law and act with civility and professionalism. Columbus Bar Assn. v. Vogel, 117 Ohio St. 3d 108, 2008-Ohio-504, 881 N.E.2d 1244 (2008).

[END OF SUPPLEMENT]

[FN1] Bray v. Squires, 702 S.W.2d 266 (Tex. App. Houston 1st Dist. 1985).
- Dishonesty, deceit, and misrepresentation by a lawyer are abhorrent concepts to the legal profession, and can give rise to the full spectrum of sanctions, including revocation. Iowa Supreme Court Attorney Disciplinary Bd. v. Hall, 728 N.W.2d 383 (Iowa 2007).
- Conduct of an attorney, who was certified to work as a public defender, in submitting billings to the office of the state public defender under the billing entry of "develop legal theory" without including documentation in the files to support the billings violated the professional rule that provided that it was professional misconduct to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. In re Disciplinary Proceedings Against Gernetzke, 2007 WI 6, 298 Wis. 2d 607, 725 N.W.2d 942 (2007).
-

[FN2] In re Scanio, 919 A.2d 1137 (D.C. 2007).
-

[FN3] Ex parte Wall, 107 U.S. 265, 2 S. Ct. 569, 27 L. Ed. 552 (1883).
-

[FN4] Lorain Cty. Bar Assn. v. Papcke, 81 Ohio St. 3d 91, 1998-Ohio-452, 689 N.E.2d 549 (1998), order modified on other grounds, 81 Ohio St. 3d 1473, 690 N.E.2d 1291 (1998) and reinstatement granted, 94 Ohio St. 3d 1413, 759 N.E.2d 1261 (2001).
-

[FN5] In re Tucker, 348 N.C. 677, 501 S.E.2d 67 (1998).
-

[FN6] Fisher v. Pace, 336 U.S. 155, 69 S. Ct. 425, 93 L. Ed. 569 (1949).
-

[FN7] Dayton Bar Assn. v. Baker, 86 Ohio St. 3d 40, 1999-Ohio-345, 711 N.E.2d 661 (1999).
-

[FN8] Akron Bar Ass'n v. Miller, 80 Ohio St. 3d 6, 1997-Ohio-364, 684 N.E.2d 288 (1997).
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I. Introduction

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§ 5. Duties of office—Public versus private duties

West's Key Number Digest

West's Key Number Digest, Attorney and Client 32(1) to 32(15)

An attorney at law has both public and private obligations because the attorney is sworn to act with all good fidelity toward both his or her client and the court.[FN1] The attorney's private obligations comprise those duties owed to his or her client;[FN2] the attorney's public duty consists of the obligation to aid the administration of justice[FN3] and to uphold the dignity of the court and respect its authority.[FN4]

[FN1] Dike v. Dike, 75 Wash. 2d 1, 448 P.2d 490 (1968).
-

[FN2] §§ 141 to 146.
-

[FN3] Chapman v. Pacific Tel. and Tel. Co., 613 F.2d 193, 63 A.L.R. Fed. 869 (9th Cir. 1979).
-

[FN4] Fisher v. Pace, 336 U.S. 155, 69 S. Ct. 425, 93 L. Ed. 569 (1949).
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I. Introduction

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§ 6. Necessity that litigant appear by counsel

West's Key Number Digest

West's Key Number Digest, Attorney and Client 32(1)

A.L.R. Library

Propriety and effect of corporation's appearance pro se through agent who is not attorney, 8 A.L.R.5th 653

Existence and extent of right of litigant in civil case, or of criminal defendant, to represent himself before state appellate courts, 24 A.L.R.4th 430

Necessity that executor or administrator be represented by counsel in presenting matters in probate court, 19 A.L.R.3d 1104

Right of litigant in civil action either to assistance of counsel where appearing pro se or to assist counsel where represented, 67 A.L.R.2d 1102

The right of a litigant to appear by attorney does not make that method of appearance obligatory; rather a natural person who is a party to an action may appear in his or her own proper person or by attorney.[FN1]
Observation: A litigant may be enjoined from representing himself or herself if the court finds that he or she had disrupted the effective and orderly administration of justice by maligning and threatening opposing counsel and filing immaterial, irrelevant, and impertinent pleadings.[FN2]

An appellate court may limit oral argument to attorneys, even in actions governed by statutes which provide that an action may be prosecuted or defended by a party in person or by an attorney,[FN3] and may condition a defendant's right to proceed pro se on appeal on his or her filing a motion ensuring his or her ability to conform to the rules of the court.[FN4]

A party to a civil action appearing pro se is not entitled, as a matter of right, to be represented by counsel at the same time.[FN5] In addition, a layperson who appears by counsel has no right to personally conduct, or assist counsel in conducting, the litigation.[FN6] Once a litigant obtains representation of an attorney, he or she cannot again proceed pro se in the litigation in the absence of a formal withdrawal of counsel.[FN7]

Where the litigant is an attorney, some courts have permitted him or her to participate in a trial even though he or she is represented by other counsel.[FN8] Others have refused to permit an attorney/litigant to assist trial counsel.[FN9]

A corporation ordinarily may not appear through an agent other than a licensed attorney,[FN10] nor may it appear in proper person.[FN11] However, some courts permit a corporation to appear otherwise than through a licensed attorney in justice or small claims courts[FN12] and before administrative agencies.[FN13]

CUMULATIVE SUPPLEMENT

Cases:

Although a pro se litigant is generally held to the same standard as an attorney, that is not the case when a pro se plaintiff also suffers from a significant mental disability. Carver v. State, 147 Wash. App. 567, 197 P.3d 678 (Div. 3 2008).

[END OF SUPPLEMENT]

[FN1] Osborn v. Bank of U.S., 22 U.S. 738, 6 L. Ed. 204, 1824 WL 2682 (1824).
- A lay relator could not maintain a qui tam action under the False Claims Act without assistance of counsel. U.S. ex rel. Fisher v. Network Software Associates, 377 F. Supp. 2d 195 (D.D.C. 2005).
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[FN2] Rodriguez-Diaz v. Abate, 613 So. 2d 515 (Fla. Dist. Ct. App. 3d Dist. 1993).
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[FN3] State ex rel. Reed v. Schwab, 287 Or. 411, 600 P.2d 387, 24 A.L.R.4th 422 (1979).
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[FN4] Long v. State, 281 Ark. 194, 662 S.W.2d 811 (1984).
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[FN5] Thomas v. National State Bank, 628 P.2d 188 (Colo. Ct. App. 1981).
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[FN6] Thomas v. National State Bank, 628 P.2d 188 (Colo. Ct. App. 1981); State v. Bell, 338 N.C. 363, 450 S.E.2d 710 (1994).
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[FN7] Waite v. Wellington Boats, Inc., 459 So. 2d 431 (Fla. Dist. Ct. App. 1st Dist. 1984).
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[FN8] Ayres v. Canales, 790 S.W.2d 554 (Tex. 1990).
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[FN9] Frank M. McDermott, Ltd. v. Moretz, 898 F.2d 418, 16 Fed. R. Serv. 3d 152 (4th Cir. 1990).
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[FN10] Am. Jur. 2d, Corporations § 1874.
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[FN11] Ramada Inns, Inc. v. Lane & Bird Advertising, Inc., 102 Ariz. 127, 426 P.2d 395 (1967).
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[FN12] Christian Business Phone Book, Inc. v. Indianapolis Jewish Community Relations Council, 576 N.E.2d 1276 (Ind. Ct. App. 1991).
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[FN13] State Bar of Michigan v. Galloway, 422 Mich. 188, 369 N.W.2d 839 (1985).
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Topic Summary Correlation Table References

§ 7. Integrated bar

West's Key Number Digest

West's Key Number Digest, Attorney and Client 31

A state may constitutionally require a lawyer to be a member of an integrated bar.[FN1]
Definition: An integrated bar is an association of attorneys in which membership and dues are required as a condition of practicing law in a state.[FN2]

[FN1] Lathrop v. Donohue, 367 U.S. 820, 81 S. Ct. 1826, 6 L. Ed. 2d 1191 (1961).
- As to mandatory membership dues and uses to which dues may constitutionally be put, see § 8.
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[FN2] Keller v. State Bar of California, 496 U.S. 1, 110 S. Ct. 2228, 110 L. Ed. 2d 1 (1990).
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§ 8. Integrated bar—Mandatory membership dues and uses to which dues may constitutionally be put

West's Key Number Digest

West's Key Number Digest, Attorney and Client 31

A.L.R. Library

Validity, Construction, and Application of State and Municipal Enactments Regulating Lobbying and of Lobbying Contracts, 35 A.L.R.6th 1

Use of compulsory bar association dues or fees for activities from which particular members dissent, 40 A.L.R.4th 672

Trial Strategy

Equal Opportunity for Broadcast Time for Political Candidates, 78 Am. Jur. Proof of Facts 3d 1

Scams and Cons, 74 Am. Jur. Proof of Facts 3d 63

Zoning: Proof of Bias or Conflict of Interest in Zoning Decision, 32 Am. Jur. Proof of Facts 3d 531

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Am. Jur. Pleading and Practice Forms, Elections §§ 53 to 55

Law Reviews and Other Periodicals

Ackerman, What Are Lobbyists Saying on Capitol Hill? Climate Change Legislation as a Case Study for Reform, 37 Envtl. L. 137 (2007)

Bopp, Jr. & Coleson, Distinguishing "Genuine" from "Sham" in Grassroots Lobbying: Protecting the Right to Petition During Elections, 29 Campbell L. Rev. 353 (2007)

Buller, Lobbying and Political Restrictions on § 501(c)(3) Organizations: A Guide for Compliance in the Wake of Increased IRS Examination, 52 S.D. L. Rev. 136 (2007)

Capps, "Gouging the Government": Why a Federal Contingency Fee Lobbying Prohibition Is Consistent with First Amendment Freedoms, 58 Vand. L. Rev. 1885 (2005)

DeShazo & Freeman, Public Agencies as Lobbyists, 105 Colum. L. Rev. 2217 (2005)

Griffith, Lobbying Reform: House-Cleaning or Window Dressing?, 75 U. Cin. L. Rev. 863 (2006)

Jacob, Free Exercise in the "Lobbying Nineties," 84 Neb. L. Rev. 795 (2006)

Johnson, Regulating Lobbyists: Law, Ethics, and Public Policy, 16 Cornell J. L. & Pub. Pol'y 1 (2006)

Krishnakumar, Towards a Madisonian, Interest-Group-Based, Approach to Lobbying Regulation, 58 Ala. L. Rev. 513 (2007)

Luneburg & Susman, Lobbying Disclosure: A Recipe for Reform, 33 J. Legis. 32 (2006)

Nipper, Lobbying the Lobbyists: A Comparative Analysis of the Lobbying Regulatory and Disclosure Models of the United States and European Union, 14 Tulsa J. Comp. & Int'l L. 339 (2007)

Retnasaba, Do Campaign Contributions and Lobbying Corrupt? Evidence from Public Finance, 2 J.L. Econ. & Pol'y 145 (2006)

Seitz, Regulating Executive Branch Lobbying, 49 Res Gestae 31 (2006)

Susman, Lobbying in the 21st Century—Reciprocity and the Need for Reform, 58 Admin. L. Rev. 737 (2006)

All members of an integrated bar may be required to pay dues, which are deemed to be a licensing fee.[FN1] Such a requirement does not violate members' rights guaranteed by the First Amendment to the Constitution of the United States.[FN2] Further, it is not a violation of the First Amendment for an integrated state bar to spend mandatory membership dues to fund activities germane to the goals of regulating the legal profession and improving the quality of legal services.[FN3] Without violating the First Amendment rights of its members, an integrated bar may use mandatory membership dues to acquire excess office space;[FN4] to fund lobbying activities seeking money for new appellate judges, salary increases for judicial staff, judicial information systems, and court-appointed representation in child abuse cases;[FN5] to fund lobbying activities designed to improve the administration of justice;[FN6] to fund publications devoted to educational articles about the legal profession or the quality of available legal services;[FN7] and to fund activities directed towards the advancement of the science of jurisprudence.[FN8]

A state bar may not, under the First Amendment, spend mandatory membership dues to fund activities of an ideological or political nature which fall outside these areas of activity.[FN9] Thus, a state bar may not use mandatory membership dues to fund lobbying if the bar association's position rests on partisan political views rather than lawyerly concerns or if the issues pertain to the political status of the state; to fund lobbying on controversial bills to change the law in ways not directly linked to the legal profession or judicial system; to provide financial support for committees formed to address issues of national and international politics and other controversial matter; to publish magazines containing markedly political and ideological material unless a broad spectrum of counterbalancing views are published;[FN10] to fund the association's taking a public position on a candidate for office;[FN11] or to lobby for matters such as the expansion of government programs for women, infants, and children, extension of Medicaid coverage for pregnant women, establishment of children's service councils, and sex education and teen pregnancy prevention.[FN12]

CUMULATIVE SUPPLEMENT

Cases:

First Amendment free speech and associational clauses prohibit the Wisconsin State Bar from funding non-germane activities with compelled dues; overruling *Thiel v. State Bar of Wisconsin*, 94 F.3d 399. U.S.C.A. Const.Amend. 1; Wis.SCR 10.01. Kingstad v. State Bar of Wis., 622 F.3d 708 (7th Cir. 2010).

[END OF SUPPLEMENT]

[FN1] Ables v. Fones, 587 F.2d 850 (6th Cir. 1978).
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[FN2] Lathrop v. Donohue, 367 U.S. 820, 81 S. Ct. 1826, 6 L. Ed. 2d 1191 (1961); Petition of Tocci, 137 N.H. 131, 624 A.2d 548 (1993).
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[FN3] Keller v. State Bar of California, 496 U.S. 1, 110 S. Ct. 2228, 110 L. Ed. 2d 1 (1990).
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[FN4] Popejoy v. New Mexico Bd. of Bar Com'rs, 887 F. Supp. 1422 (D.N.M. 1995).
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[FN5] Popejoy v. New Mexico Bd. of Bar Com'rs, 887 F. Supp. 1422 (D.N.M. 1995).
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[FN6] Schneider v. Colegio de Abogados de Puerto Rico, 917 F.2d 620 (1st Cir. 1990).
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[FN7] Schneider v. Colegio de Abogados de Puerto Rico, 917 F.2d 620 (1st Cir. 1990).
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[FN8] The Florida Bar re Schwarz, 552 So. 2d 1094 (Fla. 1989).
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[FN9] Keller v. State Bar of California, 496 U.S. 1, 110 S. Ct. 2228, 110 L. Ed. 2d 1 (1990).
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[FN10] Schneider v. Colegio de Abogados de Puerto Rico, 917 F.2d 620 (1st Cir. 1990).
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[FN11] Hollar v. Government of the Virgin Islands, 857 F.2d 163 (3d Cir. 1988).
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[FN12] The Florida Bar Re Frankel, 581 So. 2d 1294 (Fla. 1991).
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Topic Summary Correlation Table References

§ 9. Clients' security fund

West's Key Number Digest

West's Key Number Digest, Attorney and Client 32(1)

A.L.R. Library

Validity and construction of statutes or rules setting up client security fund, 53 A.L.R.3d 1298

Some jurisdictions provide for the creation of a fund for reimbursement of clients whose funds have been embezzled, misappropriated, or otherwise intentionally misused by members of the legal profession, to which attorneys are required to contribute as a condition of membership in the bar.[FN1] The purpose of such a fund is to protect clients against unscrupulous attorneys who misappropriate money,[FN2] and to promote public confidence in the administration of the business, and in the integrity, of the legal profession by reimbursing losses caused by dishonest conduct by members of the bar.[FN3] A predicate to a clients' security fund's reimbursement of clients is a determination that an attorney has acted dishonestly.[FN4]

Recovery from a clients' security fund is not intended to be a substitute for a malpractice action; reimbursement from the fund is limited to loss caused by an attorney's dishonest conduct, not by an attorney's negligence or breach of contract.[FN5] Payments from a clients' security fund are made on a discretionary basis and an applicant has no entitlement to a specific amount, but to comport with due process, the state bar must allow an applicant an opportunity to be heard and to respond to the bar's proposed disposition of the request for funds.[FN6]

A client may bring a claim against a clients' security fund for reimbursement of losses caused by an attorney's defalcation, even though the attorney dies before disciplinary proceedings are commenced against him or her.[FN7]

Eligibility for compensation from a clients' security fund is limited to persons in an attorney-client relationship with a defalcating attorney, or a person to whom that attorney owes a fiduciary relationship.[FN8] An entity that is not a party to a client's claim against an attorney for conversion and that is not aggrieved by the determination that the client is entitled to reimbursement from a clients' security fund lacks standing to collaterally attack the fund's payment to the client.[FN9]

CUMULATIVE SUPPLEMENT

Cases:

Where a client has received money from the Lawyers' Fund for Client Protection, the Fund must be repaid before the client can receive any additional restitution from the attorney. In re Johnson, 380 S.C. 76, 668 S.E.2d 416 (2008).

[END OF SUPPLEMENT]

[FN1] Bennett v. Oregon State Bar, 256 Or. 37, 470 P.2d 945, 53 A.L.R.3d 1291 (1970).
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[FN2] Jones v. State, 328 Md. 654, 616 A.2d 422 (1992).
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[FN3] Matter of Estate of Sheridan, 149 Misc. 2d 519, 566 N.Y.S.2d 845 (Sur. Ct. 1991).
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[FN4] Matter of Spagnoli, 115 N.J. 504, 559 A.2d 1352 (1989).
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[FN5] Beeson v. Idaho State Bar, 128 Idaho 45, 910 P.2d 159 (1995).
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[FN6] Ainsworth v. State Bar, 46 Cal. 3d 1218, 252 Cal. Rptr. 267, 762 P.2d 431, 86 A.L.R.4th 1053 (1988).
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[FN7] Nosal v. Neal, 318 Ark. 727, 888 S.W.2d 634 (1994).
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[FN8] Monumental Life Ins. Co. v. Trustees of Clients' Sec. Trust Fund of Bar of Maryland, 322 Md. 442, 588 A.2d 340 (1991).
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[FN9] Clients' Sec. Fund of State of N.Y. v. Goldome, 148 Misc. 2d 157, 560 N.Y.S.2d 84, 13 U.C.C. Rep. Serv. 2d 458 (Sup 1990).
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§ 10. Lawyer reference systems; the Legal Services Corporation

West's Key Number Digest

West's Key Number Digest, Attorney and Client 32(1)

A.L.R. Library

Maintenance of lawyer reference system by organization having no legal interest in proceedings, 11 A.L.R.3d 1206

The interest of the state in the regulation of the practice of law[FN1] is subordinate to the constitutional guaranties of the right to counsel, redress before the courts, and freedom of speech.[FN2] Consequently, the state cannot, by purporting to regulate the solicitation of legal employment,[FN3] prohibit the operation by a labor organization of a lawyer reference system involving the noncoercive referral of injured members to designated attorneys approved by the union as trustworthy and expert in this type of litigation.[FN4]

An attorney does not state a claim for damages based on a denial of due process or trespass against property rights where the bar association deletes the attorney's name from indigent defendant appointment lists and fails to adopt a plan for formulating rules for appointment of counsel.[FN5]

The Legal Services Corporation, a nonprofit corporation, was created by Congress to make grants to legal services programs for the purpose of providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance.[FN6]

[FN1] § 2.
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[FN2] National Ass'n for Advancement of Colored People v. Button, 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963).
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[FN3] §§ 73, 75.
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[FN4] United Transp. Union v. State Bar of Mich., 401 U.S. 576, 91 S. Ct. 1076, 28 L. Ed. 2d 339 (1971).
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[FN5] Noell v. Winston, 51 N.C. App. 455, 276 S.E.2d 766 (1981).
-
[FN6] 42 U.S.C.A. § 2996b(a).
- The Legal Services Corporation is not an agency of the federal government. Spokane County Legal Services, Inc. v. Legal Services Corp., 614 F.2d 662 (9th Cir. 1980).
- As to the Legal Services Corporation generally, see Am. Jur. 2d, Welfare Laws § 50.
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Topic Summary Correlation Table References

§ 11. State occupation tax

West's Key Number Digest

West's Key Number Digest, Attorney and Client 28

A.L.R. Library

Validity of state or municipal tax or license fee upon occupation of practicing law, 50 A.L.R.4th 467

A state may impose an occupational tax on attorneys.[FN1] These taxes differ from a license to practice in that they are imposed for revenue purposes only.[FN2]

The power to levy an occupation tax includes the power to compel payment as a condition precedent to engaging in the practice of law and the power to impose a penalty for nonpayment.[FN3]

[FN1] Royall v. State of Va., 116 U.S. 572, 6 S. Ct. 510, 29 L. Ed. 735 (1886).
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[FN2] Royall v. State of Va., 116 U.S. 572, 6 S. Ct. 510, 29 L. Ed. 735 (1886).
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[FN3] Royall v. State of Va., 116 U.S. 572, 6 S. Ct. 510, 29 L. Ed. 735 (1886).
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I. Introduction

Topic Summary Correlation Table References

§ 12. Municipal occupation tax

West's Key Number Digest

West's Key Number Digest, Attorney and Client 28

A.L.R. Library

Validity of state or municipal tax or license fee upon occupation of practicing law, 50 A.L.R.4th 467

The legislature may empower a municipality to impose an occupation tax on the practice of law.[FN1] The authorization must be conferred by a statute, a general charter provision,[FN2] or a freeholders' or home-rule charter.[FN3] The power to impose this tax on attorneys exists under statutory or charter authority to "license," "regulate," or "tax" businesses, employments, or occupations generally.[FN4]

The delegated power of a municipality to impose an occupation tax on an attorney is not affected by the fact that the state has or has not imposed a similar tax on attorneys.[FN5]

An occupational tax or license fee upon attorneys, either by its mere existence or by the operation of particular provisions, does not interfere with the regulation of the practice of law,[FN6] or with an attorney's vested right to practice.[FN7]

[FN1] Davis v. Ogden City, 117 Utah 315, 215 P.2d 616, 16 A.L.R.2d 1208 (1950).
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[FN2] Davis v. Ogden City, 117 Utah 315, 215 P.2d 616, 16 A.L.R.2d 1208 (1950).
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[FN3] Weekes v. City of Oakland, 21 Cal. 3d 386, 146 Cal. Rptr. 558, 579 P.2d 449 (1978).
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[FN4] City of Mountain Home v. Drake, 281 Ark. 336, 663 S.W.2d 738 (1984).
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[FN5] Brown v. City of Atlanta, 221 Ga. 121, 143 S.E.2d 388 (1965).

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[FN6] The Pines v. City of Santa Monica, 29 Cal. 3d 656, 175 Cal. Rptr. 336, 630 P.2d 521 (1981).

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[FN7] City of Seattle v. Campbell, 27 Wash. App. 37, 611 P.2d 1347 (Div. 1 1980).

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II. Judicial Supervision of Legal Profession
A. Admission to Practice

Topic Summary Correlation Table

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Primary Authority

28 U.S.C.A. § 530B

A.L.R. Library

A.L.R. Index, Admission to Bar

A.L.R. Index, Attorney or Assistance of Attorney

A.L.R. Index, Character and Reputation

A.L.R. Index, False Pretenses

A.L.R. Index, Fraud and Deceit

A.L.R. Index, Homosexuality

A.L.R. Index, Impersonation

A.L.R. Index, Mistake

A.L.R. Index, Moral Turpitude

A.L.R. Index, Omissions

A.L.R. Index, Sex and Sexual Matters

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II. Judicial Supervision of Legal Profession
A. Admission to Practice
1. In General

Topic Summary Correlation Table References

§ 13. Generally

West's Key Number Digest

West's Key Number Digest, Attorney and Client 1 to 11

A.L.R. Library

Falsehoods, Misrepresentations, Impersonations, and Other Irresponsible Conduct as Bearing on Requisite Good Moral Character for Admission to Bar—Conduct Unrelated to Admission to Bar, 8 A.L.R.6th 1

Rights and Liabilities of Unaccredited Law Schools and Their Students, 5 A.L.R.6th 449

Criminal Record as Affecting Applicant's Moral Character for Purposes of Admission to the Bar, 3 A.L.R.6th 49

Falsehoods, Misrepresentations, Impersonations, and Other Irresponsible Conduct as Bearing on Requisite Good Moral Character for Admission to Bar—Conduct Related to Admission to Bar, 107 A.L.R.5th 167

Validity, construction, and effect of reciprocity provisions for admission to bar of attorney admitted to practice in another jurisdiction, 14 A.L.R.4th 7

The practice of law is a privilege protected by the Federal Constitution's privileges and immunities clause.[FN1] A license to practice law covers the full panoply of actions an attorney can undertake from writing a will to representing a person in a controversy before a court, and while the issuance of a license to practice law carries with it certain rights for the holder of that license, the ability to practice before a particular court is a distinct and separate consideration.[FN2] A state can require high standards of qualification, such as good moral character and proficiency in its law, before it admits an applicant to the practice of law.[FN3] No person applying for admission to the bar on motion has an absolute right to be admitted; the applicant must satisfy the court that he or she is qualified in all respects so as to meet the high standards of the state bar.[FN4]
Observation: In the application process, the applicant bears the burden of establishing his or her fitness to practice law.[FN5]

While the highest court of a state has delegated the administrative responsibility for admissions to the state bar solely to a state bar commission, the court remains vested with the sole power to admit persons to the practice of law in the state and to fix qualifications for admission to the bar.[FN6] This power cannot be delegated to the state bar.[FN7] The practice of law in a state is restricted to members of the state bar, with limited exceptions permitted by the court.[FN8]

The court exercises its constitutional power of superintending control when it establishes and enforces standards of qualification for admission to the bar.[FN9] Thus, it is up to the court to vindicate the state's compelling interest in the calibre and integrity of persons which it allows to practice law within its boundaries.[FN10] Accordingly, the authority to control membership in the bar is exclusively and inherently in the judicial department of the government; it is not an executive power.[FN11]

To qualify for admission, an applicant must satisfy the court that he or she meets specified requirements relating to residence,[FN12] education,[FN13] good moral character,[FN14] and minimum standards of legal competency.[FN15]

An applicant may be denied admission where he or she had a past history of mental disorder, was diagnosed by a mental health expert as suffering from a probable personality disorder, and appeared unable to demonstrate a cogent line of reasoning, especially in stressful situations.[FN16]

A rejection of admission to the bar is not equivalent to disbarment.[FN17]

A full faith and credit statute does not require automatic admission to a state bar by any attorney who was admitted to a tribal court in that state, any more than it requires those tribal courts to automatically admit to its courts any attorneys authorized to practice law in the state.[FN18]

Federal law does not preempt state regulation of admission to the bar, since authority to regulate the practice of law is left to the states.[FN19]

CUMULATIVE SUPPLEMENT

Cases:

Suspended attorney's activities as corporate general counsel were within the ambit of the "practice of law" and, therefore, required appropriate licensure: duties included supervising the work of in-house attorneys, working with outside counsel, reviewing and approving reports from in-house and outside counsel, signing corporate documents for government agencies, and providing strategic legal direction, compliance with Securities and Exchange Commission (SEC) and New York Stock Exchange (NYSE) requirements, and litigation management. Hipwell v. Kentucky Bar Ass'n, 267 S.W.3d 682 (Ky. 2008).

Bar applicant's unwarranted attacks against opposing counsel and repeated and unfounded contentions in litigation revealed a singular lack of the good judgment necessary to practice of law, and thus applicant lacked requisite character, fitness, and moral qualifications to be admitted to the bar and would be disapproved to take bar examination, but could reapply the following year, provided he completed a legal ethics and professionalism course at an accredited law school; although applicant's credentials and conduct were otherwise without reproach, applicant, a physician, had shown poor judgment in pro se litigation with his former employers after suing for his discharge from practice in a hospital emergency room. Government of the Bar Rule I(11)(D)(1), (11)(D)(3). In re Application of Mitchell, 119 Ohio St. 3d 38, 2008-Ohio-3236, 891 N.E.2d 732 (2008), opinion clarified, 120 Ohio St. 3d 1430, 2008-Ohio-6274, 897 N.E.2d 662 (2008).

Bar applicant's application for admission was disapproved, where applicant did not demonstrate the requisite character, fitness, and moral qualifications to be admitted to the bar as she had two prior arrests for driving under the influence (DUI), she had failed to pay civil judgments entered against her or pay outstanding parking tickets, and she failed to appear before the panel appointed by the Board of Commissioners on Character and Fitness for a hearing on her application. In re Application of Phelps, 116 Ohio St. 3d 312, 2007-Ohio-6459, 878 N.E.2d 1037 (2007).

Rules Governing Admission to the Bar have same force and effect as statutes. V.T.C.A., Government Code § 82.022. Little v. Texas Bd. of Law Examiners, 334 S.W.3d 860 (Tex. App. Austin 2011).

Bar applicant who graduated from an unaccredited law school was not entitled to sit for bar examination, absent a showing that school was in the process of seeking accreditation, or a showing that applicant had been admitted to the bar of a court of general jurisdiction in another country and had maintained good standing or resigned in good standing following such admission. In re Hart, 2008 VT 26, 949 A.2d 447 (Vt. 2008).

[END OF SUPPLEMENT]

[FN1] Barnard v. Thorstenn, 489 U.S. 546, 109 S. Ct. 1294, 103 L. Ed. 2d 559 (1989).

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[FN2] In re Moseley, 643 S.E.2d 190 (Va. 2007).

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[FN3] Schware v. Board of Bar Exam. of State of N.M., 353 U.S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796, 64 A.L.R.2d 288 (1957).

- As to the power of the state to regulate the practice of law, generally, see § 2.

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[FN4] In re Application of Oppenheim, 2007-NMSC-022, 141 N.M. 596, 159 P.3d 245 (2007).
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[FN5] In re Baska, 281 Ga. 676, 641 S.E.2d 533 (2007).
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[FN6] In re Antonini, 272 Neb. 985, 726 N.W.2d 151 (2007).
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[FN7] In re Attorney Discipline System, 19 Cal. 4th 582, 79 Cal. Rptr. 2d 836, 967 P.2d 49 (1998).
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[FN8] In re Nolo Press/Folk Law, Inc., 991 S.W.2d 768 (Tex. 1999).
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[FN9] In re Application of Oppenheim, 2007-NMSC-022, 141 N.M. 596, 159 P.3d 245 (2007).
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[FN10] In re Application of Oppenheim, 2007-NMSC-022, 141 N.M. 596, 159 P.3d 245 (2007).
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[FN11] Strigler v. Board of Bar Examiners, 448 Mass. 1027, 864 N.E.2d 8 (2007).
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[FN12] § 17.
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[FN13] Matter of Altshuler, 171 Wis. 2d 1, 490 N.W.2d 1 (1992).
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[FN14] §§ 24 to 28.
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[FN15] § 18.
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[FN16] In re Application of Bower, 65 Ohio St. 3d 429, 605 N.E.2d 6 (1992).
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[FN17] In re Florida Bd. of Bar Examiners re C.W.G., 617 So. 2d 303 (Fla. 1993).
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[FN18] In re Helgemo, 2002 WI 57, 253 Wis. 2d 82, 644 N.W.2d 912 (2002).
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[FN19] Strigler v. Board of Bar Examiners, 448 Mass. 1027, 864 N.E.2d 8 (2007).
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1. In General

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§ 14. Constitutionality of admission requirements, generally

West's Key Number Digest

West's Key Number Digest, Attorney and Client 1

A.L.R. Library

Rights and Liabilities of Unaccredited Law Schools and Their Students, 5 A.L.R.6th 449

Sexual Conduct or Orientation as Ground for Denial of Admission to Bar, 105 A.L.R.5th 217

A state cannot exclude a person from the practice of law in a manner or for reasons that contravene the due process or equal protection clauses of the Fourteenth Amendment.[FN1] Thus, a bar applicant cannot be denied the right to practice law for reasons that do not have a rational connection with the applicant's fitness or capacity as a practitioner.[FN2] A state may deny an application for bar admission because of the applicant's refusal to answer questions relevant to his or her qualifications, as long as the applicant has been warned in advance of the consequences of such a refusal to answer.[FN3]

However, a state bar may not require that an applicant for admission to the state bar be domiciled within the state, because such a rule violates the Privileges and Immunities Clause of the United States Constitution.[FN4]

Further, even in applying permissible standards for admission to the bar, officers of a state cannot exclude an applicant when there is no basis for their finding that he or she fails to meet the standards, or when their action is invidiously discriminatory.[FN5]

Bar admission rules requiring proof of good moral character do not violate a bar applicant's right to equal protection if the applicant fails to show any difference in the way the court's rules treat bar applicants and attorneys in disciplinary proceedings, and although the applicant argues that he or she should have been treated the same as individuals who are readmitted to the bar after being disciplined, the applicant fails to show that they and the applicant were similarly situated, and thus fails to show dissimilar treatment.[FN6]

Statutes providing for appointment of the members of a board of bar examiners by justices of a state court, and providing the board with authority, subject to the court's approval, to make rules for examinations for admission to the bar and conduct the same, are not unconstitutional under separation of powers principles, since the authority to control membership in the bar is a judicial, not executive, power.[FN7]

CUMULATIVE SUPPLEMENT

Cases:

Request of state board of law examiners that state bar applicant undergo a psychological fitness evaluation before licensing her to practice law was a reasonable regulation on any constitutional interest that applicant had in pursuing her desired profession, since applicant's receipt of disability benefits in part because of chronic depression and fatigue signified that the federal government considered her unable to pursue gainful employment. Brewer v. Wisconsin Bd. of Bar Examiners, 270 Fed. Appx. 418 (7th Cir. 2008), cert. denied, 129 S. Ct. 507, 172 L. Ed. 2d 372 (2008).

Request of state board of law examiners, that bar applicant who had a history of mental illness undergo a psychological evaluation at her own expense as a precondition to evaluating her application, was not a "search" within the meaning of the Fourth Amendment. Brewer v. Wisconsin Bd. of Bar Examiners, 270 Fed. Appx. 418 (7th Cir. 2008), cert. denied, 129 S. Ct. 507, 172 L. Ed. 2d 372 (2008).

[END OF SUPPLEMENT]

[FN1] Willner v. Committee on Character and Fitness, 373 U.S. 96, 83 S. Ct. 1175, 10 L. Ed. 2d 224, 2 A.L.R.3d 1254 (1963).
- As to the constitutionality of citizenship and residency requirements, see § 17.
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[FN2] Konigsberg v. State Bar of Cal., 353 U.S. 252, 77 S. Ct. 722, 1 L. Ed. 2d 810 (1957).
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[FN3] In re Anastaplo, 366 U.S. 82, 81 S. Ct. 978, 6 L. Ed. 2d 135 (1961).
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[FN4] Noll v. Alaska Bar Ass'n, 649 P.2d 241 (Alaska 1982).
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[FN5] Schware v. Board of Bar Exam. of State of N.M., 353 U.S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796, 64 A.L.R.2d 288 (1957).
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[FN6] In re Application of Oppenheim, 2007-NMSC-022, 141 N.M. 596, 159 P.3d 245 (2007).
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[FN7] Strigler v. Board of Bar Examiners, 448 Mass. 1027, 864 N.E.2d 8 (2007).
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7 Am. Jur. 2d Attorneys at Law § 15

§ 15. Constitutionality of admission requirements, generally—Freedom of speech and association; privacy

West's Key Number Digest

West's Key Number Digest, Attorney and Client 1

Statutes prohibiting the unauthorized practice of law do not violate a layperson's First Amendment rights of freedom of speech and association when applied to preclude such layperson from representing others in court proceedings.[FN1]

While a number of cases have held that requiring an applicant for admission to the bar to answer questions concerning mere advocacy of or knowing membership in organizations advocating the forceful overthrow of the government is not an infringement of the applicant's right to freedom of speech or association under the First Amendment,[FN2] there is authority to the contrary.[FN3]

A requirement that applicants for admission to the bar submit affidavits of good moral character does not violate the applicant's right to privacy.[FN4]

[FN1] Adams v. American Bar Ass'n, 400 F. Supp. 219 (E.D. Pa. 1975).
- As to whether the use by an integrated bar of mandatory membership dues for a purpose with which a member disagrees as violative of the First Amendment rights of the member, see § 8.
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[FN2] In re Anastaplo, 366 U.S. 82, 81 S. Ct. 978, 6 L. Ed. 2d 135 (1961).
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[FN3] Application of Stolar, 401 U.S. 23, 91 S. Ct. 713, 27 L. Ed. 2d 657 (1971).
- As to the requirement that an applicant for admission to the bar be willing and able to take an oath to support the Constitution of the United States as violative of the First Amendment, see § 16.
-

[FN4] Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 91 S. Ct. 720, 27 L. Ed. 2d 749 (1971).
- As to the requirement that an applicant be of good moral character, see §§ 24 to 28.
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§ 16. Oath

West's Key Number Digest

West's Key Number Digest, Attorney and Client 8

A requirement that an applicant for admission to the bar have the willingness and ability to take an oath to support the Constitution of the United States does not infringe on the applicant's First Amendment rights.[FN1] Denying admission to the bar for the refusal of a bar applicant to take an oath to support the state Constitution does not contravene the Due Process Clause of the Fourteenth Amendment.[FN2]

[FN1] Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 91 S. Ct. 720, 27 L. Ed. 2d 749 (1971).

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[FN2] In re Summers, 325 U.S. 561, 65 S. Ct. 1307, 89 L. Ed. 1795 (1945).

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Topic Summary Correlation Table References

§ 17. Citizenship; residency

West's Key Number Digest

West's Key Number Digest, Attorney and Client 4

A.L.R. Library

What Constitutes "Unauthorized Practice of Law" by Out-of-State Counsel, 83 A.L.R.5th 497

Validity and construction of statutes or rules conditioning right to practice law upon residence or citizenship, 53 A.L.R.3d 1163

A requirement that an applicant for admission to the bar who is otherwise qualified must possess United States citizenship violates the Equal Protection Clause and is invalid.[FN1]

A requirement that a candidate for admission to the bar be a resident of the state has been held invalid.[FN2]

A federal district court may not adopt a rule which requires an otherwise qualified member of the bar of the state in which the district court sits either to reside in or to maintain an office in that state, because such a requirement is unnecessary and irrational and constitutes arbitrary discrimination.[FN3]

[FN1] Application of Griffiths, 413 U.S. 717, 93 S. Ct. 2851, 37 L. Ed. 2d 910 (1973).
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[FN2] Barnard v. Thorstenn, 489 U.S. 546, 109 S. Ct. 1294, 103 L. Ed. 2d 559 (1989).
- Non-immigrant aliens temporarily residing in the United States were not denied equal protection by application or prospective application of a state court rule requiring that every applicant for state bar be a citizen or an alien with permanent resident status; the state court had a legitimate interest in insuring that litigants in the state's courts were represented by lawyers not subject to having their residency revoked on relatively short notice, or lawyers only in the United States temporarily. LeClerc v. Webb, 419 F.3d 405 (5th Cir. 2005), cert. denied, 127 S. Ct. 3000 (U.S. 2007) and cert. denied, 127 S. Ct. 3000 (U.S. 2007).
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[FN3] Frazier v. Heebe, 482 U.S. 641, 107 S. Ct. 2607, 96 L. Ed. 2d 557, 7 Fed. R. Serv. 3d 1139 (1987).
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§ 18. Bar examination; diploma privilege

West's Key Number Digest

West's Key Number Digest, Attorney and Client 6

A.L.R. Library

Rights and Liabilities of Unaccredited Law Schools and Their Students, 5 A.L.R.6th 449

Failed applicant's right of access to bar examination questions and answers, 57 A.L.R.4th 1212

Validity, under Federal Constitution, of state bar examination procedures, 30 A.L.R. Fed. 934

Forms

Am. Jur. Pleading and Practice Forms, Attorneys at Law 7.1 (Request—For hearing regarding violation of examination rules)

Am. Jur. Pleading and Practice Forms, Attorneys at Law § 6 (Application or petition for review by attorney licensing authority—Of subcommittee decision refusing to allow applicant to take bar examination—By applicant for admission to state bar)

A state may require an applicant for admission to the bar to pass an examination to demonstrate his or her legal knowledge.[FN1] Only the highest court of the state may waive or modify this requirement.[FN2]

Where the bar rules provide that an applicant who fails the bar exam is entitled to a sampling of overall passing and failing exams, it is not sufficient to furnish the applicant with "benchmark" answers.[FN3] However, an applicant is not entitled to access to his or her own answers or to those of others where access is sought so applicant can ensure that answers submitted were matched to his or her name.[FN4] Nor is an applicant entitled to a review of his or her exam where the applicant's only contention is that the model answers contain excessive citations and argumentative discussion,[FN5] or where there is no evidence that the exam was graded arbitrarily or unreasonably.[FN6]

The right to reexamination protects a bar examinee against the danger of mechanical or arbitrary grading error for due process purposes.[FN7] In addition, grading procedures do not violate due process where there is no evidence that they result in gross grading errors.[FN8] Equal protection claims against certain regrading procedures have also been denied.[FN9] The state-action doctrine of immunity from Sherman Act liability applies to the grading of bar exams by a committee selected and appointed by the state supreme court.[FN10]

The use of essay-type questions on bar examinations to test an applicant's capacity to analyze general legal situations and to make application thereto of general legal knowledge is valid, because such capacity has a rational connection with the practice of law.[FN11]

A state may require that attorneys licensed in other states take that state's bar exam even though they have already passed their own state's bar without violating the federal privileges and immunities clause.[FN12] However, a requirement that a state have a reciprocity agreement with a sister state, in order to permit admission of lawyers to the bar without examination based on duration of practice, is not arbitrary, but is rationally related to the state's interest in upholding the licensing standards of its legal practitioners, and thus, does not violate due process.[FN13]

If a bar applicant is disabled under the Americans with Disabilities Act due to a learning disability, a board of bar examiners must reasonably accommodate him or her in administering the bar exam to ensure that the exam reflects substantive legal knowledge, reasoning ability, and analytical skills it is intended to test rather than the applicant's disability.[FN14]

CUMULATIVE SUPPLEMENT

Cases:

Applicant seeking to take the bar examination failed to prove that he was qualified for bar admission when he did not appear for proceedings to complete the character-and-fitness-review process, and thus his application would be denied. In re Application of Sherman, 117 Ohio St. 3d 528, 2008-Ohio-1472, 885 N.E.2d 233 (2008).

[END OF SUPPLEMENT]

[FN1] In re Russell, 236 So. 2d 767 (Fla. 1970).

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[FN2] Koeppel v. Wachtler, 183 A.D.2d 808, 583 N.Y.S.2d 975 (2d Dep't 1992).

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[FN3] Application of Obermeyer, 717 P.2d 382, 57 A.L.R.4th 1195 (Alaska 1986) (abrogated on other grounds by, Application of Bettine, 840 P.2d 994 (Alaska 1992)).

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[FN4] Bowles v. Askew, 264 Ga. 520, 448 S.E.2d 191 (1994).

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[FN5] Petition of W. M. I., 394 A.2d 207 (Del. 1977).

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[FN6] Faulconbridge v. North Dakota State Bar Bd., 483 N.W.2d 780 (N.D. 1992).
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[FN7] Ex parte Puckett, 603 So. 2d 908 (Ala. 1992).
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[FN8] Scinto v. Stamm, 224 Conn. 524, 620 A.2d 99 (1993).
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[FN9] In re Arnovick, 2002 UT 71, 52 P.3d 1246 (Utah 2002).
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[FN10] Hoover v. Ronwin, 466 U.S. 558, 104 S. Ct. 1989, 80 L. Ed. 2d 590 (1984).
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[FN11] Tyler v. Vickery, 517 F.2d 1089, 30 A.L.R. Fed. 907 (5th Cir. 1975); Bowens v. Board of Law Examiners of State of N. C., 57 N.C. App. 78, 291 S.E.2d 170 (1982).
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[FN12] Giannini v. Real, 911 F.2d 354 (9th Cir. 1990).
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[FN13] Minton v. Character and Fitness Committee of Ky. Bd. of Bar Examiners, 979 S.W.2d 921 (Ky. 1998).
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[FN14] Florida Bd. of Bar Examiners re S.G., 707 So. 2d 323 (Fla. 1998).
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§ 19. Procedural due process

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Rights and Liabilities of Unaccredited Law Schools and Their Students, 5 A.L.R.6th 449

Failed applicant's right of access to bar examination questions and answers, 57 A.L.R.4th 1212

Procedural due process requirements in proceedings involving applications for admission to bar, 2 A.L.R.3d 1266

Forms

Am. Jur. Pleading and Practice Forms, Attorneys at Law 5 (Application or petition for review by attorney licensing authority—Of subcommittee decision adverse to applicant—By applicant for admission to state bar)

Procedural due process in connection with the denial of a license to practice law requires that the applicant be given notice and an opportunity to be heard by the body which rules on his or her application.[FN1] When the denial is based on lack of the requisite character and fitness, due process requires that the applicant be afforded notice of reasons why admission was refused, which adequately inform the applicant of the nature of the evidence against him or her.[FN2]

Caution: At least one court has held that where an applicant has a hearing before a committee of the state bar on the issue of moral character, the applicant has no constitutional right to information as to the nature of the charges, or the right of confrontation while the investigation as to moral character is being conducted.[FN3]

However, due process does not require a hearing in case of an applicant denied admission to the bar for failure to pass the bar exam[FN4] or where the procedures of the licensing authority provide an adequate review.[FN5]

[FN1] Scott v. State Bar Examining Committee, 220 Conn. 812, 601 A.2d 1021 (1992).
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[FN2] Application of Mailath, 1988 OK 19, 752 P.2d 803 (Okla. 1988).
- As to the requirement that an applicant be of good moral character, see § 24.
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[FN3] Engel v. McCloskey, 92 Cal. App. 3d 870, 155 Cal. Rptr. 284 (2d Dist. 1979).
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[FN4] Petition of Pacheco, 85 N.M. 600, 514 P.2d 1297 (1973).
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[FN5] Giannini v. Real, 911 F.2d 354 (9th Cir. 1990).
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§ 20. Judicial review

West's Key Number Digest

West's Key Number Digest, Attorney and Client 7

A.L.R. Library

Failed applicant's right of access to bar examination questions and answers, 57 A.L.R.4th 1212

Court review of bar examiners' decision on applicant's examination, 39 A.L.R.3d 719

Forms

Am. Jur. Pleading and Practice Forms, Attorneys at Law 7 (Complaint or petition—Against attorney licensing authority—For judicial review of refusal to admit applicant to practice of law)

Am. Jur. Pleading and Practice Forms, Attorneys at Law 8 (Order—Granting application for review—Admitting applicant to state bar)

The ultimate determination of whether a bar applicant will be admitted to the bar is a question for the appellate court.[FN1] While the court accords some deference to the recommendation of a committee on admissions as to a bar application,[FN2] the question of whether the applicant has met the clear and convincing evidence standard of proof for good moral character and fitness is ultimately a question of law for the court to decide.[FN3] In reviewing the findings and recommendation of the committee on a bar application, the court will accept its factual findings if supported by substantial evidence.[FN4] The court is cautious in rejecting a board of bar examiners' recommendation of whether to admit an applicant to a state bar.[FN5] When reviewing such credibility determinations, the court makes due allowance for the committee's opportunity to observe and

evaluate the demeanor of the bar applicant where relevant,[FN6] and will usually defer to the board of bar examiners' findings based on a witness's credibility.[FN7] In addition, because the state board of bar examiners directly observes witness testimony in a bar admission proceeding and is in the best position to weigh the evidence, resolve matters of credibility, and choose between the conflicting inferences that may be drawn from the evidence, the court will defer to the board on matters of weight and credibility, viewing the evidence in the light most favorable to the board's decision and resolving all conflicts and reasonable inferences in favor of that decision.[FN8] However, the court is not precluded from reviewing the factual underpinnings of a board of bar examiners' recommendation of whether to admit an applicant to a state bar, based on an independent review of the record developed at the hearings.[FN9] Accordingly, despite the limitation on the court's discretion to weigh the evidence in a bar admission proceeding, the court nevertheless retains its authority to independently decide whether the evidence is sufficient to deny an applicant admission to the bar.[FN10]

A court will not review an applicant's bar examination absent a showing that the applicant's failure to pass the examination and to be certified for admission on the basis thereof was the result of fraud or coercion,[FN11] or was the result of unfair, arbitrary, unreasonable, or other similar conduct on the part of the bar examiners.[FN12]

On appeal from denial by the board of law examiners of an application to take the bar examination[FN13] or for bar admission and reinstatement cases the supreme court reviews the record de novo,[FN14] and will not reverse the findings of fact of the Board of Law Examiners unless they are clearly erroneous.[FN15]

[FN1] In re Bedi, 917 A.2d 659 (D.C. 2007); Strigler v. Board of Bar Examiners, 448 Mass. 1027, 864 N.E.2d 8 (2007).

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[FN2] In re Bedi, 917 A.2d 659 (D.C. 2007); Strigler v. Board of Bar Examiners, 448 Mass. 1027, 864 N.E.2d 8 (2007).

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[FN3] In re Bedi, 917 A.2d 659 (D.C. 2007).

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[FN4] In re Bedi, 917 A.2d 659 (D.C. 2007).

- The court will uphold the decision of the board to determine fitness of bar applicants if there is any evidence to support it. In re Baska, 281 Ga. 676, 641 S.E.2d 533 (2007).

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[FN5] Florida Bd. of Bar Examiners re M.B.S., 955 So. 2d 504 (Fla. 2007).

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[FN6] In re Bedi, 917 A.2d 659 (D.C. 2007).

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[FN7] Florida Bd. of Bar Examiners re M.B.S., 955 So. 2d 504 (Fla. 2007).

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[FN8] In re Application of Oppenheim, 2007-NMSC-022, 141 N.M. 596, 159 P.3d 245 (2007).

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[FN9] Florida Bd. of Bar Examiners re M.B.S., 955 So. 2d 504 (Fla. 2007).

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[FN10] In re Application of Oppenheim, 2007-NMSC-022, 141 N.M. 596, 159 P.3d 245 (2007).

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[FN11] Applicant No. 26 to 2000 Delaware Bar Examination v. Board of Bar Examiners of Delaware Supreme Court, 780 A.2d 252 (Del. 2001).

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[FN12] Davidson v. New York State Bd. of Law Examiners, 86 Misc. 2d 744, 382 N.Y.S.2d 418 (Sup 1976).
- The supreme court will not set aside the determination of the board of bar examiners as to a bar applicant's professional competence unless the applicant demonstrates arbitrariness or manifest unfairness. Applicant No. 26 to 2000 Delaware Bar Examination v. Board of Bar Examiners of Delaware Supreme Court, 780 A.2d 252 (Del. 2001).
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[FN13] In re Hanus, 627 N.W.2d 223 (Iowa 2001).
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[FN14] In re Hanus, 627 N.W.2d 223 (Iowa 2001); In re Antonini, 272 Neb. 985, 726 N.W.2d 151 (2007); In re Application of Oppenheim, 2007-NMSC-022, 141 N.M. 596, 159 P.3d 245 (2007).
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[FN15] Shochet v. Arkansas Bd. of Law Examiners, 335 Ark. 176, 979 S.W.2d 888 (1998).
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§ 21. Admission without examination

West's Key Number Digest

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A.L.R. Library

Validity, construction, and effect of reciprocity provisions for admission to bar of attorney admitted to practice in another jurisdiction, 14 A.L.R.4th 7

There is no rule of comity between states that requires one state to admit to its bar an attorney of another state solely because of his or her membership in the bar of the other jurisdiction.[FN1] Thus, an out-of-state attorney has no absolute right to practice law in a state; it is permissive and subject to the sound discretion of that state court.[FN2] However, a member of the bar of one state who moves his or her residence to another state may, in some jurisdictions, apply for a general admission to practice at the new residence, without examination, upon a showing that he or she has actually practiced in the first jurisdiction for a specified period.[FN3]

Admission in this manner may be restricted to attorneys admitted to practice in states which offer a reciprocal privilege to practitioners from the state in which admission is sought,[FN4] or to states where standards for admission are substantially the same as standards for admission to the state in which admission without examination is sought.[FN5]

Relevant to the evaluation of a foreign attorney's qualifications to determine whether a familiarity with the fundamentals of American law has been obtained for purposes of bar admission by motion, is whether the applicant has obtained a Master of Laws degree from an American Bar Association accredited law school and, if the applicant has been admitted to practice in other United States jurisdictions, the length of time and the nature of the applicant's practice.[FN6] Although the court generally gives deference to a board of bar examiners' expertise and experience, the court reviews a petitioner's legal education de novo to ascertain whether he or she has met the educational requirements for admission by motion of attorneys admitted in foreign counties.[FN7]

[FN1] State ex rel. Boynton v. Perkins, 138 Kan. 899, 28 P.2d 765 (1934).

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[FN2] Hill v. Hill, 638 S.E.2d 601 (N.C. Ct. App. 2007), appeal dismissed (N.C. June 27, 2007) and appeal dismissed, review denied (N.C. June 27, 2007).

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[FN3] Bashir v. Supreme Court of Ohio, 501 F. Supp. 288, 20 Ohio Op. 3d 294 (S.D. Ohio 1980), judgment aff'd, 652 F.2d 641, 23 Ohio Op. 3d 263 (6th Cir. 1981).

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[FN4] Schumacher v. Nix, 965 F.2d 1262 (3d Cir. 1992).

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[FN5] Lane v. W. Va. State Bd. of Law Examiners, 170 W. Va. 583, 295 S.E.2d 670 (1982).

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[FN6] Yakah v. Board of Bar Examiners, 448 Mass. 740, 864 N.E.2d 464 (2007).

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[FN7] Yakah v. Board of Bar Examiners, 448 Mass. 740, 864 N.E.2d 464 (2007).

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§ 22. Admission for particular case

West's Key Number Digest

West's Key Number Digest, Attorney and Client 10

A.L.R. Library

Attorneys: revocation of state court pro hac vice admission, 64 A.L.R.4th 1217

Attorney's right to appear pro hac vice in state court, 20 A.L.R.4th 855

Forms

Am. Jur. Pleading and Practice Forms, Attorneys at Law 8.05 (Application—By out of state attorney—To appear Pro Hac Vice)

Am. Jur. Pleading and Practice Forms, Attorneys at Law 8.1 to 8.7 (Forms relating to application to appear pro hac vice)

In general, the practice of law in a state by any attorney who is not a member of the state bar, and who has not been given prior pro hac vice permission to practice in the state, is unlawful, regardless of whether the attorney appears before any court, or before any municipal or state agency, board, or commission.[FN1] However, the Constitution does not require that because a lawyer has been admitted to the bar of one state, he or she must be allowed to practice in another.[FN2] Similarly, an out-of-state attorney has no right or entitlement under either the federal or state constitution to apply for or be granted pro hac vice status before any state court.[FN3]

The decision to admit an attorney on a pro hac vice application is within the court's discretion.[FN4]

A nonresident attorney may be permitted to participate in the trial of a case even though the attorney had, in similar circumstances, engaged in a trial, or preparation for trial, or settlement negotiations of numerous other cases in the state.[FN5]

For reasons of judicial policy, attorneys admitted pro hac vice must be provided some form of notice and an opportunity to respond before pro hac vice status may be withdrawn; the form of the notice and opportunity to

respond is left to the sound discretion of the circuit court, provided, however, that the attorney is notified of the conduct which is alleged to violate the court rule governing pro hac vice admissions and the specific reason this conduct may justify revocation under the rule.[FN6] Once an out-of-state attorney has been granted pro hac vice status in a particular case before a particular judge, the out-of-state attorney gains a limited property interest in that status, and the deprivation of this property interest must be in accord with requisite constitutional safeguards.[FN7]

The legislative requirement of local counsel, for pro hac vice admission of an out-of-state attorney, is mandatory, and the court cannot waive it.[FN8]

CUMULATIVE SUPPLEMENT

Cases:

Plaintiffs' requested attorney was disqualified under New York's advocate-witness rule, precluding his admission before court, pro hac vice, to represent plaintiffs in malpractice action against class counsel in underlying action; attorney had direct, personal involvement in alleged acts of malpractice, as he was one of only three attorneys that represented plaintiffs in underlying action during precise time of alleged malpractice, and such testimony was both necessary and prejudicial to plaintiffs' claims. N.Y.Rules of Prof.Conduct, Rule 3.7(a). Decker v. Nagel Rice LLC, 716 F. Supp. 2d 228 (S.D. N.Y. 2010).

It is discretionary with the judge whether to allow temporary admission to an out-of-state attorney. In re Fieger, 887 N.E.2d 87 (Ind. 2008).

Neither non-resident attorneys' preparation, on behalf of employer, of request for reconsideration of notice of decision issued by Workforce Safety and Insurance (WSI) granting workers' compensation benefits to claimant, nor their participation in informal internal procedures before WSI constituted "prepatory work," such as to bring attorneys' activities within provision of rule of professional conduct providing safe harbor from unauthorized practice of law for lawyers to appear in prepatory matters before pro hac vice admission so long as they reasonably expected to be authorized to be admitted pro hac vice. Carlson v. Workforce Safety & Ins., 2009 ND 87, 765 N.W.2d 691 (N.D. 2009).

[END OF SUPPLEMENT]

[FN1] In re Ferrey, 774 A.2d 62 (R.I. 2001).

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[FN2] Leis v. Flynt, 439 U.S. 438, 99 S. Ct. 698, 58 L. Ed. 2d 717 (1979).

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[FN3] Bank of Hawaii v. Kunimoto, 91 Haw. 372, 984 P.2d 1198 (1999).

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[FN4] Keller Industries, Inc. v. Blanton, 804 S.W.2d 182 (Tex. App. Houston 14th Dist. 1991).

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[FN5] CSX Transp., Inc. v. McCord, 202 Ga. App. 365, 414 S.E.2d 508 (1991).

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[FN6] Jensen v. Wisconsin Patients Compensation Fund, 2001 WI 9, 241 Wis. 2d 142, 621 N.W.2d 902 (2001).

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[FN7] Bank of Hawaii v. Kunimoto, 91 Haw. 372, 984 P.2d 1198 (1999).

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[FN8] Hill v. Hill, 638 S.E.2d 601 (N.C. Ct. App. 2007), appeal dismissed (N.C. June 27, 2007) and appeal dismissed, review denied (N.C. June 27, 2007).
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A. Admission to Practice
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Topic Summary Correlation Table References

§ 23. Effect on right to practice of change of residence to another state

West's Key Number Digest

West's Key Number Digest, Attorney and Client 4

A.L.R. Library

What Constitutes "Unauthorized Practice of Law" by Out-of-State Counsel, 83 A.L.R.5th 497

A member of the bar is entitled to hold his or her office until disbarred by judicial action after notice and an opportunity to be heard.[FN1] However, an attorney admitted and with an office in another state, but not in the state of admission, may advise out-of-state clients on that state's law and prepare documents to be given legal effect in that state, assuming he or she has the requisite competence to do so.[FN2] The attorney's moral conduct during his or her absence from the state is subject to investigation, and if membership in a state bar is a required condition to the right to practice, the attorney's reinstatement in the bar association may validly be conditioned on a prior investigation of his or her conduct during his or her absence from the state.[FN3]

[FN1] § 105.
-

[FN2] Cleveland Bar Association v. Misch, 82 Ohio St. 3d 256, 1998-Ohio-413, 695 N.E.2d 244 (1998).
-

[FN3] State ex rel. Foster v. Washington State Bar Ass'n, 23 Wash. 2d 800, 162 P.2d 261, 160 A.L.R. 1366 (1945).
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A. Admission to Practice
2. Moral Character

Topic Summary Correlation Table References

§ 24. Generally

West's Key Number Digest

West's Key Number Digest, Attorney and Client 4

A.L.R. Library

Falsehoods, Misrepresentations, Impersonations, and Other Irresponsible Conduct as Bearing on Requisite Good Moral Character for Admission to Bar—Conduct Unrelated to Admission to Bar, 8 A.L.R.6th 1

Criminal Record as Affecting Applicant's Moral Character for Purposes of Admission to the Bar, 3 A.L.R.6th 49

Falsehoods, Misrepresentations, Impersonations, and Other Irresponsible Conduct as Bearing on Requisite Good Moral Character for Admission to Bar—Conduct Related to Admission to Bar, 107 A.L.R.5th 167

Violation of draft laws as affecting character for purposes of admission to the bar, 88 A.L.R.3d 1055

Forms

Am. Jur. Pleading and Practice Forms, Attorneys at Law 6.1 (Application or petition for review by attorney licensing authority—Adverse character evaluation)

Am. Jur. Pleading and Practice Forms, Attorneys at Law 6.2 (Application or petition for review by attorney licensing authority—Allegations—Moral fitness of applicant—Entitlement for admission)

It is universally required that an applicant for admission to the bar be of good moral character.[FN1] In addition, truthfulness and candor are the most important qualifications for bar membership.[FN2] Thus, it is essential that every applicant to practice law fully disclose to the state board of bar examiners all information relevant to the applicant's character and fitness, and failure to do so is a basis for denial of admission.[FN3] It is the obligation of an applicant for admission to the bar to assure the members of the board of bar examiners and, ultimately, the court that he or she possesses the necessary qualifications to practice law in the state; such a showing requires a full and exhaustive disclosure of prior wrongdoing, including all relevant circumstances surrounding the conduct, both militating and mitigating, and official documentation where appropriate.[FN4] If an applicant for admission to the bar fails to answer all the board of bar examiners' questions candidly, both on the application and at any hearing, such dishonesty suggests that the applicant lacks the good character required for admission to the bar.[FN5] Any significant doubts about an applicant's character should be resolved in favor of protecting the public by denying bar admission to the applicant.[FN6]

The “good moral character” standard used in a state's bar admission process is not unconstitutionally vague where the rule includes specific factors that should be considered in evaluating the character and fitness of applicants.[FN7]

Attorneys for the federal government are subject to state laws and rules, and local federal court rules, governing attorneys in each state where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that state.[FN8]

CUMULATIVE SUPPLEMENT

Cases:

Attorney licensed to practice in Minnesota lacked candor, which reflected adversely on his character and fitness, as grounds for denying admission to bar in Louisiana; attorney had engaged in race-based harassment of two law school employees, attorney had failed to disclose several prior arrests and convictions when he applied to law school, he acknowledged that omissions were intentional, he was arrested for driving while intoxicated (DWI) within days of submitting law school application but did not update application at that time, as obligated to do so, and subsequent update to application contained information that was untruthful and incomplete. In re Gavin, 8 So. 3d 556 (La. 2009).

Board of Law Examiners' conclusions regarding an applicant's moral character and its recommendations concerning admission to the State Bar are entitled to great weight. In re Strzempek, 407 Md. 102, 962 A.2d 988 (2008).

Good moral character includes truthfulness and candor, and absolute candor is a requisite of admission to the State Bar. In re Strzempek, 407 Md. 102, 962 A.2d 988 (2008).

Court of Appeals makes its own independent evaluation of Bar applicant's present moral character based upon testimony and evidence submitted before the Character Committee and the Board of Law Examiners. In re Strzempek, 407 Md. 102, 962 A.2d 988 (2008).

Bar applicant's choice not to disclose his arrest, conviction, and sentence for various serious traffic offenses in the face of his known obligations to candidly, accurately and currently disclose impinged upon his character

and fitness to practice law, irrespective of any purported ultimate intent, warranting denial of application for admission. In re Strzempek, 407 Md. 102, 962 A.2d 988 (2008).

Applicant did not meet his burden of proving that he possessed the good moral character and fitness for the practice of law required for admission to State Bar; while applicant was not the subject of criminal prosecution, he had shown a pattern of financial irresponsibility, allowing his debt to escalate and making very few efforts, if any, to resolve his financial obligations until faced with the possibility that his failure could hinder his admission to the Bar, he failed to disclose a judgment against him on his Bar application and failed to disclose a number of delinquent accounts and suits related thereto on his Bar application, and he had had an inappropriate relationship with a 15-year-old female. In re Stern, 403 Md. 615, 943 A.2d 1247 (2008).

Bar applicant, previously found to be lacking requisite fitness and character to be admitted to the bar based on his history of alcohol abuse and inappropriate conduct with underage girls, including his niece, demonstrated requisite fitness and character upon subsequent application; applicant had completed counseling and was taking antidepressant medication, treating psychologist testified that applicant was unlikely to repeat his inappropriate behavior, applicant had expressed remorse for behavior leading to criminal charges, applicant demonstrated community involvement, and applicant was highly regarded by those with whom he served in his military unit. In re Hartmann, 276 Neb. 775, 757 N.W.2d 355 (2008).

Disapproval of applicant's application to register as a candidate to the practice of law, with permission to reapply, based on applicant's character, fitness and moral qualifications was warranted; applicant admitted he had been served with a complaint for copyright infringement before he submitted his application to register as a candidate for admission to the Ohio bar, that he failed to disclose the existence of that action, and that he settled that suit, paying a substantial sum in restitution. Government of the Bar Rule I, § 11(D)(1), (D)(2)(F), (D)(3), (D)(4)(i). In re Application of Brown, 125 Ohio St. 3d 354, 2010-Ohio-1863, 928 N.E.2d 445 (2010).

Bar applicant's extensive record of traffic and other misdemeanor convictions, and his failure to sufficiently disclose a default judgment for credit card debt, indicated that applicant lacked the requisite character, fitness, and moral qualifications for admission to the practice of law, warranting disapproval of application to take bar examination, with permission to apply for subsequent examination conditioned on applicant's submission to lawyers assistance program assessment. In re Acton, 121 Ohio St. 3d 154, 2009-Ohio-499, 902 N.E.2d 966 (2009).

Bar applicant failed to establish by clear and convincing evidence that she possessed requisite character, fitness, and moral qualifications for admission to the practice of law, warranting disapproval of application to take bar examination, with permission to reapply; applicant failed to readily disclose a charge of driving under the influence (DUI), failed to pay fines assessed upon her conviction of that offense, and failed to accept responsibility for her wrongdoing. In re Application of Wagner, 119 Ohio St. 3d 280, 2008-Ohio-3916, 893 N.E.2d 499 (2008).

Applicant to take the bar examination did not establish his requisite character, fitness, and moral qualifications for admission to practice of law; applicant, who was in his late twenties, had credit card debt going back to his college years, he had been charged with driving under the influence of alcohol (DUI) when he was 19 years old, which charge was ultimately dismissed, he had pled no contest to misdemeanor charge of sexual imposition when he was 18 and had completed a diversion program in lieu of conviction, and he had shown some reluctance, during the application process, in being forthcoming about elements of his past. In re Application of Rogers, 119 Ohio St. 3d 43, 2008-Ohio-3191, 891 N.E.2d 736 (2008).

Supreme Court, upon determining that applicant to take the bar examination did not establish his requisite character, fitness, and moral qualifications for admission to practice of law, would not allow applicant to reapply to take the next scheduled bar examination, and instead would allow him to reapply to take the bar examination following the next scheduled examination if he received unqualified approval of local bar association; applicant had serious wrongdoing in his past, he had neglected financial responsibilities, and he had shown, during the application process, some reluctance in being forthcoming about elements of his past, and in light of Supreme Court's continued misgivings, it was appropriate to allow applicant more time to show improvement in the areas of candor, financial responsibility, and lawful conduct. In re Application of Rogers, 119 Ohio St. 3d 43, 2008-Ohio-3191, 891 N.E.2d 736 (2008).

Applicant to take the bar examination did not establish his requisite character, fitness, and moral qualifications for admission to practice of law; applicant, who was in his late twenties, had credit card debt

going back to his college years, he had been charged with driving under the influence of alcohol (DUI) when he was 19 years old, which charge was ultimately dismissed, he had pled no contest to misdemeanor charge of sexual imposition when he was 18 and had completed a diversion program in lieu of conviction, and he had shown some reluctance, during the application process, in being forthcoming about elements of his past. Government of the Bar Rule I(11)(D)(1), (11)(D)(3)(f, g, k). In re Application of Rogers, 119 Ohio St. 3d 43, 2008-Ohio-3191, 891 N.E.2d 736 (2008).

Former teacher lacked requisite fitness, character, and moral qualifications for admission to bar because he had engaged in inappropriate relationship with teenage student while he was her teacher and failed to disclose on law-school and bar-admission applications that he had been disciplined for this conduct; but he could reapply to take the July 2009 bar exam if he submitted favorable psychological assessment. In re Application of Creighton, 117 Ohio St. 3d 253, 2008-Ohio-852, 883 N.E.2d 433 (2008).

Bar applicant's application for admission was disapproved, where applicant did not demonstrate the requisite character, fitness, and moral qualifications to be admitted to the bar as she had two prior arrests for driving under the influence (DUI), she had failed to pay civil judgments entered against her or pay outstanding parking tickets, and she failed to appear before the panel appointed by the Board of Commissioners on Character and Fitness for a hearing on her application. In re Application of Phelps, 116 Ohio St. 3d 312, 2007-Ohio-6459, 878 N.E.2d 1037 (2007).

Bar applicant did not yet possess the requisite character, fitness, and moral qualifications to be admitted to the bar, and thus would be disapproved for bar admission, but could reapply the following year, provided he demonstrate continued compliance with Ohio Lawyers Assistance Program (OLAP) contract; applicant demonstrated lack of remorse and personal responsibility for two separate alcohol-related offenses, applicant demonstrated an existing dependence on alcohol and a pattern of disregarding the law, and applicant was in denial about his alcoholism, but appeared committed to intensive outpatient treatment program. In re Application of Lynch, 116 Ohio St. 3d 187, 2007-Ohio-6044, 877 N.E.2d 656 (2007).

Applicant failed to demonstrate that he possessed the necessary moral character to be admitted to the Vermont Bar; applicant failed to disclose his entire criminal history and his prior academic probation on law school application, and applicant's incomplete and evasive answers to questions on law school application demonstrated a pattern short of complete honesty, and this lack of forthrightness was further borne out in applicant's answers on his Vermont Bar application, and applicant's repeated nondisclosure of his past, and his continuing insistence that he had acted properly, did not give appellate court confidence that applicant understood importance of honesty or the gravity of his behavior. Admission to the Bar, 11(b)(1). In re Bitter, 2008 VT 132, 969 A.2d 71 (Vt. 2008).

[END OF SUPPLEMENT]

[FN1] Application of Levine, 97 Ariz. 88, 397 P.2d 205 (1964).
- Although government attorneys must abide by the ethical codes of conduct of each state in which they perform their services, they do not have to be licensed by those states to practice law. Augustine v. Department of Veterans Affairs, 429 F.3d 1334 (Fed. Cir. 2005).
- As to the requirement that a bar applicant possess good moral character as not violative of First Amendment, see § 15.
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[FN2] Florida Bd. of Bar Examiners re M.B.S., 955 So. 2d 504 (Fla. 2007).
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[FN3] Application of Bernath, 327 Or. 422, 962 P.2d 685 (1998).
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[FN4] Strigler v. Board of Bar Examiners, 448 Mass. 1027, 864 N.E.2d 8 (2007).
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[FN5] Strigler v. Board of Bar Examiners, 448 Mass. 1027, 864 N.E.2d 8 (2007).
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[FN6] Strigler v. Board of Bar Examiners, 448 Mass. 1027, 864 N.E.2d 8 (2007).
- An applicant for admission to a state bar who engages in serious criminal conduct and breach of trust just days before entering law school and who thereafter demonstrates a further lack of candor must demonstrate behavior and character of the highest level subsequent to the disqualifying conduct to clearly and convincingly establish that admission is proper to a profession that requires its members to be absolutely above and beyond suspicion. Florida Bd. of Bar Examiners re M.B.S., 955 So. 2d 504 (Fla. 2007).
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[FN7] In re Application of Oppenheim, 2007-NMSC-022, 141 N.M. 596, 159 P.3d 245 (2007).
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[FN8] 28 U.S.C.A. § 530B(a).
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§ 25. Burden of proving good moral character

West's Key Number Digest

West's Key Number Digest, Attorney and Client 4

A.L.R. Library

Criminal Record as Affecting Applicant's Moral Character for Purposes of Admission to the Bar, 3 A.L.R.6th 49

Once there has been a showing of bad character by the a committee on admissions, the applicant then must produce evidence of good moral character or rebut the committee's showing of bad character, after which the committee must decide whether the applicant has shown clearly and convincingly good moral character.[FN1] The burden of establishing good moral character rests upon an applicant for admission to the bar.[FN2] The applicant must produce documentation, reports, and witnesses in support of the application.[FN3] The applicant must initially furnish enough evidence of good character to make a prima facie case.[FN4] A prima facie showing of good moral character is made where letters from attorneys, law school professors, judges, and former employers attest to an applicant's moral fitness for the practice of law, and the applicant is a member in good standing of a foreign bar.[FN5]

An applicant for admission to the bar must prove that he or she has the requisite good moral character by clear and convincing evidence, which requires the applicant to show that it is "highly probable" that he or she has good moral character.[FN6] Once the applicant establishes a prima facie case of good moral character, the state bar has the opportunity to rebut that showing with evidence of bad character; if the bar does so, the applicant must introduce further evidence of good moral character or discredit the state bar's evidence.[FN7]

The burden of proof is imposed for the protection of prospective clients, and the assurance of the ethical, orderly, and efficient administration of justice.[FN8]

CUMULATIVE SUPPLEMENT

Cases:

Applicant for admission to State Bar has burden of proving that he possesses the present good moral character to practice law in State. In re Strzempek, 407 Md. 102, 962 A.2d 988 (2008).

Bar applicant failed to establish by clear and convincing evidence that she possessed requisite character, fitness, and moral qualifications for admission to the practice of law, warranting disapproval of application to take bar examination, with permission to reapply; applicant failed to readily disclose a charge of driving under the influence (DUI), failed to pay fines assessed upon her conviction of that offense, and failed to accept responsibility for her wrongdoing. In re Application of Wagner, 119 Ohio St. 3d 280, 2008-Ohio-3916, 893 N.E.2d 499 (2008).

[END OF SUPPLEMENT]

[FN1] In re Bedi, 917 A.2d 659 (D.C. 2007).
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[FN2] In re Antonini, 272 Neb. 985, 726 N.W.2d 151 (2007).
- An applicant who had five arrests for driving while intoxicated failed to meet his burden of proving that he had good moral character to be admitted to the state bar association. In re Brown, 951 So. 2d 165 (La. 2007).
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[FN3] In re Antonini, 272 Neb. 985, 726 N.W.2d 151 (2007).
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[FN4] In re Bedi, 917 A.2d 659 (D.C. 2007).
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[FN5] Reese v. Board of Com'rs of Alabama State Bar, 379 So. 2d 564 (Ala. 1980).
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[FN6] In re Carter, 334 Or. 388, 49 P.3d 792 (2002).
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[FN7] Lubetzky v. State Bar, 54 Cal. 3d 308, 285 Cal. Rptr. 268, 815 P.2d 341 (1991).
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[FN8] In re Bedi, 917 A.2d 659 (D.C. 2007).
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§ 26. What does or does not constitute lack of good character

West's Key Number Digest

West's Key Number Digest, Attorney and Client 4

A.L.R. Library

Sexual Conduct or Orientation as Ground for Denial of Admission to Bar, 105 A.L.R.5th 217

Lack of good moral character has been found, and admission to the bar refused, for misconduct such as making false statements or affidavits in support of the application for admission,[FN1] abusive, disruptive, hostile, intemperate, intimidating, irresponsible, threatening, or turbulent behavior,[FN2] a record manifesting a significant deficiency in the honesty, trustworthiness, diligence, or reliability of an applicant,[FN3] criminal activity,[FN4] unethical or questionable business practices,[FN5] lack of financial responsibility,[FN6] failure to honor legal commitments and obligations,[FN7] a pattern of disregard of state laws,[FN8] failure to reveal extensive criminal history on a law school application,[FN9] and repeated civil legal troubles.[FN10]

A bar applicant's private, non-commercial sexual conduct between consenting adults may not be used to deny the applicant admission to the bar.[FN11]

CUMULATIVE SUPPLEMENT

Cases:

Bar applicant lacked requisite fitness, character, and moral qualifications for admission to bar based upon his deceitful conduct in handling bankruptcy claims as a law firm clerk, although, based on his genuine remorse and acceptance of responsibility, he could reapply upon reestablishing his moral qualifications to practice law; despite false assurances to supervising attorney and clients, applicant filed nothing with the court, and went so far as fabricating a court order allowing a continuance of a creditor meeting, complete with a forged signature purporting to be that of the bankruptcy court clerk. In re Application of Kohler, 115 Ohio St. 3d 11, 2007-Ohio-4261, 873 N.E.2d 818 (2007).

[END OF SUPPLEMENT]

[FN1] Florida Bd. of Bar Examiners re B.H.A., 626 So. 2d 683 (Fla. 1993).
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[FN2] In re Antonini, 272 Neb. 985, 726 N.W.2d 151 (2007).
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[FN3] In re Antonini, 272 Neb. 985, 726 N.W.2d 151 (2007).
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[FN4] § 28.
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[FN5] Application of Bernath, 327 Or. 422, 962 P.2d 685 (1998).
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[FN6] In re Application of Ford, 110 Ohio St. 3d 503, 2006-Ohio-4967, 854 N.E.2d 501 (2006).
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[FN7] In re Adams, 273 Ga. 333, 540 S.E.2d 609 (2001).
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[FN8] In re Application of Dickens, 106 Ohio St. 3d 128, 2005-Ohio-4097, 832 N.E.2d 725 (2005).
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[FN9] In re Application of Dickens, 106 Ohio St. 3d 128, 2005-Ohio-4097, 832 N.E.2d 725 (2005).
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[FN10] In re Application of Dickens, 106 Ohio St. 3d 128, 2005-Ohio-4097, 832 N.E.2d 725 (2005).
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[FN11] Florida Bd. of Bar Examiners Re N.R.S., 403 So. 2d 1315, 21 A.L.R.4th 1103 (Fla. 1981).
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§ 27. Rehabilitation of moral character; conditional admission

West's Key Number Digest

West's Key Number Digest, Attorney and Client 4

A.L.R. Library

Criminal Record as Affecting Applicant's Moral Character for Purposes of Admission to the Bar, 3 A.L.R.6th 49

Conditioning reinstatement of attorney upon reaffirmation of debt discharged in bankruptcy, 39 A.L.R.4th 586

Past misconduct sufficient to deny application for admission to the bar may be offset by a showing of rehabilitation of the applicant and of his or her current moral qualification for admission.[FN1] Although no prior offense is so grave as to preclude a showing of present moral fitness, an applicant for admission to the bar must show that at the present time he or she has so rehabilitated himself or herself by leading a sufficiently exemplary life to inspire public confidence once again, in spite of his or her previous actions.[FN2]

Disqualifying conduct extending over a long period of time will require a longer period of rehabilitation to satisfy the court that the applicant for admission to a state bar can maintain the high standards of the profession and the professionalism necessary after gaining admission.[FN3] Similarly, the more serious the disqualifying conduct, the greater the burden of proof of rehabilitation.[FN4]

When an applicant has previously committed acts of moral turpitude, the applicant bears the burden of demonstrating that he or she is rehabilitated and currently possesses the moral qualifications to be a member of the bar.[FN5]

The conditional admission process is intended to apply to persons who have an established a history of conduct related to conditions clearly subject to rehabilitation who can enter a plan for some period of time after admission to a state bar.[FN6] Conditional admission to a state bar can only be considered after rehabilitation has been established.[FN7] For conditional admission to a state bar to be considered, there must be a clear nexus between the disqualifying conduct and the condition subject to rehabilitation and the future plan.[FN8] However, conditional admission to a state bar is not intended to replace the need for a clear and convincing record of rehabilitation.[FN9]

[FN1] Application of Peterman, 134 N.J. 201, 632 A.2d 271 (1993).

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[FN2] Strigler v. Board of Bar Examiners, 448 Mass. 1027, 864 N.E.2d 8 (2007).
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[FN3] Florida Bd. of Bar Examiners re M.B.S., 955 So. 2d 504 (Fla. 2007).
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[FN4] Florida Bd. of Bar Examiners re M.B.S., 955 So. 2d 504 (Fla. 2007).
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[FN5] Seide v. Committee of Bar Examiners, 49 Cal. 3d 933, 264 Cal. Rptr. 361, 782 P.2d 602 (1989).
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[FN6] Florida Bd. of Bar Examiners re M.B.S., 955 So. 2d 504 (Fla. 2007).
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[FN7] Florida Bd. of Bar Examiners re M.B.S., 955 So. 2d 504 (Fla. 2007).
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[FN8] Florida Bd. of Bar Examiners re M.B.S., 955 So. 2d 504 (Fla. 2007).
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[FN9] Florida Bd. of Bar Examiners re M.B.S., 955 So. 2d 504 (Fla. 2007).
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§ 28. Criminal record as bearing on moral character

West's Key Number Digest

West's Key Number Digest, Attorney and Client 4

A.L.R. Library

Criminal Record as Affecting Applicant's Moral Character for Purposes of Admission to the Bar, 3 A.L.R.6th 49

Violation of draft laws as affecting character for purposes of admission to the bar, 88 A.L.R.3d 1055

Admission to the bar has been refused to an applicant who has been convicted of, or pleaded guilty to, a crime.[FN1] However, the mere fact that an applicant has a record of arrest, indictment, or conviction of crime does not necessarily result in automatic disqualification from admission to practice.[FN2]

Where an applicant for admission to the bar has a criminal record, his or her burden of establishing present good moral character takes on the added weight of proving full and complete rehabilitation subsequent to conviction, and it is only fitting that proof of rehabilitation be by clear and convincing evidence.[FN3]

A statute providing that disbarment for conviction of an offense involving moral turpitude is both mandatory and permanent in all cases in which a pardon has not been granted does not violate the separation of powers.[FN4]

[FN1] Matter of Martin, 181 Wis. 2d 27, 510 N.W.2d 687 (1994).

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[FN2] Schware v. Board of Bar Exam. of State of N.M., 353 U.S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796, 64 A.L.R.2d 288 (1957).

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[FN3] In re Adams, 273 Ga. 333, 540 S.E.2d 609 (2001).

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[FN4] In re Krouner, 920 A.2d 1039 (D.C. 2007).

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A.L.R. Index, Disbarment of Attorney

A.L.R. Index, Discipline and Disciplinary Actions

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Model Codes and Restatements

Model Rules of Professional Conduct (ABA) Rules 1.2, 1.7, 1.8, 1.15, 1.16, 3.1, 3.3 to 3.5, 3.7, 3.8, 4.2, 5.4, 7.1, 7.3, 8.2, 8.4

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7 Am. Jur. 2d Attorneys at Law § 29

American Jurisprudence, Second Edition
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Attorneys at Law
Rachel M. Kane, M.A., J.D.

II. Judicial Supervision of Legal Profession
B. Disciplinary Proceedings
1. In General

Topic Summary Correlation Table References

§ 29. Generally

West's Key Number Digest

West's Key Number Digest, Attorney and Client 34 to 61, 105 to 115

A.L.R. Library

Reciprocal Discipline of Attorneys—Commingling or Other Mishandling of Client Funds, 45 A.L.R.6th 175

Validity and construction of procedures to temporarily suspend attorney from practice, or place attorney on inactive status, pending investigation of, and action upon, disciplinary charges, 80 A.L.R.4th 136

Trial Strategy

Mental or Emotional Disturbance as Defense or Mitigating Factor In Attorney Disciplinary Proceeding, 46 Am. Jur. Proof of Facts 2d 563

Attorneys have a continuing obligation to comply with rules of professional conduct,[FN1] and advocacy to which a client and the client's legal position is entitled cannot enable or justify an attorney in violating ethical restraints to which he or she is subject.[FN2] Hence, an attorney discipline system that is separate from court action is necessary to protect the public, since society has found that the regulation of various professions through licensing is an essential companion to the relief available through civil and criminal litigation.[FN3]

In furtherance of its legitimate interest in regulating the practice of law, the state may, without violating due process, create an integrated bar to provide for the discipline of attorneys.[FN4] Thus, without invading any constitutional privilege or right,[FN5] an attorney's right to practice law may be revoked by a disbarment proceeding, based on conduct rendering the attorney unfit to hold a license to practice or to exercise the duties and responsibilities of an attorney.[FN6] In addition, these concerns are at their zenith in the case of an attorney who has previously committed an offense serious enough to justify disbarment and is again found to have departed from the rules of professional conduct.[FN7] An attorney's right to practice is not, however, a mere matter of grace or favor revocable at pleasure.[FN8] Rather, an attorney can be deprived of his or her office only for good cause shown in a judicial proceeding conducted in a legal manner.[FN9] When an attorney is subject to disciplinary measures, the following factors should be considered in determining the severity of the sanctions, though the list is nonexclusive:[FN10]

• The nature of the misconduct involved

• The need to deter similar misconduct

• Preservation of the dignity and reputation of the legal profession

• Protection of the public

• Sanctions imposed in similar cases

The fact that an attorney no longer engages in active legal practice will not avoid disciplinary proceedings for violation of standards of professional conduct.[FN11]

The basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.[FN12]

Observation: Attorney discipline, including sanctions and disbarment, is not "punishment" for purposes of the double jeopardy clause.[FN13]

It has been stated that the judicial power in disciplinary and admission matters remains with the court and is not delegated to the bar.[FN14]

Although the court decides attorney disciplinary matters on a case-by-case basis, other similar disciplinary proceedings are helpful in determining sanctions.[FN15]

The sanction resulting from a bar disciplinary proceeding must be fair to society, fair to the attorney, and severe enough to deter other attorneys from similar misconduct.[FN16]

The breach of an ethics rule provides only a public, i.e. disciplinary, remedy, and not a private remedy.[FN17]

A lawyer may not employ a threat of disciplinary action against another lawyer to obtain a legal advantage for his or her client.[FN18]

CUMULATIVE SUPPLEMENT

Cases:

An attorney is admitted to the practice of law on the implied condition that the continuation of this right depends on remaining a fit and safe person to exercise it. Statewide Grievance Committee v. Johnson, 108 Conn. App. 74, 946 A.2d 1256 (2008), certification denied, 288 Conn. 915, 954 A.2d 187 (2008).

Severity of the sanction in attorney disciplinary proceeding depends on several things, including the circumstances of each case, the intent to which the acts were committed, and the gravity, nature, and effects of the violations as well as any mitigating factors. Attorney Grievance Com'n of Maryland v. Kendrick, 403 Md. 489, 943 A.2d 1173 (2008).

[END OF SUPPLEMENT]

[FN1] Vavrosky MacColl Olson Busch & Pfeifer PC v. Employment Dept., 212 Or. App. 174, 157 P.3d 312 (2007).
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[FN2] In re Comfort, 159 P.3d 1011 (Kan. 2007).
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[FN3] In re Attorney Discipline System, 19 Cal. 4th 582, 79 Cal. Rptr. 2d 836, 967 P.2d 49 (1998).
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[FN4] Lebbos v. State Bar, 53 Cal. 3d 37, 278 Cal. Rptr. 845, 806 P.2d 317 (1991).
- As to integrated bars generally, see § 7.
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[FN5] Ex parte Wall, 107 U.S. 265, 2 S. Ct. 569, 27 L. Ed. 552 (1883).
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[FN6] Matter of Field, 79 A.D.2d 198, 436 N.Y.S.2d 290 (1st Dep't 1981).
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[FN7] In re Silverton, 36 Cal. 4th 81, 29 Cal. Rptr. 3d 766, 113 P.3d 556 (2005).
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[FN8] Ex parte Garland, 71 U.S. 333, 18 L. Ed. 366, 32 How. Pr. 241, 1866 WL 9477 (1866).
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[FN9] Randall v. Brigham, 74 U.S. 523, 19 L. Ed. 285, 1868 WL 11160 (1868).
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[FN10] Culpepper v. Mississippi State Bar, 588 So. 2d 413 (Miss. 1991).
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[FN11] The Florida Bar v. St. Laurent, 617 So. 2d 1055 (Fla. 1993).
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[FN12] State ex rel. Counsel for Discipline of Nebraska Supreme Court v. Wickenkamp, 272 Neb. 889, 725 N.W.2d 811 (2007).
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[FN13] Matter of Caranchini, 160 F.3d 420 (8th Cir. 1998).
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[FN14] In re Attorney Discipline System, 19 Cal. 4th 582, 79 Cal. Rptr. 2d 836, 967 P.2d 49 (1998).
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[FN15] Disciplinary Counsel v. Brown, 87 Ohio St. 3d 316, 1999-Ohio-74, 720 N.E.2d 525 (1999).
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[FN16] The Florida Bar v. Committe, 916 So. 2d 741 (Fla. 2005), cert. denied, 547 U.S. 1098, 126 S. Ct. 1890, 164 L. Ed. 2d 569 (2006).

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[FN17] Just Dirt, Inc. v. Knight Excavating, Inc., 138 Wash. App. 409, 157 P.3d 431 (Div. 2 2007).

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[FN18] In re Comfort, 159 P.3d 1011 (Kan. 2007).

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II. Judicial Supervision of Legal Profession
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1. In General

Topic Summary Correlation Table References

§ 30. Purpose of proceeding

West's Key Number Digest

West's Key Number Digest, Attorney and Client 47.1, 49

A.L.R. Library

Modern status of law regarding solicitation of business by or for attorney, 5 A.L.R.4th 866

The purpose of suspending or disbarring an attorney is to remove from the profession a person whose misconduct has proved such person unfit to be entrusted with the duties and responsibilities belonging to the office of an attorney, and thus to protect the public and those charged with the administration of justice, rather than to punish the attorney,[FN1] although disbarment is nonetheless a punishment or penalty imposed on the lawyer[FN2] and the sanctions imposed may have that incidental effect.[FN3]

The purpose of the attorney disciplinary process is not to punish the offender[FN4] but to protect the public.[FN5] The principal reason for attorney discipline is to preserve the confidence of the public in the integrity and trustworthiness of lawyers in general.[FN6] Attorney discipline is designed to protect the public, the legal profession, and the legal system and to deter other attorneys from engaging in unprofessional conduct.[FN7] Thus, the judgment of a disciplinary proceeding must be fair to society,[FN8] both in terms of protecting the public from unethical conduct[FN9] and, at the same time, not denying the public the services of a qualified lawyer; it must be fair to the attorney,[FN10] being sufficient to punish a breach of ethics and, at the same time, encourage reformation and rehabilitation;[FN11] and it must be severe enough to deter others who might be prone or tempted to become involved in like violations.[FN12]

The court does not lightly impose on an attorney the sanction of permanent disbarment.[FN13]

CUMULATIVE SUPPLEMENT

Cases:

A court disciplining an attorney does so not to punish the attorney but to safeguard the administration of justice and to protect the public from the misconduct or unfitness of those who are members of the legal profession. Statewide Grievance Committee v. Johnson, 108 Conn. App. 74, 946 A.2d 1256 (2008), certification denied, 288 Conn. 915, 954 A.2d 187 (2008).

Disciplinary proceedings protect the public through sanctions against offending attorneys in two ways: through deterrence of the type of conduct which will not be tolerated, and by removing those unfit to continue in the practice of law from the rolls of those authorized to practice. Attorney Grievance Com'n of Maryland v. Zodrow, 419 Md. 286, 19 A.3d 381 (2011).

Court of Appeals's aim in imposing sanctions for attorney misconduct is to protect the public and the public's confidence in the legal profession rather than to punish the attorney. Attorney Grievance Com'n v. Taylor, 405 Md. 697, 955 A.2d 755 (2008).

The primary purpose in imposing discipline on an attorney for violation of the rules of professional conduct is not to punish the lawyer but rather to protect the public and the public's confidence in the legal profession. Attorney Grievance Com'n of Maryland v. Ugwuonye, 405 Md. 351, 952 A.2d 226 (2008).

The purpose of disciplinary proceedings is to protect the public, rather than to punish the attorney. Attorney Grievance Com'n of Maryland v. Zuckerman, 403 Md. 695, 944 A.2d 525 (2008).

When determining whether to impose the ultimate sanction of disbarment, the Supreme Court focuses not on punishing the offender, but on protecting the public, maintaining public confidence in the bar, preserving the integrity of the legal profession, and preventing similar conduct in the future. In re Morse, 160 N.H. 538, 7 A.3d 1259 (2010).

In deciding on a sanction, Supreme Court is always mindful that the attorney disciplinary process exists not to punish the offender but to protect the public from lawyers who are unworthy of the trust and confidence essential to the attorney-client relationship and to allow the Supreme Court to ascertain the lawyer's fitness to practice law. Akron Bar Assn. v. Catanzarite, 119 Ohio St. 3d 313, 2008-Ohio-4063, 893 N.E.2d 835 (2008).

The Supreme Court's primary purpose in imposing disciplinary sanctions is not to punish the offender, but to protect the public. Stark Cty. Bar Assn. v. Marosan, 119 Ohio St. 3d 113, 2008-Ohio-3882, 892 N.E.2d 447 (2008).

The primary purpose of disciplinary sanctions against an attorney is not to punish the offender, but to protect the public. Cincinnati Bar Assn. v. Lawson, 119 Ohio St. 3d 58, 2008-Ohio-3340, 891 N.E.2d 749 (2008).

A disciplinary proceeding is instituted to safeguard the courts and to protect the public from the misconduct of those who are licensed to practice law, and is neither a criminal nor a civil proceeding. Disciplinary Counsel v. Heiland, 116 Ohio St. 3d 521, 2008-Ohio-91, 880 N.E.2d 467 (2008).

[END OF SUPPLEMENT]

[FN1] Ex parte Wall, 107 U.S. 265, 2 S. Ct. 569, 27 L. Ed. 552 (1883); In re Attorney Discipline System, 19 Cal. 4th 582, 79 Cal. Rptr. 2d 836, 967 P.2d 49 (1998).
- As to the nature of disciplinary proceedings, generally, see § 101.
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[FN2] In re Ruffalo, 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968).
- The lawyer discipline system was not designed to be either punitive or penal in nature. In re Tenenbaum, 918 A.2d 1109 (Del. 2007).
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[FN3] In re Non-Member of State Bar of Arizona, Van Dox, 214 Ariz. 300, 152 P.3d 1183 (2007).
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[FN4] Attorney Grievance Com'n of Maryland v. Goff, 399 Md. 1, 922 A.2d 554 (2007), reinstatement granted, 2007 WL 2128391 (Md. 2007).
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[FN5] Attorney Grievance Com'n of Maryland v. Goff, 399 Md. 1, 922 A.2d 554 (2007), reinstatement granted, 2007 WL 2128391 (Md. 2007).
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[FN6] In re Scanio, 919 A.2d 1137 (D.C. 2007).
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[FN7] In re Non-Member of State Bar of Arizona, Van Dox, 214 Ariz. 300, 152 P.3d 1183 (2007).
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[FN8] The Florida Bar v. Cox, 718 So. 2d 788 (Fla. 1998).
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[FN9] The Florida Bar v. Krasnove, 697 So. 2d 1208 (Fla. 1997).
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[FN10] The Florida Bar v. Cox, 718 So. 2d 788 (Fla. 1998).
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[FN11] The Florida Bar v. Poplack, 599 So. 2d 116 (Fla. 1992).
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[FN12] The Florida Bar v. Cox, 718 So. 2d 788 (Fla. 1998).
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[FN13] In re Shortess, 950 So. 2d 570 (La. 2007).
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Topic Summary Correlation Table References

§ 31. Effect of attempted resignation of attorney

West's Key Number Digest

West's Key Number Digest, Attorney and Client 59.12

A.L.R. Library

Propriety of attorney's resignation from bar in light of pending or potential disciplinary action, 54 A.L.R.4th 264

Ordinarily, an attorney's resignation from membership in the bar must be accepted or consented to by a court having jurisdiction, and acceptance or consent may be withheld or refused if it enables the attorney to evade or forestall disbarment or disciplinary action.[FN1] A resignation of an attorney without permission of the court is not effectual to preclude disbarment, when disciplinary proceedings were pending at the time of the resignation.[FN2] However, under some circumstances the purposes of a disbarment may be fully satisfied, and the ends of justice as well or better served by permitting the attorney to resign; hence, the pendency or anticipation of disciplinary proceedings against an attorney does not necessarily require the rejection of his or her application for permission to resign,[FN3] such as where the attorney makes a statement in the application for resignation that constitutes an admission of the charges,[FN4] especially in a jurisdiction wherein resignation during the pendency of disciplinary proceedings is tantamount to admission of the charges,[FN5] and the question of acceptance or rejection rests in the judicial discretion of the court.[FN6]

Whether resignation or retirement during the pendency of attorney disciplinary proceedings is ultimately accepted depends on the court's assessment of the impact that resignation or retirement will have on public policy interests such as the integrity of the legal profession, the administration of justice, and protection of the public.[FN7]

CUMULATIVE SUPPLEMENT

Cases:

Court of Appeals would grant attorney, who was subject to disciplinary proceedings for failing to comply with scheduling orders and in making misrepresentations to court and disciplinary committee, leave to resign from Court's bar; grievance committee had recommended that attorney be suspended for six months and subject to continuing legal education (CLE) requirements, resignation was a remedial measure arguably more onerous than she likely faced if proceedings continued, and misunderstandings about nature of attorney's withdrawal were unlikely since the order would be made public. In re Yan Wang, 389 Fed. Appx. 2 (2d Cir. 2010).

State bar established by clear and convincing evidence that attorney's actions constituted professional misconduct warranting disbarment, where attorney pled guilty in federal court to felony offense of conspiracy to

corruptly influence an elected state official and filed with state supreme court his notice of irrevocable resignation. The Mississippi Bar v. Langston, 987 So. 2d 936 (Miss. 2008).

Mississippi Bar was entitled to revocation of attorney's license to practice law, to issuance of order forever barring attorney's right to seek reinstatement, and to termination of all outstanding disciplinary proceedings against attorney, where attorney, after Bar had filed disciplinary proceeding seeking disbarment based on attorney's entry of guilty plea, in federal court, to conspiracy to commit bribery of elected state official, filed notice of irrevocable resignation, in which he expressed his desire not to defend against the disciplinary matter relating to the guilty plea or to defend against another pending disciplinary matter. Mississippi Bar v. Balducci, 987 So. 2d 933 (Miss. 2008).

Supreme Court would accept resignation of, and disbar with no right to seek reinstatement, attorney who requested permission to resign after disciplinary proceedings were initiated against attorney for misconduct leading to his felony driving under the influence (DUI) conviction. Mississippi Bar v. Naugle, 968 So. 2d 1266 (Miss. 2007).

Attorney, by filing with Supreme Court a voluntary surrender of license to practice law and by not challenging allegations of Committee on Inquiry relating to misuse of client funds, thereby voluntarily surrendered his license to practice law, knowingly did not challenge or contest truth of the allegations against him in application for temporary suspension, waived all proceedings against him in connection therewith, and consented to entry of order of disbarment. State ex rel. Counsel for Discipline of Nebraska Supreme Court v. Ginsburg, 277 Neb. 474, 763 N.W.2d 378 (2009).

Supreme Court would grant Oklahoma Bar Association's (OBA) application for approval of attorney's resignation from membership in the bar while disciplinary proceedings were pending, which proceedings were based on allegations that attorney neglected the matters of two clients, that attorney perjured himself, in case involving allegations of failure to protect client's child from abuse, when questioned by judge about client's living arrangements, and that attorney committed other misconduct, and which resignation was tendered after attorney was convicted of three counts of second-offense domestic assault and battery. State ex rel. Oklahoma Bar Ass'n v. Frazier, 2008 OK 59, 195 P.3d 885 (Okla. 2008).

[END OF SUPPLEMENT]

[FN1] Matter of Atkins, 253 Ga. 319, 320 S.E.2d 146, 54 A.L.R.4th 259 (1984).
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[FN2] Matter of Reed, 429 A.2d 987 (Del. 1981).
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[FN3] The Florida Bar, 381 So. 2d 705 (Fla. 1980).
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[FN4] Matter of Perla, 180 A.D.2d 116, 586 N.Y.S.2d 893 (2d Dep't 1992).
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[FN5] In re Johnston, 272 Ga. 444, 531 S.E.2d 351 (2000).
- An affidavit of resignation from an attorney who was being investigated for professional misconduct would be accepted upon his admission that he submitted the resignation freely, voluntarily, and without coercion or duress, that he was fully aware of the implications of submitting the resignation, that he was aware that he was being investigated on complaints of professional misconduct, and that if charges were brought predicated upon such complaints, he would be unable to successfully defend himself. In re Lieberman, 23 A.D.3d 91, 802 N.Y.S.2d 121 (1st Dep't 2005).
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[FN6] Matter of Flynn, 123 A.D.2d 415, 506 N.Y.S.2d 562 (2d Dep't 1986).
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[FN7] In re Maguire, 725 A.2d 417 (Del. 1999).
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Topic Summary Correlation Table References

§ 32. Generally

West's Key Number Digest

West's Key Number Digest, Attorney and Client 36(1), 36(2)

The judicial power in disciplinary matters remains with the court and is not delegated to the bar.[FN1] Its power to discipline attorneys' behavior is inherent.[FN2] Thus, by reason of its necessary and inherent power to control the conduct of its own affairs and to maintain its own dignity, a court has summary jurisdiction to deal with the alleged misconduct of an attorney.[FN3]

When a court proceeds against an attorney using its inherent power of discipline, the court is not bound by the rules of a state bar.[FN4]

CUMULATIVE SUPPLEMENT

Cases:

Court of Appeals has original and complete jurisdiction in attorney discipline proceedings. Attorney Grievance Com'n v. Taylor, 405 Md. 697, 955 A.2d 755 (2008).

The Supreme Court has plenary authority to determine the nature of lawyer discipline. Burtch, In re Disciplinary Proceeding Against, 162 Wash. 2d 873, 175 P.3d 1070 (2008).

[END OF SUPPLEMENT]

[FN1] In re Attorney Discipline System, 19 Cal. 4th 582, 79 Cal. Rptr. 2d 836, 967 P.2d 49 (1998).
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[FN2] In re Bennett, 960 S.W.2d 35 (Tex. 1997).
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[FN3] Ex parte Bradley, 74 U.S. 364, 19 L. Ed. 214, 1868 WL 11137 (1868).
- In proceedings involving attorney discipline, the court of appeals has original and complete jurisdiction. Attorney Grievance Com'n of Maryland v. Parker, 389 Md. 142, 884 A.2d 104 (2005).
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[FN4] In re License of Delk, 336 N.C. 543, 444 S.E.2d 198 (1994).
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Topic Summary Correlation Table References

§ 33. What courts have disciplinary power

West's Key Number Digest

West's Key Number Digest, Attorney and Client 36(1), 36(2)

The court has the inherent and exclusive authority to discipline members of a state bar.[FN1] In disciplinary proceedings, the court acts as a licensing court in the exercise of its original[FN2] and exclusive

jurisdiction.[FN3] However, a court's authority in the discipline of attorneys practicing before it is limited to the jurisdictional boundaries of that court and cannot extend to other courts beyond that boundary.[FN4]

Unless restricted by the constitution or a statute, a court of general jurisdiction has inherent power to suspend or disbar an attorney who is found guilty of conduct unbecoming the standard of propriety that should be maintained by members of the legal profession.[FN5] Accordingly, independently of any statutory restriction, the courts of record of the state might, in a proper case, suspend or annul the license of an attorney, so far as it authorized him or her to practice in the particular court, which pronounced the sentence, but no farther.[FN6] This power is possessed by all courts having authority to admit attorneys to practice.[FN7]

Courts of special or limited jurisdiction have no power to disbar an attorney unless that power has been expressly conferred on them.[FN8]

Federal courts do not have jurisdiction to interfere with disciplinary proceedings of a state bar even where the defendant argues that the proceedings violated federal due process requirements.[FN9]

CUMULATIVE SUPPLEMENT

Cases:

Judges of the Superior Court possess the inherent authority to regulate attorney conduct and to discipline the members of the bar. Statewide Grievance Committee v. Johnson, 108 Conn. App. 74, 946 A.2d 1256 (2008), certification denied, 288 Conn. 915, 954 A.2d 187 (2008).

In proceedings involving attorney discipline, Court of Appeals has original and complete jurisdiction and conducts an independent review of the record. Attorney Grievance Com'n of Maryland v. Kendrick, 403 Md. 489, 943 A.2d 1173 (2008).

The authority to discipline attorneys and the manner in which the discipline is given rests entirely with the Supreme Court. In re Pennington, 380 S.C. 49, 668 S.E.2d 402 (2008).

Authority to discipline attorneys and the manner in which discipline is given rests entirely with the state supreme court. In re Hazzard, 377 S.C. 482, 661 S.E.2d 102 (2008), reinstatement granted, 2008 WL 5120038 (S.C. 2008).

The authority to discipline attorneys and the manner in which the discipline is given rests entirely with the Supreme Court. In re Tullis, 375 S.C. 190, 652 S.E.2d 395 (2007).

[END OF SUPPLEMENT]

[FN1] In re Abbott, 925 A.2d 482 (Del. 2007), petition for cert. filed (U.S. July 30, 2007); In re Key, 643 S.E.2d 452 (N.C. Ct. App. 2007), writ denied, review denied, 2007 WL 2156157 (N.C. 2007).
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[FN2] In re Phelps, 953 So. 2d 45 (La. 2007).
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[FN3] State ex rel. Oklahoma Bar Ass'n v. Wagner, 2007 OK 3, 152 P.3d 212 (Okla. 2007).
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[FN4] In re Moseley, 643 S.E.2d 190 (Va. 2007).
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[FN5] Ex parte Wall, 107 U.S. 265, 2 S. Ct. 569, 27 L. Ed. 552 (1883).
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[FN6] In re Moseley, 643 S.E.2d 190 (Va. 2007).
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[FN7] Ex parte Robinson, 86 U.S. 513, 22 L. Ed. 205, 1873 WL 16068 (1873).
- As to the rule empowering a court of appeals to exercise disciplinary power over attorneys who are members

of its bar, see Fed. R. App. P. 46.

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[FN8] Appeal of A Juvenile, 61 Ohio App. 2d 235, 15 Ohio Op. 3d 400, 401 N.E.2d 937 (11th Dist. Lake County 1978).

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[FN9] Doe v. State Bar of California, 582 F.2d 25 (9th Cir. 1978).

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§ 34. Preliminary general investigation by bar

West's Key Number Digest

West's Key Number Digest, Attorney and Client 48

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Validity and construction of procedures to temporarily suspend attorney from practice, or place attorney on inactive status, pending investigation of, and action upon, disciplinary charges, 80 A.L.R.4th 136

Extent and determination of attorney's right or privilege against self-incrimination in disbarment or other disciplinary proceedings—post-Spevack cases, 30 A.L.R.4th 243

Antecedent to the institution of disciplinary proceedings against a particular attorney, the court has power to conduct a general investigation into the conduct and practices of attorneys whenever it has probable cause to

believe that professional misconduct has occurred, with the aim of collecting and assembling facts and information that will enable the court to take such action as it may deem expedient for the public welfare.[FN1] During the course of such an investigation, the court may compel an attorney to testify to his or her professional acts, provided the inquiry is secret in its preliminary stages and is subject to the attorney's privilege against self-incrimination.[FN2]

CUMULATIVE SUPPLEMENT

Cases:

In attorney disciplinary proceedings, grievance panels and reviewing committees carry out what are essentially investigative, fact-bound functions that only determine the probability that an act of attorney misconduct has occurred. Statewide Grievance Committee v. Johnson, 108 Conn. App. 74, 946 A.2d 1256 (2008), certification denied, 288 Conn. 915, 954 A.2d 187 (2008).

The purpose of the temporary suspension of a lawyer is more than disciplinary; it is also intended to prompt a response to the board's inquires so the disciplinary action may proceed in a timely and informed fashion. Iowa Supreme Court Attorney Disciplinary Bd. v. Fields, 790 N.W.2d 791 (Iowa 2010).

Evidence established probable cause to believe that attorney misappropriated or otherwise improperly dealt with client funds, and to believe that attorney was addicted to intoxicants or drugs and did not have the physical or mental fitness to continue to practice law, warranting temporary suspension of attorney from practice of law; attorney was subject of complaint that he double-charged decedent's estate and misappropriated funds in excess of $60,000, attorney had several criminal complaints filed against him for writing bad checks, and attorney was subject to several other complaints that he neglected client matters and took payment for work he never performed. Inquiry Com'n v. Cameron, 247 S.W.3d 535 (Ky. 2008).

Bar rule governing disciplinary procedure and regulations relating to investigation and proceedings involving complaints of attorney misconduct are to be construed liberally for the protection of the public, the courts, and the legal profession. Disciplinary Counsel v. Heiland, 116 Ohio St. 3d 521, 2008-Ohio-91, 880 N.E.2d 467 (2008).

[END OF SUPPLEMENT]

[FN1] Smith v. Grievance Committee, State Bar of Tex. for Dist. 14-A, 475 S.W.2d 396 (Tex. Civ. App. Corpus Christi 1972).

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[FN2] Spevack v. Klein, 385 U.S. 511, 87 S. Ct. 625, 17 L. Ed. 2d 574 (1967).

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§ 35. Preliminary general investigation by bar—Extent of discipline as discretionary with court

West's Key Number Digest

West's Key Number Digest, Attorney and Client 48, 59.4

Discipline of an attorney may be effected by disbarment, suspension,[FN1] or censure, sometimes called reprimand, which may be public or private.[FN2]

Further, an attorney should be disbarred or suspended only where his or her continuance in practice will be subversive of the proper administration of justice, or incompatible with a proper respect of the court for itself or a proper regard for the integrity of the profession.[FN3]

The appropriate sanction in a case of professional misconduct depends on the duties violated, the actual injury caused, the attorney's mental state, the existence of aggravating or mitigating circumstances, and sanctions imposed in similar cases.[FN4]

In all cases, the determination of the form and measure of discipline to be applied involves the exercise of sound judicial discretion.[FN5] The court is the trier of ultimate facts,[FN6] and it is not bound by the findings or recommendations of a disciplinary board or committee of the state bar,[FN7] although their recommendations should receive serious consideration by the court.[FN8] The court's scope of review over attorney disciplinary recommendations is broader than that afforded to findings of fact because it is the court's responsibility to order the appropriate discipline.[FN9] In addition, although a referee's recommendation is persuasive, the court does not pay the same deference to this recommendation as it does to the guilt recommendation because the court has the ultimate responsibility to determine the appropriate sanction for attorney misconduct.[FN10] Generally speaking, the court will not second-guess a referee's recommended discipline as long as that discipline has a reasonable basis in existing caselaw or in the standards for imposing lawyer sanctions.[FN11] Thus, the referee's findings of fact carry a presumption of correctness which will be upheld on review unless clearly erroneous[FN12] or lacking in evidentiary support.[FN13] Accordingly, if the referee's findings in bar discipline case are supported by competent, substantial evidence, the court is precluded from reweighing the evidence and substituting its judgment for that of the referee.[FN14]

In determining the appropriate degree of discipline, the court may properly consider an attorney's prior record of discipline.[FN15] In addition, the court considers not only the duty violated, but also the attorney's mental state, the actual injury caused, and whether mitigating factors exist.[FN16]

CUMULATIVE SUPPLEMENT

Cases:

Published censure was warranted by attorney's failure to return many telephone calls while working at public defender's office, practice of law on suspended license, failure to provide a written response or file

answer to initial complaint, and failure to notify clients, opposing counsel, and the courts of his suspension. In re Lee, 287 Kan. 676, 198 P.3d 140 (2008).

Six-month suspension was appropriate baseline sanction for attorneys' misconduct in having unrepresented victim of crimes of which their client was charged sign a confidentiality agreement providing that all statements made during meeting between client and victim were privileged and inadmissible in any legal proceeding, and providing that breach of agreement would expose breaching party to liability. In re Stanford, 48 So. 3d 224 (La. 2010).

One-year suspension of attorney's license to practice, stayed on condition of no further misconduct, was appropriate for disciplinary violations, arising from agreement with company purporting to serve homeowners threatened with foreclosure, that included unauthorized lawyer referrals, fee-sharing with nonlawyers, aiding unauthorized practice of law, forming partnership with a nonlawyer involving practice of law, handling legal matter without adequate preparation, and intentionally failing to seek client's lawful objectives; attorney was seasoned practitioner, and aggravating factors included pattern of misconduct, multiple offenses, and vulnerability of clients. Cincinnati Bar Assn. v. Mullaney, 119 Ohio St. 3d 412, 2008-Ohio-4541, 894 N.E.2d 1210 (2008).

To determine the appropriate length of any attorney's suspension for professional misconduct, Supreme Court weighs the aggravating and mitigating factors to decide whether circumstances warrant a more lenient or exacting disposition. Akron Bar Assn. v. Catanzarite, 119 Ohio St. 3d 313, 2008-Ohio-4063, 893 N.E.2d 835 (2008).

Permanent disbarment was warranted as attorney disciplinary sanction for attorney's misconduct as an attorney and later as a common pleas court judge, which misconduct included, as a judge, hiding his interest in a building in which space was leased to Adult Parole Authority (APA) and then attempting to sell the building in exchange for laundered money, failing to follow proper procedures for recusal, showing favoritism to a court employee and her husband and to the cousin of a good friend, and issuing a press release commenting on results of polygraph examination administered to the court employee, and, as an attorney, converting estates' funds for his personal use and charging clearly excessive attorney fees to estates. Disciplinary Counsel v. Hoskins, 119 Ohio St. 3d 17, 2008-Ohio-3194, 891 N.E.2d 324 (2008).

To determine the proper attorney disciplinary sanction to impose on attorney, who was a common pleas court judge, for his violations of the Code of Judicial Conduct and the Rules of Professional Responsibility for attorneys, Supreme Court would examine all pertinent factors, including the duties violated, attorney's mental state, the injury caused, the existence of aggravating or mitigating circumstances, and applicable precedent. Disciplinary Counsel v. Hoskins, 119 Ohio St. 3d 17, 2008-Ohio-3194, 891 N.E.2d 324 (2008).

In determining the appropriate sanction to impose for attorney misconduct, the Supreme Court considers the duties violated, the actual or potential injury caused, the attorney's mental state, the existence of aggravating or mitigating circumstances, and sanctions imposed in similar cases. Butler Cty. Bar Assn. v. Cunningham, 118 Ohio St. 3d 188, 2008-Ohio-1979, 887 N.E.2d 343 (2008).

In determining the appropriate sanction to impose for attorney misconduct, the Supreme Court considers the duties violated, the actual or potential injury caused, the attorney's mental state, the existence of aggravating or mitigating circumstances, and sanctions imposed in similar cases. Cleveland Bar Assn. v. Mishler, 118 Ohio St. 3d 109, 2008-Ohio-1810, 886 N.E.2d 818 (2008).

When Supreme Court determines the appropriate attorney disciplinary sanction, it is not limited to the aggravating and mitigating factors specified in the Rules and Regulations Governing Procedure on Complaints and Hearings Before the Board of Commissioners on Grievances and Discipline, and may take into account all relevant factors in determining which sanction to impose. Cleveland Bar Assn. v. Mishler, 118 Ohio St. 3d 109, 2008-Ohio-1810, 886 N.E.2d 818 (2008).

Public reprimand was appropriate disciplinary sanction for attorney's conduct in filing an unauthorized loss-of-consortium claim on behalf of non-client wife of personal-injury client, without investigating client's marital status, i.e., client was living separately from his wife, whom he later would divorce, and without speaking to client's wife, and attorney's conduct in later dismissing the loss-of-consortium claim with prejudice, without wife's consent, when attorney settled the case on behalf of client. Disciplinary Counsel v. Ita, 117 Ohio St. 3d 477, 2008-Ohio-1508, 884 N.E.2d 1073 (2008).

A lawyer's failure to cooperate in a disciplinary investigation, in and of itself, may warrant an actual suspension from practice. Butler Cty. Bar Assn. v. Williamson, 117 Ohio St. 3d 399, 2008-Ohio-1196, 884 N.E.2d 55 (2008).

One-year suspension from the practice of law, with six months of the suspension conditionally stayed, was warranted for attorney who violated disciplinary rules by neglecting entrusted legal matters, attempting to exonerate himself from liability for malpractice, defying court orders, misusing client trust account, and engaging in unprofessional courtroom behavior; although attorney had no prior disciplinary record and expressed genuine remorse, attorney knowingly violated duties owed to his clients, the public, and the judicial system, demonstrating a dire need for rehabilitative oversight. Akron Bar Assn. v. Markovich, 117 Ohio St. 3d 313, 2008-Ohio-862, 883 N.E.2d 1046 (2008).

In determining the appropriate sanction to impose for attorney misconduct, Supreme Court considers the duties violated, the actual or potential injury caused, the attorney's mental state, the existence of aggravating or mitigating circumstances, and sanctions imposed in similar cases; the Court weighs the aggravating and mitigating factors to decide whether circumstances warrant a more lenient or exacting disposition. Akron Bar Assn. v. Markovich, 117 Ohio St. 3d 313, 2008-Ohio-862, 883 N.E.2d 1046 (2008).

Because each disciplinary case involves unique facts and circumstances, Supreme Court may take into account all relevant factors in determining which sanction to impose. Akron Bar Assn. v. Markovich, 117 Ohio St. 3d 313, 2008-Ohio-862, 883 N.E.2d 1046 (2008).

In determining the appropriate sanction to impose for attorney misconduct, the Supreme Court considers the duties violated, the actual or potential injury caused, the attorney's mental state, the existence of aggravating or mitigating circumstances, and sanctions imposed in similar cases. Cuyahoga Cty. Bar Assn. v. Leneghan, 117 Ohio St. 3d 103, 2008-Ohio-506, 881 N.E.2d 1241 (2008).

In determining the appropriate sanction to impose for attorney misconduct, the Supreme Court considers the duties violated, the actual or potential injury caused, the attorney's mental state, the existence of aggravating or mitigating circumstances, and sanctions imposed in similar cases, and weighs the aggravating and mitigating factors to decide whether circumstances warrant a more lenient or exacting disposition. Disciplinary Counsel v. Roberts, 117 Ohio St. 3d 99, 2008-Ohio-505, 881 N.E.2d 1236 (2008).

Because each attorney disciplinary case involves unique facts and circumstances, the Supreme Court is not limited to the aggravating and mitigating factors specified in the applicable rule, and may take into account all relevant factors in determining which sanction to impose. Disciplinary Counsel v. Roberts, 117 Ohio St. 3d 99, 2008-Ohio-505, 881 N.E.2d 1236 (2008).

Public reprimand, rather than suspension, was warranted by attorney's misrepresentations in attempt to obtain copy of notice of default filed against former employer for failure to pay child support and attorney's failure to notify clients of lack of malpractice insurance; attorney falsely told child support enforcement agency that he represented former employer's ex-wife in the child-support litigation and did not know former employer or attorney's partner who had failed in attempt to obtain the notice, the misconduct involved only a brief conversation, attorney did not engage in a course of conduct, and mitigating factors weighed against suspension. Columbus Bar Assn. v. Shea, 117 Ohio St. 3d 55, 2008-Ohio-263, 881 N.E.2d 847 (2008).

In determining the appropriate sanction for attorney misconduct, the Supreme Court considers the duties violated, the actual or potential injury caused, the attorney's mental state, the existence of aggravating or mitigating circumstances, and sanctions imposed in similar cases. Cleveland Bar Assn. v. Kraus, 116 Ohio St. 3d 302, 2007-Ohio-6458, 878 N.E.2d 1028 (2007).

Two-year suspension and payment of costs was warranted for attorney whose misconduct, in failing to review documents, failing to advise clients of conflicts of interest, failing to timely respond to complaints and inquiries, failing to act with diligence in obtaining an order of substitution, failing to file response to summary judgment motion, submitting false documents to Office of Disciplinary Counsel, failing to competently and diligently pursue the malpractice claim, and settling a client's claims without withholding or paying the costs and fees owed under a lien to a prior attorney, violated rules of professional conduct governing competence, scope of representation, diligence, communication, fees, safekeeping of property, conflicts of interest, prohibited transactions, meritorious claims and contentions, candor to the tribunal, expediting litigation disobedience of obligation under the rules, failure to comply with discovery requests, disciplinary matters,

dishonesty, fraud, deceit, or misrepresentation, and conduct prejudicial to the administration of justice. In re Pennington, 380 S.C. 49, 668 S.E.2d 402 (2008).

The Supreme Court has the sole authority to discipline attorneys and to decide the appropriate sanction after a thorough review of the record. In re White, 378 S.C. 333, 663 S.E.2d 21 (2008), reinstatement granted, 380 S.C. 200, 669 S.E.2d 588 (2008).

The Supreme Court has the sole authority to discipline attorneys and to decide the appropriate sanction after a thorough review of the record. In re White, 378 S.C. 76, 661 S.E.2d 376 (2008), opinion withdrawn and superseded on denial of reh'g, 378 S.C. 333, 663 S.E.2d 21 (2008), reinstatement granted, 669 S.E.2d 588 (S.C. 2008) and withdrawn from bound volume.

Commission on Lawyer Conduct abused its discretion in denying request of Office of Disciplinary Counsel (ODC) for a continuance to obtain and present evidence to rebut surprise evidence of lack of harm to clients presented by attorney at hearing to determine appropriate sanction to be imposed on him for his misconduct in connection with eight criminal client matters, as mitigating testimony regarding ultimate outcome of clients' cases touched on more substantive matters than the usual mitigation testimony regarding an attorney's character and personal situation, such that it should have been considered in conjunction with rebuttal evidence showing actual harm to clients. In re Sturkey, 376 S.C. 286, 657 S.E.2d 465 (2008).

The source of authority of the Board of Professional Responsibility and its functions lies in the Supreme Court, and included in the Court's duty to regulate the practice of law in this state is the ultimate disciplinary responsibility for violations of the rules governing the legal profession. Board of Professional Responsibility v. Allison, 284 S.W.3d 316 (Tenn. 2009).

The reviewing body may disbar an attorney for misconduct under the standard grievance process, but also has the ability to assess a range of lesser sanctions, including various types of suspension and reprimand. In re Caballero, 272 S.W.3d 595 (Tex. 2008).

Presumptive sanction for attorney's misconduct in submitting letter in response to inquiry from State Bar Association Disciplinary Board which contained falsehoods about handling of trust account was suspension, rather than disbarment, absent finding that attorney's conduct caused serious or potentially serious injury to client, public, or legal system. In re Disciplinary Proceeding Against Hicks, 166 Wash. 2d 774, 214 P.3d 897 (2009).

The hearing officer should err on the side of allowing in evidence in order to examine the full record when determining whether a sanction as serious as disbarment is appropriate. Burtch, In re Disciplinary Proceeding Against, 162 Wash. 2d 873, 175 P.3d 1070 (2008).

Supreme Court may impose whatever sanction it sees fit in attorney disciplinary proceeding regardless of the referee's recommendation. Lucius, In re Disciplinary Proceedings Against, 2008 WI 12, 307 Wis. 2d 255, 744 N.W.2d 605 (2008).

In lawyer disciplinary matter, the Supreme Court may impose whatever sanction it sees fit regardless of the referee's recommendation. In re Disciplinary Proceedings Against Reitz, 2009 WI 90, 769 N.W.2d 566 (Wis. 2009).

[END OF SUPPLEMENT]

[FN1] In re MacKay, 416 P.2d 823 (Alaska 1964).
- Ordinarily, disbarment is the appropriate sanction for a lawyer who practices law while suspended or disbarred or after being allowed to resign. The Florida Bar v. Shoureas, 913 So. 2d 554 (Fla. 2005).
- As to suspension of the privilege of an out-of-state attorney to seek admission pro hac vice, see § 22.
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[FN2] The Florida Bar v. Daniels, 361 So. 2d 420 (Fla. 1978).
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[FN3] Ex parte Wall, 107 U.S. 265, 2 S. Ct. 569, 27 L. Ed. 552 (1883).
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[FN4] Disciplinary Counsel v. Bowman, 110 Ohio St. 3d 480, 2006-Ohio-4333, 854 N.E.2d 480 (2006).
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[FN5] Bradley v. Fisher, 80 U.S. 335, 20 L. Ed. 646, 1871 WL 14737 (1871).
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[FN6] The Florida Bar v. Reed, 644 So. 2d 1355 (Fla. 1994).
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[FN7] In re Leardo, 53 Cal. 3d 1, 278 Cal. Rptr. 689, 805 P.2d 948 (1991).
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[FN8] Galardi v. State Bar, 43 Cal. 3d 683, 238 Cal. Rptr. 774, 739 P.2d 134 (1987).
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[FN9] The Florida Bar v. Committe, 916 So. 2d 741 (Fla. 2005), cert. denied, 547 U.S. 1098, 126 S. Ct. 1890, 164 L. Ed. 2d 569 (2006).
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[FN10] The Florida Bar v. Kossow, 912 So. 2d 544 (Fla. 2005).
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[FN11] The Florida Bar v. Kossow, 912 So. 2d 544 (Fla. 2005).
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[FN12] The Florida Bar v. Martocci, 699 So. 2d 1357 (Fla. 1997); Attorney Grievance Com'n of Maryland v. Parker, 389 Md. 142, 884 A.2d 104 (2005).
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[FN13] The Florida Bar v. Martocci, 699 So. 2d 1357 (Fla. 1997).
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[FN14] The Florida Bar v. Martocci, 699 So. 2d 1357 (Fla. 1997).
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[FN15] Davis v. State Bar, 33 Cal. 3d 231, 188 Cal. Rptr. 441, 655 P.2d 1276 (1983).
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[FN16] Cuyahoga Cty. Bar Assn. v. Boychuk, 79 Ohio St. 3d 93, 1997-Ohio-403, 679 N.E.2d 1081 (1997), reinstatement granted, 86 Ohio St. 3d 1214, 1999-Ohio-179, 715 N.E.2d 561 (1999).
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7 Am. Jur. 2d Attorneys at Law § 36

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II. Judicial Supervision of Legal Profession
B. Disciplinary Proceedings
2. Discipline as a Judicial Function

Topic Summary Correlation Table References

§ 36. Restitution

West's Key Number Digest

West's Key Number Digest, Attorney and Client 59.10

A.L.R. Library

Conditioning reinstatement of attorney upon reaffirmation of debt discharged in bankruptcy, 39 A.L.R.4th 586

Power of court to order restitution to wronged client in disciplinary proceeding against attorney, 75 A.L.R.3d 307

Some courts find it within their power in a disciplinary action against an attorney to order restitution to a wronged client,[FN1] although in some instances where the power to order restitution was recognized, it was deemed an inappropriate remedy under the particular circumstances.[FN2] However, it has been stated that a lawyer subject to professional discipline may be ordered to make restitution to persons financially injured by the lawyer's conduct.[FN3]

CUMULATIVE SUPPLEMENT

Cases:

Nonretroactive disbarment and restitution was appropriate sanction for attorney who engaged in multiple instances of misconduct involving misappropriation of funds in client trust account, failure to pay financial obligations to clients and expert, and failure to respond to notices of disciplinary investigation. In re Ruffin, 382 S.C. 598, 677 S.E.2d 25 (2009).

[END OF SUPPLEMENT]

[FN1] In re Cornelius, 521 P.2d 497 (Alaska 1974).
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[FN2] The Florida Bar v. Rogowski, 399 So. 2d 1390 (Fla. 1981).
- A restitution award against an attorney for the full amount of a default judgment entered against a client in a tort matter that the attorney neglected would not be assessed in a disciplinary proceeding, as it was neither appropriate nor possible in the disciplinary proceeding to determine what part of the damages were caused by the attorney's neglect and what part by the client's underlying conduct. In re Scott, 979 P.2d 572 (Colo. 1999).
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[FN3] In re Disciplinary Proceeding Against Marshall, 160 Wash. 2d 317, 157 P.3d 859 (2007).
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7 Am. Jur. 2d Attorneys at Law § 37

American Jurisprudence, Second Edition
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Attorneys at Law
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B. Disciplinary Proceedings
3. Effect of Disbarment or Suspension

Topic Summary Correlation Table References

§ 37. Generally

West's Key Number Digest

West's Key Number Digest, Attorney and Client 60

A.L.R. Library

Nature of legal services or law-related services which may be performed for others by disbarred or suspended attorney, 87 A.L.R.3d 279

An attorney on suspension is barred not only from practicing law but also from holding himself or herself out as entitled to practice during the suspension period.[FN1]

Despite the fact that an attorney is suspended, he or she remains a member of the state bar and, as such, is subject to the continuing disciplinary jurisdiction of the court to the same extent as any other member of the state bar; the same is not true of attorneys who have been disbarred or who have resigned in the face of disciplinary charges, as such attorneys are no longer "members" of the state bar.[FN2] However, suspended attorneys, disbarred attorneys, and attorneys who have resigned in the face of disciplinary charges are all subject to the continuing jurisdiction of the court by virtue of the respective orders under which they were disciplined.[FN3]

CUMULATIVE SUPPLEMENT

Cases:

Suspension from practice of law for six months was appropriate sanction for attorney's failure to keep clients informed on status of their cases, failure to act with diligence in representing them, and failure to inform clients of 90-day suspension he was placed on while representation was ongoing, in violation of Rules of Professional Conduct, in view of attorney's cooperation with State Bar in submitting petition for voluntary discipline and demonstration of remorse. In re Elkins, 284 Ga. 670, 670 S.E.2d 783 (2008).

An attorney who has been disbarred or suspended from the practice of law is permitted to work as a law clerk, investigator, paralegal, or in any capacity as a lay person for a licensed attorney-employer if the suspended lawyer's functions are limited exclusively to work of a preparatory nature under the supervision of a licensed attorney-employer and does not involve client contact. In re Jones, 241 P.3d 90 (Kan. 2010).

Attorney who served as corporate general counsel after he had been suspended for non-payment of bar dues was subject to suspension from practice of law for period of one year retroactive to the date he brought his conduct into compliance with bar association's request that he cease unauthorized practice of law, costs of $139.80, and requirement that he notify all courts in which he had matters pending and all clients for whom he was actively involved in litigation and similar legal matters of his suspension; attorney had been aware that his license was suspended, but did not believe his performance of duties as general counsel constituted the practice of law that would require a license. Hipwell v. Kentucky Bar Ass'n, 267 S.W.3d 682 (Ky. 2008).

Attorney's use of her attorney trust account as both business account and personal checking account and her failure to promptly deliver trust account funds to client's health care provider warranted one-year suspension from practice of law, retroactive to date of temporary suspension, with reinstatement on conditions. State ex rel. Counsel for Discipline of Nebraska Supreme Court v. Davis, 276 Neb. 158, 760 N.W.2d 928 (2008).

Suspension from the practice of law for two years, to be followed by a two-year period of monitored probation upon reinstatement, was warranted as a sanction for attorney's stipulated misconduct, including attorney's mishandling duties as executor of estate and holder of power of attorney, failing to disclose to clients that he no longer carried malpractice insurance, failing to maintain trust account, failing to keep an accounting of client funds, and settling lawsuit without client authorization. Columbus Bar Assn. v. DeVillers, 116 Ohio St. 3d 33, 2007-Ohio-5552, 876 N.E.2d 530 (2007).

Failure to comply with disciplinary rules governing resumption of practice after attorney's 90-day suspension warranted a retroactive suspension of six months to the date he filed his motion for an order of reinstatement, the payment of costs of $1,006.61, and filing of affidavit on familiarity with disciplinary rules; attorney acted in ignorance, rather than rebellion, in not notifying clients of suspension or filing affidavit with Supreme Court, no clients suffered harm because of his actions, his attempts to seek guidance on rules from bar association were met with incomplete responses, and when he realized he was still listed as suspended, he immediately ceased practice and applied for reinstatement. State ex rel. Oklahoma Bar Ass'n v. Combs, 2008 OK 96, 2008 WL 4724447 (Okla. 2008).

[END OF SUPPLEMENT]

[FN1] In re Naney, 51 Cal. 3d 186, 270 Cal. Rptr. 848, 793 P.2d 54 (1990).

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[FN2] The Florida Bar v. Ross, 732 So. 2d 1037 (Fla. 1998).

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[FN3] The Florida Bar v. Ross, 732 So. 2d 1037 (Fla. 1998).

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7 Am. Jur. 2d Attorneys at Law § 38

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§ 38. On practice in other states; reciprocal discipline

West's Key Number Digest

West's Key Number Digest, Attorney and Client 59.18, 60

A.L.R. Library

Reciprocal Discipline of Attorneys—Commingling or Other Mishandling of Client Funds, 45 A.L.R.6th 175

Reciprocal Discipline of Attorneys—Noncriminal Misconduct Towards Clients Not Involving Client Funds, 44 A.L.R.6th 75

Disbarment or suspension of attorney in one state as affecting right to continue practice in another state, 81 A.L.R.3d 1281

There is a presumption that reciprocal discipline will be imposed for disciplinary violations in another state unless an attorney can show by clear and convincing evidence that a specified exception to reciprocal discipline applies.[FN1] In addition, there is a rebuttable presumption which favors the imposition of identical reciprocal discipline[FN2] unless the attorney demonstrates, or the court finds on the face of the record, by clear and convincing evidence that one or more exceptions applies.[FN3] Moreover, in a reciprocal attorney disciplinary action, the bar rules and notions of comity dictate that the courts give deference to the assessment of an attorney's conduct and the measure of discipline imposed by the other jurisdiction.[FN4]
Observation: "Identical discipline," which generally must be imposed under the rule governing reciprocal discipline for an attorney already disciplined in another state, refers to the punishment meted out and not to the level of possible punishment.[FN5]

Exceptions to reciprocal discipline include the following:[FN6]
• Procedural defects violating due process

• Insufficient proof establishing misconduct

• The fact that the misconduct established warranted substantially different discipline in the second state

When considering a reciprocal disciplinary matter, the court may impose the identical discipline imposed by the other jurisdiction unless, among other considerations, the misconduct established does not justify the same discipline in the state.[FN7]

A two-step analysis applies to impose substantially different discipline on an attorney disciplined in another jurisdiction: (1) it is necessary to determine if the misconduct in question would not have resulted in the same punishment in the state as it did in the disciplining jurisdiction, and (2) where the discipline imposed in the state would be different from that of the disciplining court, it must be determined whether the difference is substantial.[FN8] In matters of reciprocal discipline, it is the state where an attorney lived and practiced law at the time of the offense that has the greatest interest in the matter of disciplining the attorney.[FN9]

Observation: Reciprocal discipline proceedings are not a forum to reargue the foreign attorney discipline.[FN10]

In reciprocal attorney disciplinary cases in which neither bar counsel nor the attorney opposes identical discipline, the most the board on professional responsibility should consider itself obliged to do is to review the foreign proceeding sufficiently to satisfy itself that no obvious miscarriage of justice would result from the imposition of identical discipline.[FN11]

Where a disbarment occurred because of the attorney's default in answering disciplinary charges, not because of the attorney's conviction on the charges, reciprocal discipline will not be imposed.[FN12] However, resignation in lieu of disciplinary action in one state, and disbarment in another, warrants reciprocal disbarment.[FN13]

Practice Tip: An attorney is required under disciplinary rules to advise a state bar association of a disciplinary action in another state.[FN14]

A court is not bound to follow a sister state's decision as to the appropriate sanction in a reciprocal discipline case.[FN15] When the court considers the appropriate sanction in a case of reciprocal discipline, the court looks not only to the sanction imposed by the other jurisdiction but to state cases as well; the sanction will depend on the unique facts and circumstances of each case, but with a view toward consistent dispositions for similar misconduct.[FN16] Similarly, the court need not adhere strictly to the state presumptive sanction whenever that sanction exceeds the discipline imposed by another jurisdiction.[FN17] Thus, the court is at liberty to impose sanctions either less or greater than those imposed in another state.[FN18]

A resignation procedure, when undertaken in the face of an attorney disciplinary proceeding in another state, provides a sound basis for reciprocal discipline.[FN19]

CUMULATIVE SUPPLEMENT

Cases:

Imposition of identical reciprocal discipline, a six-month suspension followed by a three-year period of unsupervised probation, subject to conditions imposed by Virginia court, was warranted for attorney who was subject to discipline in Virginia stemming from representing a client in an employment discrimination matter; Board on Professional Responsibility recommended reciprocal discipline, attorney consented to the discipline, case did not present any basis to reduce the recommended sanction, and Board's recommendation was to be given heightened deference since no exceptions were filed. In re Beattie, 956 A.2d 84 (D.C. 2008).

Attorney's three-year suspension in Delaware for concealment of failure to pay taxes and failure to provide competent client representation warranted imposition of reciprocal discipline in District of Columbia of three years' suspension with requirement of demonstration of fitness prior to reinstatement, where no enumerated exception to reciprocal discipline applied. In re Ayres-Fountain, 955 A.2d 157 (D.C. 2008).

Attorney's misconduct in Maryland, including calling a member of his staff to testify under oath in collection action under name of client's corporate representative, warranted imposition of identical reciprocal discipline of disbarment, where attorney failed to rebut presumption favoring identical reciprocal discipline or to file exceptions to recommendation of Board on Professional Responsibility, and sanction of disbarment was not inconsistent with discipline imposed for similar misconduct in the District of Columbia. In re Kline, 955 A.2d 155 (D.C. 2008).

Six-month suspension from practice of law in District of Columbia, with reinstatement requirement, was appropriate reciprocal sanction for attorney's misconduct in New Jersey in violation of New Jersey Rules of Professional Conduct that resulted in six-month suspension there. In re Landfield, 955 A.2d 150 (D.C. 2008).

Five-year suspension, with a fitness requirement for reinstatement, would be imposed as reciprocal discipline in District of Columbia, after attorney's voluntary resignation from the California Bar during a disciplinary investigation in California relating to attorney's felony conviction in California for conspiracy to commit the unauthorized practice of law; attorney's voluntary resignation from California Bar resulted in the California disciplinary proceedings being held in abeyance until attorney applied for reinstatement in California, with attorney precluded from seeking reinstatement in California for five years. In re Weaver, 954 A.2d 425 (D.C. 2008).

Disbarment was warranted as reciprocal discipline in District of Columbia, after attorney was disbarred in Maryland for serious and protracted acts of neglect and was dishonest with clients, opposing counsel, and tribunals during his representation of two clients in separate probate and bankruptcy matters. In re Steinberg, 953 A.2d 306 (D.C. 2008).

Disbarment was appropriate reciprocal discipline for attorney's misconduct of misrepresenting to clients the status of their personal injury matters, improperly placing a $10,000 attorney's lien on the case of another client after he was terminated one day after being retained to represent the client in a personal injury matter and after doing no work on behalf of the client, and being convicted of second-degree assault, which resulted in disbarment from practice of law in Maryland. In re Long, 948 A.2d 516 (D.C. 2008).

Suspension from practice of law for two years, stayed in favor of probation for three years, with a nine-month actual suspension was appropriate reciprocal discipline for attorney's failure to file affidavit showing his compliance with court order requiring him pay restitution to former client, which resulted in suspension from practice of law in California for two years, stayed in favor of probation for three years, with a nine-month actual suspension. In re Coopet, 947 A.2d 1125 (D.C. 2008).

Greater sanction of 60-day suspension was warranted, as exception to general rule of imposing reciprocal discipline, for attorney who was publicly censured in originating jurisdiction after entering guilty plea relating to assault on his wife that caused her to dislocate shoulder, undergo six months of physical therapy, and return to work on only a part-time basis; public censure fell outside range of sanctions warranted in District of Columbia for a criminal act reflecting adversely on fitness of lawyer, and difference between the sanctions was substantial, as suspension would impair attorney's ability to practice and affect his employment while public censure would not. In re Jacoby, 945 A.2d 1193 (D.C. 2008).

Attorney's criminal conviction in another jurisdiction warranted imposition of effectively reciprocal discipline consisting of three-year suspension from practice of law with fitness requirement for reinstatement, where jurisdiction in which attorney was convicted imposed indefinite suspension, which sanction was not provided for in District of Columbia bar rules, and fitness requirement permitted deferral of question of whether attorney's extrajurisdictional conviction involved crime of moral turpitude, without necessity for immediate hearing. In re Gailliard, 944 A.2d 1109 (D.C. 2008).

Attorney was entitled to nunc pro tunc treatment of reciprocal discipline sanction of five years suspension imposed after attorney was suspended indefinitely from practice of law in Massachusetts for billing clients for personal expenses, where attorney never practiced law in District of Columbia, and Bar Counsel was promptly notified of Massachusetts proceedings. In re Hallal, 944 A.2d 1085 (D.C. 2008).

Five-year suspension was warranted in reciprocal discipline proceeding against attorney who resigned from California Bar while charges were pending for his unauthorized practice of law in Florida, even though the misconduct that led to the disciplinary proceeding against attorney occurred before his admission to the District of Columbia Bar. In re Lebowitz, 944 A.2d 444 (D.C. 2008).

Suspended attorney would be required to show proof of fitness to practice law in District of Columbia, upon conclusion of his period of suspension in reciprocal attorney disciplinary action, where attorney's prior disciplinary record gave rise to serious doubt concerning his fitness to meet his responsibilities to court and to defendants in his practice as prosecutor, New York disciplinary authorities imposed such requirement, and attorney was required to make same showing in New York as in District of Columbia to demonstrate fitness. In re Stuart, 942 A.2d 1118 (D.C. 2008).

Six-month suspension in District of Columbia, with requirement to prove fitness as condition of reinstatement, but with attorney permitted to petition to vacate the fitness requirement if he was summarily reinstated in Maryland, was appropriate reciprocal discipline for attorney who had received indefinite suspension in Maryland for lack of competence, commingling and misappropriation, disbursing client funds, and interfering with administration of justice. In re Maignan, 942 A.2d 1115 (D.C. 2007).

An attorney's "home state," for purposes of attorney discipline, is determined by consideration of jurisdiction where attorney was practicing when misconduct occurred, the situs of misconduct which resulted in discipline, and jurisdiction where disciplinary proceedings were first initiated. Florida Bd. of Bar Examiners re Webster, 3 So. 3d 1058 (Fla. 2009).

Attorney's failure to file response to Kansas formal complaint and to appear before state supreme court in connection therewith, her valid disbarment by default in Missouri, and her false representation to Kansas disciplinary authorities that she would seek to set aside Missouri disbarment warranted indefinite suspension from practice of law, with special condition that any application for reinstatement be accompanied by proof of attorney's reinstatement in Missouri. In re Harris, 182 P.3d 1249 (Kan. 2008).

Appropriate attorney disciplinary sanction in Kansas, in reciprocal discipline proceeding after attorney's default disbarment in Missouri, was indefinite suspension with special condition that no application for reinstatement would be considered unless accompanied by proof that attorney had been reinstated to practice of law in Missouri, where attorney misrepresented to Kansas Disciplinary Administrator that attorney would seek to set aside his default disbarment in Missouri, and attorney failed to file a response to the Kansas formal disciplinary complaint and failed to appear before the Kansas Supreme Court. In re Tarantino, 182 P.3d 1241 (Kan. 2008).

Indefinite suspension was warranted as reciprocal discipline for misconduct in the District of Columbia involving incompetent representation and conflict of interest in handling estate and conduct prejudicial to administration of justice, even though District of Columbia and Maryland imposed suspensions of six months and ninety days; attorney had been continuously suspended from the practice of law for two decades because of complete disregard for the administrative and financial obligations placed upon attorneys who would be active practitioners in state. In re Evans, 285 Kan. 147, 169 P.3d 1083 (2007).

Attorney's five-year suspension from the practice of law ran from the time the court imposed the suspension, rather than from the time attorney was permanently disbarred in the State of Ohio, in reciprocal disciplinary case; attorney was required to notify the Kentucky Bar Association of his Ohio disbarment, attorney failed to do so, and attorney's petition for reinstatement, which was filed ten years after he was disbarred in Ohio, failed to disclose the nature of the discipline imposed by the Ohio Supreme Court. Brown v. Kentucky Bar Ass'n, 283 S.W.3d 238 (Ky. 2009).

Five-year suspension from the practice of law was warranted, in reciprocal discipline case; attorney was permanently disbarred in the state of Ohio in 1997, but in Kentucky, at the time attorney was permanently disbarred, a five-year suspension was the highest sanction available against attorney. Brown v. Kentucky Bar Ass'n, 283 S.W.3d 238 (Ky. 2009).

Imposition of more severe sanction than public reprimand was not warranted based upon prior disciplinary record of attorney who was subject to reciprocal discipline based upon public reprimand imposed upon attorney by Ohio Supreme Court for failing to inform client that his professional liability insurance coverage had been cancelled two years previously, even though attorney had previously had conditionally stayed suspension imposed upon him by Ohio Supreme Court for failing to maintain accurate records for client fund accounts and reciprocal, stayed suspension was also imposed in Kentucky. Kentucky Bar Ass'n v. Trainor, 277 S.W.3d 604 (Ky. 2009).

Sanction of public reprimand imposed upon attorney by Ohio Supreme Court, based upon his violation of Ohio professional conduct rule by failing to inform client that his professional liability insurance coverage had

been cancelled two years previously, warranted reciprocal discipline of public reprimand in Kentucky, even though Kentucky's professional conduct rules did not contain equivalent requirement, given that attorney's conduct disobeying obligation under rules of Ohio Supreme Court violated Kentucky professional conduct rule generally prohibiting attorney from knowingly or intentionally disobeying obligation under rules of a tribunal. Kentucky Bar Ass'n v. Trainor, 277 S.W.3d 604 (Ky. 2009).

Immediate interim suspension from practice of law in Louisiana was warranted as reciprocal discipline, after the Delaware Supreme Court had issued an order immediately suspending attorney's license to practice law in Delaware pending a final determination of disciplinary proceedings against him in Delaware, which order had been based on evidence that attorney had converted client funds in an estate matter and on Delaware Supreme Court's conclusion that attorney had engaged in professional misconduct demonstrating that he posed a significant threat of harm to the public and to the orderly administration of justice. In re Tyrrell, 993 So. 2d 1208 (La. 2008).

Reciprocal discipline could be imposed on attorney who had resigned from practice while a disciplinary investigation was pending against him in Connecticut, even though attorney did not admit committing misconduct when he resigned, since resignation constituted discipline; at time of resignation, a disbarment order had already been entered against attorney, which disbarment was only vacated on acceptance of attorney's resignation accompanied by a permanent waiver of his right to apply for readmission. In re Ngobeni, 453 Mass. 233, 901 N.E.2d 113 (2009).

Suspension from practice of law in Tennessee based on attorney's admission of guilt to violations of Tennessee Rules of Professional Conduct was grounds for imposition of reciprocal discipline in Mississippi. Mississippi Bar v. Dolan, 987 So. 2d 921 (Miss. 2008).

In a proceeding for reciprocal discipline of an attorney, the Supreme Court is not bound by the findings of the foreign jurisdiction in determining an appropriate sanction. Mississippi Bar v. Abioto, 987 So. 2d 913 (Miss. 2007).

Attorney's misconduct leading to his disbarment by New Hampshire Supreme Court warranted reciprocal discipline of disbarment in New York; attorney formed limited partnership that acquired bank's mortgages on, and title to, property that belonged to client and client's estranged wife, without disclosing his interest in partnership, and filed bankruptcy petition on client's behalf that did not disclose prepetition transfer of client's interest in property. In re Wolterbeek, 64 A.D.3d 259, 880 N.Y.S.2d 109 (2d Dep't 2009).

Imposition of reciprocal discipline was warranted in disciplinary proceeding against attorney previously suspended from the practice of law in New Jersey for six months based on his conviction for stalking, his psychological problems and drug and alcohol abuse, and his conduct of stalking two people involved in his divorce case and making threats; attorney's reinstatement in New Jersey was made contingent on a demonstration of his fitness to practice. In re Wachtel, 63 A.D.3d 108, 880 N.Y.S.2d 71 (2d Dep't 2009).

Neighboring state's imposition of one-year suspension for attorney's misconduct in deceptively labeling a personal account as a trust account so that he could shield his personal funds from judgment creditors did not constitute a grave injustice under the circumstances of the case, and thus, reciprocal discipline was warranted; in imposing discipline, neighboring state relied, in part, on attorney's prior record of discipline in North Dakota. In re Disciplinary Action Against Overboe, 2009 ND 40, 763 N.W.2d 776 (N.D. 2009).

Indefinite suspension was warranted as disciplinary sanction for attorney's conduct in continuing to practice law while his license was suspended for failing to comply with requirements for continuing legal education (CLE) and failing to comply with attorney-registration requirements, and his conduct in failing to cooperate in disciplinary investigation. Disciplinary Counsel v. Higgins, 117 Ohio St. 3d 473, 2008-Ohio-1509, 884 N.E.2d 1070 (2008).

Indefinite suspension of attorney, to run consecutively to attorney's current indefinite suspension, was appropriate disciplinary sanction for attorney's conduct in neglecting his clients' legal matter, ignoring county bar association's investigative inquiries into the disciplinary grievance, and failing to file an answer to the charges set forth in the disciplinary complaint, where the current indefinite suspension was for virtually identical misconduct. Cuyahoga Cty. Bar Assn. v. Church, 116 Ohio St. 3d 563, 2008-Ohio-81, 880 N.E.2d 917 (2008).

Indefinite suspension was appropriate sanction for attorney who participated in a scheme to defraud nursing homes that provided for the care of his in-laws, misused his client trust account over a three-year period,

overdrew the account on several occasions, commingled personal and client funds, failed to maintain adequate records, offered evasive testimony during the disciplinary hearing, and failed to cooperate fully in the disciplinary process. Disciplinary Counsel v. Heiland, 116 Ohio St. 3d 521, 2008-Ohio-91, 880 N.E.2d 467 (2008).

Discipline imposed on attorney by the United States Bankruptcy Court warranted reciprocal discipline of two-year suspension, even though the court imposing the discipline was not outside the borders of the state, as noted in governing rule; federal courts were another jurisdiction for purposes of reciprocal discipline rule, and attorney was required to disgorge fees for 24 bankruptcy clients and provide proof of restitution, provide 20 days notice of application to seek reinstatement, and appear before the chief bankruptcy judge in order to be reinstated. In re Edwards, 380 S.C. 84, 668 S.E.2d 791 (2008).

Attorney who was disbarred from practice of law in other state in which he was licensed was subject to reciprocal discipline upon his failure to respond to notice of disciplinary proceedings; Office of Disciplinary Counsel filed response stating it had no information that would indicate imposition of identical discipline was not warranted. In re Geller, 378 S.C. 92, 661 S.E.2d 384 (2008).

Although the Supreme Court generally does not impose 30-day suspensions in attorney disciplinary proceedings, the Court will do so in the context of a reciprocal discipline situation in order to impose the identical discipline as imposed by the other jurisdiction. In re Disciplinary Proceedings Against Rudolph, 2009 WI 94, 321 Wis. 2d 285, 774 N.W.2d 466 (2009).

Public reprimand was warranted as reciprocal discipline for attorney who was publicly reprimanded and placed on one year of unsupervised probation in Minnesota after committing misconduct by failing to comply with terms of previous probation, failing to file timely individual income tax returns, and being convicted of fifth-degree assault. In re Disciplinary Proceedings Against Selmer, 2009 WI 15, 761 N.W.2d 6 (Wis. 2009).

Attorney's license to practice law in Wisconsin would be suspended for three years, as reciprocal discipline, after the Illinois Supreme Court ordered attorney to be disbarred on consent for a minimum of three years, for Illinois misconduct that involved conversion of client funds. In re Disciplinary Proceedings Against Tully, 2008 WI 121, 757 N.W.2d 226 (Wis. 2008).

Attorney's conduct in Minnesota, which included conversion of client funds, inducing his client to transfer client's property interests to attorney's spouse, making false statements to client and third party, falsely drafting, notarizing, and signing documents, and engaging in business transactions with client on unreasonable and undisclosed terms without advising client in writing to seek independent counsel and without obtaining client's written consent to transactions, resulting in his disbarment in Minnesota, warranted reciprocal revocation of his license in Wisconsin, where no exception to reciprocal discipline was claimed or shown. In re Disciplinary Proceedings Against Swensen, 2008 WI 113, 754 N.W.2d 499 (Wis. 2008).

Attorney's license to practice law in Wisconsin would be suspended for a period of 30 days as reciprocal discipline to 30-day suspension imposed by the Supreme Court of Minnesota for attorney's failure to act with diligence and promptness in representing a client, failure to communicate with clients, engaging in dishonesty or misrepresentation, and failure to cooperate with disciplinary investigation. In re Disciplinary Proceedings Against Crandall, 2008 WI 112, 754 N.W.2d 501 (Wis. 2008).

[END OF SUPPLEMENT]

[FN1] In re Bielec, 755 A.2d 1018 (D.C. 2000).

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[FN2] In re Winston, 917 A.2d 629 (D.C. 2007).

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[FN3] In re Steele, 914 A.2d 679 (D.C. 2007).

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[FN4] In re Belli, 766 A.2d 526 (D.C. 2001).

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[FN5] Kentucky Bar Ass'n v. Fish, 2 S.W.3d 786 (Ky. 1999).
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[FN6] Office of Disciplinary Counsel v. Smith, 71 Haw. 39, 780 P.2d 87 (1989).
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[FN7] In re Sheridan, 449 Mass. 1005, 867 N.E.2d 297 (2007).
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[FN8] In re Patel, 926 A.2d 124 (D.C. 2007).
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[FN9] In re Jacoby, 837 N.Y.S.2d 118 (App. Div. 1st Dep't 2007).
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[FN10] In re Steele, 914 A.2d 679 (D.C. 2007).
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[FN11] In re Ayele, 918 A.2d 384 (D.C. 2007).
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[FN12] In re Pearson, 628 A.2d 94 (D.C. 1993).
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[FN13] In re Torrence, 37 S.W.3d 576 (Ark. 2001).
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[FN14] Kentucky Bar Ass'n v. Marsick, 986 S.W.2d 899 (Ky. 1999).
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[FN15] Attorney Grievance Com'n of Maryland v. Dechowitz, 358 Md. 184, 747 A.2d 657 (2000).
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[FN16] Attorney Grievance Com'n of Maryland v. Dechowitz, 358 Md. 184, 747 A.2d 657 (2000).
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[FN17] In re Watt, 430 Mass. 232, 717 N.E.2d 246 (1999).
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[FN18] Mississippi Bar v. Shah, 749 So. 2d 1047 (Miss. 1999), reinstatement granted, 797 So. 2d 199 (Miss. 2000).
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[FN19] In re Rostoker, 918 A.2d 425 (D.C. 2007).
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7 Am. Jur. 2d Attorneys at Law § 39

§ 39. On practice in federal courts

West's Key Number Digest

West's Key Number Digest, Attorney and Client 60

Although admission to practice before a federal court is derivative from membership in a state bar, disbarment by the state does not result in automatic disbarment by the federal court.[FN1] A lawyer is admitted into a federal court by way of a state court, but is not automatically sent out of the federal court by the same route, since the federal and state courts have autonomous control over their respective officers, among whom lawyers are included.[FN2] Disbarment is a very serious business, so the federal courts must afford ample opportunity to show cause why an accused practitioner should not be disbarred.[FN3]

The federal court in which disbarment is sought will recognize the condition created by the state court judgment of disbarment,[FN4] unless it appears that the state court proceedings failed to meet certain standards as to due process, proof, or other basic principles of right and justice.[FN5]

Suspension or permanent deprivation of the right to practice before the Supreme Court of the United States is governed by the rules of that court.[FN6]

The fact that an attorney who was a practitioner in the highest courts of a state has been struck from the roll of the District Court of the United States in that state for contempt is no ground for refusal to admit the attorney to practice in the United States Supreme Court.[FN7]

CUMULATIVE SUPPLEMENT

Cases:

Where action against attorney is based on discipline imposed by state court, ultimate decision of state court as to type and kind of discipline is not conclusively binding on federal appellate court; nevertheless, in federal disciplinary proceeding, appellate court is without jurisdiction to disturb state court's discipline and, generally, affords high degree of respect to state court's substantive findings when asked to impose reciprocal discipline. In re Oliveras Lopez De Victoria, 561 F.3d 1 (1st Cir. 2009).

Evidence supported attorney's suspension from practice of law in state court disciplinary proceeding, in support of imposing suspension under reciprocal discipline procedure, for attorney's ethics violation in misleading lower court in underlying inheritance action by filing motion to withdraw funds consigned in lower court for client, but failing to disclose that client had died and misstating that there were no minors involved, since attorney admitted his misconduct and only later made last ditch effort to shirk responsibility by claiming that his signature on motion was forged. In re Oliveras Lopez De Victoria, 561 F.3d 1 (1st Cir. 2009).

General counsel's admitted conduct constituting federal felony of securities fraud based on backdating license agreements for his employer, as publicly-traded company in business of licensing computer software, was essentially similar to New York felony of fraudulent securities transactions, under General Business Law,

and similar to New York felonies of scheme to defraud in first degree and offering false instrument for filing in first degree, in violation of Penal Laws, and thus, counsel was automatically disbarred and ceased to be attorney and counselor-at-law, pursuant to Judiciary Law. In re Woghin, 64 A.D.3d 5, 880 N.Y.S.2d 74 (2d Dep't 2009).

Attorney's federal conviction, upon his guilty plea, for conspiracy to commit wire fraud warranted automatic disbarment, since, during plea allocution, attorney admitted to conduct which satisfied the elements of scheme to defraud in the first degree, a New York felony; attorney admitted that he conspired with others to defraud his employer of commissions of almost $80,000 and the Bangladesh Ministry of money and property in excess of the statutory requirement by making materially false and fraudulent representations and promises and, in doing so, transmitting wire communications in interstate and foreign commerce. In re Sheinbaum, 47 A.D.3d 49, 845 N.Y.S.2d 264 (1st Dep't 2007).

Admitted conduct underlying attorney's conviction for federal felony of conspiracy to commit securities fraud, mail fraud and wire fraud was essentially similar to New York felony of first-degree offering a false instrument for filing, such that attorney was automatically disbarred upon his conviction; attorney's plea admission stated that he knowingly approved company's proxy statements and SEC filings which falsely reported that stock options granted to executives were issued with a fair exercise price. In re Sorin, 47 A.D.3d 1, 845 N.Y.S.2d 250 (1st Dep't 2007).

[END OF SUPPLEMENT]

[FN1] In re Ruffalo, 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968).
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[FN2] Theard v. U.S., 354 U.S. 278, 77 S. Ct. 1274, 1 L. Ed. 2d 1342 (1957).
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[FN3] Matter of Crow., 359 U.S. 1007, 79 S. Ct. 1152, 3 L. Ed. 2d 1025 (1959).
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[FN4] Selling v. Radford, 243 U.S. 46, 37 S. Ct. 377, 61 L. Ed. 585 (1917).
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[FN5] Theard v. U.S., 354 U.S. 278, 77 S. Ct. 1274, 1 L. Ed. 2d 1342 (1957).
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[FN6] Selling v. Radford, 243 U.S. 46, 37 S. Ct. 377, 61 L. Ed. 585 (1917).
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[FN7] Ex parte Tillinghast, 29 U.S. 108, 7 L. Ed. 798, 1830 WL 3884 (1830).
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§ 40. Basic considerations

West's Key Number Digest

West's Key Number Digest, Attorney and Client 37 to 45

A.L.R. Library

Engaging in offensive personality as ground for disciplinary action against attorney, 58 A.L.R.5th 429

Violation of a disciplinary rule concerning the practice of law is a ground for discipline.[FN1] An attorney may also be disbarred or suspended for any violation of his or her oath or duties as an attorney and counselor.[FN2]
Observation: The rules of professional conduct for attorneys are not rules of evidence and do not have the same force of substantive law as a rule of evidence.[FN3]

The court treats cumulative misconduct seriously in determining an appropriate sanction in an attorney disciplinary proceeding.[FN4] Thus, cumulative attorney misconduct must be treated more severely than isolated misconduct when determining the disciplinary sanction.[FN5]

Statutes have been enacted in some jurisdictions specifying the acts for which an attorney may be disciplined, although the absence of such a statute does not prevent attorneys from being disciplined when they have been guilty of any misconduct that shows them to be lacking in honesty, probity, and good demeanor, or unworthy to continue as officers of the court.[FN6]

Acts or omissions resulting from mere inadvertence or errors of judgment made in good faith do not generally justify attorney discipline.[FN7]

CUMULATIVE SUPPLEMENT

Cases:

The Supreme Court views cumulative misconduct of a lawyer more seriously than an isolated instance of misconduct, and the cumulative misconduct of a similar nature warrants an even more severe discipline than might dissimilar conduct. The Florida Bar v. Abramson, 3 So. 3d 964 (Fla. 2009).

The Supreme Court views cumulative attorney misconduct more seriously than an isolated instance of misconduct. The Florida Bar v. Glueck, 985 So. 2d 1052 (Fla. 2008).

Attorney formed an operation with consulting company that was essentially a partnership, in support of a finding that the attorney violated the Rule of Professional Conduct governing partnerships with non-lawyers, where the company billed clients, including attorney's services as a line item, it would pay attorney for his

services, a company employee served as attorney's paralegal, attorney did not pay for such employee's services, for rent, utilities, photocopying, or for secretarial services, and he had a law office in the company's suite. The Florida Bar v. Glueck, 985 So. 2d 1052 (Fla. 2008).

Attorney's knowing misrepresentations to court were not only a breach of professional ethics in itself but also served to exacerbate his other misconduct, in context of determining appropriate sanction. I.C.A. Rule 32:3.3(a)(1). Iowa Supreme Court Attorney Disciplinary Bd. v. Netti, 797 N.W.2d 591 (Iowa 2011).

Attorney's practicing law on a suspended license adversely reflects on fitness to practice law. In re Lee, 287 Kan. 676, 198 P.3d 140 (2008).

A lawyer's prior disciplinary history is relevant to determine the appropriate sanction for further professional misconduct. In re Disciplinary Action Against Fett, 790 N.W.2d 840 (Minn. 2010).

An attorney who engages in conduct that violates disciplinary rule involving dishonest conduct will ordinarily be suspended from the practice of law. Disciplinary Counsel v. Niermeyer, 119 Ohio St. 3d 99, 2008-Ohio-3824, 892 N.E.2d 434 (2008).

[END OF SUPPLEMENT]

[FN1] State ex rel. Counsel for Discipline of Nebraska Supreme Court v. Wickenkamp, 272 Neb. 889, 725 N.W.2d 811 (2007).

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[FN2] Columbus & Franklin Cty. Metro. Park Dist. v. Shank, 65 Ohio St. 3d 86, 600 N.E.2d 1042 (1992).
- As to oath of attorney, see § 16.

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[FN3] Adams v. Franklin, 924 A.2d 993 (D.C. 2007).

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[FN4] The Florida Bar v. Feige, 937 So. 2d 605 (Fla. 2006).

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[FN5] The Florida Bar v. Walkden, 950 So. 2d 407 (Fla. 2007).
- Disbarment is warranted where the composite conduct of a lawyer is gross. The Florida Bar v. Horowitz, 697 So. 2d 78 (Fla. 1997).

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[FN6] Ex parte Secombe, 60 U.S. 9, 19 How. 9, 15 L. Ed. 565, 1856 WL 8736 (1856).

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[FN7] Iowa Supreme Court Attorney Disciplinary Bd. v. Dunahoo, 730 N.W.2d 202 (Iowa 2007).

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§ 41. Misconduct before admission to the bar

West's Key Number Digest

West's Key Number Digest, Attorney and Client 45

A.L.R. Library

Disciplinary action against attorney based on misconduct prior to admission to bar, 92 A.L.R.3d 807

An attorney may be disbarred for misconduct committed before his or her admission to the bar.[FN1] In order to justify disbarment for acts committed before admission, the transaction must be so corrupt and false as to constitute a criminal act or so unprincipled and disgraceful as to be reprehensible to a high degree.[FN2]

An attorney is subject to discipline for acts committed in another state before he or she was admitted to practice in the state imposing discipline if the acts in question were such that, if known at the time the attorney was admitted, would have resulted in a denial of his or her application for admission to the bar.[FN3]

[FN1] Stratmore v. State Bar, 14 Cal. 3d 887, 123 Cal. Rptr. 101, 538 P.2d 229, 92 A.L.R.3d 803 (1975).
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[FN2] Matter of Bar Admission of Craig, 190 Wis. 2d 494, 526 N.W.2d 261 (1995).
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[FN3] Kentucky Bar Ass'n v. Signer, 533 S.W.2d 534 (Ky. 1976).
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§ 42. Misconduct incident to admission to the bar

West's Key Number Digest

West's Key Number Digest, Attorney and Client 38, 40 to 43

A.L.R. Library

Disbarment or suspension of attorney in one state as affecting right to continue practice in another state, 81 A.L.R.3d 1281

An attorney may be disbarred for fraud in procuring admission to the bar,[FN1] such as by failing to discuss a previous bar application.[FN2] The same is true of one who conceals a previous arrest record.[FN3]

In addition, false and incomplete answers in an application to take the bar examination, continued dishonesty during part of the admissions process, and attempts to excuse or minimize such conduct at the hearing, will establish a present lack of integrity for admission to practice law.[FN4]

[FN1] Gould v. State, 99 Fla. 662, 127 So. 309, 69 A.L.R. 699 (1930).
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[FN2] Matter of Charos, 585 N.E.2d 1334 (Ind. 1992).
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[FN3] Matter of Charos, 585 N.E.2d 1334 (Ind. 1992).
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[FN4] In re Application of Panepinto, 84 Ohio St. 3d 397, 1999-Ohio-466, 704 N.E.2d 564, 107 A.L.R.5th 733 (1999).
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§ 43. Loss of moral character

West's Key Number Digest

West's Key Number Digest, Attorney and Client 38

An attorney may be disbarred for moral turpitude in either the attorney's professional[FN1] or nonprofessional activities.[FN2]

Just as possession of a good moral character is a condition precedent to admission to the bar,[FN3] the continued possession of good moral character is a condition for continuance in the practice of the law, and its loss requires suspension or disbarment.[FN4]

CUMULATIVE SUPPLEMENT

Cases:

Violations of professional conduct rule prohibiting conduct involving dishonesty, fraud, deceit or misrepresentation may occur either intentionally or negligently. Md.Rule 16–812, Rules of Prof.Conduct, Rule 8.4(c). Attorney Grievance Com'n of Maryland v. Nwadike, 416 Md. 180, 6 A.3d 287 (2010).

[END OF SUPPLEMENT]

[FN1] Yokozeki v. State Bar, 11 Cal. 3d 436, 113 Cal. Rptr. 602, 521 P.2d 858 (1974).
- An attorney's conduct in locking a client in the attorney's office, holding her down in a chair, and sexually assaulting her while she attempted to get away, violated the code of professional responsibility that prohibited a lawyer from engaging in illegal conduct involving moral turpitude. In re Tenenbaum, 918 A.2d 1109 (Del. 2007).
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[FN2] Ex parte Wall, 107 U.S. 265, 2 S. Ct. 569, 27 L. Ed. 552 (1883).
- As to nonprofessional misconduct as grounds for discipline, see §§ 82 to 96.
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[FN3] § 24.
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[FN4] Selling v. Radford, 243 U.S. 46, 37 S. Ct. 377, 61 L. Ed. 585 (1917).
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§ 44. Generally

West's Key Number Digest

West's Key Number Digest, Attorney and Client 37 to 45

A.L.R. Library

Engaging in offensive personality as ground for disciplinary action against attorney, 58 A.L.R.5th 429

Bringing of frivolous civil claim or action as ground for discipline of attorney, 85 A.L.R.4th 544

Initiating, or threatening to initiate, criminal prosecution as ground for disciplining counsel, 42 A.L.R.4th 1000

One of the fundamental tenets of the professional responsibility of a lawyer is that he or she should maintain a degree of personal and professional integrity that meets the highest standard, as the integrity of the profession can be maintained only if the conduct of the individual attorney is above reproach.[FN1]

To warrant disciplinary action it is not necessary that the misconduct of an attorney is such as will render the attorney liable to criminal prosecution; misconduct that shows he or she is unfit to discharge the duties of his or her office or is unworthy of confidence, even though the misconduct is outside the attorney's professional dealings, is sufficient.[FN2] Such conduct may relate to a court or judge,[FN3] to an attorney's clients,[FN4] or to a person not his or her client but to whom the attorney assumes a fiduciary relationship.[FN5]

An attorney may be suspended or disbarred for misconduct which shows him or her to be unfit to enjoy the privileges and manage the business of others in the capacity of attorney,[FN6] or for conduct that tends to bring reproach on the legal profession or to injure it in the favorable opinion of the public.[FN7]

It is within the real meaning and intent of the code of professional responsibility that lawyers should always be cognizant of the necessity for good manners, courtesy and discourse, both to their client and other practitioners, as part of their professional ethics.[FN8]

In addition, the zeal employed by an attorney in guarding the interests of his or her clients must always be tempered so as not to inject his or her personal feelings or display a demeanor that subjects the parties to a proceeding or opposing counsel to certain indignities.[FN9]

Observation: Alcohol and depression do not excuse attorney misconduct.[FN10] However, it has been stated that the rule that an attorney must not engage in conduct that adversely reflects on his or her fitness to practice is not applied to an attorney's DUI arrest, where there is no evidence that the attorney represented his or her client while intoxicated.[FN11]

Relevant factors to consider in determining an appropriate sanction for attorney misconduct are: (1) the nature of the duty violated; (2) the lawyer's mental state; (3) the actual/potential injury caused by the misconduct; and (4) the existence of aggravating and mitigating circumstances.[FN12]

In addition, an attorney should refrain from any illegal conduct, as anything short of this lessens public confidence in the legal system because obedience to the law exemplifies respect for the law.[FN13]

CUMULATIVE SUPPLEMENT

Cases:

Disbarment was the appropriate sanction for attorney's misconduct in failing to provide meaningful assistance to clients, attempting to mislead the Bar during its investigation of attorney, assisting in the unlicensed practice of law, and forming an improper partnership with a non-lawyer whom he had previously represented, despite mitigating factors of no previous discipline and attorney's character and reputation, where attorney's misconduct affected eight clients. The Florida Bar v. Glueck, 985 So. 2d 1052 (Fla. 2008).

Attorney's willful filing of false income tax return, to which he entered guilty plea, violated Professional Conduct Rules that prohibited engaging in criminal acts that reflected adversely on lawyer's honesty, trustworthiness, or fitness as lawyer, and conduct involving dishonesty, fraud, deceit or misrepresentation. In re Lehman, 901 N.E.2d 1097 (Ind. 2009).

Permanent disbarment was warranted for attorney who pled guilty to conspiracy to engage and attempt to engage in monetary transactions in criminally derived property that was of a value that was greater than 's 10,000. Conway v. Kentucky Bar Ass'n, 277 S.W.3d 608 (Ky. 2009).

The discipline to be imposed upon an attorney depends upon the facts of each case and the seriousness of the offenses involved considered in light of any aggravating and mitigating circumstances. In re Richard, 50 So. 3d 1284 (La. 2010).

Attorney's misconduct in representing a client in a divorce case at a time when she remained on voluntary inactive status, combined with her refusal to cooperate with Office of Disciplinary Counsel's (ODC) in ensuing investigation into the matter, warranted her suspension from the practice of law for a period of one year and one day. In re Johnson, 9 So. 3d 835 (La. 2009).

Suspended attorney's filing of notice of appeal in foreclosure action, which benefited both an agent of attorney's real estate business and attorney's own interest, constituted the unauthorized practice of law, in violation of rules of professional conduct. Attorney Grievance Com'n of Maryland v. Shryock, 408 Md. 105, 968 A.2d 593 (2009).

Considering how best to protect the public from a particular attorney ordinarily involves considering the ethical lapses both in comparison to relevant disciplinary precedents and in the context of that attorney's history rather than merely identifying the attorney's specific unethical act. In re Witherspoon, 203 N.J. 343, 3 A.3d 496 (2010).

When imposing sanctions for attorney misconduct, the Supreme Court considers relevant factors, including the duties violated by the lawyer in question and the sanctions imposed in similar cases. Cleveland Bar Association v. Davis, 121 Ohio St. 3d 337, 2009-Ohio-764, 904 N.E.2d 517 (2009).

A lawyer's neglect of legal matters and failure to cooperate in the ensuing disciplinary investigation generally warrants an indefinite suspension from the practice of law. Cleveland Bar Association v. Davis, 121 Ohio St. 3d 337, 2009-Ohio-764, 904 N.E.2d 517 (2009).

Two-year suspension, with no credit given for prior interim suspension, but with second year stayed on conditions, was warranted for attorney whose misconduct, engaging in illegal conduct resulting in a conviction for fifth-degree drug possession, failing to appear at a client's court proceeding, and practicing law in violation of a court order, violated rules, including those prohibiting conduct that adversely reflects on a lawyer's fitness to practice law and prohibiting a lawyer from neglecting a legal matter entrusted to him; attorney's long history of chemical dependence and mental illness contributed to violations, but attorney was attending daily alcohol dependency support meetings, refraining from using drugs or alcohol, and complying with the recommended treatments from a clinical psychologist. Disciplinary Counsel v. Jarabek, 121 Ohio St. 3d 257, 2009-Ohio-748, 903 N.E.2d 624 (2009).

One-year suspension with credit for prior suspensions was warranted for attorney whose misconduct in failing to comply with orders for child support, violated rule of professional conduct prohibiting conduct that adversely reflects on a lawyer's fitness to practice law; attorney had responsibly cured the default in his child support obligations but had yet to pay the costs of prior disciplinary proceeding arising from his earlier failure to pay child support. Cincinnati Bar Assn. v. Heisler, 119 Ohio St. 3d 573, 2008-Ohio-5221, 895 N.E.2d 839 (2008).

Attorney's misconduct, in failing to comply with orders for child support, violated former disciplinary rule and current rule of professional conduct, prohibiting conduct that adversely reflects on a lawyer's fitness to practice law. Cincinnati Bar Assn. v. Heisler, 119 Ohio St. 3d 573, 2008-Ohio-5221, 895 N.E.2d 839 (2008).

When imposing sanctions for attorney misconduct, Supreme Court considers the duties violated, the actual or potential injury caused, the attorney's mental state, and sanctions imposed in similar cases. Cincinnati Bar Assn. v. Farrell, 119 Ohio St. 3d 529, 2008-Ohio-4540, 895 N.E.2d 800 (2008).

An attorney's course of deceitful conduct is hardly made more tolerable because it did not victimize a client or occur in court. Cincinnati Bar Assn. v. Farrell, 119 Ohio St. 3d 529, 2008-Ohio-4540, 895 N.E.2d 800 (2008).

To determine the appropriate length of any attorney's suspension for professional misconduct, including any attendant conditions for a stay, Supreme Court considers the duties violated, the actual or potential injury caused, the attorney's mental state, the existence of aggravating or mitigating circumstances, and sanctions imposed in similar cases. Akron Bar Assn. v. Catanzarite, 119 Ohio St. 3d 313, 2008-Ohio-4063, 893 N.E.2d 835 (2008).

Attorney's filing of action to collect allegedly unpaid fees from prospective clients, who did not agree to attorney's representation or his fee, violated disciplinary rule prohibiting taking legal action merely to harass another person; attorney filed action to exact punishment for what he perceived to be attempt to obtain free legal advice. Akron Bar Assn. v. Catanzarite, 119 Ohio St. 3d 313, 2008-Ohio-4063, 893 N.E.2d 835 (2008).

Conditionally stayed one-year suspension from practice of law was appropriate sanction for attorney who, without proper disclosures, represented multiple parties to a real-estate business venture in which he also had a significant financial interest and then exacerbated situation by continuing in those roles after the alliance had begun to unravel, in view of mitigating evidence that attorney had no prior disciplinary record, cooperated in

disciplinary proceedings, and exhibited good character and reputation apart from his misconduct. Disciplinary Counsel v. McNamee, 119 Ohio St. 3d 269, 2008-Ohio-3883, 893 N.E.2d 490 (2008).

Attorney who, without proper disclosures, represented all sides to a real-estate development project in which he also had significant financial interest and continued to do so after alliance began to unravel, despite calls for his disqualification, violated disciplinary rules against conduct prejudicial to administration of justice, acceptance of employment if professional conduct will or may be affected by lawyer's interests, representing a client in contemplated or pending litigation if lawyer knows or should know that he or she ought to be called as a witness, transacting business with client who has not waived conflict, and representing clients having conflicting interests. Disciplinary Counsel v. McNamee, 119 Ohio St. 3d 269, 2008-Ohio-3883, 893 N.E.2d 490 (2008).

Attorney violated disciplinary rule that prohibits a lawyer from recommending his or her employment to a nonlawyer who has not sought the lawyer's advice regarding employment of counsel when attorney recommended himself as legal representative for property owners whom he persuaded to enter into a joint venture agreement concerning real-estate development project in which attorney held a personal financial interest. Disciplinary Counsel v. McNamee, 119 Ohio St. 3d 269, 2008-Ohio-3883, 893 N.E.2d 490 (2008).

In determining the appropriate attorney disciplinary sanction, a judge is held to higher standards of integrity and ethical conduct than attorneys or other persons not invested with the public trust. Disciplinary Counsel v. Hoskins, 119 Ohio St. 3d 17, 2008-Ohio-3194, 891 N.E.2d 324 (2008).

Indefinite suspension was appropriate disciplinary sanction for attorney's conduct in abandoning clients' cases and refusing to cooperate in disciplinary process, where attorney was still under a suspension, which had commenced three years earlier, for failing to comply with Supreme Court's attorney-registration requirements. Dayton Bar Assn. v. Randall, 118 Ohio St. 3d 408, 2008-Ohio-2709, 889 N.E.2d 535 (2008).

Attorney's conduct of not responding to bar association's notices and requests for responses concerning grievances brought against him until subpoenaed to do so violated provision of code of professional responsibility that prohibited lawyer from engaging in conduct that adversely reflects on the lawyer's fitness to practice law and violated Government of the Bar rule that required a lawyer to assist in an investigation of misconduct. Columbus Bar Assn. v. Hayes, 118 Ohio St. 3d 336, 2008-Ohio-2466, 889 N.E.2d 109 (2008).

In determining the appropriate sanction to impose for attorney misconduct, the Supreme Court considers the duties violated, the actual or potential injury caused, the attorney's mental state, the existence of aggravating or mitigating circumstances, and sanctions imposed in similar cases. Disciplinary Counsel v. Goldblatt, 118 Ohio St. 3d 310, 2008-Ohio-2458, 888 N.E.2d 1091 (2008).

Attorney violated the disciplinary rules and the rules for government of the bar when she refused to provide her current address for her attorney registration, providing instead only a post office box number. Cleveland Bar Assn. v. Mitchell, 118 Ohio St. 3d 98, 2008-Ohio-1822, 886 N.E.2d 222 (2008).

In determining the appropriate sanction to impose for attorney misconduct, the Supreme Court considers the duties violated, the actual or potential injury caused, the attorney's mental state, the sanctions imposed in similar cases, and the existence of aggravating or mitigating circumstances. Disciplinary Counsel v. Tomlan, 118 Ohio St. 3d 1, 2008-Ohio-1471, 885 N.E.2d 895 (2008).

Attorney's failure to respond to orders to show cause issued by bankruptcy court, or to orders finding him in contempt and ordering return of client fees, violated attorney disciplinary rules prohibiting conduct adversely reflecting on lawyer's fitness to practice law, intentional failure to seek client's lawful objectives, and intentional failure to carry out employment contract, and requiring prompt delivery of client funds to which client was entitled. Cuyahoga Cty. Bar Assn. v. Wagner, 117 Ohio St. 3d 456, 2008-Ohio-1200, 884 N.E.2d 1053 (2008).

Conduct of attorney in becoming intimately involved with client after agreeing to represent her in divorce proceedings, coupled with his behavior in concealing the relationship and failing to cooperate in investigation into the alleged misconduct, warranted indefinite suspension from practice of law. Butler Cty. Bar Assn. v. Williamson, 117 Ohio St. 3d 399, 2008-Ohio-1196, 884 N.E.2d 55 (2008).

A lawyer's record of professional missteps as well a lawyer's record without missteps are important to the Supreme Court's assessment of the appropriate discipline. In re Spilman, 2010 OK 70, 240 P.3d 702 (Okla. 2010), as corrected, (Oct. 20, 2010).

A lawyer's state of mind may be considered in fashioning discipline. State ex rel. Oklahoma Bar Ass'n v. Combs, 2008 OK 96, 2008 WL 4724447 (Okla. 2008).

Every lawyer is charged with the observance of the rules of professional conduct. State ex rel. Oklahoma Bar Ass'n v. Combs, 2008 OK 96, 2008 WL 4724447 (Okla. 2008).

Attorney did not assist with unauthorized practice of law and thus did not violate rules of professional conduct when her husband, whose license to practice law had been suspended, communicated with attorney's client regarding client's employment discrimination case and sent settlement funds to client, where attorney did not assist husband in his actions. In re Johnson, 380 S.C. 76, 668 S.E.2d 416 (2008).

Attorney's communication with her husband, whose license to practice law had been suspended, concerning status of attorney's personal injury case that had been handled by husband before his suspension did not constitute assisting with unauthorized practice of law and thus did not violate rules of professional conduct. In re Johnson, 380 S.C. 76, 668 S.E.2d 416 (2008).

Attorney's misconduct, in taking fees paid in cash to her law firm and depositing them into her personal account, resulting in a conviction for breach of trust, failing to adequately prepare client for divorce mediation, failing to communicate with another client regarding client's complaint for child support, and failing to timely inform third client of change in bar status during divorce proceedings, violated rules of professional conduct requiring lawyer to provide competent representation to a client, requiring lawyer to act with reasonable diligence and promptness, requiring lawyer to keep client reasonably informed, prohibiting lawyer from representing a client if the lawyer's physical or mental condition materially impairs the lawyer's ability, requiring lawyer to withdraw from representing a client only if withdrawal can be accomplished without material adverse effect on the interests of the client, requiring lawyer to comply with applicable law requiring notice to or permission of a tribunal when terminating a representation, requiring lawyer to protect client's interests on termination, requiring lawyer to make reasonable efforts to expedite litigation, requiring lawyer to comply with rule of professional conduct, prohibiting lawyer from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, and prohibiting lawyer from engaging in conduct prejudicial to the administration of justice. In re Koulpasis, 380 S.C. 17, 667 S.E.2d 548 (2008).

Attorney's conduct in providing $3,500 to client to aid in her divorce negotiations and $100 in cash for personal use violated the professional rule that prohibited a lawyer from providing financial assistance to a client in connection with pending or contemplated litigation. In re Hoffmeyer, 376 S.C. 221, 656 S.E.2d 376 (2008).

Attorney's conduct in representing out-of-state creditor and debt collections law firm solely for purpose of allowing filing of pleadings in state in which he was licensed to practice, only to have out-of-state law office perform substantive work in matters, constituted violation of professional rules prohibiting a lawyer to assist non-lawyers in the unauthorized practice of law and violation of professional rules. In re DuBre, 376 S.C. 158, 656 S.E.2d 343 (2007).

Attorney's conduct in allowing non-lawyer employees to perform legal services in home loan refinance transactions violated professional rules prohibiting lawyers from assisting others in the unauthorized practice of law and violating professional rules. In re Pincelli, 375 S.C. 495, 654 S.E.2d 522 (2007).

For purposes of determining appropriate sanction for professional misconduct, public approval of the respondent attorney does not prove that no injury was done to the public. In re Neisner, 2010 VT 102, 16 A.3d 587 (Vt. 2010).

State bar association disciplinary board should deviate from the presumptive sanction only if the aggravating or mitigating factors are sufficiently compelling to justify a departure. Burtch, In re Disciplinary Proceeding Against, 162 Wash. 2d 873, 175 P.3d 1070 (2008).

Attorney's conduct in deliberately misrepresenting to corrections officials at jail that he represented inmate in order to arrange a meeting with inmate violated the professional rules that prohibited a lawyer from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, or engaging in conduct that was prejudicial to the administration of justice. Rules of Prof.Conduct, Rule 8.4(c, d). Lawyer Disciplinary Bd. v. Stanton, 225 W. Va. 671, 695 S.E.2d 901 (2010).

Attorney's violation of numerous Rules of Professional Conduct, and his failure to cooperate with or give truthful statements to office of disciplinary counsel, warranted annulment of attorney's license to practice law; attorney failed to file action for client, agreed to share fee in personal injury action with nonlawyer employee, made claim to improperly withhold expenses from client's settlement, opened checking account in own name

with client's settlement check, and improperly attempted to withhold attorney fees from client. Lawyer Disciplinary Bd. v. Duty, 222 W. Va. 758, 671 S.E.2d 763 (2008).

Attorney's professional misconduct in assisting unlicensed person in unauthorized practice of law, knowingly making false statement to tribunal, allowing unlicensed person to sign her name to correspondence and pleadings she had never seen, failing to deposit checks for benefit of her clients into client trust accounts, failing to prepare complete records of trust account funds or trust property, failing to conspicuously label solicitation letters with word "Advertisement," failing to file copy of those letters with Office of Lawyer Regulation (OLR), making false and misleading statements to potential clients, and failing to provide OLR with documents evidencing payments to clients warranted suspension of her law license for four months. In re Disciplinary Proceedings Against Knight, 2008 WI 13, 307 Wis. 2d 273, 745 N.W.2d 77 (2008).

The complexities of litigation should not relieve an attorney of the duty to keep a client reasonably informed about the status of a matter, to provide a client with explanations reasonably necessary to permit informed decisions, and to provide truthful information to a court as well as during an Office of Lawyer Regulation (OLR) investigation. In re Disciplinary Proceedings Against Nunnery, 2009 WI 89, 769 N.W.2d 858 (Wis. 2009).

[END OF SUPPLEMENT]

[FN1] Toledo Bar Assn. v. Abood, 104 Ohio St. 3d 655, 2004-Ohio-7015, 821 N.E.2d 560 (2004), reinstatement granted, 106 Ohio St. 3d 1205, 2005-Ohio-4100, 832 N.E.2d 730 (2005).

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[FN2] The Florida Bar v. Rood, 620 So. 2d 1252 (Fla. 1993).

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[FN3] §§ 45 to 53.

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[FN4] §§ 54 to 69.

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[FN5] Sodikoff v. State Bar, 14 Cal. 3d 422, 121 Cal. Rptr. 467, 535 P.2d 331 (1975).

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[FN6] Ex parte Robinson, 86 U.S. 505, 22 L. Ed. 205, 1873 WL 16067 (1873).

- An attorney who uses law firm resources to place his or her pecuniary interests over those of the firm engages in misconduct that indubitably calls into question the attorney's fitness to practice law, and such ongoing and intentional misconduct by an attorney justifies serious discipline. The Florida Bar v. Kossow, 912 So. 2d 544 (Fla. 2005).

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[FN7] Matter of Disciplinary Proceedings Against Ditter, 187 Wis. 2d 337, 523 N.W.2d 105 (1994).

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[FN8] Disciplinary Counsel v. Jackson, 84 Ohio St. 3d 386, 1999-Ohio-485, 704 N.E.2d 246 (1999).

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[FN9] Disciplinary Counsel v. Jackson, 84 Ohio St. 3d 386, 1999-Ohio-485, 704 N.E.2d 246 (1999).

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[FN10] In re Nelson, 333 S.C. 498, 510 S.E.2d 718 (1999).

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[FN11] Matter of Morris, 251 Kan. 592, 834 P.2d 384 (1992), reinstatement granted, 272 Kan. 1, 30 P.3d 1001 (2001).

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[FN12] In re Shearin, 765 A.2d 930 (Del. 2000).
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[FN13] Toledo Bar Assn. v. Abood, 104 Ohio St. 3d 655, 2004-Ohio-7015, 821 N.E.2d 560 (2004), reinstatement granted, 106 Ohio St. 3d 1205, 2005-Ohio-4100, 832 N.E.2d 730 (2005).
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AMJUR ATTNYS § 44

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7 Am. Jur. 2d Attorneys at Law § 45

American Jurisprudence, Second Edition
Database updated August 2011

Attorneys at Law
Rachel M. Kane, M.A., J.D.

II. Judicial Supervision of Legal Profession
B. Disciplinary Proceedings
4. Grounds for Discipline
b. Misconduct as an Attorney
(2) In Relation to Court or Judge

Topic Summary Correlation Table References

§ 45. Generally

West's Key Number Digest

West's Key Number Digest, Attorney and Client 42, 43

A.L.R. Library

Attorney's misrepresentation to court of his state of health or other personal matter in seeking trial delay as ground for disciplinary action, 61 A.L.R.4th 1216

Validity and propriety of arrangement by which attorney pays or advances expenses of client, 8 A.L.R.3d 1155

Although a lawyer has a duty to his or her client, each lawyer has sworn an oath to practice with all good fidelity as well to the court as to the client; this responsibility to the "court" takes precedence over the interests

of the client because officers of the court are obligated to represent these clients zealously within the bounds of both the positive law and the rules of ethics.[FN1]

An attorney has a duty to be civil to opposing counsel and the court.[FN2] Hence, an attorney is subject to discipline for making extrajudicial statements to the press if the lawyer knows or reasonably should know that the statements will have a substantial likelihood of materially prejudicing an adjudicative proceeding,[FN3] or for making willful misrepresentations to a judge.[FN4]

An attorney is subject to disciplinary action for—

— failure to obtain the bankruptcy court's approval to represent a debtor in bankruptcy proceedings.[FN5]

— refusing to comply with a court order.[FN6]

— practicing law while under suspension for non-compliance with continuing legal education requirements.[FN7]

— knowingly engaging in a pattern of misconduct that caused both potential and actual injury to the legal system.[FN8]

— knowingly making a false statement of material fact.[FN9]

— attempting to obstruct another party's access to evidence.[FN10]

— intentionally or habitually violating an established rule of procedure or evidence.[FN11]

— communicating directly with a client known to be represented by a lawyer.[FN12]

— counseling or assisting a client in conduct that the lawyer knows is illegal or fraudulent.[FN13]

— representing a client in an adjudicative proceeding while knowing that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding without taking reasonable remedial measures, including, if necessary, disclosure to the tribunal.[FN14]

— perpetrating a fraud on the court during the representation of a client.[FN15]

— misconduct in submitting a fee application.[FN16]

— failure to promptly pay court-related expenses, coupled with a history of prior similar violations.[FN17]

— asserting to an appellate court that a pretrial hearing was evidentiary, when it was not.[FN18]

A finding of “fraud on the court” carries severe disciplinary consequences for attorneys.[FN19]

CUMULATIVE SUPPLEMENT

Cases:

Attorney who accepted retainer agreements and payment from automobile passenger engaged in misrepresentation by appearing in court and filing official pleadings suggesting she represented him, but arranging for another lawyer to file a notice of appearance on passenger's behalf so that this other lawyer was attorney of record; attorney's actions were deliberate and knowing. The Florida Bar v. Brown, 978 So. 2d 107 (Fla. 2008).

Attorney's admitted misconduct of filing on client's behalf a "notice of suggestion of bankruptcy" approximately two months before he filed bankruptcy petition, which created misapprehension about client in superior court case, was a negligent misrepresentation constituting violation of rule of professional conduct prohibiting attorneys from engaging in professional conduct involving dishonesty, fraud, deceit or misrepresentation. In re Roberts, 284 Ga. 445, 668 S.E.2d 256 (2008).

Attorney's knowingly false statements to disciplinary commission warranted period of active suspension. In re Cueller, 880 N.E.2d 1209 (Ind. 2008).

Disbarment of attorney was warranted, in attorney disciplinary case in which attorney engaged in a pattern of misconduct, where attorney shouted profanities at court clerks, disputed court proceedings, was convicted of disorderly conduct for his actions in state and federal courts, and in changing a fee agreement form charging a flat fee of $3,500 for a criminal matter to charge $3,500 per hour, in violation the professional rules. Sup.Ct.Rules, Rule 226, Rules of Prof.Conduct, Rules 1.1, 1.5(a), 3.4(c), 3.5(d), 4.4(a), 8.4(b–d), (g). In re Romious, 240 P.3d 945 (Kan. 2010).

Attorney's failure to show good cause as to why he should not be sanctioned or suspended from practice of law due to his noncompliance with minimum continuing legal education (CLE) requirements provided cause for supreme court to fine attorney in amount of $750, while reserving right to suspend him if he failed to pay fine, along with appropriate late fees to receive credit for 4.75 hours of late-reported CLE credits, and to complete sufficient CLE credits to cure his deficiency; in addition, attorney could not apply for non-hardship extension for current educational year. Kentucky Bar Ass'n, CLE Com'n v. McGeeney, 278 S.W.3d 138 (Ky. 2009).

Attorney failed to show good cause as to why he should not be sanctioned or suspended from practice of law due to his noncompliance with minimum continuing legal education (CLE) requirements when attorney cited his increased work load, increased traveling, and financial woes related to current economic circumstances, given that such troubles did not consume completely time of attorney, who was able to complete some CLE classes, and increased work load did not excuse attorney from his CLE responsibilities. Kentucky Bar Ass'n, CLE Com'n v. McGeeney, 278 S.W.3d 138 (Ky. 2009).

Attorney's repeated failure to satisfy her continuing legal education (CLE) requirements, in violation of Supreme Court order giving attorney extension to fulfill such requirements, warranted suspension from the practice of law, until such time as Supreme Court entered order restoring or reinstating attorney's membership in the bar. Kentucky Bar Ass'n v. Bock, 237 S.W.3d 539 (Ky. 2007).

Attorney's conduct in filing, on client's behalf, ineligible expungement petitions in the District Court after unsuccessfully attempting, on three separate occasions, to file ineligible expungement petitions in the Circuit Court, while hoping that ineligible petitions would "slip through" and avoid detection by the District Court, misled the District Court and violated rule of professional conduct prohibiting a lawyer from making a false statement of fact or law to a tribunal. Attorney Grievance Com'n of Maryland v. Tanko, 408 Md. 404, 969 A.2d 1010 (2009).

Sixty-day suspension was warranted as a sanction for attorney who committed misconduct by misleading District Court in filing, on behalf of client, ineligible expungement petitions in the hope that they would "slip through" and avoid detection by the District Court; attorney lacked prior discipline and claimed a misunderstanding of the relevant case and statutory law. Attorney Grievance Com'n of Maryland v. Tanko, 408 Md. 404, 969 A.2d 1010 (2009).

Attorney's conduct violated the professional rule that prohibited an attorney from engaging in conduct that was prejudicial to the administration of justice; attorney submitted false evidence in connection with client's probation hearing, and attorney failed to take reasonable remedial measures to correct client's false statements during a restitution hearing concerning client's weekly pay. In re Disciplinary Action Against Houge, 764 N.W.2d 328 (Minn. 2009).

Attorney's characterization of the basis for his request that he be relieved as counsel, that client had proceeded on her own without the advice or knowledge of counsel, did not violate the rule of professional conduct governing candor to the tribunal, since characterization was true; although at some point attorney had spoken to client about an appeal, when client filed pro se appeal, attorney was in hospital and had no knowledge of the appeal and had not advised client about the appeal. In re Pennington, 380 S.C. 49, 668 S.E.2d 402 (2008).

Trial court's inherent power to discipline an attorney's behavior by imposing sanctions may be exercised to the extent necessary to deter, alleviate, and counteract bad faith abuse of the judicial process, such as any

significant interference with the traditional core functions of the court, including hearing evidence, deciding issues of fact raised by the pleadings, deciding questions of law, rendering final judgments, and enforcing judgments. Davis v. Rupe, 307 S.W.3d 528 (Tex. App. Dallas 2010), reh'g overruled, (Apr. 20, 2010).

Refusal to pay restitution to client as required by state bar association disciplinary board violated rules on knowingly disobeying an obligation under the rules of a tribunal and sanction imposed under the Rules for Enforcement of Lawyer Conduct in connection with a disciplinary matter. Burtch, In re Disciplinary Proceeding Against, 162 Wash. 2d 873, 175 P.3d 1070 (2008).

[END OF SUPPLEMENT]

[FN1] In re Abbott, 925 A.2d 482 (Del. 2007), petition for cert. filed (U.S. July 30, 2007).
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[FN2] Disciplinary Counsel v. Jackson, 84 Ohio St. 3d 386, 1999-Ohio-485, 704 N.E.2d 246 (1999).
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[FN3] Matter of Sullivan, 185 A.D.2d 440, 586 N.Y.S.2d 322 (3d Dep't 1992) (discipline not appropriate).
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[FN4] Bach v. State Bar, 43 Cal. 3d 848, 239 Cal. Rptr. 302, 740 P.2d 414 (1987).
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[FN5] In re Reuss, 273 Ga. 832, 546 S.E.2d 495 (2001).
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[FN6] People v. Huntzinger, 967 P.2d 160 (Colo. 1998); The Florida Bar v. Gersten, 707 So. 2d 711 (Fla. 1998).
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[FN7] Kentucky Bar Ass'n v. Trumbo, 26 S.W.3d 792 (Ky. 2000).
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[FN8] In re Conduct of Jaffee, 331 Or. 398, 15 P.3d 533 (2000).
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[FN9] The Florida Bar v. Budnitz, 690 So. 2d 1239 (Fla. 1997).
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[FN10] In re Disciplinary Action Against Dvorak, 2000 ND 98, 611 N.W.2d 147 (N.D. 2000), reinstatement granted, 2002 ND 100, 645 N.W.2d 222 (N.D. 2002).
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[FN11] Disciplinary Counsel v. LoDico, 106 Ohio St. 3d 229, 2005-Ohio-4630, 833 N.E.2d 1235 (2005).
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[FN12] Rule 4.2, ABA Model Rules of Professional Conduct.
- As soon as it is perceived that a party is appearing by attorney, all further contacts with that party by the opposing attorney, including the service of papers, must be made through the attorney. Albany, FSB v. Dashnaw, 37 A.D.3d 932, 830 N.Y.S.2d 792 (3d Dep't 2007).
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[FN13] Rule 1.2, ABA Model Rules of Professional Conduct.
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[FN14] Rule 3.3, ABA Model Rules of Professional Conduct.
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[FN15] Office of Disciplinary Counsel v. Taylor, 78 Ohio St. 3d 312, 1997-Ohio-211, 677 N.E.2d 1188 (1997), reinstatement granted, 105 Ohio St. 3d 1219, 2005-Ohio-1738, 825 N.E.2d 609 (2005).
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[FN16] Matter of Friedman, 270 Ga. 5, 505 S.E.2d 727 (1998).
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[FN17] In re Thornton, 342 S.C. 440, 538 S.E.2d 4 (2000).
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[FN18] Michiana Easy Livin' Country, Inc. v. Holten, 168 S.W.3d 777 (Tex. 2005).
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[FN19] In re Will of Crabtree, 449 Mass. 128, 865 N.E.2d 1119 (2007).
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AMJUR ATTNYS § 45

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7 Am. Jur. 2d Attorneys at Law § 46

American Jurisprudence, Second Edition
Database updated August 2011

Attorneys at Law
Rachel M. Kane, M.A., J.D.

II. Judicial Supervision of Legal Profession
B. Disciplinary Proceedings
4. Grounds for Discipline
b. Misconduct as an Attorney
(2) In Relation to Court or Judge

Topic Summary Correlation Table References

§ 46. Frivolous or unfounded litigation

West's Key Number Digest

West's Key Number Digest, Attorney and Client 38

A.L.R. Library

Bringing of frivolous civil claim or action as ground for discipline of attorney, 85 A.L.R.4th 544

Participation in allegedly collusive or connived divorce proceedings as subjecting attorney to disciplinary action, 13 A.L.R.3d 1010

An attorney has a duty to refrain from advocacy, such as filing frivolous claims, which undermines or interferes with the functioning of the judicial system.[FN1] Violation of the attorney disciplinary rule prohibiting the filing of frivolous suits is grounds for attorney discipline and can lead to disbarment.[FN2] An attorney's conduct in neglecting an entrusted legal matter, and filing a suit when he or she knew or it was obvious that such action would serve merely to harass or maliciously injure another, will warrant disciplinary action.[FN3] In addition, a lawyer who files a frivolous lawsuit or a meritless appeal on the instructions of the client without informing the client of the weakness of the claim is violating both a duty to serve the client's interests and a duty to the judicial system.[FN4]

Observation: To some extent, the definition of "frivolous," as it applies to an attorney's ethical duty not to file frivolous actions, is incapable of precise determination.[FN5]

A lawyer must not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.[FN6] In addition, except as otherwise stated, a lawyer must not represent a client or, where representation has commenced, must withdraw from the representation of a client if the representation will result in violation of the rules of professional conduct or other law.[FN7]

In presenting a matter to a tribunal, a lawyer must disclose legal authority in the controlling jurisdiction which is known to the attorney to be directly adverse to the client's position and which is not disclosed by opposing counsel.[FN8]

In its discretion, a court may award costs and financial sanctions against an attorney or party resulting from frivolous conduct.[FN9]

CUMULATIVE SUPPLEMENT

Cases:

Defendant's 52-page motion to correct illegal sentence with approximately 100 exhibits was frivolous and abusive, and thus its filing warranted imposition of sanctions by the trial court; defendant's conviction and sentence had previously been affirmed, as had the denial of his timely motion for postconviction relief and his untimely claim of ineffective assistance of counsel, and motion to correct illegal sentence did not raise any actual claims of sentencing error, but rather was a collateral attack on defendant's conviction that raised issues that could only be raised in a motion for postconviction relief or that were or should have been raised on direct appeal. West's F.S.A. §§ 944.279(1), 944.28; West's F.S.A. RCrP Rules 3.800(a), 3.850. Moore v. State, 55 So. 3d 600 (Fla. Dist. Ct. App. 4th Dist. 2011).

A party or the party's attorney may be sanctioned for filing a frivolous pleading, motion, or other paper, or for making frivolous arguments; the party or attorney may also be sanctioned for filing a pleading, motion, or other paper in bad faith whether or not there is good ground to support it. Ex parte Gregory, 378 S.C. 430, 663 S.E.2d 46 (2008).

Sanction of $27,364.31 levied against counsel for alleging his client's former attorney had converted settlement proceeds for his own use, under the Frivolous Proceedings Act, appropriately included the costs former attorney incurred in pursuing the claim for sanctions; statutory language, "reasonably incurred in litigating the proceedings," contemplated the fees and costs attorney had to pay to defend the suit against him in addition to the sanctions proceedings. Ex parte Gregory, 378 S.C. 430, 663 S.E.2d 46 (2008).

[END OF SUPPLEMENT]

[FN1] de Vaux v. Westwood Baptist Church, 953 So. 2d 677 (Fla. Dist. Ct. App. 1st Dist. 2007).
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[FN2] Parler & Wobber v. Miles & Stockbridge, 359 Md. 671, 756 A.2d 526 (2000).
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[FN3] Cleveland Bar Assn. v. Santarelli, 86 Ohio St. 3d 36, 1999-Ohio-346, 711 N.E.2d 658 (1999).
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[FN4] de Vaux v. Westwood Baptist Church, 953 So. 2d 677 (Fla. Dist. Ct. App. 1st Dist. 2007).
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[FN5] de Vaux v. Westwood Baptist Church, 953 So. 2d 677 (Fla. Dist. Ct. App. 1st Dist. 2007).
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[FN6] Rule 3.1, ABA Model Rules of Professional Conduct.
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[FN7] Rule 1.16(a)(1), ABA Model Rules of Professional Conduct.
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[FN8] Rule 3.3(a)(2), ABA Model Rules of Professional Conduct.
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[FN9] Kamen v. Diaz-Kamen, 40 A.D.3d 937, 837 N.Y.S.2d 666 (2d Dep't 2007).
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7 Am. Jur. 2d Attorneys at Law § 47

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§ 47. Communications with judge

West's Key Number Digest

West's Key Number Digest, Attorney and Client 42, 43

A.L.R. Library

Attorney's misrepresentation to court of his state of health or other personal matter in seeking trial delay as ground for disciplinary action, 61 A.L.R.4th 1216

Disciplinary action against attorney based on communications to judge respecting merits of cause, 22 A.L.R.4th 917

Attorneys are officers of the court, and when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath.[FN1]

In an ex parte proceeding, a lawyer must inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.[FN2] Thus, a lawyer must fully disclose all facts tangentially relevant and material to a judge's decision and a lawyer's failure to do so amounts to misrepresentation.[FN3] An attorney, by obtaining an ex parte custody order, violates a disciplinary rule prohibiting ex parte communications with judges if the attorney does not tell the judge that the other party is represented by counsel and does not disclose the existence of, or circumstances prompting, a letter from the other party's attorney to his or her client indicating recommended visitations and the judge, as a result, is deceived into signing the order.[FN4] An attorney's failure to inform an opposing party of ex parte contact with the court to obtain procedural advice warrants a public reprimand and costs and attorney's fees incurred for having to file a petition for extraordinary relief and for taking an attorney's deposition.[FN5]

An attorney's failure to disclose to an appellate tribunal the controlling authority which is known to him or her, and has not been disclosed by opposing counsel, that is directly adverse to his or her client's position, and to advise the client of the adverse authority when the client is contemplating his or her legal options, warrants a public reprimand and admonishment.[FN6]

An attorney's misconduct in verbally abusing, physically threatening and being disrespectful to a judge violates the professional rule prohibiting attorneys from engaging in conduct that is prejudicial to the administration of justice, even when the statements and misconduct occur in the judge's chambers, rather than a courtroom proceeding.[FN7]

CUMULATIVE SUPPLEMENT

Cases:

Attorney's misconduct, speaking to a probate judge outside courthouse about the merits of a pending adversarial proceeding without notice to opposing counsel and without legal justification, violated disciplinary rule prohibiting attorney from communicating ex parte on the merits of a case with a judge. Disciplinary Counsel v. Tomlan, 118 Ohio St. 3d 1, 2008-Ohio-1471, 885 N.E.2d 895 (2008).

[END OF SUPPLEMENT]

[FN1] State v. Maskiell, 100 Conn. App. 507, 918 A.2d 293 (2007), certification denied, 282 Conn. 922, 925 A.2d 1104 (2007).

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[FN2] Rule 3.3(d), ABA Model Rules of Professional Conduct.
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[FN3] Iowa Supreme Court Attorney Disciplinary Bd. v. Gottschalk, 729 N.W.2d 812 (Iowa 2007).
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[FN4] Iowa Supreme Court Bd. of Professional Ethics and Conduct v. Lesyshen, 585 N.W.2d 281 (Iowa 1998).
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[FN5] Mississippi Bar v. Logan, 726 So. 2d 170 (Miss. 1998).
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[FN6] In re Thonert, 733 N.E.2d 932 (Ind. 2000).
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[FN7] Matter of Scimeca, 265 Kan. 742, 962 P.2d 1080 (1998), reinstatement granted, 277 Kan. 307, 84 P.3d 1046 (2004).
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7 Am. Jur. 2d Attorneys at Law § 48

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Topic Summary Correlation Table References

§ 48. Communications with jury

West's Key Number Digest

West's Key Number Digest, Attorney and Client 38, 42

A.L.R. Library

Propriety of attorney's communication with jurors after trial, 19 A.L.R.4th 1209

Contact or communication between juror and party or counsel during trial of civil case as ground for mistrial, new trial, or reversal, 62 A.L.R.2d 298

An attorney is subject to disciplinary action for bribing a juror,[FN1] for tampering with a jury list,[FN2] and for instructing a member of venire for his or her client's case as to what to say and what not to say during questioning.[FN3]

An attorney's conduct in approaching jurors after they have delivered a verdict in his or her client's case but while the jurors are still members of venire for other cases warrants a public reprimand.[FN4]

An attorney who wins a trial by jury may write to the jurors following the verdict and request that he or she be notified of any post-trial contact with the jurors by the adverse side and that he or she be allowed either to be present for any interviews granted to the adverse side or to discuss with the juror any communications received from the adverse side.[FN5] However, an elected prosecutor will be reprimanded for sending letters to members of a jury criticizing their verdict of not guilty.[FN6]

The disciplinary rule regulating postverdict communications does not violate the constitutional guarantee of free speech insofar as the rule is applied to discipline an attorney for making abusive and insulting comments in a postverdict letter to jurors.[FN7] In addition, the disciplinary rule prohibiting comments by an attorney calculated to harass or embarrass a discharged juror, or to influence discharged jurors' actions in future jury service, is not unconstitutionally overbroad on its face.[FN8] The rule, however, applies only to those communications which an ordinary reasonable lawyer would foresee are likely to harass, embarrass, or influence an ordinary juror.[FN9]

[FN1] In re Keenan, 287 Mass. 577, 192 N.E. 65, 96 A.L.R. 679 (1934).

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[FN2] Noland v. State Bar of Cal., 63 Cal. 2d 298, 46 Cal. Rptr. 305, 405 P.2d 129 (1965).

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[FN3] The Florida Bar v. Simmons, 581 So. 2d 154 (Fla. 1991).

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[FN4] In re Smith, 338 S.C. 465, 527 S.E.2d 758 (2000).

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[FN5] Lind v. Medevac, Inc., 219 Cal. App. 3d 516, 268 Cal. Rptr. 359 (1st Dist. 1990).

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[FN6] Matter of Berning, 468 N.E.2d 843 (Ind. 1984).

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[FN7] Commission for Lawyer Discipline v. Benton, 980 S.W.2d 425 (Tex. 1998).

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[FN8] Commission for Lawyer Discipline v. Benton, 980 S.W.2d 425 (Tex. 1998).

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[FN9] Commission for Lawyer Discipline v. Benton, 980 S.W.2d 425 (Tex. 1998).

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§ 49. Suppression or fabrication of papers or evidence

West's Key Number Digest

West's Key Number Digest, Attorney and Client 41

A.L.R. Library

Attorney's conduct in delaying or obstructing discovery as basis for contempt proceeding, 8 A.L.R.4th 1181

Fabrication or suppression of evidence as ground of disciplinary action against attorney, 40 A.L.R.3d 169

Participation in allegedly collusive or connived divorce proceedings as subjecting attorney to disciplinary action, 13 A.L.R.3d 1010

A lawyer must not knowingly offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.[FN1] In addition, a lawyer must not falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.[FN2]

Disciplinary action will lie against an attorney for—

— inducing a witness or client to testify falsely or not testify.[FN3]

— giving false testimony.[FN4]

— failing to disclose a client's fraud on traffic officers.[FN5]

— using false,[FN6] fabricated or altered documents.[FN7]

— forging a notary public's signature.[FN8]

— knowingly submitting false affidavits.[FN9]

— knowingly submitting false immigration documents for unqualified immigrants.[FN10]

— destroying evidence.[FN11]

— failing to bring to the court's attention the fact that the clerk failed to deliver evidence to the bailiff for use during trial.[FN12]

— filing improperly attested wills and deeds with the probate court.[FN13]

— concealing, suppressing,[FN14] or failing to produce a paper or document material to the issues.[FN15]

— misstating facts crucial in prompting a grant of dismissal.[FN16]

— obstructing an adverse party's access to evidence.[FN17]

The falsification of documents and forgery of a judge's signature in an effort to conceal his or her neglect, warrants an attorney's discipline.[FN18]

Discipline is warranted upon an admission of professional misconduct regarding the filing of an attorney's lien against a client's homestead without a signed waiver of the homestead exemption and fabrication of the waiver.[FN19]

Although an attorney's falsification of court documents, in violation of the disciplinary rule prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation, ordinarily requires that the attorney receive a term of actual suspension for the public's protection, each case of professional misconduct must be decided on the unique facts and circumstances presented.[FN20]

CUMULATIVE SUPPLEMENT

Cases:

Attorney engaged in professional misconduct by improperly using subpoenas before the commencement of litigation; attorney purported to issue orders on behalf of a court, rather than simply making requests on behalf of his client, giving the party to whom the subpoenas were issued the false impression that he could be held in contempt of court if he failed to appear and produce the documents requested. In re Anonymous, 896 N.E.2d 916 (Ind. 2008).

Attorney, who forged his wife's signature on a power of attorney to obtain a loan, lied about the authenticity of the forged signature to the attorney who notarized it, and fabricated six letters, including two purporting to be job offers from actual companies, one purporting to be from the United States Postal Service assuring proper mail service, and three purporting to be from bank specifying bank's efforts to remedy credit "fraud" that in fact attorney had perpetrated through the forged power of attorney, violated disciplinary rules prohibiting illegal conduct involving moral turpitude and prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation. Cincinnati Bar Assn. v. Farrell, 119 Ohio St. 3d 529, 2008-Ohio-4540, 895 N.E.2d 800 (2008).

Attorney violated disciplinary rules prohibiting dishonest conduct and the creation or preservation of false evidence when, after realizing that the time for refiling client's withdrawn workers' compensation claim had passed, he superimposed a date stamp from an unrelated case onto a document from client's case to fabricate a

new, purportedly timely filed, document and filed that document with Bureau of Workers' Compensation. Disciplinary Counsel v. Niermeyer, 119 Ohio St. 3d 99, 2008-Ohio-3824, 892 N.E.2d 434 (2008).

Attorney's admitted submission of factually erroneous affidavit in domestic relations matter, on which affidavit she forged and notarized her client's signature, constituted conduct prejudicial to administration of justice and conduct adversely reflecting on fitness to practice law, in violation of applicable provisions of Code of Professional Responsibility. Akron Bar Assn. v. Finan, 118 Ohio St. 3d 106, 2008-Ohio-1807, 886 N.E.2d 229 (2008).

Attorney's admitted submission of factually erroneous affidavit in domestic relations matter, on which affidavit she forged and notarized her client's signature, warranted public reprimand, in light of mitigating evidence; attorney had no prior disciplinary record and was known to have good character and reputation, no evidence was presented of dishonest or selfish motive, attorney made timely, good faith effort to rectify consequences of her misconduct, and attorney was cooperative during disciplinary proceedings and disclosed information fully and freely. Akron Bar Assn. v. Finan, 118 Ohio St. 3d 106, 2008-Ohio-1807, 886 N.E.2d 229 (2008).

Attorney's conduct in committing a fraud on the court by representing that subpoenas had been destroyed, which were never in fact destroyed, violated rules requiring lawyers to maintain a respectful attitude toward the courts, prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation, prohibiting conduct prejudicial to the administration of justice, and prohibiting conduct that adversely reflects on a lawyer's fitness to practice law. Columbus Bar Assn. v. Vogel, 117 Ohio St. 3d 108, 2008-Ohio-504, 881 N.E.2d 1244 (2008).

When a lawyer notarizes a signature knowing that it is forged, and especially when the lawyer commits the forgery, an actual suspension is warranted. Disciplinary Counsel v. Roberts, 117 Ohio St. 3d 99, 2008-Ohio-505, 881 N.E.2d 1236 (2008).

Attorney's actions in knowingly dishonoring his notary jurat and signing his clients' names to various settlement-related documents without authority violated provisions of Code of Professional Responsibility prohibiting conduct involving fraud, deceit, dishonesty, or misrepresentation and conduct adversely reflecting on a lawyer's fitness to practice law. Disciplinary Counsel v. Roberts, 117 Ohio St. 3d 99, 2008-Ohio-505, 881 N.E.2d 1236 (2008).

Lack of diligence and failure to produce discovery and comply with discovery orders warranted public reprimand; although there were multiple violations, he caused harm to vulnerable individuals, and he had extensive experience in practice of law, he had never been subject of professional discipline, conduct was not result of dishonesty or selfishness but rather alcoholism, he self-reported alcoholism, conduct, and admitted violations, he suffered lengthy suspension without pay from his position as assistant district attorney, he successfully rehabilitated himself for several years, he sought intensive treatment at significant personal cost, and he had satisfactory job performance over previous several years. SCR 20:1.3, 20:3.2, 20:3.4(c, d). In re Disciplinary Proceedings Against Frisch, 2010 WI 60, 784 N.W.2d 670 (Wis. 2010).

[END OF SUPPLEMENT]

[FN1] Rule 3.3(a)(3), ABA Model Rules of Professional Conduct.

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[FN2] Rule 3.4(b), ABA Model Rules of Professional Conduct.

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[FN3] In re Storment, 873 S.W.2d 227 (Mo. 1994).

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[FN4] Attorney Grievance Com'n v. White, 354 Md. 346, 731 A.2d 447 (1999).

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[FN5] Matter of Disciplinary Proceedings Against Sieg, 183 Wis. 2d 704, 515 N.W.2d 694 (1994).

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[FN6] In re Admission to Bar of Com., 431 Mass. 678, 729 N.E.2d 1085 (2000); In re Disciplinary Action Against McDonald, 2000 ND 87, 609 N.W.2d 418 (N.D. 2000).
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[FN7] In re Disciplinary Action Against Graham, 503 N.W.2d 476 (Minn. 1993).
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[FN8] State ex rel. Nebraska State Bar Ass'n v. Reiner, 257 Neb. 550, 599 N.W.2d 199 (1999).
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[FN9] The Florida Bar v. Rood, 622 So. 2d 974 (Fla. 1993).
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[FN10] The Florida Bar v. Grief, 701 So. 2d 555 (Fla. 1997).
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[FN11] Attorney Grievance Com'n v. White, 354 Md. 346, 731 A.2d 447 (1999).
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[FN12] Disciplinary Counsel v. Jones, 66 Ohio St. 3d 369, 613 N.E.2d 178 (1993), reinstatement granted, 68 Ohio St. 3d 1213, 625 N.E.2d 617 (1994).
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[FN13] Disciplinary Counsel v. Beeler, 105 Ohio St. 3d 188, 2005-Ohio-1143, 824 N.E.2d 78 (2005), reinstatement granted, 107 Ohio St. 3d 1204, 2005-Ohio-6188, 837 N.E.2d 786 (2005).
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[FN14] Cincinnati Bar Assn. v. Marsick, 81 Ohio St. 3d 551, 1998-Ohio-337, 692 N.E.2d 991 (1998), reinstatement granted, 84 Ohio St. 3d 1215, 1998-Ohio-326, 702 N.E.2d 1209 (1998).
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[FN15] Sullins v. State Bar, 15 Cal. 3d 609, 125 Cal. Rptr. 471, 542 P.2d 631 (1975).
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[FN16] Iowa Supreme Court Bd. of Professional Ethics and Conduct v. Ackerman, 611 N.W.2d 473 (Iowa 2000).
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[FN17] Matter of Geisler, 614 N.E.2d 939 (Ind. 1993).
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[FN18] In re Eager, 708 N.E.2d 584 (Ind. 1999).
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[FN19] In re Disciplinary Action Against Peterson, 620 N.W.2d 29 (Minn. 2000), reinstatement granted, 660 N.W.2d 419 (Minn. 2003).
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[FN20] Toledo Bar Assn. v. Lowden, 105 Ohio St. 3d 377, 2005-Ohio-2162, 826 N.E.2d 836 (2005).
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§ 50. Disrespectful, abusive conduct

West's Key Number Digest

West's Key Number Digest, Attorney and Client 38

A.L.R. Library

Misconduct involving intoxication as ground for disciplinary action against attorney, 1 A.L.R.5th 874

Attorney's criticism of judicial acts as ground of disciplinary action, 12 A.L.R.3d 1408

Among the duties imposed upon attorneys is the duty to maintain the respect due to the courts of justice and to judicial officers.[FN1] It is the duty of every member of the bar to maintain the respect due to the courts and to abstain from all offensive personality.[FN2] While an attorney has a duty to represent his or her client zealously,[FN3] the attorney should not engage in any conduct that offends the dignity and decorum of the proceedings.[FN4] Even in a situation where the attorney represents himself or herself, he or she must follow the code of professional responsibility and show proper respect for the court[FN5] by being civil to opposing counsel and the court.[FN6]

An attorney may be disciplined for failure to comport himself or herself with courtesy and respect to courts of justice and judicial officers.[FN7] Thus, suspension or disbarment may result from an endeavor to coerce a judge in the decision of a cause by personal attack, threats, or other means of intimidation,[FN8] or from an indulgence in invective or innuendo that tends to degrade the court or to impair its respectability and usefulness.[FN9] Ethical considerations do not countenance the use of epithets and racial slurs.[FN10] In addition, uttering obscene statements toward the opposing party and counsel will warrant a public reprimand.[FN11]

It is not necessary that the threat, indignity, or insult to the judge occurs in open court or constitutes a statutory contempt of court.[FN12] Thus, an attorney's misconduct in verbally abusing, physically threatening and being disrespectful to a judge violates the professional rule prohibiting attorneys from engaging in conduct that is prejudicial to the administration of justice, even when the statements and misconduct occur in the judge's chambers, rather than a courtroom proceeding.[FN13]

CUMULATIVE SUPPLEMENT

Cases:

Attorney's conduct in failing to appear on behalf of a client before the Immigration Court and in engaging in three confrontational conversations with a court administrator in which attorney used offensive and disrespectful language violated the professional rules that prohibited a lawyer from engaging in undignified or discourteous conduct degrading to a tribunal or from engaging in conduct that was prejudicial to the administration of justice. Sup.Ct.Rules, Rule 226, Rules of Prof.Conduct, Rules 3.5(d), 8.4(d). In re Chavez, 251 P.3d 628 (Kan. 2011).

Conduct that is degrading and disrespectful to judges and fellow attorneys is neither zealous advocacy nor legitimate trial tactics. Columbus Bar Assn. v. Vogel, 117 Ohio St. 3d 108, 2008-Ohio-504, 881 N.E.2d 1244 (2008).

[END OF SUPPLEMENT]

[FN1] In re Comfort, 159 P.3d 1011 (Kan. 2007).
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[FN2] People v. Zurinaga, 148 Cal. App. 4th 1248, 56 Cal. Rptr. 3d 411 (2d Dist. 2007), review denied, (July 11, 2007).
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[FN3] Toledo Bar Assn. v. Batt, 78 Ohio St. 3d 189, 1997-Ohio-222, 677 N.E.2d 349 (1997).
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[FN4] Disciplinary Counsel v. Donnell, 79 Ohio St. 3d 501, 684 N.E.2d 36 (1997), reinstatement granted, 82 Ohio St. 3d 1220, 1998-Ohio-487, 695 N.E.2d 775 (1998).
- An attorney's conduct, as criminal defense attorney during a hearing and pretrial conference in two criminal matters, in making inappropriate, hostile, and slanderous comments about witnesses who might testify, in exhibiting erratic and aggressive behavior which required the trial judge to raise his voice to an unacceptable level and demand that the attorney immediately stop talking before trying to engage him in an inquiry about representation of the defendant in the courtroom, and, during the ensuing exchange with the trial judge, in showing contempt through facial expressions and by making inappropriate remarks to the judge, violated the professional responsibility rule barring undignified or discourteous conduct that degrades a tribunal. Disciplinary Counsel v. LoDico, 106 Ohio St. 3d 229, 2005-Ohio-4630, 833 N.E.2d 1235 (2005).
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[FN5] Disciplinary Counsel v. Donnell, 79 Ohio St. 3d 501, 684 N.E.2d 36 (1997), reinstatement granted, 82 Ohio St. 3d 1220, 1998-Ohio-487, 695 N.E.2d 775 (1998).
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[FN6] Toledo Bar Assn. v. Batt, 78 Ohio St. 3d 189, 1997-Ohio-222, 677 N.E.2d 349 (1997).
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[FN7] Ex parte Secombe, 60 U.S. 9, 19 How. 9, 15 L. Ed. 565, 1856 WL 8736 (1856).
- Rule 3.5(d), ABA Model Rules of Professional Conduct, prohibits a lawyer from engaging in conduct intended to disrupt a tribunal.
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[FN8] Bradley v. Fisher, 80 U.S. 335, 20 L. Ed. 646, 1871 WL 14737 (1871).
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[FN9] Disciplinary Counsel v. Grimes, 66 Ohio St. 3d 607, 1993-Ohio-125, 614 N.E.2d 740 (1993).
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[FN10] Disciplinary Counsel v. Jackson, 84 Ohio St. 3d 386, 1999-Ohio-485, 704 N.E.2d 246 (1999).
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[FN11] Disciplinary Counsel v. Jackson, 84 Ohio St. 3d 386, 1999-Ohio-485, 704 N.E.2d 246 (1999).
-

[FN12] Bradley v. Fisher, 80 U.S. 335, 20 L. Ed. 646, 1871 WL 14737 (1871).
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[FN13] Matter of Scimeca, 265 Kan. 742, 962 P.2d 1080 (1998), reinstatement granted, 277 Kan. 307, 84 P.3d 1046 (2004).
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§ 51. Criticism of judicial acts

West's Key Number Digest

West's Key Number Digest, Attorney and Client 38, 42

A.L.R. Library

Attorney's criticism of judicial acts as ground of disciplinary action, 12 A.L.R.3d 1408

A court may discipline, suspend, or disbar an attorney for comment on and criticism of the judicial acts of a court or its members when the statements are false or made in reckless disregard of the truth.[FN1] The constitutional right of free speech does not preclude disciplinary action against attorneys based on criticism or abuse of the courts or judges.[FN2] Thus, the First Amendment does not protect those who make harassing or threatening remarks about the judiciary.[FN3]

Discipline may be based on abusive letters written by the attorney.[FN4] In addition, falsely accusing a judge of not acting impartially violates the prohibition against knowingly making a false accusation against a judge.[FN5]

It has also been noted that while remarks made during the course of a trial may tend to obstruct the administration of justice, remarks made afterwards would not.[FN6]

A lawyer cannot insulate himself or herself from professional discipline by characterizing questionable statements about judges or other adjudicatory officers as opinions.[FN7]

CUMULATIVE SUPPLEMENT

Cases:

Attorney's conduct in falsely accusing a judge of conspiring with the prosecutor to force an innocent criminal defendant to plead guilty violated rules requiring lawyers to maintain a respectful attitude toward the courts, prohibiting conduct prejudicial to the administration of justice, prohibiting conduct that adversely reflects on a lawyer's fitness to practice law, prohibiting a lawyer from engaging in undignified or discourteous conduct that is degrading to a tribunal, and prohibiting a lawyer from knowingly making false accusations against a judge or other adjudicatory officer. Columbus Bar Assn. v. Vogel, 117 Ohio St. 3d 108, 2008-Ohio-504, 881 N.E.2d 1244 (2008).

[END OF SUPPLEMENT]

[FN1] Lebbos v. State Bar, 53 Cal. 3d 37, 278 Cal. Rptr. 845, 806 P.2d 317 (1991).
- Rule 8.2(a), ABA Model Rules of Professional Conduct, provides that a lawyer must not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.
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[FN2] In re Sawyer, 360 U.S. 622, 79 S. Ct. 1376, 3 L. Ed. 2d 1473 (1959).
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[FN3] The Florida Bar v. Sayler, 721 So. 2d 1152 (Fla. 1998).
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[FN4] In re Estiverne, 741 So. 2d 649 (La. 1999).
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[FN5] Akron Bar Assn. v. Holder, 105 Ohio St. 3d 443, 2005-Ohio-2695, 828 N.E.2d 621 (2005).
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[FN6] In re Sawyer, 360 U.S. 622, 79 S. Ct. 1376, 3 L. Ed. 2d 1473 (1959).
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[FN7] In re Pyle, 283 Kan. 807, 156 P.3d 1231 (2007), reinstatement granted, 2007 WL 2141809 (Kan. 2007).
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§ 52. Contempt

West's Key Number Digest

West's Key Number Digest, Attorney and Client 43

Forms

Am. Jur. Pleading and Practice Forms, Contempt § 11 (Affidavit of contempt—For practicing law while suspended from right to do so)

Am. Jur. Pleading and Practice Forms, Contempt § 12 (Affidavit—Nonpayment of state bar dues—In support of affidavit of contempt for practice of law while suspended from state bar)

Practicing law without being properly authorized to do so or holding oneself out as an attorney at law during a period in which one's right to practice as an attorney has been suspended,[FN1] or if an attorney subject to a disciplinary order imposing restrictions or conditions relating to the discipline at issue violates the same, he or she stands in contempt of the court.[FN2]

Where the punishment for contempt is limited to a fine or imprisonment, an attorney may not be disbarred as a punishment for contempt of court.[FN3] However, there are instances where aggravated and base contempts may be punished by disbarment or suspension.[FN4]

A court has no power to disbar for a contempt committed before another court.[FN5]

CUMULATIVE SUPPLEMENT

Cases:

Disbarment was appropriate disciplinary sanction for attorney's misconduct, which included representing defendants in criminal cases after having been ordered by Court of Appeals to cease practicing law, missing one scheduled court appearance during such period of representation and being significantly late for two others, ignoring three letters from Bar Counsel's Office requesting explanations of his conduct, and undertaking representation of a defendant with whom he had been arrested for possession of cocaine and marijuana on the charges arising out of the arrest. Attorney Grievance Com'n of Maryland v. Walker, 405 Md. 3, 948 A.2d 1263 (2008).

Attorney who refused to appropriately question witnesses in criminal matter, failed to interact with opposing counsel professionally, and failed to obey court rulings, resulting in finding of contempt, violated disciplinary rules providing that a lawyer shall not engage in conduct prejudicial to the administration of justice, a lawyer shall not engage in conduct that adversely reflects on the lawyer's fitness to practice law, a lawyer shall not ask any question that is intended to degrade a witness, and a lawyer shall not assert his personal opinion as to the credibility of a witness. Akron Bar Assn. v. Markovich, 117 Ohio St. 3d 313, 2008-Ohio-862, 883 N.E.2d 1046 (2008).

[END OF SUPPLEMENT]

[FN1] Matter of Anderson, 180 A.D.2d 146, 585 N.Y.S.2d 19 (1st Dep't 1992).
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[FN2] The Florida Bar v. Ross, 732 So. 2d 1037 (Fla. 1998).
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[FN3] Ex parte Robinson, 86 U.S. 513, 22 L. Ed. 205, 1873 WL 16068 (1873).
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[FN4] Sacher v. Association of the Bar of City of N.Y., 347 U.S. 388, 74 S. Ct. 569, 98 L. Ed. 790 (1954).
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[FN5] Ex parte Bradley, 74 U.S. 364, 19 L. Ed. 214, 1868 WL 11137 (1868).
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7 Am. Jur. 2d Attorneys at Law § 53

Topic Summary Correlation Table References

§ 53. Failure to cooperate with disciplinary body

West's Key Number Digest

West's Key Number Digest, Attorney and Client 38, 42

The requirement to cooperate in disciplinary investigations is rooted in the self-governing nature of the legal profession; as a corollary, each lawyer has a duty to participate in the regulation of the profession, even when the lawyer himself or herself is the subject of the investigation.[FN1] The court expects and demands that attorneys cooperate with disciplinary investigations, and a failure to do so is an independent act of professional misconduct.[FN2] Thus, even when a disciplinary complaint is not well-founded, an attorney is not excused from providing necessary information to the attorney disciplinary board.[FN3] In addition, an attorney may be disciplined for failing to cooperate in a disciplinary investigation,[FN4] even if the attorney is not found guilty of any of the original offenses with which he or she was charged.[FN5]

An attorney's complete failure to cooperate with a disciplinary investigation is considered a serious ethical violation.[FN6] The failure to respond to charges may be deemed an admission of the charges.[FN7]

An attorney is required to cooperate with a disciplinary investigation even when the subject of the investigation is himself or herself.[FN8]

Ill health is no excuse for an attorney's failure to cooperate with disciplinary proceedings.[FN9] In addition, an attorney's ignorance of the disciplinary process is no excuse for a failure to cooperate with disciplinary proceedings.[FN10]

CUMULATIVE SUPPLEMENT

Cases:

Attorney's failure to provide a written response to initial complaint as requested by the Disciplinary Administrator and the attorney investigator violated duty to cooperate in disciplinary investigation. In re Lee, 287 Kan. 676, 198 P.3d 140 (2008).

Attorney's refusal to cooperate with Office of Disciplinary Counsel's (ODC) investigation into her alleged unauthorized practice of law in representing a client in a divorce case at a time when she remained on voluntary inactive status violated professional rules requiring lawyers to respond to lawful demands for information from a disciplinary authority and to cooperate with the ODC in its investigations. In re Johnson, 9 So. 3d 835 (La. 2009).

Attorney's four-month delay in acknowledging Bar Counsel's repeated requests for information constituted a violation of rule of professional conduct prohibiting a lawyer from knowingly failing to respond to a lawful demand for information from a disciplinary authority. Attorney Grievance Com'n of Maryland v. Queen, 407 Md. 556, 967 A.2d 198 (2009).

Bar Counsel's letters to attorney requesting a written response to an overdraft in his trust account and information regarding a second matter were "lawful demands for information" within the meaning of rule of professional conduct prohibiting an attorney's knowing failure to respond to a lawful demand for information from a disciplinary authority. Attorney Grievance Com'n v. Taylor, 405 Md. 697, 955 A.2d 755 (2008).

Attorney who told investigator for bar association that he had never received notices of pretrial or trial dates in subrogation action by another driver's automobile insurer against attorney's client, when in fact attorney had received written notices of those dates from the court, violated Government of the Bar rule requiring cooperation in a disciplinary investigation, professional conduct rule that prohibited knowingly making false statement of material fact in connection with a disciplinary matter, and professional conduct rule prohibiting conduct adversely reflecting on fitness to practice law. Rules of Prof.Conduct, Rules 8.1(a), 8.4 (h); Government of the Bar Rule V(4)(G). Cleveland Metro. Bar Assn. v. Kealy, 2010-Ohio-1554, 927 N.E.2d 591 (Ohio 2010).

Attorney's conduct, in giving conflicting testimony during disciplinary proceedings, violated rules prohibiting knowingly making a false statement of material fact in connection with a disciplinary matter and requiring attorney to cooperate with a disciplinary investigation; attorney gave conflicting testimony as to whether he had gone to airport to speak to federal agents on client's behalf, and, concerning a separate matter, gave conflicting testimony as to whether he had signed client's name to a settlement check and as to whether he had received any of the proceeds from the settlement. Rules of Prof.Conduct, Rule 8.1(a); Government of the Bar Rule V(4)(G). Disciplinary Counsel v. Jackson, 127 Ohio St. 3d 250, 2010-Ohio-5709, 938 N.E.2d 1021 (2010).

Attorney's conduct in ignoring investigative inquiries by Board of Commissioners on Grievances and Discipline and failing to file an answer to Board's complaint, violated bar rule and rule of professional conduct requiring a lawyer to cooperate in a disciplinary investigation. Stark Cty. Bar Assn. v. Marosan, 119 Ohio St. 3d 113, 2008-Ohio-3882, 892 N.E.2d 447 (2008).

Attorney's failure to respond to inquiries upon filing of grievances with state bar or to answer disciplinary complaint violated rule for government of the state bar requiring lawyers' cooperation in disciplinary investigations. Cuyahoga Cty. Bar Assn. v. Wagner, 117 Ohio St. 3d 456, 2008-Ohio-1200, 884 N.E.2d 1053 (2008).

Attorney did not make "full and complete response" to inquiries of Bar Association Disciplinary Board, in violation of Rule of Enforcement of Legal Conduct, when he wrote letter to Board to which he later admitted that he "fudged things" and provided information that was "different than, you know, the facts" relating to handling of his lawyer's trust account. In re Disciplinary Proceeding Against Hicks, 166 Wash. 2d 774, 214 P.3d 897 (2009).

[END OF SUPPLEMENT]

[FN1] Cleveland Bar Assn. v. Witt, 85 Ohio St. 3d 9, 1999-Ohio-198, 706 N.E.2d 763 (1999).

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[FN2] Iowa Supreme Court Attorney Disciplinary Bd. v. Rickabaugh, 728 N.W.2d 375 (Iowa 2007).

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[FN3] Iowa Supreme Court Attorney Disciplinary Bd. v. Tompkins, 733 N.W.2d 661 (Iowa 2007).

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[FN4] Disciplinary Counsel v. White, 106 Ohio St. 3d 108, 2005-Ohio-3957, 832 N.E.2d 51 (2005); Cuyahoga Cty. Bar Assn. v. King, 106 Ohio St. 3d 102, 2005-Ohio-3955, 832 N.E.2d 45 (2005).

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[FN5] The Florida Bar v. Vaughn, 608 So. 2d 18 (Fla. 1992).

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[FN6] In re Conduct of Crist, 327 Or. 609, 965 P.2d 1023 (1998).
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[FN7] Matter of Calderone, 189 A.D.2d 1, 595 N.Y.S.2d 66 (2d Dep't 1993).
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[FN8] Cuyahoga Cty. Bar Assn. v. Rubino, 87 Ohio St. 3d 466, 2000-Ohio-480, 721 N.E.2d 986 (2000).
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[FN9] Cuyahoga Cty. Bar Assn. v. Curry, 79 Ohio St. 3d 181, 1997-Ohio-166, 680 N.E.2d 966 (1997).
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[FN10] Cuyahoga Cty. Bar Assn. v. Curry, 79 Ohio St. 3d 181, 1997-Ohio-166, 680 N.E.2d 966 (1997).
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7 Am. Jur. 2d Attorneys at Law § 54

American Jurisprudence, Second Edition
Database updated August 2011

Attorneys at Law
Rachel M. Kane, M.A., J.D.

II. Judicial Supervision of Legal Profession
B. Disciplinary Proceedings
4. Grounds for Discipline
b. Misconduct as an Attorney
(3) In Relation to Clients
(a) In General

Topic Summary Correlation Table References

§ 54. Failure to act honestly and in good faith

West's Key Number Digest

West's Key Number Digest, Attorney and Client 44(1)

A.L.R. Library

Attorneys at law: disciplinary proceedings for drafting instrument such as will or trust under which attorney-drafter or member of attorney's family or law firm is beneficiary, grantee, legatee, or devisee, 80 A.L.R.5th 597

Soliciting client to commit illegal or immoral act as ground for discipline of attorney, 85 A.L.R.4th 567

Attorney's conduct in connection with malpractice claim against himself as meriting disciplinary action, 14 A.L.R.4th 209

Conduct of attorney in capacity of executor or administrator of decedent's estate as ground for disciplinary action, 92 A.L.R.3d 655

Conduct of attorney in connection with settlement of client's case as ground for disciplinary action, 92 A.L.R.3d 288

The burden is on the lawyer to ensure that all attorney-client dealings remain on a professional level.[FN1] It is unprofessional for an attorney to act toward a client otherwise than with the utmost good faith; therefore, any advice given by an attorney which the attorney does not believe to be correct, and any action taken by the attorney with a view of affecting his or her client injuriously, or of obtaining some advantage for himself or herself,[FN2] to the prejudice of the client, justifies disciplinary action.[FN3] Lawyering involves a public trust and requires an unswerving allegiance to honesty and integrity; accordingly, it is the responsibility of every attorney at all times to be truthful.[FN4]

An attorney is guilty of misconduct if he or she—

— accepts and retains a fee for legal services without performing such services.[FN5]

— fails to carry professional liability insurance and to inform his or her clients that he or she lacked insurance and obtain their signature acknowledging having received notice.[FN6]

— makes intentional omissions and misrepresentations in connection with the transfer of property received by his or her client in divorce proceedings.[FN7]

— misrepresents to a client that his or her case has settled.[FN8]

— enters into a contingent fee contract in a criminal case.[FN9]

Drawing a will under which the attorney figures as legatee or devisee may subject the attorney to disciplinary action.[FN10]

Unauthorized settlement of a client's cause is a breach of an attorney's ethical duty which will subject the attorney to disciplinary action.[FN11]

CUMULATIVE SUPPLEMENT

Cases:

Disbarment was appropriate disciplinary sanction for attorney's misconduct, which included failing to take action in cases, failing to keep clients informed about status of their cases, failing to respond to clients' requests for information, accepting a settlement without client's approval, giving clients erroneous legal advice, failing to appear at hearings in clients' cases, missing deadlines in clients' cases, failing to properly handle, use, account for, and/or refund money paid to her by clients, charging unreasonable fees to clients, failing to reduce contingent fee agreements to writing, misrepresenting the extent of her professional experience to clients, and making false statements to Disciplinary Commission during its investigations. In re Powell, 893 N.E.2d 729 (Ind. 2008).

Suspension of 61 days was warranted for attorney whose misconduct, in failing to file a lawsuit on client's behalf after being hired to do so, failing to respond to client's phone calls or provide client with any information regarding his failure to file the lawsuit, failing to refund client's money, and subsequently failing to file a timely answer to disciplinary charges against him, violated rules of professional conduct requiring an attorney to act with reasonable diligence and promptness, refund unearned fees, and respond to a lawful information request from a disciplinary authority. Kentucky Bar Ass'n v. Leadingham, 281 S.W.3d 284 (Ky. 2009).

Suspension for 180 days was appropriate disciplinary sanction, for conduct of attorney in failing to provide diligent representation to clients, failing to keep clients reasonably informed and promptly comply with clients' reasonable requests for information, and failing to take reasonably practicable steps to protect clients' interests upon termination of representation, where attorney was still under a 120-day suspension in an earlier disciplinary proceeding, apparently because attorney had failed to file an affidavit of compliance after expiration of 120-day suspension period. Lampe v. Kentucky Bar Ass'n, 253 S.W.3d 64 (Ky. 2008).

Disbarment was appropriate sanction for attorney's misconduct related to his plea of guilty to charges of conspiracy to commit wire fraud and his misconduct related to several client cases, including violations of disciplinary rules concerning dishonesty, fraud, deceit or misrepresentation, failure to communicate with client, failure to provide funds to client, failure to notify the Bar Association of change of address, and failure to protect client's interest upon termination. Sexton v. Kentucky Bar Ass'n, 253 S.W.3d 54 (Ky. 2008).

Suspension for 181 days was appropriate disciplinary sanction for attorney's conduct in failing to act with reasonable diligence and promptness in representing clients, failing to keep clients reasonably informed and promptly comply with clients' reasonable requests for information, failing to withdraw from representation when attorney's physical or mental condition materially impaired his ability to represent clients, failing to expedite litigation, and knowingly or intentionally disobeying an obligation under the rules of a tribunal. McClure v. Kentucky Bar Ass'n, 253 S.W.3d 51 (Ky. 2008).

Sixty days suspension of license to practice law, with thirty days to be served and thirty days probated for one year, subject to certain conditions was appropriate sanction for attorney who failed to advise his client, a bank, of the need for a title search on piece of property, failed to advise other client of liability for real estate company's commission upon sale of his home, traded houses with other client and then represented him in a lawsuit, provided loans to other client and engaged in business ventures with him, failed to transfer title to certain properties, and failed to account for funds and property of other client following his entry into business dealings with him. Schott v. Kentucky Bar Ass'n, 253 S.W.3d 48 (Ky. 2008).

Attorney's conduct, informing client in personal injury matter that he had filed legal documents when he had not, failing to timely file petition for damages, failing to return client's telephone calls, failing to meet with client at scheduled times, converting client's settlement check for his own use, and failing to respond to disciplinary complaint filed as a result of misconduct, violated rules of professional conduct including those prohibiting failure to provide competent representation to a client, failure to timely return an unearned fee, failure to hold client's property separate, failure to make reasonable efforts to expedite litigation, knowing disobedience of an obligation under the rules of a tribunal, knowingly making a false statement of material fact in connection with a disciplinary matter, and knowing failure to respond to a lawful demand for information from a disciplinary authority. In re Engolio, 7 So. 3d 1162 (La. 2009).

Disbarment was warranted based on attorney's lack of competence, lack of diligence, lack of truthfulness and honesty in dealing with her clients, her failure to communicate with her clients, her misrepresentations to her clients, and her charging of unreasonable fees, considering her extensive prior disciplinary record. Attorney Grievance Com'n of Maryland v. Kreamer, 404 Md. 282, 946 A.2d 500 (2008).

Disbarment ordinarily should be the sanction for intentionally dishonest conduct. Attorney Grievance Com'n of Maryland v. Parsons, 404 Md. 175, 946 A.2d 437 (2008).

Attorney's dishonest conduct, which included making knowingly false statements, amounting to perjury, as to his bar status, and misleading and defrauding investors, warranted disbarment. Attorney Grievance Com'n of Maryland v. Parsons, 404 Md. 175, 946 A.2d 437 (2008).

Permanent disbarment was warranted for attorney whose misconduct, including misappropriating over $172,000 from client's trust, resulting in third-degree theft conviction, and neglecting defense of a mechanic's lien foreclosure action, violated rules of professional responsibility, including those prohibiting illegal conduct involving moral turpitude, and prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation;

attorney misappropriated money that client had intended to serve charitable purposes, in order to maintain the illusion that he had a successful legal practice, thefts began less than a week after securing signatory authority on the trust and continued for almost two years, and attorney's neglect of mechanic's lien case resulted in default judgment and dismissal of client's counterclaim. Cleveland Metro. Bar Assn. v. Parrish, 121 Ohio St. 3d 610, 2009-Ohio-1969, 906 N.E.2d 1113 (2009).

Public reprimand was warranted for attorney who failed to properly dispose of confidential client files and other materials, in violation of rules prohibiting a lawyer from revealing information relating to the representation of a client and prohibiting a lawyer who has formerly represented a client from revealing information relating to that representation. Disciplinary Counsel v. Shaver, 121 Ohio St. 3d 393, 2009-Ohio-1385, 904 N.E.2d 883 (2009).

Attorney's misconduct, in assisting company claiming to offer legitimate assistance to debtors facing foreclosure and failing to disclose to debtors that he did not have malpractice insurance, violated rules of professional responsibility requiring a lawyer to disclose to a client his or her lack of malpractice insurance coverage and prohibiting a lawyer from aiding a nonlawyer in the unauthorized practice of law; attorney assisted company, whose employees were all unlicensed laypersons, by acting as attorney of record in debtors' foreclosure action, without providing any verbal or written communications to debtors concerning the status of their case or his limited involvement therein. Mahoning Cty. Bar Assn. v. Palombaro, 121 Ohio St. 3d 351, 2009-Ohio-1223, 904 N.E.2d 529 (2009).

A lawyer's repeated or continuous attempts to mislead warrants an actual suspension from the practice of law. Cincinnati Bar Assn. v. Farrell, 119 Ohio St. 3d 529, 2008-Ohio-4540, 895 N.E.2d 800 (2008).

When a lawyer plans and administers a multistep process to defraud those entitled to rely on the validity of forged documents, the violation of disciplinary rule prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation warrants an actual suspension from the practice of law. Cincinnati Bar Assn. v. Farrell, 119 Ohio St. 3d 529, 2008-Ohio-4540, 895 N.E.2d 800 (2008).

Attorney's misrepresentations to client about work he was purportedly performing on client's behalf in matter involving possible forged will, of which client would have been a beneficiary, including informing client that pretrial and trial had been scheduled, when in fact they had not, violated provisions of code of professional responsibility prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, and from neglecting an entrusted legal matter. Toledo Bar Assn. v. Hickman, 119 Ohio St. 3d 102, 2008-Ohio-3837, 892 N.E.2d 437 (2008).

Attorney's misconduct, in accepting in his law firm's name a computer and electronic equipment on an account for representation of client, and then keeping the equipment even though his law firm would not accept them as payment for services and ordered him to return them, accepting an additional $2,500 from client after being fired from law firm, indicating during investigation of grievance that all but one half-hour of the fees was for work performed while he was still employed by firm, and failing to return to the firm any portion of the fees earned from client while attorney was employed at firm, violated rules of professional responsibility prohibiting attorney from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, engaging in conduct prejudicial to the administration of justice, engaging in conduct adversely reflecting on the lawyer's fitness to practice law, and bar rule requiring a lawyer to cooperate in an investigation. Disciplinary Counsel v. Zigan, 118 Ohio St. 3d 180, 2008-Ohio-1976, 887 N.E.2d 334 (2008).

Attorney who made misrepresentations to clients, including misrepresentations regarding nature of attorney's contract with out-of-state law firm, under which attorney would market and sell living trusts and other estate-planning services in Ohio and law firm would be attorney's sole agent for marketing, sales and preparing estate-planning packages, violated rule prohibiting lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; attorney never told clients about such contract or that he would be paying firm a portion of the fee that he charged them, nor did he inform clients that contract required him to use firm for trust-funding advice and document preparation or that clients could simply transfer their own assets into trust rather than rely on financial advice from firm. Columbus Bar Assn. v. Willette, 117 Ohio St. 3d 433, 2008-Ohio-1198, 884 N.E.2d 581 (2008), reinstatement granted, 2008-Ohio-5448, 2008 WL 4601668 (Ohio 2008).

Attorney's letter to clients offering partial refund of their fee "in exchange for a full release and with the understanding that you are responsible for the remaining funding of the trust and any changes that may be needed in the future," after clients demanded full refund in connection with attorney's recommendation and

preparation of living trust for clients, violated rule barring a lawyer from attempting to exonerate himself from or limit his liability to a client for personal malpractice. Columbus Bar Assn. v. Willette, 117 Ohio St. 3d 433, 2008-Ohio-1198, 884 N.E.2d 581 (2008), reinstatement granted, 119 Ohio St. 3d 1232, 2008-Ohio-5448, 895 N.E.2d 559 (2008).

Attorney's sharing of clients' financial information, including their Social Security numbers, with out-of-state law firm, with which attorney had contract whereby attorney would market and sell living trusts and other estate-planning services in Ohio and law firm would be attorney's sole agent for marketing, sales, and preparing estate-planning packages, without clients' knowledge or express consent violated rule barring a lawyer from knowingly revealing the confidences and secrets of a client. Columbus Bar Assn. v. Willette, 117 Ohio St. 3d 433, 2008-Ohio-1198, 884 N.E.2d 581 (2008), reinstatement granted, 119 Ohio St. 3d 1232, 2008-Ohio-5448, 895 N.E.2d 559 (2008).

Attorney's misconduct, including making of misrepresentations to clients about attorney's contract with out-of-state law firm, under which attorney would market and sell trusts and other estate-planning services in Ohio and law firm would be attorney's sole agent for marketing, sales, and preparing estate-planning packages, along with firm's use of advertisements containing misleading, false, and unverifiable statements, attorney's soliciting of legal business by telephone, attorney's sharing of clients' financial and other private information, and attorney's conduct that adversely reflected on his fitness to practice law, warranted one-year suspension, with six months stayed. Columbus Bar Assn. v. Willette, 117 Ohio St. 3d 433, 2008-Ohio-1198, 884 N.E.2d 581 (2008), reinstatement granted, 119 Ohio St. 3d 1232, 2008-Ohio-5448, 895 N.E.2d 559 (2008).

Conduct of attorney in becoming intimately involved with client after agreeing to represent her in divorce proceeding, then acting dishonestly in concealing the relationship, violated professional rules prohibiting lawyers from engaging in conduct that is prejudicial to the administration of justice, engaging in conduct that adversely reflects on the lawyer's fitness to practice law, and engaging in conduct involving fraud, deceit, dishonesty, or misrepresentation. Butler Cty. Bar Assn. v. Williamson, 117 Ohio St. 3d 399, 2008-Ohio-1196, 884 N.E.2d 55 (2008).

Conduct of attorney in becoming intimately involved with client after agreeing to represent her in divorce proceedings, coupled with his behavior in concealing the relationship and failing to cooperate in investigation into the alleged misconduct, warranted indefinite suspension from practice of law. Butler Cty. Bar Assn. v. Williamson, 117 Ohio St. 3d 399, 2008-Ohio-1196, 884 N.E.2d 55 (2008).

Attorney's failure to respond to subpoena or cooperate in disciplinary proceeding concerning allegation that he became intimately involved with client after agreeing to represent client in divorce proceeding violated professional rule requiring a lawyer to cooperate in an investigation of misconduct. Butler Cty. Bar Assn. v. Williamson, 117 Ohio St. 3d 399, 2008-Ohio-1196, 884 N.E.2d 55 (2008).

In preparing entry for a voluntary dismissal of complaint without prejudice while representing a plaintiff in federal court, attorney's conduct in wrongly representing that allegations had been dismissed with prejudice previously, and in failing to specify that the voluntary dismissal was at plaintiff's cost violated disciplinary rules providing that a lawyer shall not engage in conduct involving misrepresentation, a lawyer shall not engage in conduct prejudicial to the administration of justice, a lawyer shall not engage in conduct that adversely reflects on the lawyer's fitness to practice law. Akron Bar Assn. v. Markovich, 117 Ohio St. 3d 313, 2008-Ohio-862, 883 N.E.2d 1046 (2008).

Attorney's conduct in going to a residence with his client, in violation of civil protection order (CPO) that forbade client from initiating contact with certain persons, their residences, "or babysitters," and forbade contact through any means, including "through another person," violated disciplinary rules providing that a lawyer shall not engage in conduct prejudicial to the administration of justice, and a lawyer shall not engage in conduct that adversely reflects on the lawyer's fitness to practice law; attorney approached front door of residence to confront a babysitter inside, intending to intimidate the babysitter to gain an advantage for his client. Akron Bar Assn. v. Markovich, 117 Ohio St. 3d 313, 2008-Ohio-862, 883 N.E.2d 1046 (2008).

Attorney violated disciplinary rule prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation by titling his client trust account "Legal Aid Trust Account—State of Ohio"; attorney had no affiliation with Legal Aid or any other government-subsidized legal-services organization, and offered no corroborating evidence that would support his claim that he had been instructed by a bank employee

to title the trust account in this manner. Disciplinary Counsel v. Heiland, 116 Ohio St. 3d 521, 2008-Ohio-91, 880 N.E.2d 467 (2008).

Attorney who participated in a scheme to defraud nursing homes that provided for the care of his in-laws, misused his client trust account over a three-year period, overdrew the account on several occasions, commingled personal and client funds, failed to maintain adequate records, offered evasive testimony during the disciplinary hearing, and failed to cooperate fully in the disciplinary process, violated disciplinary rules prohibiting conduct involving moral turpitude, conduct involving dishonesty, fraud, deceit, or misrepresentation, conduct that is prejudicial to the administration of justice, and conduct that adversely reflects on a lawyer's fitness to practice law, disciplinary rule requiring a lawyer to maintain complete records of all properties of a client, and bar rule requiring cooperation in a disciplinary investigation. Disciplinary Counsel v. Heiland, 116 Ohio St. 3d 521, 2008-Ohio-91, 880 N.E.2d 467 (2008).

Attorney's conduct in neglecting criminal case by failing to appear at pretrial conference and failing to contact client ever again, after the conference, constituted a violation of the Disciplinary rules. Cleveland Bar Assn. v. Kraus, 116 Ohio St. 3d 302, 2007-Ohio-6458, 878 N.E.2d 1028 (2007).

Attorney's neglect of criminal case, when he failed to file notice of appearance or to appear at arraignment, resulting in arrest warrant issued against client, constituted a violation of the Disciplinary Rules. Cleveland Bar Assn. v. Kraus, 116 Ohio St. 3d 302, 2007-Ohio-6458, 878 N.E.2d 1028 (2007).

Attorney's misconduct, failing to pay money owed to former client, failing to respond to Office of Disciplinary Counsel (ODC), failing to file divorce action on client's behalf, failing to keep client reasonably informed, failing to return client's phone calls, and failing to make reasonable efforts to expedite client's case, violated rules of professional conduct requiring lawyer to act with reasonable diligence and promptness in representing a client, promptly respond to clients reasonable requests for information, make reasonable efforts to expedite litigation consistent with client's interests, not knowingly fail to respond to lawful demand for information from disciplinary authority, not violate rules of professional conduct, not engage in conduct that is prejudicial to the administration of justice. In re Sims, 380 S.C. 61, 668 S.E.2d 408 (2008).

Attorney did not have proper authorization to settle client's personal injury case, as would support finding of misconduct in disciplinary action; attorney's reliance on his retainer agreement to support his decision to settle the case was misplaced since terms of retainer agreement only authorized attorney to receive settlement check and endorse client's name if client agreed to proposed settlement, and client adamantly denied authorizing attorney to settle her case. In re White, 378 S.C. 333, 663 S.E.2d 21 (2008), reinstatement granted, 380 S.C. 200, 669 S.E.2d 588 (2008).

Evidence supported hearing panel's finding in attorney disciplinary proceeding that attorney did not have proper authorization to settle his client's personal injury case; terms of the retainer agreement only authorized attorney to receive a settlement check and endorse client's name if client agreed to the proposed settlement, and client adamantly denied authorizing attorney to settle her case. In re White, 378 S.C. 76, 661 S.E.2d 376 (2008), opinion withdrawn and superseded on denial of reh'g, 378 S.C. 333, 663 S.E.2d 21 (2008), reinstatement granted, 669 S.E.2d 588 (S.C. 2008) and withdrawn from bound volume.

Attorney's failure to promptly return entire amount of client's personal injury settlement proceeds to insurance carrier after being advised by client's new counsel to do so, thereby preventing new counsel from expeditiously pursuing client's personal injury claim with carrier, violated rules of professional conduct prohibiting lawyer from engaging in conduct that was prejudicial to the administration of justice. In re White, 378 S.C. 76, 661 S.E.2d 376 (2008), opinion withdrawn and superseded on denial of reh'g, 378 S.C. 333, 663 S.E.2d 21 (2008), reinstatement granted, 669 S.E.2d 588 (S.C. 2008) and withdrawn from bound volume.

Evidence supported hearing panel's finding in attorney disciplinary proceeding that attorney violated insurance carrier's instructions to hold client's personal injury settlement check in escrow until release was signed by client and her husband; attorney admitted that he endorsed the settlement check, deposited it into his trust account, and transferred his legal fees to his operating account. In re White, 378 S.C. 76, 661 S.E.2d 376 (2008), opinion withdrawn and superseded on denial of reh'g, 378 S.C. 333, 663 S.E.2d 21 (2008), reinstatement granted, 669 S.E.2d 588 (S.C. 2008) and withdrawn from bound volume.

Attorney's conduct of signing his client's husband's name to client's personal injury settlement check without husband's consent and without an agreement to represent him violated rule of professional conduct that prohibited a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. In re White,

378 S.C. 76, 661 S.E.2d 376 (2008), opinion withdrawn and superseded on denial of reh'g, 378 S.C. 333, 663 S.E.2d 21 (2008), reinstatement granted, 669 S.E.2d 588 (S.C. 2008) and withdrawn from bound volume.

Attorney's conduct that resulted in convictions for mail fraud, wire fraud, and conspiracy to commit money laundering violated Rules of Professional Conduct prohibiting lawyer from committing criminal act that reflected adversely on lawyer's honesty, trustworthiness or fitness as lawyer, from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, from engaging in conduct prejudicial to administration of justice, and from violating Rules. In re Sexton, 377 S.C. 402, 661 S.E.2d 60 (2008).

Attorney violated Rule of Professional Conduct (RPC) prohibiting her to make a statement she knew to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, by asserting as a part of postconviction motion unsupportable allegations challenging the judge's integrity without properly investigating their truth or falsity, including allegations of a relationship between the judge and the defendant's former wife as cause for bias. In re Disciplinary Proceedings Against Joan M. Boyd, 2009 WI 59, 318 Wis. 2d 281, 767 N.W.2d 226 (2009).

Attorney violated Rule of Professional Conduct (RPC) requiring competent representation of a client, by filing a postconviction motion alleging a presumed acquaintance between her client's former wife and the trial judge, without investigating whether such a relationship existed or whether there was a basis for claiming bias, and by filing a motion for an extension of time to take a postconviction relief appeal that was not allowed under existing law. In re Disciplinary Proceedings Against Joan M. Boyd, 2009 WI 59, 318 Wis. 2d 281, 767 N.W.2d 226 (2009).

[END OF SUPPLEMENT]

[FN1] Cleveland Bar Assn. v. Feneli, 86 Ohio St. 3d 102, 1999-Ohio-140, 712 N.E.2d 119 (1999), reinstatement granted, 90 Ohio St. 3d 1208, 2000-Ohio-41, 735 N.E.2d 894 (2000).

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[FN2] The Florida Bar v. Micks, 628 So. 2d 1104 (Fla. 1993).

- An attorney's ethical obligation of honesty is not bounded by contractual duties. The Florida Bar v. Brown, 905 So. 2d 76 (Fla. 2005).

- In order to sustain a violation of the bar rule prohibiting attorneys from engaging in dishonesty, fraud, deceit, or misrepresentation, the bar must prove intent. The Florida Bar v. Brown, 905 So. 2d 76 (Fla. 2005).

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[FN3] The Florida Bar v. Van Stillman, 606 So. 2d 360 (Fla. 1992).

- Dishonest conduct on the part of an attorney generally warrants an actual suspension from the practice of law. Disciplinary Counsel v. Rooney, 110 Ohio St. 3d 349, 2006-Ohio-4576, 853 N.E.2d 663 (2006).

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[FN4] In re Bosse's Case, 920 A.2d 1203 (N.H. 2007).

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[FN5] Disciplinary Counsel v. White, 106 Ohio St. 3d 108, 2005-Ohio-3957, 832 N.E.2d 51 (2005).

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[FN6] Cuyahoga Cty. Bar Assn. v. Jurczenko, 106 Ohio St. 3d 123, 2005-Ohio-4101, 832 N.E.2d 720 (2005).

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[FN7] In re Jones, 344 S.C. 379, 544 S.E.2d 826 (2001).

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[FN8] Matter of Cholakis, 179 A.D.2d 862, 578 N.Y.S.2d 671 (3d Dep't 1992).

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[FN9] Rule 1.5(d)(2), ABA Model Rules of Professional Conduct.

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[FN10] The Florida Bar v. Weidenbenner, 630 So. 2d 534 (Fla. 1993).
- As to the propriety and validity of gifts or bequests to an attorney, see §§ 143 to 146.
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[FN11] Matter of Nugent, 624 A.2d 291 (R.I. 1993).
- As to the effect of an attorney's unauthorized settlement, see § 169.
-

AMJUR ATTNYS § 54

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7 Am. Jur. 2d Attorneys at Law § 55

American Jurisprudence, Second Edition
Database updated August 2011

Attorneys at Law
Rachel M. Kane, M.A., J.D.

II. Judicial Supervision of Legal Profession
B. Disciplinary Proceedings
4. Grounds for Discipline
b. Misconduct as an Attorney
(3) In Relation to Clients
(a) In General

Topic Summary Correlation Table References

§ 55. Representing conflicting interests

West's Key Number Digest

West's Key Number Digest, Attorney and Client 44(1)

A.L.R. Library

Attorneys at law: disciplinary proceedings for drafting instrument such as will or trust under which attorney-drafter or member of attorney's family or law firm is beneficiary, grantee, legatee, or devisee, 80 A.L.R.5th 597

Attorney and client: Conflict of interest in real-estate closing situations, 68 A.L.R.3d 967

What constitutes representation of conflicting interests subjecting attorney to disciplinary action, 17 A.L.R.3d 835

Circumstances giving rise to prejudicial conflict of interests between criminal defendant and defense counsel—federal cases, 53 A.L.R. Fed. 140

Propriety of law firm's representation of client in federal court where lawyer affiliated with firm is disqualified from representing client, 51 A.L.R. Fed. 678

Forms

Am. Jur. Pleading and Practice Forms, Attorneys at Law §§ 87 to 98 (Forms relating to motion to disqualify for conflict of interest)

The duty of a lawyer to provide competent representation to a client[FN1] requires the attorney to refuse to accept or continue employment if the representation of one client will be directly adverse to another client, or there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.[FN2] The substantial relationship test, used to determine whether disqualification of an attorney is required for his or her successive representation of parties with adverse interests, is intended to protect the confidences of former clients when an attorney has been in a position to learn them.[FN3] However, a lawyer may represent a client if the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; the representation is not prohibited by law; the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and each affected client gives informed consent, confirmed in writing.[FN4] An attorney's conflicts of interest embrace all situations in which the attorney's loyalty to, or efforts on behalf of, a client are threatened by his or her responsibilities to another client or a third person or by his or her own interests.[FN5]

The professional conduct rule on conflicts of interest applies to potential conflicts of interest, and thus, the rule applies even absent a direct conflict of interest.[FN6]

Observation: The interests of the lawyer's clients, not the lawyer's own personal interests, must always come first.[FN7]

Counsel's mere exposure to the confidences of an adversary does not, standing alone, warrant disqualification.[FN8] Disqualification of counsel is a drastic course of action that should not be taken simply out of hypersensitivity to ethical nuances or the appearance of impropriety.[FN9]

CUMULATIVE SUPPLEMENT

Cases:

Attorney's conduct of representing client at the same time he represented his own company, which was client's competitor, without obtaining client's consent, created direct conflict of interest, and violated rule of professional conduct prohibiting an attorney from representing a client if the representation would be directly adverse to the interests of another client, unless each client consents after consultation. The Florida Bar v. Herman, 8 So. 3d 1100 (Fla. 2009).

An attorney engages in unethical conduct when she undertakes a representation when she either knows or should know of a conflict of interest prohibiting the representation. The Florida Bar v. Brown, 978 So. 2d 107 (Fla. 2008).

Attorney violated conflict of interest rule by representing driver on speeding and license suspension charges and passenger on charge of being felon in possession of firearm found in center console; driver and passenger had adverse interests, even if driver were not convicted felon and attorney was unaware of driver's status as

convicted felon, and it did not matter that passenger raised gun ownership issue after representation of driver had ended. The Florida Bar v. Brown, 978 So. 2d 107 (Fla. 2008).

Ninety-day suspension was appropriate discipline for attorney's conflict of interest in representing driver on speeding and license suspension charges and passenger on charge of being felon in possession of firearm found in center console, failure to act with reasonable diligence or promptness in representing passenger and to keep him reasonably informed, and misrepresentation about representing passenger. The Florida Bar v. Brown, 978 So. 2d 107 (Fla. 2008).

Attorney was acting under conflict of interest, in violation of Rules of Professional Conduct, when he bonded 17-year-old client out of jail, drove her to motel, rented room for several days and took client to room where he waited while she showered, and took photograph of client while she was wearing only towel. In re McCalep, 283 Ga. 586, 662 S.E.2d 120 (2008).

Attorney, by commencing a proceeding to appoint the attorney as guardian for client, just a few days after client executed a will naming attorney as primary beneficiary and attorney's son as contingent beneficiary, violated professional conduct rule prohibiting a lawyer from representing a client when there is a concurrent conflict of interest due to the lawyer's personal interests; guardianship petition stated that attorney was representing client in guardianship proceeding, circumstances such as attorney's handling of other legal matters for client indicated that client considered attorney to be representing him when guardianship petition was filed and thereafter, and by becoming client's guardian, attorney was put in charge of property he stood to inherit under client's will, which could have provided an incentive for attorney to preserve the property rather then expend it for client's care and comfort. In re Colman, 885 N.E.2d 1238 (Ind. 2008).

Attorney who purportedly was representing both husband and wife, in proceeding initiated by their daughter for appointment of conservator or guardian for husband, violated professional conduct rules generally prohibiting representation of client if the representation will be directly or substantially adverse to another client or if representation of client may be materially limited by lawyer's responsibilities to another client, where attorney also filed two lawsuits seeking to drastically alter husband's estate in favor of wife while acknowledging doubts about husband's mental capacity, i.e., first suit, which was filed purportedly on behalf of wife individually and on behalf of husband through wife as his attorney-in-fact, sought to void trusts created by husband and to have corpus of trusts declared community property, and second suit, filed on behalf of wife individually against brokerage firm, resulted in attorney's negotiating the removal of assets from spouses' joint brokerage account and the placement of those assets in individual account in wife's name; wife's interests were clearly adverse to husband's interests. In the Matter of Stein, 2008-NMSC-013, 143 N.M. 462, 177 P.3d 513 (2008), petition for cert. filed, 76 U.S.L.W. 3630, 77 U.S.L.W. 3020 (U.S. May 16, 2008).

Attorney's failure to advise client of any potential conflict of interest or advise him to consult independent counsel regarding client's loan to attorney and attorney's continued representation of client and subsequent representation of client's estate in probate proceeding without first obtaining client's and executer's consent after explaining attendant risks of their conflicting interests given outstanding loan violated professional rules prohibiting attorney from accepting employment if exercise of professional judgment on behalf of client will or reasonably may be affected by attorney's financial interest and prohibiting attorney from entering into business transaction with client without full disclosure. Disciplinary Counsel v. Dettinger, 121 Ohio St. 3d 400, 2009-Ohio-1429, 904 N.E.2d 890 (2009).

Attorney who prepared joint venture agreement under which clients' property would become part of residential development, without alerting clients to his representation of another joint venture that owned other property involved in the development, without disclosing his ownership of interest in other property, and without advising clients to obtain independent counsel, violated disciplinary rules barring a lawyer, absent client's consent after full disclosure, from accepting employment if lawyer's professional judgment will or may be affected by lawyer's own interests and from transacting business with a client having conflicting interests.). Disciplinary Counsel v. McNamee, 119 Ohio St. 3d 269, 2008-Ohio-3883, 893 N.E.2d 490 (2008).

Attorney who prepared joint venture agreement under which clients' property would become part of residential development, without alerting clients to his representation of another joint venture that owned other property involved in the development, without disclosing his ownership of interest in other property, and without advising clients to obtain independent counsel, violated disciplinary rules barring a lawyer, absent client's consent after full disclosure, from accepting employment if lawyer's professional judgment will or may

be affected by lawyer's own interests and from transacting business with a client having conflicting interests. Disciplinary Counsel v. McNamee, 119 Ohio St. 3d 269, 2008-Ohio-3883, 893 N.E.2d 490 (2008).

Attorney's conduct, in naming himself trustee of land trust and also representing the trust, without advising client, a beneficiary of the trust, of the dual representation, and subsequent sale of trust land without reimbursing client, violated rule of professional responsibility prohibiting a lawyers from entering into a business transaction with a client if they have differing interests and if the client expects the lawyer to exercise professional judgment for protection of the client, unless the client has consented after full disclosure. Stark Cty. Bar Assn. v. Marosan, 119 Ohio St. 3d 113, 2008-Ohio-3882, 892 N.E.2d 447 (2008).

Permanent disbarment was warranted for attorney who engaged in self-dealing in land trust matter, and who ignored investigative inquiries by Board of Commissioners on Grievances and Discipline and failed to file an answer to Board's complaint, in violation of rule of professional responsibility prohibiting a lawyers from entering into a business transaction with a client if they have differing interests and if the client expects the lawyer to exercise professional judgment for protection of the client, unless the client has consented after full disclosure, and in violation of bar rule and rule of professional conduct requiring a lawyer to cooperate in a disciplinary investigation; attorney had previously been disciplined on two separate occasions and was currently under suspension, had acted with a dishonest or selfish motive, had failed to cooperate in the disciplinary process, victim was vulnerable, and attorney had failed to make restitution. Code of Prof.Resp., DR 5-104(A); Government of the Bar Rule V, § 4(G); Rules of Prof.Cond., Rule 8.1(b). Stark Cty. Bar Assn. v. Marosan, 119 Ohio St. 3d 113, 2008-Ohio-3882, 892 N.E.2d 447 (2008).

Loan transaction between borrower and lender, in which attorney represented borrower and drafted promissory notes and mortgages, was "significantly-related matter" with regard to subsequent debt collection dispute between lender and borrower's estate, as required for attorney's representation of lender in collection matter to violate rule prohibiting attorneys from representing clients in significantly related matters when interests of current and former clients would be in actual or likely conflict; lender's collection matter was exercise in enforcement of his rights arising out of underlying loan transaction with borrower, and deceased borrower's interests in minimization of legal debt were represented by personal representative. Code of Prof.Resp., DR 5–105(C)(1) (2004). In re Hostetter, 348 Or. 574, 238 P.3d 13 (2010).

Attorney's failure to advise client of conflict of interest in becoming client's attorney-in-fact, his misappropriation of $400,000 of client's assets for his own personal use, his borrowing from client without client's informed consent to the conflict of interest, and his guilty plea to exploitation of vulnerable adult, violated rules of professional conduct governing business transactions with client, requiring lawyer to keep client's property separate from his own, prohibiting lawyers from committing criminal acts that reflected adversely on lawyer's honesty, trustworthiness, and fitness as lawyer, and that involved moral turpitude, prohibiting lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, and prohibiting lawyer from engaging in conduct prejudicial to administration of justice. In re Williams, 376 S.C. 640, 659 S.E.2d 100 (2008).

Counsel's conduct in continuing to represent client after he formally withdrew as her counsel, and continuing to have a sexual relationship with client, violated the professional rules concerning withdrawal from representation and conflict of interest. In re Hoffmeyer, 376 S.C. 221, 656 S.E.2d 376 (2008).

Counsel's conduct in engaging in a sexual relationship with client, belittling client's husband during a confrontation at counsel's house by using information he obtained through his representation of client, sewing up client's self-inflicted wrist wound to avoid use of the incident in client's child custody dispute, obtaining a waiver of liability for an individual's injuries, which were caused by client at counsel's house, failing to inform client that she should seek independent legal advice, and failing to inform the family court of client's problems with substance abuse and eating disorders demonstrated an unfitness to practice law, which was a ground for sanctions. In re Hoffmeyer, 376 S.C. 221, 656 S.E.2d 376 (2008).

Attorney's failure to appear for case, to notify client of trial on belief that case would be continued, and to inform solicitor he was ill, together with failure to respond to initial inquiries by Office of Disciplinary Counsel, violated Rules of Professional Conduct requiring lawyers to provide competent representation, to act with reasonable diligence and promptness, to explain matter to client to extent reasonably necessary to permit client to make informed decisions, and to respond to lawful demand for requests for information from disciplinary

authority. In re Rogers, 375 S.C. 535, 654 S.E.2d 538 (2007), reinstatement granted, 376 S.C. 1, 654 S.E.2d 835 (2007).

Attorney's failure to appear for case, to notify client of trial on belief that case would be continued, and to inform solicitor he was ill, together with failure to respond to initial inquiries by Office of Disciplinary Counsel, violated Lawyer Disciplinary Enforcement Rules providing grounds for discipline for violating Rules of Professional Conduct, for failing to respond to lawful demand from disciplinary authority, and for violating oath of office taken upon admission to practice of law. In re Rogers, 375 S.C. 535, 654 S.E.2d 538 (2007), reinstatement granted, 376 S.C. 1, 654 S.E.2d 835 (2007).

Attorney's lack of action in client's case involving toxic mold in home and lien violated duty to diligently represent client; the circumstances of client's claim and the toxic living conditions of her home required immediate action. RPC 1.3. Burtch, In re Disciplinary Proceeding Against, 162 Wash. 2d 873, 175 P.3d 1070 (2008).

[END OF SUPPLEMENT]

[FN1] Rule 1.1, ABA Model Rules of Professional Conduct.
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[FN2] Rule 1.7(a), ABA Model Rules of Professional Conduct.
- As to representation of conflicting interests in general, see §§ 188 to 195.
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[FN3] Knight v. Ferguson, 149 Cal. App. 4th 1207, 57 Cal. Rptr. 3d 823 (2d Dist. 2007), review denied, (July 11, 2007).
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[FN4] Rule 1.7(b), ABA Model Rules of Professional Conduct.
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[FN5] People v. Dunkle, 36 Cal. 4th 861, 32 Cal. Rptr. 3d 23, 116 P.3d 494 (2005), cert. denied, 547 U.S. 1100, 126 S. Ct. 1884, 164 L. Ed. 2d 571 (2006).
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[FN6] In re Disciplinary Proceeding Against Marshall, 160 Wash. 2d 317, 157 P.3d 859 (2007).
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[FN7] Lorain Cty. Bar Assn. v. Noll, 105 Ohio St. 3d 6, 2004-Ohio-7013, 821 N.E.2d 988 (2004).
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[FN8] Roush v. Seagate Technology, LLC, 150 Cal. App. 4th 210, 58 Cal. Rptr. 3d 275 (6th Dist. 2007), review denied, (July 25, 2007).
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[FN9] Roush v. Seagate Technology, LLC, 150 Cal. App. 4th 210, 58 Cal. Rptr. 3d 275 (6th Dist. 2007), review denied, (July 25, 2007).
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Topic Summary Correlation Table References

§ 56. Representing conflicting interests—What constitutes conflicting interests

West's Key Number Digest

West's Key Number Digest, Attorney and Client 44(1)

A.L.R. Library

Propriety of attorney who has represented corporation acting for corporation in controversy with officer, director, or stockholder, 1 A.L.R.4th 1124

What constitutes representation of conflicting interests subjecting attorney to disciplinary action, 17 A.L.R.3d 835

Constitutionalty and construction of statute against public attorney representing private person in civil action, 82 A.L.R.2d 774

Propriety and effect of attorney representing interest adverse to that of former client, 52 A.L.R.2d 1243

"Conflict of interest" on the part of an attorney, the existence of which will violate a defendant's Sixth Amendment right to effective assistance of counsel, bespeaks a situation in which regard for one duty tends to lead to disregard of another; an obvious example is the representation of clients with incompatible interests.[FN1]

An attorney is subject to discipline for—

— becoming personally and romantically involved with the parent of children for whom the attorney has been appointed to serve as guardian at litem.[FN2]

— preparing a will in which the lawyer will be a beneficiary.[FN3]

— using information relating to the representation of a former client to his or her disadvantage.[FN4]

Whether two legal matters are substantially related, for purposes of determining whether an attorney has a conflict of interest, depends upon the specific facts of each particular situation or transaction.[FN5]

CUMULATIVE SUPPLEMENT

Cases:

Attorney's withdrawal from an indemnity claim against former client for proceedings from personal injury settlement, without taking steps to protect former client's interest, did not violate professional conduct rule relating to termination of representation; former client was no longer a client at time of indemnity action because attorney had filed an answer without client's authorization. I.C.A. Rule 32:1.16(d). Iowa Supreme Court Attorney Disciplinary Bd. v. Netti, 797 N.W.2d 591 (Iowa 2011).

A sexual relationship with the spouse of a current client is a per se violation of professional conduct rule relating to concurrent conflicts of interest, as such a relationship creates the significant risk that the representation of the client will be limited by the personal interests of the attorney. Appellate Court Rule 407, Rules of Prof.Conduct, Rule 1.7(a)(2). In re Anonymous Member of South Carolina Bar, 389 S.C. 462, 699 S.E.2d 693 (2010).

Attorney, whose law firm had contracted to represent federally recognized Indian tribe but not any particular persons within the tribe, violated disciplinary rule relating to duties to former clients by representing the interests of deposed members of tribal council in actions contrary to an interim council's governance of tribe and in actions contrary to a subsequently elected council's governance of tribe. SCR 20:1.9(a) (2006). In re Disciplinary Proceedings Against Brown, 2010 WI 104, 787 N.W.2d 800 (Wis. 2010).

[END OF SUPPLEMENT]

[FN1] State v. Getsy, 84 Ohio St. 3d 180, 1998-Ohio-533, 702 N.E.2d 866 (1998).
- As to representation of conflicting interests in general, see §§ 188 to 195.
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[FN2] In re Pattison, 280 Kan. 349, 121 P.3d 423 (2005).
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[FN3] In re Polevoy, 980 P.2d 985 (Colo. 1999).
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[FN4] The Florida Bar v. Dunagan, 731 So. 2d 1237 (Fla. 1999), reinstatement granted, 775 So. 2d 959 (Fla. 2000).
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[FN5] The Florida Bar v. Dunagan, 731 So. 2d 1237 (Fla. 1999), reinstatement granted, 775 So. 2d 959 (Fla. 2000).
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Topic Summary Correlation Table References

§ 57. Business relations with client

West's Key Number Digest

West's Key Number Digest, Attorney and Client 44(1)

A.L.R. Library

Disciplinary action against attorney taking loan from client, 9 A.L.R.5th 193

Attorney and client: Disciplinary proceeding based upon attorney's direct or indirect purchase of client's property, 35 A.L.R.3d 674

A lawyer must not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client; the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.[FN1] Subject to certain exceptions, an attorney may not acquire a proprietary interest in the cause of action or subject matter of litigation the attorney is conducting for a client.[FN2]

When an attorney purchases property from a client, disciplinary measures may be applied where the attorney has acted in a fraudulent or overreaching manner designed to advance the attorney's own interest to the possible detriment of the client.[FN3]

Similar concerns are raised where the fee arrangement gives the attorney an ownership interest in a client's property that has a greater value than the amount agreed upon in fees.[FN4]

Borrowing money from a client without making full disclosure of all pertinent circumstances,[FN5] and not advising the client to seek independent advice upon the advisability of entering into such a contract[FN6] can subject an attorney to disciplinary action.

CUMULATIVE SUPPLEMENT

Cases:

Attorney violated disciplinary rule providing that a lawyer shall not enter into a business transaction with a client unless the client has consented after full disclosure, where attorney retained $15,000 as a loan from his client, who was also his sister-in law, after obtaining that amount in settlement of a personal injury claim, without disclosing the attendant risks and without obtaining her consent. Akron Bar Assn. v. Markovich, 117 Ohio St. 3d 313, 2008-Ohio-862, 883 N.E.2d 1046 (2008).

Attorney did not violate rule of professional conduct prohibiting an attorney from entering into a business transaction with a client without proper documentation, where attorney did not lend funds to client. In re Johnson, 380 S.C. 76, 668 S.E.2d 416 (2008).

[END OF SUPPLEMENT]

[FN1] Rule 1.8(a), ABA Model Rules of Professional Conduct.

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[FN2] Rule 1.8(i), ABA Model Rules of Professional Conduct.

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[FN3] Matter of Discipline of Martin, 506 N.W.2d 101 (S.D. 1993).

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[FN4] Brockway v. State Bar, 53 Cal. 3d 51, 278 Cal. Rptr. 836, 806 P.2d 308 (1991).

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[FN5] Matter of Disciplinary Proceedings Against Roffa, 185 Wis. 2d 363, 517 N.W.2d 187 (1994).

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[FN6] Matter of Disciplinary Proceedings Against Roffa, 185 Wis. 2d 363, 517 N.W.2d 187 (1994).

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Topic Summary Correlation Table References

§ 58. Failure to communicate with client

West's Key Number Digest

West's Key Number Digest, Attorney and Client 44(1)

A.L.R. Library

Attorney's failure to report promptly receipt of money or property belonging to client as ground for disciplinary action, 91 A.L.R.3d 975

Failure to communicate with client as basis for disciplinary action against attorney, 80 A.L.R.3d 1240

Proper communication with clients is essential to maintain public confidence in the legal profession.[FN1] Thus, an attorney must communicate with his or her client and is subject to discipline for failure to discharge this duty.[FN2] An attorney must inform his or her clients of relevant considerations and factors in the decision-making process and of their rights and interests in the subject matter, and give clients the opportunity to make decisions; failure to do so subjects the lawyer to disciplinary action.[FN3]

A lawyer must promptly notify his or her client of the receipt of funds or other properties of the client,[FN4] and failure to do so is a ground for disciplinary action.[FN5]

The communication required by the rule of professional conduct, requiring that the client be kept reasonably informed, is not limited to only written or direct communications from the lawyer.[FN6]

CUMULATIVE SUPPLEMENT

Cases:

Attorney's failure to keep clients informed on status of their cases, failure to act with diligence in representing them, and failure to inform clients of 90-day suspension he was placed on while representation was ongoing, violated Rules of Professional Conduct requiring attorney to act with reasonable diligence and to communicate with clients. In re Elkins, 284 Ga. 670, 670 S.E.2d 783 (2008).

Attorney's misconduct while representing client in products liability case, in failing to forward discovery requests to his client, failing to respond to the discovery requests, failing to inform his partner on the case of the problems, and making misrepresentations to the district court, resulting in dismissal of client's answer and defenses, violated rules of professional conduct. In re Stincer, 284 Ga. 451, 668 S.E.2d 257 (2008).

Attorney's failure to return many telephone calls while working at public defender's office violated duties to act with reasonable diligence and promptness in representing clients and to keep clients reasonably informed about the status of a matter and promptly comply with reasonable requests for information. In re Lee, 287 Kan. 676, 198 P.3d 140 (2008).

Attorney's conduct in failing to explain to clients that defendant had made a lump sum settlement offer to entire group of clients and that attorneys would be responsible for determining the amount of money each client

would receive violated rule of professional conduct requiring informed consent of clients before an aggregate settlement is made. Sup.Ct.Rules, Rule 3.130, Rules of Prof.Conduct, Rule 1.8(g). Kentucky Bar Ass'n v. Mills, 318 S.W.3d 89 (Ky. 2010).

Public reprimand was appropriate sanction for attorney who failed to return client's telephone messages or communicate with her regarding progress of uncontested divorce, and who terminated representation without contacting client or refunding any amount of fee that had not been earned, in violation of Rules of Professional Conduct. Riley v. Kentucky Bar Ass'n, 262 S.W.3d 203 (Ky. 2008).

Attorney's failure to return client's telephone messages or communicate with her regarding progress of uncontested divorce, and his termination of representation without contacting client or refunding any amount of fee paid in advance that had not been earned, violated Rules of Professional Conduct requiring lawyer to act with reasonable diligence and promptness in representing client, to keep client informed about status of case and promptly reply to reasonable requests for information, and to take steps upon termination of representation to protect client's interests, such as reasonable notice to client to allow time for employment of other counsel, and refunding any advance payment of fee that had not been earned. Riley v. Kentucky Bar Ass'n, 262 S.W.3d 203 (Ky. 2008).

Attorney's refusal to surrender requested papers to client constituted a failure to take reasonable and practicable steps to protect client's interest and a failure to properly communicate with client in violation of the rules of professional conduct, even though client had terminated attorney's representation with regard to the sale of her real estate, where attorney continued to administer decedent's estate, of which client was the sole heir. Md.Rule 16–812, Rules of Prof.Conduct, Rules 1.4, 1.16(d). Attorney Grievance Com'n of Maryland v. Edib, 415 Md. 696, 4 A.3d 957 (2010).

Attorney's failure to appreciate negative impact of sexual relationship with client while he was representing her in employment discrimination suit, which suit was based on employee's transfer to different position when employer learned of her sexual relationship with married supervisor, together with attorney's summary dismissal of client's concerns about relationship's impact on her representation, violated Rules of Professional Conduct requiring lawyers to explain matters to client to extent reasonably necessary to permit client to make informed decisions about representation, regardless of whether or not attorney was aware of inherent conflict of interest. Attorney Grievance Com'n of Maryland v. Hall, 408 Md. 306, 969 A.2d 953 (2009).

Public reprimand, rather than an indefinite suspension, was appropriate sanction for attorney who negligently handled a single case and who failed to acknowledge Bar Counsel's requests for information for four months, where attorney was honest with his client about his mistakes, urged her to hire independent counsel to pursue a malpractice claim, compensated client from his personal resources without resort to his malpractice carrier, showed remorse for his misconduct, and had no prior disciplinary record. Attorney Grievance Com'n of Maryland v. Queen, 407 Md. 556, 967 A.2d 198 (2009).

Indefinite suspension was appropriate base sanction for violation by Pennsylvania law firm's executive attorneys of Maryland rules of professional conduct requiring adequate supervision of attorneys and governing communications with clients, where harm suffered by firm's clients was egregious and flowed from executive attorneys' misconduct. Attorney Grievance Com'n of Maryland v. Kimmel, 405 Md. 647, 955 A.2d 269 (2008).

Attorney's failure to comply with his client's reasonable requests for information about his employment discrimination case violated professional conduct rule that required lawyer to keep client reasonably informed about the status of matter and promptly comply with requests for information. Attorney Grievance Com'n of Maryland v. Ugwuonye, 405 Md. 351, 952 A.2d 226 (2008).

Reprimand was warranted for attorney's violation of rules of professional conduct by failing to communicate with client and engaging in conduct that was prejudicial to the administration of justice. Attorney Grievance Com'n v. Akpan, 405 Md. 277, 950 A.2d 820 (2008).

Conduct of attorney who had drafted a will for client before a court had appointed a guardian/conservator for client, which will had devised client's condominium to client's daughter, in drafting and obtaining the execution of a new will for client, which devised all of client's property, including the condominium, equally to client's daughter and two sons, without attorney communicating with guardian/conservator, violated professional conduct rule requiring a lawyer representing a client who has limited capacity to make decisions ordinarily to look to the client's appointed representative for decisions on behalf of the client, and to be cognizant of extent of powers and duties conferred upon client's appointed representative, where attorney had

reviewed documents indicating that client suffered from Parkinson's disease and short-term memory loss, though attorney acted out of a desire to give his client attention and respect. Rules of Prof.Conduct, Rule 1.14 cmt. 5. In re Disciplinary Action Against Kuhn, 2010 ND 127, 785 N.W.2d 195 (N.D. 2010).

Attorney's admitted failure timely to refile personal injury claim on behalf of client, and to inform client that attorney lacked malpractice insurance, violated provisions of Code of Professional Responsibility prohibiting conduct prejudicial to administration of justice and neglect of entrusted legal matters, and requiring an attorney to advise a client that attorney does not carry recommended amount of professional-liability insurance. Disciplinary Counsel v. Sabol, 118 Ohio St. 3d 65, 2008-Ohio-1594, 886 N.E.2d 191 (2008).

The following factors are relevant to determining whether a lawyer has violated rule requiring lawyers to keep clients reasonably informed and to explain matters to clients to extent reasonably necessary to permit clients to make informed decisions: the length of time between a lawyer's decision and the lawyer's communication of that decision to the client; whether the lawyer failed to respond promptly to reasonable requests for information from the client; and whether the lawyer knew or a reasonable lawyer would have foreseen that a delay in communication would prejudice the client. Rules of Prof.Conduct, Rule 1.4. In re Conduct of Groom, 350 Or. 113, 249 P.3d 976 (2011).

Attorney's conduct in eight different matters, including his failure to adequately communicate with his clients or to act with diligence and competence, his misuse and mismanagement of trust account funds, and his failure to respond to Disciplinary Counsel inquiries and notices, constituted violation of the Rules of Professional Conduct. In re Tullis, 375 S.C. 190, 652 S.E.2d 395 (2007).

Attorney's conduct in eight different matters, including his failure to adequately communicate with his clients or to act with diligence and competence, his misuse and mismanagement of trust account funds, and his failure to respond to Disciplinary Counsel inquiries and notices, constituted violation of the Rules of Professional Conduct. Appellate Court Rule 407, Rules of Prof.Conduct, Rules 1.1 to 1.5, 1.8, 1.15, 1.16, 4.4, 8.1, 8.4. In re Tullis, 375 S.C. 190, 652 S.E.2d 395 (2007).

Attorney's lack of a written employment contract, fee agreement, or agreement limiting the scope of his representation of non-English speaking client, and his failure to send the client a written copy of letter to which he had signed client's name either before or after filing it with Board of Immigration Appeals, did not amount to violation of rule of professional conduct concerning attorney's communication with client, in light of unrebutted evidence regarding language difficulties in communicating with the client and the attorney's diligent maintenance of oral communication and consultation with client via client's own interpreter. Sup.Ct.Rules, Rule 8, Rules of Prof.Conduct, Rule 1.4(a, b). Flowers v. Board of Professional Responsibility, 314 S.W.3d 882 (Tenn. 2010).

Attorney had an obligation to respond to client's fee-related inquiries, even if he believed that he had earned all of the advance fees she had paid to him, and his failure to respond was a violation of former rule requiring attorneys to promptly comply with reasonable requests for information. In re Disciplinary Proceedings Against Osicka, 2009 WI 38, 317 Wis. 2d 135, 765 N.W.2d 775 (2009).

Attorney's willful failure to disclose information to Office of Lawyer Regulation (OLR) during grievance investigation and failure to comply promptly with client's requests for information warranted reprimand and restitution of portion of fee to former client. In re Disciplinary Proceedings Against Osicka, 2009 WI 38, 317 Wis. 2d 135, 765 N.W.2d 775 (2009).

[END OF SUPPLEMENT]

[FN1] In re Lawrence, 954 So. 2d 113 (La. 2007).

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[FN2] Matter of Disciplinary Proceedings Against Bennett, 190 Wis. 2d 637, 527 N.W.2d 691 (1995).

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[FN3] Matter of Jenkins, 255 Kan. 797, 877 P.2d 423 (1994).

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[FN4] Rule 1.15(d), ABA Model Rules of Professional Conduct.
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[FN5] In re Phillips, 767 S.W.2d 16 (Mo. 1989).
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[FN6] Kentucky Bar Ass'n v. Craft, 208 S.W.3d 245 (Ky. 2006).
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§ 59. Securing agreements violative of public policy

West's Key Number Digest

West's Key Number Digest, Attorney and Client 44(1)

A.L.R. Library

Validity and propriety of arrangement by which attorney pays or advances expenses of client, 8 A.L.R.3d 1155

An attorney is guilty of professional misconduct justifying disciplinary action when he or she secures from a client a contract contemplating improper payment of client expenses by an attorney.[FN1]

An attorney may not agree with an illegal syndicate to represent its members or employees with respect to future violations of the law.[FN2]

Attorneys who engage in agreements restricting their right to practice, as part of the settlement of a controversy between private parties, receive severe sanctions.[FN3]

[FN1] State ex rel. Florida Bar v. Dawson, 111 So. 2d 427 (Fla. 1959).
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[FN2] In re Abrams, 56 N.J. 271, 266 A.2d 275 (1970).
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[FN3] The Florida Bar v. Rodriguez, 959 So. 2d 150 (Fla. 2007).
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§ 60. Fee collection practices

West's Key Number Digest

West's Key Number Digest, Attorney and Client 44(1)

A.L.R. Library

Attorney's assertion of retaining lien as violation of ethical code or rules governing professional conduct, 69 A.L.R.4th 974

Initiating, or threatening to initiate, criminal prosecution as ground for disciplining counsel, 42 A.L.R.4th 1000

Attorneys at Law: fee collection practices as ground for disciplinary action, 91 A.L.R.3d 583

An attorney may be subject to discipline for threatening legal action against the client to compel payment of the fee,[FN1] threatening to withdraw from the case if the client does not pay the fee,[FN2] or threatening to prejudice a client's interests by terminating the representation at a critical stage of the proceedings to coerce payment of additional fees.[FN3] An attorney will be subject to discipline for coercing a client into paying an additional fee outside the terms of a closing statement.[FN4] An attorney may not unilaterally determine his or her fee and withhold trust funds to satisfy it.[FN5] An attorney may be disciplined for demanding and receiving funds from bankruptcy clients without approval of the court,[FN6] and for withdrawing from a corporate client's bank account money in excess of what the attorney was entitled to pursuant to a written contract for the attorney's services.[FN7]

CUMULATIVE SUPPLEMENT

Cases:

Attorney violated rules relating to withdrawal from representation, competent representation, carrying out contract of employment, prompt payment or delivery of client funds, and charging of excessive fees, where client retained attorney on contingent-fee basis to file wrongful death action, no one filed lawsuit or responded to client's calls, client sent letter discharging attorney and requesting return of case file, attorney's associate sent letter refusing to return file unless client paid unspecified amount of legal fees and threatening legal action if client did not pay, and limitations period on wrongful death claim elapsed by date of disciplinary hearing. Cincinnati Bar Assn. v. Lawson, 119 Ohio St. 3d 58, 2008-Ohio-3340, 891 N.E.2d 749 (2008).

Attorney's conduct, after client had paid $300 flat fee for attorney to defend client against petty-theft charge in municipal court, in failing to appear in court on new date scheduled for trial, violated professional responsibility rule prohibiting neglect of entrusted legal matter. Toledo Bar Assn. v. Lowden, 117 Ohio St. 3d 396, 2008-Ohio-1199, 884 N.E.2d 52 (2008).

Attorney's misconduct involving 11 clients, including ineffective or no communications with clients, neglecting cases, incompetent representation, and failing to show up in court on behalf of clients, warranted discipline of retroactive suspension of attorney from the date he self-suspended due to incapacity until the date the Supreme Court issued its opinion, resulting in a period of just over a year, in light of the mitigating circumstances of attorney's drug and alcohol addictions, his cooperation in getting his former clients the help they needed to resolve their cases, and attorney's conduct since his rehabilitation treatment. State ex rel. Oklahoma Bar Ass'n v. Albert, 2007 OK 31, 163 P.3d 527 (Okla. 2007).

Attorney's failure to adequately and accurately explain fee agreement to client violated obligations of communication. Burtch, In re Disciplinary Proceeding Against, 162 Wash. 2d 873, 175 P.3d 1070 (2008).

[END OF SUPPLEMENT]

[FN1] People v. Farrant, 852 P.2d 452 (Colo. 1993).
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[FN2] People v. Peters, 849 P.2d 51 (Colo. 1993).
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[FN3] In re Dawson, 2000-NMSC-024, 129 N.M. 369, 8 P.3d 856 (2000).
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[FN4] The Florida Bar v. Murphy, 614 So. 2d 1090 (Fla. 1993), reinstatement granted, 640 So. 2d 1108 (Fla. 1994).
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[FN5] Murray v. State Bar, 40 Cal. 3d 575, 220 Cal. Rptr. 677, 709 P.2d 480 (1985).
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[FN6] Matter of Feeley, 180 Ariz. 41, 881 P.2d 1146 (1994).
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[FN7] Matter of Disciplinary Proceedings Against Lehmann, 180 Wis. 2d 477, 509 N.W.2d 291 (1994).
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§ 61. Excessive fees; fee sharing

West's Key Number Digest

West's Key Number Digest, Attorney and Client 44(1)

A.L.R. Library

Excessiveness or adequacy of attorneys' fees in matters involving real estate—modern cases, 10 A.L.R.5th 448

Attorney's charging excessive fee as ground for disciplinary action, 11 A.L.R.4th 133 (§§ 8[a],8[b],8[c],9[a],9[b],9[c],14[a],14[b],14[c] superseded in part by Attorney's Charging Excessive Fee as Ground for Disciplinary Action—Estate, Trust, Domestic Relations, and Family Law Matters, 26 A.L.R.6th 1)

Trial Strategy

Reasonableness of Contingent Fee in Personal Injury Action, 46 Am. Jur. Proof of Facts 2d 1

Amount of Allowance for Attorney Fees in Domestic Relation Action, 45 Am. Jur. Proof of Facts 2d 699

Forms

Am. Jur. Pleading and Practice Forms, Attorneys at Law §§ 205 to 221

Law Reviews and Other Periodicals

Cummisford, Resolving Fee Disputes and Legal Malpractice Claims Using ADR, 85 Marq. L. Rev. 975 (2002)

Richmond, Professional Responsibilities of Law Firm Associates, 45 Brandeis L.J. 199 (2007)

An attorney may be subject to discipline for charging excessive fees for legal services.[FN1] An attorney is subject to discipline for grossly inflating attorney or paralegal hours and supporting hours charged with inadequate documentation,[FN2] as well as for charging "lost opportunity" fees.[FN3]

The prohibition against sharing legal fees with nonlawyers benefits the public by (1) limiting the possibility that a nonlawyer will interfere with the exercise of a lawyer's professional judgment in representing a client, and (2) ensuring that the total fee paid by the client is not unreasonably high.[FN4]

CUMULATIVE SUPPLEMENT

Cases:

Attorney's conduct of accepting $12,500 retainer from client for representation in a divorce action, his numerous withdrawals of these funds from his client trust account even though he had not earned these amounts in fees, and his request and receipt from client of two additional $5,000 retainers violated provisions of code of professional responsibility prohibiting a lawyer from charging or collecting a clearly excessive fee, and requiring a lawyer to promptly pay or deliver upon request funds to which the client is entitled. Toledo Bar Assn. v. Hickman, 119 Ohio St. 3d 102, 2008-Ohio-3837, 892 N.E.2d 437 (2008).

Attorney, by charging $43,761.68 for attorney fees as executor of estates of his uncle and his cousin, violated professional responsibility rule prohibiting clearly excessive attorney fees, even if none of the heirs objected to the fees; expert witness for disciplinary counsel pointed out numerous defects and inconsistencies in attorney's time records, such as reporting as his own work 45 hours that were attributable to successor counsel and at least one entry that should have been billed at paralegal's rate rather than at an attorney's rate, and expert opined that attorney's time records justified at most a fee of $12,000. Disciplinary Counsel v. Hoskins, 119 Ohio St. 3d 17, 2008-Ohio-3194, 891 N.E.2d 324 (2008).

[END OF SUPPLEMENT]

[FN1] Matter of Disciplinary Proceedings Against Forester, 189 Wis. 2d 563, 530 N.W.2d 375 (1995).
- Rule 1.5(a), ABA Model Rules of Professional Conduct, provides that a lawyer may not enter into an agreement for, charge, or collect an unreasonable fee, and lists eight factors to be considered as guides in determining the reasonableness of a fee.
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[FN2] Case of Kalled, 135 N.H. 557, 607 A.2d 613 (1992).
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[FN3] Columbus Bar Assn. v. Halliburton-Cohen, 106 Ohio St. 3d 98, 2005-Ohio-3956, 832 N.E.2d 42 (2005).
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[FN4] Disciplinary Counsel v. Simonelli, 113 Ohio St. 3d 215, 2007-Ohio-1535, 863 N.E.2d 1039 (2007).
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§ 62. Generally

West's Key Number Digest

The court employs three different culpability standards when evaluating the mishandling of client funds: (1) "commingling," which takes place when client money is intermixed with an attorney's personal funds; (2) simple "conversion," which occurs when a lawyer applies a client's money to a purpose other than that for which it was entrusted to the lawyer; and (3) "misappropriation," the most serious infraction, which involves an act of conversion, or similar wrongful taking, when an attorney purposefully deprives a client of money by way of deceit and fraud.[FN1] Absent mitigating circumstances, the appropriate discipline in cases of attorney misappropriation,[FN2] conversion[FN3] or commingling of client funds is typically disbarment.[FN4]

CUMULATIVE SUPPLEMENT

Cases:

Attorney's misconduct, in causing a $300,000 shortage in his trust account, writing checks on trust account for which there were insufficient funds, failing to obtain title insurance or return the funds collected for such purpose and failing to timely file the warranty deeds while acting as the closing attorney for purchase of real property, and failing file sworn responses to the three notices of investigation served by the state bar, violated state bar rules and rules of professional conduct. In re Simpson, 284 Ga. 446, 668 S.E.2d 243 (2008).

Disbarment was appropriate for converting client's funds, giving to client check drawn on estate, breaching fiduciary duty to heirs as estate executor, mishandling trust account funds, failing to notify client of settlement, and failing to communicate with client; aggravating factors included a attorney's pattern of misconduct out of dishonest or selfish motive, his refusal to acknowledge the wrongful nature of his conduct, and his indifference to restitution. In re Byars, 282 Ga. 630, 652 S.E.2d 567 (2007).

Attorney who did not participate in arbitration when client asked bar association to arbitrate fee dispute, and who failed to return $1,350 in fees to client after being directed to do so by fee-arbitration committee that determined he had improperly withheld that amount from client, violated disciplinary rules requiring an attorney to promptly pay or deliver funds in the lawyer's possession to which the client is entitled. Disciplinary Counsel v. McShane, 121 Ohio St. 3d 169, 2009-Ohio-746, 902 N.E.2d 980 (2009).

Attorney's failure to return unearned fees and a case file to a client following his suspension for violating professional rules, by itself, violated professional rule requiring lawyers to promptly pay or deliver funds and property to which a client is entitled. Cuyahoga Cty. Bar Assn. v. Freedman, 119 Ohio St. 3d 571, 2008-Ohio-5220, 895 N.E.2d 837 (2008).

Attorney violated disciplinary rules relating to conduct reflecting adversely on fitness to practice, promptly notifying client of receipt of funds, and maintaining records of client properties and rendering appropriate accounting, where attorney received separate settlement checks made out to each of six clients, endorsed checks without clients' knowledge and deposited funds in client trust account, withdrew more than twice his fee from that account and used money to pay past-due amounts on personal mortgage, later sent letter informing clients he was calculating his expenses and would be sending out their share of settlement, and paid only three clients by date of disciplinary hearing. Cincinnati Bar Assn. v. Lawson, 119 Ohio St. 3d 58, 2008-Ohio-3340, 891 N.E.2d 749 (2008).

Attorney violated disciplinary rule providing that a lawyer shall deposit client funds, other than advances for costs and expenses, in a separate identifiable bank account, where attorney improperly used his client trust account by paying his administrative assistant with client funds. Akron Bar Assn. v. Markovich, 117 Ohio St. 3d 313, 2008-Ohio-862, 883 N.E.2d 1046 (2008).

Attorney's conduct in processing home mortgage loans and closing on transactions using two-transaction "flip" method whereby he used loan proceeds, intended to fund only second transaction, to fund both, in addition to using client trust funds and falsifying documents to secure loans, violated professional rules prohibiting lawyers from providing financial assistance to clients, commingling client trust funds, knowingly making false statements of material fact or law to a third person or failing to disclose material facts when

disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, and committing criminal acts. In re Newton, 375 S.C. 531, 654 S.E.2d 536 (2007).

Attorney's failure to monitor, review, and balance trust account being managed by assistant, who was embezzling funds from account, violated Rules of Professional Conduct requiring attorney to provide competent representation, to safekeep client property, to not use entrusted property for benefit of others, to make reasonable efforts to ensure that non-lawyer employee's conduct is compatible with professional obligations, to have direct supervisory authority over non-lawyer employee, to be responsible for conduct of non-lawyer employee, and not to violate Rules of Professional Conduct. In re Ponder, 375 S.C. 525, 654 S.E.2d 533 (2007).

Lawyer's breach of fiduciary duty and fraudulent conduct in misappropriating clients' funds, when he stole clients' money and then lied to them about the theft for years, demonstrated "bad motive" and "malice" as a matter of law, as required in order for clients to be entitled to an award of punitive damages in their breach of fiduciary duties, misrepresentation and misappropriation action, even if lawyer did not intend to harm clients and always intended to return the money, and thus the jury was not required to determine that the lawyer's motive in stealing the funds was to harm clients rather than to enrich himself in order to award clients punitive damages. DeYoung v. Ruggiero, 2009 VT 9, 971 A.2d 627 (Vt. 2009).

Client's funds held in trust accounts with two law firms remained the property of the client, rather than being owned by the law firms with the client being a creditor of the law firms, which were subject to garnishment in satisfaction of a judgment. Marcus, Santoro & Kozak, P.C. v. Hung-Lin Wu, 652 S.E.2d 777 (Va. 2007).

[END OF SUPPLEMENT]

[FN1] State ex rel. Oklahoma Bar Ass'n v. Taylor, 2000 OK 35, 4 P.3d 1242 (Okla. 2000).

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[FN2] State ex rel. Nebraska State Bar Ass'n v. Mefferd, 258 Neb. 616, 604 N.W.2d 839 (2000); In re Herbert, 163 N.J. 90, 747 A.2d 783 (2000).

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[FN3] Disciplinary Counsel v. Wherry, 87 Ohio St. 3d 584, 2000-Ohio-254, 722 N.E.2d 515 (2000).

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[FN4] State ex rel. Nebraska State Bar Ass'n v. Mefferd, 258 Neb. 616, 604 N.W.2d 839 (2000).

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Topic Summary Correlation Table References

§ 63. Misappropriation or conversion of client's property

West's Key Number Digest

West's Key Number Digest, Attorney and Client 44(2)

A.L.R. Library

Attorney's assertion of retaining lien as violation of ethical code or rules governing professional conduct, 69 A.L.R.4th 974

An attorney may be disbarred or suspended under the disciplinary rule prohibiting an attorney from engaging in illegal conduct involving dishonesty, fraud, deceit, or misrepresentation[FN1] where the attorney converts or wrongfully retains, misappropriates, or misapplies money or property received in his or her professional capacity.[FN2] Continuing public confidence in the judicial system and the bar requires that the strictest attorney discipline be imposed in misappropriation cases[FN3] and no circumstances ever justify the deliberate misappropriation of client's funds for a lawyer's personal benefit.[FN4]

A lawyer must maintain complete records of all funds and other properties of a client coming into his or her possession and render appropriate accounts to his or her client regarding them.[FN5] Failure to maintain such records is grounds for professional discipline.[FN6]

A lawyer must hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property.[FN7] Funds must be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person.[FN8] An attorney's conduct in failing to keep and maintain records of a trust account reflecting the exact balance for each client, putting personal funds into the law firm's trust account, and withdrawing funds from the trust account for personal use will warrant discipline.[FN9] Moreover, failing to maintain trust account books and records in compliance with applicable rules while on probation is serious misconduct and is an aggravating factor in determining an appropriate sanction.[FN10] An attorney's using a portion of settlement proceeds being held for a client in an attorney escrow account for his or her own benefit will warrant discipline.[FN11]

Observation: Continuing public confidence in the judicial system and the bar requires that the strictest discipline be imposed in misappropriation cases.[FN12]

CUMULATIVE SUPPLEMENT

Cases:

Attorney's misappropriation of $70,000 of client's funds in violation of disciplinary rule warranted disbarment and payment of restitution. In re Haines, 177 P.3d 1239 (Colo. 2008).

Attorney's intentional misappropriation and unauthorized use of client funds warranted disbarment, with reinstatement conditioned on restitution to clients in amount of $36,930. In re Stewart, 953 A.2d 1034 (D.C. 2008).

Disbarment, with restitution as a condition for reinstatement, was warranted for attorney who took and spent for his own purposes a check for over $241,000 issued to his client while knowing that the majority of the funds did not belong to him, in violation of rules of professional conduct prohibiting a lawyer from commission of a criminal act, engaging in dishonesty, engaging in misappropriation, failing to notify client of receipt of funds, failing to segregate funds, failing to deposit funds in separate account, and failing to inform client. In re Mitrano, 952 A.2d 901 (D.C. 2008).

Six-month suspension, with requirement to prove fitness as condition of reinstatement, was warranted as reciprocal discipline in District of Columbia, after attorney received discipline in New Jersey, i.e., suspension for six months and "until further order" of New Jersey Supreme Court, for misconduct that included failure to safeguard and promptly deliver funds, record-keeping violations, failure to expedite litigation, lack of fairness to opposing party, lack of truthfulness, criminal conduct reflecting adversely on attorney's honesty, lack of trustworthiness or fitness as lawyer, conduct involving dishonesty, fraud, deceit, or representation, and conduct prejudicial to administration of justice. In re Richardson, 935 A.2d 1076 (D.C. 2007).

Attorneys violated rule of professional conduct regarding obligation to promptly release funds owing to a client when they failed to distribute to client the minimum amount of award that client was indisputably due under contract while unresolved issues regarding which contract applied were worked out. In re Marshall, 902 N.E.2d 249 (Ind. 2009).

Misappropriation of client funds is a grave transgression; it demonstrates a conscious desire to accomplish an unlawful act, denotes a lack of virtually all personal characteristics the Supreme Court deems important to law practice, threatens to bring significant misfortune on the unsuspecting client, and severely impugns the integrity of the profession. In re Patterson, 888 N.E.2d 752 (Ind. 2008).

One year suspension was appropriate discipline for attorney who displayed pattern of neglect and knowingly failed to perform services; attorney failed to repay his clients, he did not file an answer, return phone calls, or perform any work on his client's behalf, attorney's dishonest conduct could not be corrected by probation, and it was not in the interests of the profession or the citizens of Kansas to recommend probation. In re Woodring, 289 Kan. 173, 210 P.3d 120 (2009).

Attorney's conduct of commingling funds belonging to him with funds belonging to clients and failing to keep complete record of his client trust account violated rule of professional conduct that required a lawyer to hold property of clients that is in lawyer's possession in connection with a representation separate from the lawyer's own property and keep complete record of account funds and other property. In re Corrin, 184 P.3d 923 (Kan. 2008).

Indefinite suspension from the practice of law was appropriate sanction for attorney's misconduct, which consisted of failing to file a case in his client's behalf within the statute of limitations, failing to return client's telephone calls and provide her with timely and appropriate communication regarding the status of his representation, commingling funds belonging to attorney with funds belonging to clients, failing to promptly deliver funds to client when he was entitled to receive them, and exhibiting a lack of cooperation and communication with the Office of the Disciplinary Administrator's (ODA's) audit of attorney's client trust account. In re Corrin, 184 P.3d 923 (Kan. 2008).

Fact that attorney's trust account was overdrawn, along with attorney's commingling of her own funds with client's funds, violated attorney disciplinary rule requiring that lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. In re Quinn, 184 P.3d 235 (Kan. 2008).

Three-year suspension was appropriate sanction for attorney's violations of Rules of Professional Conduct by failing to communicate with client after he filed motion for temporary custody on her behalf and failing to refund any portion of unearned fee upon her request, and in view of attorney's consistent failure to respond to charges and complaints in prior reported disciplinary proceedings. Kentucky Bar Ass'n v. Burlew, 281 S.W.3d 768 (Ky. 2009), as modified, (May 21, 2009).

Attorney's failure to communicate with client after he filed motion for temporary custody on her behalf, together with failure to refund any portion of unearned fee upon her request, violated Rules of Professional

Conduct requiring attorney to act with diligence, to keep client informed about status of case, and governing termination of representation. Kentucky Bar Ass'n v. Burlew, 281 S.W.3d 768 (Ky. 2009), as modified, (May 21, 2009).

Attorney's failure to return unearned fee to client until after client filed bar complaint did not violate professional rule requiring refund of unearned fee at termination of representation; there was no indication that attorney purposefully tried to avoid returning unearned fee. Kentucky Bar Ass'n v. Thornton, 279 S.W.3d 516 (Ky. 2009).

Evidence established probable cause to believe that attorney misappropriated or otherwise improperly dealt with funds held on behalf of his clients, warranting temporary suspension of attorney from practice of law; attorney was subject of complaints alleging that he failed to account for client funds given to him to hold in escrow, failed to account for funds he received on behalf of client's wife's estate, failed to account for funds for clients during bankruptcy actions, and failed to account for $70,000 from payments on client's father's life insurance and fire insurance policies. Inquiry Com'n v. Menefee, 255 S.W.3d 515 (Ky. 2008).

Attorney's conduct in misappropriating or converting home loan payoff funds and failing to disburse net sales proceeds to appropriate parties at closings, coupled with his failure to cooperate with Office of Disciplinary Counsel (ODC) in its investigation of matters, violated professional rules requiring the safekeeping of property of clients or third persons, prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation, and requiring cooperation in bar disciplinary matters. In re Ellzey, 9 So. 3d 839 (La. 2009).

Disbarment was warranted for attorney who neglected client's bankruptcy matter, failed to refund an unearned fee and unused costs, failed to return client's documents upon termination of representation, engaged in violent criminal conduct by hitting girlfriend with his hands and a beer bottle, failed to cooperate in disciplinary investigation, and practiced law while ineligible to do so. In re Willis, 8 So. 3d 548 (La. 2009).

Disbarment was appropriate sanction for suspended attorney who continued to use his attorney trust account, engaged in the unauthorized practice of law by representing agent of his real estate business in court, committed, in the process, a criminal act bearing on his trustworthiness and his fitness to practice law, and failed to cooperate with Bar Counsel's investigation of his misuse of trust account. Attorney Grievance Com'n of Maryland v. Shryock, 408 Md. 105, 968 A.2d 593 (2009).

Attorney's failure to return client's unearned fee upon termination of representing client in his claims for monetary damages against crime solving agency violated rule of professional conduct requiring a lawyer to refund any unearned advance made by a client upon termination of representation; while attorney claimed the fee was earned as a result of his research on the case, client's claims were without merit, and thus attorney violated rule of professional conduct when he agreed to represent client. Attorney Grievance Com'n of Maryland v. Ugwuonye, 405 Md. 351, 952 A.2d 226 (2008).

Disbarment was appropriate sanction for attorney's misappropriation of $600,000 from conservatorship of an adult disabled ward to purchase an investment property for attorney and his business partner, even though attorney repaid the conservatorship with interest, where attorney had previously been sanctioned for failing to obtain the requisite court approval before paying himself legal fees, attorney's self-dealing involved a vulnerable victim, and attorney had substantial experience in the practice of law. Attorney Grievance Com'n v. Whitehead, 405 Md. 240, 950 A.2d 798 (2008).

Attorney's withdrawal of $600,000 of conservatorship assets, without court approval, to purchase an investment property for attorney and his business partner violated Rule of Professional Conduct prohibiting conduct involving dishonesty, fraud, deceit or misrepresentation, even though attorney allegedly wanted to benefit the conservatorship and did not know the rules governing conservatorships; attorney's self-dealing constituted an intentional misappropriation, despite his motivation. Attorney Grievance Com'n v. Whitehead, 405 Md. 240, 950 A.2d 798 (2008).

Paying clients before funds belonging to them were deposited in attorney's trust account violated obligation to use trust money only for purpose for which the trust money was entrusted to the lawyer, even though no client was harmed; the attorney used other clients' funds to make the payments. Attorney Grievance Com'n of Maryland v. Zuckerman, 403 Md. 695, 944 A.2d 525 (2008).

Failing to promptly pay individuals who had funds on deposit in trust account violated duties of competence, diligence, safekeeping of property, and prompt notification and deliverance of funds in which a

client or third party had an interest, and was prejudicial to administration of justice. Attorney Grievance Com'n of Maryland v. Zuckerman, 403 Md. 695, 944 A.2d 525 (2008).

Attorney violated professional conduct rule relating to safekeeping of property when, as personal representative of estate, she failed to turn over to the successor personal representative undisputed assets of the estate and all financial records in her possession and in possession of co-representative, when she admittedly failed to locate a check payable to the estate in the amount of $196.80, and when she failed to file a third and final administration account approved by the Orphans' Court. Attorney Grievance Com'n of Maryland v. Kendrick, 403 Md. 489, 943 A.2d 1173 (2008).

Attorney's misconduct in misappropriating client funds from trust account over a period of two years in order to cover personal expenses unrelated to his representation of those clients in violation of the rules of professional conduct warranted disbarment. Attorney Grievance Com'n of Maryland v. Nussbaum, 401 Md. 612, 934 A.2d 1 (2007).

Attorney's misconduct in securing an indorsement of a check from a person not authorized to sign it, depositing the check into his personal bank account, and using the vast majority of the proceeds to pay his personal obligations, while knowing at all times that the amount of the check greatly exceeded any fees to which he was entitled, warranted disbarment, which represented reciprocal discipline to that imposed in state in which conduct occurred; based on attorney's conduct, sanction of disbarment did not represent a grave injustice. In re Mitrano, 453 Mass. 1026, 906 N.E.2d 340 (2009).

Attorney's seven-week delay in informing client about receiving $8,000 in personal injury protection (PIP) funds on client's behalf violated professional conduct rule requiring a lawyer to promptly notify client after receiving trust funds or other trust property in which client has an interest, particularly where earlier in seven-week period an employee in attorney's office had delivered a check to client without explaining that it was a partial payment of PIP funds and attorney was holding the balance to pay outstanding medical bills, and where by the time attorney gave client notice about the full amount received, he had paid out all remaining funds to third parties. In re Discipline of an Attorney, 451 Mass. 131, 884 N.E.2d 450 (2008).

As stipulated by attorney and Director of the Office of Lawyers Professional Responsibility, indefinite suspension of five years, rather than disbarment, was appropriate discipline for professional misconduct that included misappropriation of client funds, concealment of the misappropriation, making false statements to clients, forging of client's signature, and failure to cooperate with the disciplinary investigation, in view of mitigating factors such as attorney's depression, his lack of disciplinary history prior to events leading to present proceeding and prior to his diagnosis with a terminal heart condition, and his repayment of all misappropriations. In re Disciplinary Action Against Berg, 741 N.W.2d 600 (Minn. 2007).

Indefinite suspension from the practice of law without leave to apply for reinstatement for three years was appropriate disciplinary sanction for attorney who misappropriated client funds; while mitigating circumstances included attorney's bipolar disorder, his self-reporting of his misconduct, his voluntary restoring of the funds, and his remorse, misappropriation of client funds presented a paramount risk to the integrity of the legal profession, and attorney acted with a dishonest and selfish motive in taking his clients' funds, which he did on multiple occasions. In re Belz, 258 S.W.3d 38 (Mo. 2008).

Attorney's failure to pay to client $15 refund attorney received from county clerk's office for approximately eight months violated provision of code of professional responsibility stating that lawyers should promptly notify a client of receipt of his funds, provision dealing with violation of a disciplinary rule, and attorney's oath of office. State ex rel. Counsel for Discipline of Nebraska Supreme Court v. Wright, 277 Neb. 709, 764 N.W.2d 874 (2009).

Imposition of reciprocal discipline was appropriate where attorney, in consenting to his disbarment in New Jersey, acknowledged being aware of charges that he knowingly misappropriated client trust funds, admitted that the allegations were true and that he could not successfully defend against them, and stated that his consent was freely and voluntarily given and that he was fully aware of the implications of submitting his consent to disbarment; attorney received sufficient notice of the charges and an opportunity to answer them, no infirmity of proof existed, and his admitted misconduct would clearly constitute professional misconduct in New York. In re Rumore, 63 A.D.3d 1, 880 N.Y.S.2d 1 (1st Dep't 2009).

Disbarment from the practice of law was appropriate sanction for attorney who, despite having been repeatedly disciplined for similar misconduct, persistently demonstrated apathetic and neglectful attitude

towards representation of his clients by, inter alia, failure to communicate with clients and opposing counsel, failure to maintain attorney escrow account, charging an excessive fee, and failure to provide letter of engagement or enter into retainer agreement with client. In re Hogan, 56 A.D.3d 887, 866 N.Y.S.2d 452 (3d Dep't 2008).

Attorney violated professional conduct rules relating to making agreement for, charging, or collecting an unreasonable fee, as well as rule concerning safekeeping property, where attorney billed hours to the files of four clients, who were represented by another attorney in his firm, for work that was not actually done or was of no value to the clients. Rules of Prof.Conduct, Rules 1.5(a), 1.15(a, c). In re Disciplinary Action Against Wolff, 2010 ND 175, 788 N.W.2d 594 (N.D. 2010).

Attorney's conduct, in misleading client into thinking case had settled, failing to deposit client funds in client trust account, failing to file client's injury suit before expiration of statute of limitations, and failing to disclose absence of malpractice insurance, violated professional rules, including rules prohibiting lawyer from engaging in conduct involving dishonesty, from neglecting entrusted legal matter, from not safeguarding client funds, from failing to maintain copy of notice of lack of malpractice insurance signed by client, and from failing to advise client that lawyer lacked malpractice insurance. Toledo Bar Assn. v. Baker, 122 Ohio St. 3d 45, 2009-Ohio-2371, 907 N.E.2d 1172 (2009).

Attorney's failure to account to clients for legal fee he retained after disbursing client's settlement check violated professional rule requiring a lawyer to maintain complete records of all funds coming into the possession of lawyer and render appropriate accounts to client. Toledo Bar Assn. v. Baker, 122 Ohio St. 3d 45, 2009-Ohio-2371, 907 N.E.2d 1172 (2009).

Two-year suspension, with second year stayed on conditions, was warranted for attorney whose misconduct, in failing to preserve the identity of his clients' funds, failing to keep complete records of his client trust account, failing to give notice to his clients that his malpractice insurance had lapsed, and failing to update his attorney-registration record, violated rules, including those requiring a lawyer to maintain client funds in a separate identifiable bank account and requiring a lawyer to maintain complete records of client funds in the lawyer's possession. Akron Bar Assn. v. McNerney, 122 Ohio St. 3d 40, 2009-Ohio-2374, 907 N.E.2d 1167 (2009).

Permanent disbarment was warranted for attorney whose misconduct, including misappropriating over $172,000 from client's trust, resulting in third-degree theft conviction, and neglecting defense of a mechanic's lien foreclosure action, violated rules of professional responsibility, including those prohibiting illegal conduct involving moral turpitude, and prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation; attorney misappropriated money that client had intended to serve charitable purposes, in order to maintain the illusion that he had a successful legal practice, thefts began less than a week after securing signatory authority on the trust and continued for almost two years, and attorney's neglect of mechanic's lien case resulted in default judgment and dismissal of client's counterclaim. Cleveland Metro. Bar Assn. v. Parrish, 121 Ohio St. 3d 610, 2009-Ohio-1969, 906 N.E.2d 1113 (2009).

Attorney's conduct in estate matter of cashing cashier's check made payable to decedent without consent of client that had retained him to open and administer estate and his misappropriation of that money and $500 legal fee client paid to him violated rules of professional conduct requiring lawyers to promptly inform client of any circumstance with respect to which client's informed consent is required, to appropriately safeguard client's property in his possession, to deposit into client trust account legal fees and expenses that have been paid in advance, to be withdrawn by lawyer only as fees are earned or expenses incurred, as well as rule prohibiting lawyers from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. Cincinnati Bar Assn. v. Brown, 121 Ohio St. 3d 445, 2009-Ohio-1249, 905 N.E.2d 184 (2009).

Attorney's failure to promptly pay clients settlement funds belonging to them or to hold those funds in trust violated provisions of code of professional conduct prohibiting attorneys from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, and conduct that adversely reflects on lawyer's fitness to practice law, as well as provisions requiring lawyer to maintain complete records of all client funds in his possession and to render appropriate accounts regarding those funds to his clients and requiring prompt delivery of client funds. Disciplinary Counsel v. Wolanin, 121 Ohio St. 3d 390, 2009-Ohio-1393, 904 N.E.2d 879 (2009).

Attorney's misappropriation of funds from client trust account, failure to keep written records of client trust account, and delay in providing any trust account information to bar association during disciplinary

investigation violated professional rules prohibiting attorney from engaging in conduct prejudicial to administration of justice, requiring attorney to maintain client funds in separate identifiable bank account, requiring attorney to maintain complete records of all client funds, and requiring attorney to promptly pay to client funds to which client was entitled. Trumbull Cty. Bar Assn. v. Kafantaris, 121 Ohio St. 3d 387, 2009-Ohio-1389, 904 N.E.2d 875 (2009).

Attorney's failure to disclose client's personal injury settlement to probate court, misappropriation of funds from trust account, and failure to provide requested trust account records to bar association during disciplinary investigation violated professional rules prohibiting attorney from engaging in conduct involving dishonesty, prohibiting attorney from engaging in conduct prejudicial to administration of justice, prohibiting attorney from engaging in conduct that adversely reflects on fitness to practice law, prohibiting attorney from concealing that which was required to be revealed by law, requiring attorney to maintain complete records of all client funds, and requiring attorney to promptly pay to client funds to which client was entitled. Trumbull Cty. Bar Assn. v. Kafantaris, 121 Ohio St. 3d 387, 2009-Ohio-1389, 904 N.E.2d 875 (2009).

Attorney's misconduct, in regularly writing checks from client trust account to pay his own business expenses and overdrawing client trust account, violated rules of professional responsibility requiring a lawyer to maintain client funds in a separate, identifiable bank account, requiring a lawyer to maintain complete records of client property in his or her possession and render appropriate account, and requiring a lawyer to promptly pay requested funds in his or her possession that the client is entitled to receive. Mahoning Cty. Bar Assn. v. Palombaro, 121 Ohio St. 3d 351, 2009-Ohio-1223, 904 N.E.2d 529 (2009).

Attorney's misconduct, in making a $19,000 deposit into client trust account but failing to provide the funds to client to use to pay restitution in criminal case, and making payments out of client's trust account without dispersing funds to attorney's own business account, violated rules of professional responsibility requiring a lawyer to maintain client funds in a separate, identifiable bank account, requiring a lawyer to maintain complete records of client property in his or her possession and render appropriate account, and requiring a lawyer to promptly pay requested funds in his or her possession that the client is entitled to receive. Mahoning Cty. Bar Assn. v. Palombaro, 121 Ohio St. 3d 351, 2009-Ohio-1223, 904 N.E.2d 529 (2009).

Counsel's charging of $5,000 fee for advice regarding problems that prospective clients were having with their business partner violated disciplinary rule requiring attorneys to charge fees in reasonable amounts; prospective clients did not agree to attorney's representation or his fee, and attorney spent no more than two hours of his time consulting with prospective clients. Akron Bar Assn. v. Catanzarite, 119 Ohio St. 3d 313, 2008-Ohio-4063, 893 N.E.2d 835 (2008).

Suspension for 18 months, with six months stayed on condition that attorney take classes in office management and ethics, was appropriate disciplinary sanction for attorney's conduct in granting his legal secretary broad authority to deal with and work directly for clients in bankruptcy cases, with secretary collecting fees from clients, which secretary pocketed, and attorney's failure to maintain a client trust account. Disciplinary Counsel v. Maley, 119 Ohio St. 3d 217, 2008-Ohio-3923, 893 N.E.2d 180 (2008).

Attorney's conduct of telling client that his suspension from practice of law was about to terminate and that he would be reinstated, when in fact attorney knew there were additional grievances pending against him that would likely prevent his reinstatement, agreeing to transfer client's $1,500 retainer from his trust account to attorney he worked with once this attorney began representing client, and his failure to refund client's retainer violated provisions of code of professional responsibility prohibiting a lawyer from practicing law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction, and from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, and provision requiring a lawyer to preserve the identity of funds and property of a client. Toledo Bar Assn. v. Hickman, 119 Ohio St. 3d 102, 2008-Ohio-3837, 892 N.E.2d 437 (2008).

Permanent disbarment from practice of law was appropriate sanction for attorney's misconduct, including his misrepresentations to client about work he was purportedly performing on client's behalf in matter, failing to refund another client's retainer, and accepting $12,500 retainer from a third client and then withdrawing these funds from his client trust account even though he had not earned theses amounts in fees, all of which violated numerous provisions of code of professional responsibility; there had been two prior disciplinary cases against attorney for same type of misconduct, and attorney acted with a dishonest or selfish motive, engaged in a pattern of misconduct, failed to acknowledge wrongful nature of his misconduct, and failed to make restitution

to his clients, many of whom were vulnerable. Toledo Bar Assn. v. Hickman, 119 Ohio St. 3d 102, 2008-Ohio-3837, 892 N.E.2d 437 (2008).

Six-month conditionally stayed suspension was warranted for attorney who neglected a client's case and failed to properly maintain and account for fees that client advanced, in violation of rules of professional conduct prohibiting a lawyer from neglecting an entrusted legal matter, requiring a lawyer to deposit funds of client in one or more identifiable bank accounts and requiring a lawyer to maintain complete records and render appropriate accounts of client funds in the lawyer's possession. Cleveland Bar Assn. v. Ramos, 119 Ohio St. 3d 36, 2008-Ohio-3235, 891 N.E.2d 730 (2008).

Conduct of attorney as executor of estates of his uncle and his cousin, in using estate assets to directly pay his personal creditors, using debit slips to withdraw funds from estates without recording the purpose of those withdrawals, failing to close the estates in timely manner, and failing to timely respond to requests for further information and documentation from probate court and successor counsel, violated professional responsibility rules barring conduct involving dishonesty, barring conduct prejudicial to administration of justice, barring conduct reflecting adversely on fitness to practice law, barring neglect of entrusted legal matter, and requiring a lawyer to maintain complete records of all properties of a client. Disciplinary Counsel v. Hoskins, 119 Ohio St. 3d 17, 2008-Ohio-3194, 891 N.E.2d 324 (2008).

Permanent disbarment was warranted as a sanction for attorney who engaged in a continuous course of conduct involving deceit, misappropriation of clients' funds, neglect of clients' cases, failure to account for fees, failure to make restitution, and failure to cooperate in the investigation of this misconduct, in violation of professional responsibility prohibiting a lawyer from engaging in illegal conduct involving moral turpitude, prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, prohibiting conduct that adversely reflects on the lawyer's fitness to practice law, prohibiting a lawyer from dividing fees with lawyers not in the same firm where the division is not in proportion to the services performed by each lawyer, requiring the disclosure in writing of the terms of the division of fees, prohibiting the sharing of unreasonable fees among lawyers not in the same firm, prohibiting a lawyer from neglecting an entrusted legal matter, prohibiting a lawyer from intentionally failing to carry out a contract of employment entered into with the client for professional services, prohibiting a lawyer from intentionally prejudicing or damaging his client during the course of the professional relationship, requiring a lawyer to maintain complete records of all funds, securities, and other properties of a client coming into the lawyer's possession and failing to render appropriate accounts to the clients regarding those funds, and requiring a lawyer to promptly pay or deliver upon request funds to which the client is entitled, and government of the bar rule requiring a lawyer to cooperate in a disciplinary investigation. Toledo Bar Assn. v. Mason, 118 Ohio St. 3d 412, 2008-Ohio-2704, 889 N.E.2d 539 (2008).

Attorney's conduct in overdrawing his client trust account nine times during two calendar years, so that attorney was unable to immediately refund an unearned $1,500 fee to a client, in failing to maintain an interest-bearing client trust account for three months yet continuing to collect funds from clients, in sometimes using funds from client trust account to pay costs for clients before they paid him, and in occasionally depositing unearned fees in his office operating account, violated professional responsibility rule regarding client funds and client property. Columbus Bar Assn. v. Peden, 118 Ohio St. 3d 244, 2008-Ohio-2237, 887 N.E.2d 1183 (2008).

Attorney's misconduct, failing to deposit funds he received settling client's personal injury matter into the Interest on Lawyers' Trust Accounts (IOLTA) account of his law firm, failing to indicate to firm that the matter had been settled, cashing the settlement check, paying client a portion of the settlement but failing to pay any of the remaining funds to the law firm, which became aware of situation when client complained that his medical bills still had not been paid, violated rules of professional responsibility prohibiting attorney from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, engaging in conduct prejudicial to the administration of justice, engaging in conduct adversely reflecting on the lawyer's fitness to practice law, and prohibiting a lawyer from depositing personal funds in law firm accounts. Disciplinary Counsel v. Zigan, 118 Ohio St. 3d 180, 2008-Ohio-1976, 887 N.E.2d 334 (2008).

Misappropriation of a client's money cannot be tolerated, and the presumptive attorney disciplinary measure for acts of misappropriation is disbarment. Cleveland Bar Assn. v. Mishler, 118 Ohio St. 3d 109, 2008-Ohio-1810, 886 N.E.2d 818 (2008).

Attorney's misconduct, facilitating the purchase of four $100,000 certificates of deposit and the transfer of over $1,000,000 in stock with assets previously held individually by his elderly and debilitated client, and placing the assets in joint accounts that would pass to him upon her death, violated disciplinary rules prohibiting conduct adversely reflecting upon attorney's fitness to practice law, and prohibiting attorney, except with consent of client after full disclosure, from accepting employment if the exercise of professional judgment on behalf of the client may be reasonably affected by attorney's financial and personal interests. Disciplinary Counsel v. Tomlan, 118 Ohio St. 3d 1, 2008-Ohio-1471, 885 N.E.2d 895 (2008).

Attorney's misconduct during litigation regarding his deceased client's estate, in failing to reveal certificates of deposit, stocks, and other assets, valued at over $1.4 million, that had once belonged to client and presently belonged to him, violated disciplinary rules prohibiting conduct involving fraud, deceit, dishonesty, or misrepresentation, and prohibiting attorney from suppressing evidence that attorney had a legal obligation to reveal or produce. Disciplinary Counsel v. Tomlan, 118 Ohio St. 3d 1, 2008-Ohio-1471, 885 N.E.2d 895 (2008).

Attorney's misconduct in performing his duties as administrator of deceased client's estate, delaying admitting the estate to probate for 16 months, ignoring the court-appointed administrator's efforts to open the estate, failing to turn over estate assets, and failing to pay estate creditors, leading to the filing of a common pleas action to recover assets held by attorney, violated disciplinary rules prohibiting conduct that is prejudicial to the administration of justice, and prohibiting conduct that adversely reflects upon attorney's fitness to practice law. Disciplinary Counsel v. Tomlan, 118 Ohio St. 3d 1, 2008-Ohio-1471, 885 N.E.2d 895 (2008).

Indefinite suspension was appropriate sanction for attorney who, without elderly client's informed consent, transferred over $1 million in client's financial assets to joint and survivorship accounts in both of their names, concealed estate proceeds in his possession after his client died, unduly delayed performing his duties as executor of the client's estate, and engaged in prohibited ex-parte communication with a probate court judge; although attorney had no prior disciplinary record and cooperated professionally in the disciplinary proceedings, those mitigating factors were outweighed by the aggravating factors that attorney compromised his vulnerable client and her named beneficiaries to benefit his own financial interests, that he did so in a series of wrongful acts, and that attorney profited from his wrongdoing. Disciplinary Counsel v. Tomlan, 118 Ohio St. 3d 1, 2008-Ohio-1471, 885 N.E.2d 895 (2008).

Attorney's conduct, after failing to appear in municipal court on new date for trial of petty-theft charge against client, in failing to return to client the $300 flat fee that client had paid to attorney for the representation, violated professional responsibility rule requiring a lawyer to promptly pay funds in the lawyer's possession to which the client is entitled. Toledo Bar Assn. v. Lowden, 117 Ohio St. 3d 396, 2008-Ohio-1199, 884 N.E.2d 52 (2008).

Disbarment was appropriate reciprocal discipline for attorney who was disbarred in Colorado for conversion of client's trust fund, despite attorney's lack of previous discipline and his alleged cooperation in investigation against him, where attorney converted $268,247.95 from the fund. State ex rel. Oklahoma Bar Ass'n v. Rymer, 2008 OK 50, 187 P.3d 725 (Okla. 2008).

Nonretroactive disbarment and restitution was appropriate sanction for attorney who engaged in multiple instances of misconduct involving misappropriation of funds in client trust account, failure to pay financial obligations to clients and expert, and failure to respond to notices of disciplinary investigation. In re Ruffin, 382 S.C. 598, 677 S.E.2d 25 (2009).

Conduct of attorney in negotiating settlement check from personal injury case and disbursing his legal fees to his operating account, in violation of instructions of third party involved in settlement, violated rule of professional conduct setting forth procedure lawyer should follow after conclusion of contingent fee matter and rule governing safekeeping of client's property. In re White, 378 S.C. 333, 663 S.E.2d 21 (2008), reinstatement granted, 380 S.C. 200, 669 S.E.2d 588 (2008).

Attorney's failure to promptly return entire amount of settlement proceeds from personal injury case impeded other attorney's progress in pursuing client's claim with third party involved in settlement, as would support finding of misconduct in disciplinary action; client never signed settlement release, attorney knew of correspondence between other attorney and third party regarding potential settlement of client's claim, and attorney never relinquished amount of his attorney fees even though he failed to procure final settlement for

client. In re White, 378 S.C. 333, 663 S.E.2d 21 (2008), reinstatement granted, 380 S.C. 200, 669 S.E.2d 588 (2008).

Attorney's actions were in direct violation of instructions by third party involved in settlement, that attorney retain settlement proceeds from personal injury case in his trust account until parties signed and returned release, as would support finding of misconduct in disciplinary action; although attorney was aware that client did not intend to sign release, attorney endorsed settlement check, deposited it into his trust account, and transferred his legal fees to his operating account, and attorney, per party's instruction, should have returned his legal fees to his trust account until matter was resolved. In re White, 378 S.C. 333, 663 S.E.2d 21 (2008), reinstatement granted, 380 S.C. 200, 669 S.E.2d 588 (2008).

As provided in agreement for discipline by consent, suspension for 30 days was appropriate sanction for attorney's misconduct in neglecting client cases as a result of closing of law office and in depositing client checks into firm's operating account, before transferring them to trust account, so as to avoid difficulties caused when clients' checks were returned for insufficient funds, where attorney fully cooperated with the Office of Disciplinary counsel on the client files and resumed active representation on files returned to him by attorneys appointed to protect clients' interests (APCI). In re Long, 375 S.C. 195, 652 S.E.2d 397 (2007), reinstatement granted, 375 S.C. 495, 654 S.E.2d 271 (2007).

Eighteen-month suspension from practice was appropriate sanction for attorney's conduct in withdrawing client funds from escrow before earning them and failing to keep clients informed regarding their case. Green v. Virginia State Bar, 278 Va. 162, 677 S.E.2d 227 (2009).

Client's funds held in trust accounts with two law firms remained the property of the client, rather than being owned by the law firms with the client being a creditor of the law firms, which were subject to garnishment in satisfaction of a judgment. Marcus, Santoro & Kozak, P.C. v. Hung-Lin Wu, 652 S.E.2d 777 (Va. 2007).

Suspension from practice of law for 24 months was not disproportionate to attorney's violations of Rules of Professional Conduct for misusing trust account and engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. In re Disciplinary Proceeding Against Hicks, 166 Wash. 2d 774, 214 P.3d 897 (2009).

Substantial evidence supported hearing officer's finding of fact that there were 66 instances in which funds deposited into attorney's trust account were non-refundable retainers that they attorney considered fully earned fees, for purposes of disciplinary charge of commingling of funds, in violation of the Rules of Professional Conduct; attorney admitted that when he "received a check from a client he deposited the check into his trust account regardless of whether the funds were client funds, fully earned fees or non-refundable retainers". In re Disciplinary Proceeding Against Trejo, 163 Wash. 2d 701, 185 P.3d 1160 (2008).

Transactions in which client loaned money to attorney violated professional conduct rule on conflicts of interest and business transactions with current clients; attorney did not discuss with client payment of interest, fees, or penalties, attorney did not advise client that attorney's interests might conflict with client's interests, attorney failed to prepare written promissory notes, loans were unsecured, and client expressed concern that if he stopped loaning funds to attorney, the employment discrimination case in which attorney was representing client as plaintiff would suffer. In re Disciplinary Proceeding Against Holcomb, 162 Wash. 2d 563, 173 P.3d 898 (2007).

Transactions in which client loaned money to attorney materially limited attorney's representation of client as plaintiff in employment discrimination action, for purposes of professional conduct rules' general rule on conflicts of interest; attorney was representing client while also using client as source of funds for attorney's own purposes, and attorney admittedly acted in his own interests rather than in client's interests when he failed to repay the last loan of $1,800 for over a year because he was repairing the septic system at his home. In re Disciplinary Proceeding Against Holcomb, 162 Wash. 2d 563, 173 P.3d 898 (2007).

Attorney's misconduct involving abandoning his practice without notifying his clients or returning fees that had been advanced by clients warranted revocation of his license to practice law and payment of restitution. SCR 20:8.4. In re Disciplinary Proceedings Against Fisher, 2010 WI 45, 324 Wis. 2d 745, 785 N.W.2d 321 (2010).

Attorney violated Rule of Professional Conduct (RPC) requiring that she take steps to the extent reasonably practicable to protect a client's interests, upon termination of representation, by failing to refund to client a minimum of $1,000, which attorney acknowledged she did not earn because she neglected to file an appeal

from a postconviction ruling. In re Disciplinary Proceedings Against Joan M. Boyd, 2009 WI 59, 318 Wis. 2d 281, 767 N.W.2d 226 (2009).

Attorney's failure to respond to client's requests for detailing billing reflecting the work attorney performed in representing client in criminal prosecution, following client's termination of attorney's services, violated professional rule requiring lawyers to promptly respond to a client's request for information concerning fees and expenses. In re Disciplinary Proceedings Against Ryan, 2009 WI 39, 317 Wis. 2d 196, 766 N.W.2d 186 (2009).

Attorney's conduct in failing to give chiropractor written notice that settlement proceeds from personal injury cases were received in several cases and, moreover, in failing to promptly deliver to chiropractor the amount he was entitled to receive, in violation of professional rule requiring lawyers to deliver to clients or third persons any funds or other property that clients or third persons are entitled to receive, warranted a 90-day suspension from the practice of law. In re Disciplinary Proceedings Against Reitz, 2009 WI 90, 769 N.W.2d 566 (Wis. 2009).

Attorney's failure to give chiropractor written notice that settlement proceeds from personal injury cases were received in several cases in which he was the treating chiropractor and attorney's failure to promptly deliver to chiropractor the amount he was entitled to receive violated professional rule requiring lawyers to deliver to clients or third persons any funds or other property that clients or third persons are entitled to receive. In re Disciplinary Proceedings Against Reitz, 2009 WI 90, 769 N.W.2d 566 (Wis. 2009).

[END OF SUPPLEMENT]

[FN1] Rule 8.4(c), ABA Model Rules of Professional Conduct.

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[FN2] Matter of Disciplinary Proceedings Against Rudolph, 187 Wis. 2d 324, 522 N.W.2d 219 (1994).

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[FN3] Disciplinary Counsel v. Roberts, 86 Ohio St. 3d 551, 715 N.E.2d 1138 (1999).

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[FN4] Cleveland Bar Ass'n v. Belock, 82 Ohio St. 3d 98, 1998-Ohio-261, 694 N.E.2d 897 (1998).

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[FN5] Rule 1.15(a), (d), ABA Model Rules of Professional Conduct.

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[FN6] Matter of Struthers, 179 Ariz. 216, 877 P.2d 789 (1994).

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[FN7] Rule 1.15(a), ABA Model Rules of Professional Conduct.

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[FN8] Rule 1.15(a), ABA Model Rules of Professional Conduct.

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[FN9] Matter of Gavel, 269 Ga. 758, 507 S.E.2d 423 (1998), reinstatement granted, 275 Ga. 494, 569 S.E.2d 840 (2002).

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[FN10] In re Disciplinary Action Against Hoedeman, 620 N.W.2d 714 (Minn. 2001).

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[FN11] In re Redic, 271 Ga. 466, 521 S.E.2d 809 (1999).

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[FN12] Disciplinary Counsel v. Romaniw, 83 Ohio St. 3d 462, 1998-Ohio-25, 700 N.E.2d 858 (1998).

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AMJUR ATTNYS § 63

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7 Am. Jur. 2d Attorneys at Law § 64

American Jurisprudence, Second Edition
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Attorneys at Law
Rachel M. Kane, M.A., J.D.

II. Judicial Supervision of Legal Profession
B. Disciplinary Proceedings
4. Grounds for Discipline
b. Misconduct as an Attorney
(3) In Relation to Clients
(b) Misappropriation, Conversion and Commingling

Topic Summary Correlation Table References

§ 64. Commingling of funds

West's Key Number Digest

West's Key Number Digest, Attorney and Client 44(2)

A.L.R. Library

Reciprocal Discipline of Attorneys—Commingling or Other Mishandling of Client Funds, 45 A.L.R.6th 175

Attorney's commingling of client's funds with his own as ground for disciplinary action—modern status, 94 A.L.R.3d 846

Commingling of trust account funds, and using trust account funds for personal purposes, warrants disbarment.[FN1] Stated differently, it is a ground for professional discipline when an attorney commingles the funds of a client with his or her own.[FN2] Even when the client suffers no harm, an attorney's commingling of his or her own funds with client funds or the attorney's use of client funds for operating expenses is subject to sanction.[FN3] In addition, funds may not be withdrawn from a client's account for a lawyer's own purposes whether for personal or private business use.[FN4]

CUMULATIVE SUPPLEMENT

Cases:

Suspension for 45 days, with requirement of paying restitution of $479.50 to client plus costs, was appropriate disciplinary sanction for attorney's conduct, relating to representation of client in divorce action, in failing to act with diligence with respect to motion by client's wife to compel client to make mortgage payments on marital home and with respect to wife's motion to hold client in contempt for failing to pay arrearages on the mortgage, failing to keep client informed regarding the motions, failing to adequately explain those matters to client, failing to return to client the unearned balance of $479.50, from client's advance fee payment of $1,000, upon termination of representation, and for attorney's conduct in failing to respond to two letters from Office of Bar Counsel (OBC) seeking explanation of inconsistencies in attorney's response to bar complaint. Kentucky Bar Ass'n v. Glidewell, 241 S.W.3d 316 (Ky. 2007).

Attorney's acts in converting client funds totaling more than $56,000 for his own use caused serious potential harm to his clients and serious actual harm to his former law partners, and was therefore, misconduct for which disbarment was the baseline sanction. In re Hodge, 999 So. 2d 1131 (La. 2009).

One-year suspension with all but six months deferred was appropriate sanction for attorney's commingling of client funds with her personal funds and conversion of client funds, where, at the time attorney cashed client's settlement check, she was subject to the extreme stress and unprecedented disruption occasioned by Hurricane Katrina, attorney's decision to cash the check was motivated by an attempt to protect her client's interests, client did not suffer any significant harm from attorney's actions, and there were several mitigating factors. In re Keller, 998 So. 2d 40 (La. 2008).

Attorney, who cashed her client's settlement check instead of depositing the check into her client trust account and then deposited the cash into her personal checking account, commingled client funds with her personal funds and converted client funds, in violation of rule of professional conduct governing the safekeeping of property of clients. In re Keller, 998 So. 2d 40 (La. 2008).

Attorney's use of trust account to pay an office phone bill and his subsequent deposit of personal funds to cover the overdraft violated rule of professional conduct governing the safekeeping of property, even though there was no commingling with or misuse of client funds. Attorney Grievance Com'n v. Taylor, 405 Md. 697, 955 A.2d 755 (2008).

Attorney violated rule prohibiting commingling of funds in attorney trust accounts by leaving his fee in account following disbursement of funds from a settlement and paying bills and personal expenses from the account, even if no client funds were in the account and attorney no longer used the account as a trust account, where account was still denominated as a trust account. Attorney Grievance Com'n v. Taylor, 405 Md. 697, 955 A.2d 755 (2008).

Appropriate sanction for attorney who violated rule of professional conduct governing the safekeeping of property and rule prohibiting commingling of funds in attorney trust account would not have been any different if rule of professional conduct prohibiting an attorney's knowing failure to respond to a lawful demand for information from a disciplinary authority had also been violated, and thus it was not necessary for Court of Appeals to remand disciplinary matter to hearing judge to make findings of fact as to attorney's claim that his failure to timely respond to Bar Counsel was not a knowing failure. Attorney Grievance Com'n v. Taylor, 405 Md. 697, 955 A.2d 755 (2008).

Attorney's conduct in cashing checks, through deposit to attorney's client trust account and disbursement to former client of part of the proceeds, at request of former client that attorney had previously represented in five criminal matters including various theft charges, which checks were Social Security checks made out to a person unknown to attorney and purportedly endorsed by that person, which endorsement the United States Treasury Department later determined to be forged, violated professional conduct rule prohibiting a lawyer from commingling the lawyer's funds with client funds in a client trust account; funds were not being held in connection with representation of a client but as a service to former client, who needed to have the check cashed, and as a means for attorney to be reimbursed for a loan to client by keeping part of the proceeds. In re Disciplinary Action Against Varriano, 755 N.W.2d 282 (Minn. 2008).

In attorney disciplinary proceeding in Minnesota, relating to attorney who was admitted to practice in both Minnesota and North Dakota, referee's findings, that attorney commingled client funds and personal funds in an

Interest on Lawyers Trust Account (IOLTA) in North Dakota and that he maintained personal funds in the account that were not for permissible client purposes, were not clearly erroneous; numerous letters from attorney to Director of Minnesota Office of Lawyers Professional Responsibility indicated that there were "no client funds" in IOLTA account at time of overdraft and thereafter, attorney did not make his assertions, that majority of surplus in IOLTA account was his wife's money and that his wife was a client, until well into investigatory process and after Director notified attorney that having his personal funds in IOLTA account would violate professional conduct rules, attorney offered no specific evidence that his wife was a client, and he admitted that $4,500 he deposited into IOLTA account, as prospective donation for war veterans memorial, was not client money. In re Disciplinary Action Against Overboe, 745 N.W.2d 852 (Minn. 2008).

Attorney's conduct in mismanaging his client trust account to a point at which he deemed it necessary to disburse settlement proceeds to a client from his personal account, coupled with the manner in which he referred a criminal matter to a criminal lawyer and shared prepaid legal fees without client's written consent, warranted six-month suspension from the practice of law, with reinstatement conditioned upon a two-year probationary period during which he was required to retain, at his expense, an accountant to audit his trust account every 6 months, for a period of 2 years, and submit the results of those audits to the Counsel for Discipline. State ex rel. Counsel for Discipline of Nebraska Supreme Court v. Lindmeier, 280 Neb. 620, 788 N.W.2d 555 (2010).

Disbarment was appropriate sanction for attorney who failed to return client's funds held in attorney's client trust account, failed to respond to requests from Counsel for Discipline for information, failed to respond to the formal charges, and failed to file a brief with Supreme Court. State ex rel. Counsel for Discipline of Nebraska Supreme Court v. Fournier, 277 Neb. 541, 763 N.W.2d 401 (2009).

Attorney's use of her attorney trust account as both business account and personal checking account and her failure to promptly deliver trust account funds to client's health care provider warranted one-year suspension from practice of law, retroactive to date of temporary suspension, with reinstatement on conditions. State ex rel. Counsel for Discipline of Nebraska Supreme Court v. Davis, 276 Neb. 158, 760 N.W.2d 928 (2008).

Attorney commingled, with personal funds, funds entrusted to him as fiduciary, incident to his practice of law, in violation of Code of Professional Responsibility, where attorney deposited both funds entrusted to him as fiduciary, incident to his practice of law, and personal funds into his attorney trust fund accounts, allowed earned legal fees to remain on deposit in accounts, and drew checks for personal expenses on accounts. In re Dash, 64 A.D.3d 242, 880 N.Y.S.2d 104 (2d Dep't 2009).

Five-year suspension from practice of law was warranted by conduct of attorney who was found to have commingled funds entrusted to him as fiduciary, incident to his practice of law, with personal funds, engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, engaged in conduct that adversely reflected on his fitness as lawyer, improperly disbursed escrow funds to suspended attorney, engaged in impermissible conflict of interest, improperly disbursed funds held by him as fiduciary, incident to his practice of law, without his client's authorization, and failed to produce required bookkeeping records, given attorney's prior disciplinary history, which involved, in part, similar misconduct, and his attempts to disguise true nature of his involvement with attorney who was suspended. In re Dash, 64 A.D.3d 242, 880 N.Y.S.2d 104 (2d Dep't 2009).

Attorney's conduct, in failing to preserve the identity of his clients' funds, failing to keep complete records of his client trust account, failing to give notice to his clients that his malpractice insurance had lapsed, and failing to update his attorney-registration record, violated rules requiring a lawyer to maintain client funds in a separate identifiable bank account, requiring a lawyer to maintain complete records of client funds in the lawyer's possession, precluding a lawyer from depositing personal funds into his client trust account except as necessary to pay bank service charges, requiring a lawyer to inform clients if the lawyer's professional-liability insurance is terminated, and prohibiting lawyers from engaging in conduct that adversely reflects on a lawyer's fitness to practice law. Akron Bar Assn. v. McNerney, 122 Ohio St. 3d 40, 2009-Ohio-2374, 907 N.E.2d 1167 (2009).

Attorney's commingling of his own personal money in client trust accounts violated professional rule requiring a lawyer to safeguard client funds by maintaining them in a separate, identifiable bank account; to conceal from a client that he had lost her case, attorney falsely told her that the parties had reached a settlement, and gave client a $2,500 check, drawn from his client trust account, which contained not only his clients' funds

but more than $170,000 of his own money. Cleveland Bar Assn. v. Slavin, 121 Ohio St. 3d 618, 2009-Ohio-2015, 906 N.E.2d 1121 (2009).

Attorney's commingling of his own personal money in client trust accounts violated professional rule requiring a lawyer to safeguard client funds by maintaining them in a separate, identifiable bank account; to conceal from a client that he had lost her case, attorney falsely told her that the parties had reached a settlement, and gave client a $2,500 check, drawn from his client trust account, which contained not only his clients' funds but more than $170,000 of his own money. Cleveland Bar Assn. v. Slavin, 121 Ohio St. 3d 618, 2009-Ohio-2015, 906 N.E.2d 1121 (2009), reinstatement granted, 124 Ohio St. 3d 1201, 2009-Ohio-6878, 918 N.E.2d 1007 (2009).

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Attorney's conduct, in commingling personal and client funds in his client trust account by depositing client funds, personal funds, earned attorney fees, and unearned retainer fees into the account and withdrawing or writing checks on account to pay personal obligations, and as a result overdrawing account and bouncing a check to a client, violated rules prohibiting a lawyer from engaging in conduct that adversely reflects upon his fitness to practice law, requiring a lawyer to keep client funds in separate account, and requiring a lawyer to maintain complete records of client funds and properties. Disciplinary Counsel v. Johnston, 121 Ohio St. 3d 403, 2009-Ohio-1432, 904 N.E.2d 892 (2009).

Attorney's conduct, in commingling personal and client funds in his client trust account by depositing client funds, personal funds, earned attorney fees, and unearned retainer fees into the account and withdrawing or writing checks on account to pay personal obligations, and as a result overdrawing account and bouncing a check to a client, violated rules prohibiting a lawyer from engaging in conduct that adversely reflects upon his fitness to practice law, requiring a lawyer to keep client funds in separate account, and requiring a lawyer to maintain complete records of client funds and properties. Code of Prof.Resp., DR 1-102(A)(6), DR 9-102(A), (B)(3); Rules of Prof.Conduct, Rules 1.15(a), 8.4(h). Disciplinary Counsel v. Johnston, 121 Ohio St. 3d 403, 2009-Ohio-1432, 904 N.E.2d 892 (2009).

Attorney's failure to promptly pay clients settlement funds belonging to them or to hold those funds in trust violated provisions of code of professional conduct prohibiting attorneys from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, and conduct that adversely reflects on lawyer's fitness to practice law, as well as provisions requiring lawyer to maintain complete records of all client funds in his possession and to render appropriate accounts regarding those funds to his clients and requiring prompt delivery of client funds. Disciplinary Counsel v. Wolanin, 121 Ohio St. 3d 390, 2009-Ohio-1393, 904 N.E.2d 879 (2009).

Two-year probation, and one-year suspension stayed on conditions, were warranted for attorney whose misconduct, in assisting non-attorneys representing debtors facing foreclosure, failing to advise clients that he had no malpractice insurance, and commingling his own funds with those of clients, violated rules of professional conduct, including those prohibiting a lawyer from aiding a nonlawyer in the unauthorized practice of law and requiring a lawyer to maintain client funds in a separate, identifiable bank account. Mahoning Cty. Bar Assn. v. Palombaro, 121 Ohio St. 3d 351, 2009-Ohio-1223, 904 N.E.2d 529 (2009).

Attorney's conduct, in failing to file an answer in defending client in lawsuit, instead doubling his fee without client's assent and demanding more money before taking action, resulting in default judgment being entered against client, and depositing client funds into his personal account even though he had not earned them, violated rules of professional responsibility prohibiting a lawyer from neglecting an entrusted legal matter, requiring a lawyer to maintain client funds other than advances for costs and expenses in a separate identifiable bank account, and requiring a lawyer to maintain complete records and render appropriate accounts of client funds in the lawyer's possession. Lake Cty. Bar Assn. v. Troy, 121 Ohio St. 3d 51, 2009-Ohio-502, 901 N.E.2d 809 (2009).

Attorney violated disciplinary rules relating to management of client trust account by commingling personal and client funds and using client trust account for personal expenses, for cash withdrawals, to avoid creditors including Internal Revenue Service, and to purchase drugs. Cincinnati Bar Assn. v. Lawson, 119 Ohio St. 3d 58, 2008-Ohio-3340, 891 N.E.2d 749 (2008).

Attorney violated disciplinary rules relating to dishonesty or fraud and conduct prejudicial to the administration of justice by lying to disciplinary authorities about commingling his personal and client funds. Cincinnati Bar Assn. v. Lawson, 119 Ohio St. 3d 58, 2008-Ohio-3340, 891 N.E.2d 749 (2008).

Conduct of attorney in paying an employee with a check drawn from his trust account and making transfers from the account to pay for personal and business expenses, even overdrawing account on one occasion, violated professional rules prohibiting commingling of personal and client funds. Cuyahoga Cty. Bar Assn. v. Nance, 119 Ohio St. 3d 55, 2008-Ohio-3333, 891 N.E.2d 746 (2008).

Conduct of attorney in paying an employee with a check drawn from his trust account and making transfers from the account to pay for personal and business expenses, even overdrawing account on one occasion, warranted six-month suspension from practice of law. Cuyahoga Cty. Bar Assn. v. Nance, 119 Ohio St. 3d 55, 2008-Ohio-3333, 891 N.E.2d 746 (2008).

Attorney's misconduct, in misleading a client about the availability of her settlement proceeds and then using the funds to pay his business expenses, violated rules of professional responsibility prohibiting conduct involving fraud, dishonesty, deceit, or misrepresentation, prohibiting conduct that adversely reflects on a lawyer's fitness to practice law, requiring a lawyer to deposit and maintain client funds, other than advances for costs and expenses, in a separate and identifiable bank account, requiring a lawyer to maintain complete records of and account for client property in the lawyer's possession, and requiring a lawyer to promptly pay or deliver client funds on request. Disciplinary Counsel v. Manning, 119 Ohio St. 3d 52, 2008-Ohio-3319, 891 N.E.2d 743 (2008).

Attorney's misconduct, in impermissibly depositing client's retainer fee directly into his operating account rather than holding it in his client trust account until earned and failing to account to client as promised with monthly invoices violated rules of professional conduct requiring a lawyer to deposit funds of client in one or more identifiable bank accounts and requiring a lawyer to maintain complete records and render appropriate accounts of client funds in the lawyer's possession. Cleveland Bar Assn. v. Ramos, 119 Ohio St. 3d 36, 2008-Ohio-3235, 891 N.E.2d 730 (2008).

Attorney's conduct in failing to file fiduciary income tax returns, allowing estate to remain open for over nine years, misrepresenting the final estate income, the amount of his fee, and the amount of taxes in the final account violated the professional rules that required a lawyer to act with reasonable diligence and promptness in representing a client, and prohibited a lawyer from making a false statement of fact or law to a tribunal. In re Disciplinary Proceedings Against Losby, 2008 WI 8, 306 Wis. 2d 303, 743 N.W.2d 819 (2008).

Attorney's failure to notify his client of the receipt of equalization payment in divorce proceeding and failure to deliver such funds promptly to client violated rule of professional conduct requiring attorney to render a full accounting regarding property in his possession. In re Disciplinary Proceedings Against Pitts, 2007 WI 112, 735 N.W.2d 917 (Wis. 2007).

[END OF SUPPLEMENT]

[FN1] In re Moore, 342 S.C. 1, 536 S.E.2d 367 (2000).

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[FN2] In re Gibson, 639 So. 2d 212 (La. 1994).

- An attorney's conduct in failing to deposit and hold in his trust account funds a client paid for a bankruptcy filing fee, in failing to file the bankruptcy action for over two years, and in failing to fully respond to the Office of Lawyer Regulation inquiries into the matter violated the professional rules that required a lawyer to hold in trust, separate from the lawyer's own property, the property of clients that was in the lawyer's possession, and to act with reasonable diligence and promptness when representing a client. In re Disciplinary Proceedings

Against Engelbrecht, 2007 WI 2, 298 Wis. 2d 323, 725 N.W.2d 630 (2007).
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[FN3] Columbus Bar Assn. v. Kostelac, 80 Ohio St. 3d 432, 1997-Ohio-285, 687 N.E.2d 408 (1997).
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[FN4] Cincinnati Bar Assn. v. White, 79 Ohio St. 3d 491, 1997-Ohio-160, 684 N.E.2d 29 (1997).
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AMJUR ATTNYS § 64

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7 Am. Jur. 2d Attorneys at Law § 65

American Jurisprudence, Second Edition
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Attorneys at Law
Rachel M. Kane, M.A., J.D.

II. Judicial Supervision of Legal Profession
B. Disciplinary Proceedings
4. Grounds for Discipline
b. Misconduct as an Attorney
(3) In Relation to Clients
(b) Misappropriation, Conversion and Commingling

Topic Summary Correlation Table References

§ 65. Mitigating factors considered

West's Key Number Digest

West's Key Number Digest, Attorney and Client 44(2), 59.5(5)

A.L.R. Library

Mental or emotional disturbance as defense to or mitigation of charges against attorney in disciplinary proceeding, 26 A.L.R.4th 995

Restitution as mitigating circumstance in disciplinary action against attorney based on wrongful conduct creating liability to client, 95 A.L.R.3d 724

An attorney is never justified in making personal use of the funds of his or her client.[FN1] Moreover, the fact that the attorney later made restitution to or settlement with the client will not prevent disbarment or other disciplinary measure, especially where restitution was not made until after the commencement of disciplinary proceedings.[FN2]

However, restitution of misappropriated property may be considered in setting the degree of discipline.[FN3]

In disciplinary proceedings based on a failure to account, mitigating circumstances that, while not defenses, may enable the attorney to avoid a disbarment order include—

— poor judgment and a lack of understanding of proper law practice management requirements.[FN4]

— previous good character,[FN5]

— mental illness.[FN6]

— successful therapeutic rehabilitation or strong prognosis for future rehabilitation.[FN7]

— absence of fraudulent intent or deceitful or dishonest motive.[FN8]

— personal and emotional problems.[FN9]

— display of candor, cooperation, and remorse.[FN10]

— the smallness of the amount involved.[FN11]

When an attorney in a disciplinary action raises psychological disability as a mitigating factor, the attorney must prove by clear and convincing evidence that he or she indeed has a severe psychological problem, that the psychological problem was the cause of the misconduct, that he or she is undergoing treatment and is making progress to recover from the psychological problem which caused or contributed to the misconduct, that the recovery has arrested the misconduct, and that the misconduct is not apt to recur.[FN12]

For restitution to be accepted as a mitigating factor in attorney disciplinary proceedings based on conversion of client funds, such restitution must be made promptly.[FN13]

However, sometimes disbarment has been imposed regardless of mitigating factors,[FN14] such as that the misconduct was not part of a scheme to conceal income, that the misconduct was not the product of selfish or dishonest motives, or that client funds were never in fact at risk.[FN15]

CUMULATIVE SUPPLEMENT

Cases:

Private reprimand was warranted for attorney who engaged in professional misconduct by improperly using subpoenas before the commencement of litigation; although offense would usually have warranted discipline more severe, there was a lack of adverse consequences, and attorney cooperated in disciplinary proceedings. In re Anonymous, 896 N.E.2d 916 (Ind. 2008).

A mitigating factor in attorney disciplinary proceeding was that attorney had some short-term memory loss stemming from treatment for a brain tumor. Iowa Supreme Court Attorney Disciplinary Bd. v. Netti, 797 N.W.2d 591 (Iowa 2011).

Two-year suspension, as opposed to revocation of license, was appropriate sanction for attorney whose second conviction for domestic abuse and repeated defiance of a no-contact order violated professional conduct rule prohibiting criminal conduct that reflects adversely on fitness to practice law, though attorney had previously engaged in misconduct resulting in a license suspension and private admonitions, where, in mitigation, attorney had made rehabilitative efforts in actively attempting to control his addiction to alcohol,

attorney had cooperated fully with Attorney Disciplinary Board in present and past proceedings, and no client was hurt by his misconduct. I.C.A. Rule 32:8.4(b). Iowa Supreme Court Attorney Disciplinary Bd. v. Axt, 791 N.W.2d 98 (Iowa 2010).

Three-month license suspension, with requirement that any application for reinstatement be supported by an evaluation from a licensed health care professional demonstrating attorney's fitness to practice law, was warranted as disciplinary sanction for attorney's conduct, in three probate matters involving establishment of guardianships and conservatorships, in failing to secure the necessary surety bonds, his conduct, in one probate matter involving administration of an estate, in failing to publish the required notices, his conduct in failing to cure numerous delinquencies in the four matters, and his conduct in taking probate fees without prior court approval; as aggravating circumstance the attorney previously had received a public reprimand for neglect in the three of the cases, and as mitigating circumstances the attorney suffered from depression, he had voluntarily ceased the practice of law after receiving the public reprimand, and he intended to forego private practice, including probate work, in the future and return to a career as a prosecutor. I.C.A. Rules 32:1.1, 32:1.3, 32:1.5(a), 32:3.2. Iowa Supreme Court Attorney Disciplinary Bd. v. Lickiss, 786 N.W.2d 860 (Iowa 2010).

Indefinite suspension of license to practice law with no possibility of reinstatement for three months was appropriate sanction for conduct adversely reflecting on fitness as a lawyer that consisted of attorney's looking through female victims' bedroom and bathroom windows on multiple occasions; aggravating circumstances included egregious and persistent nature of attorney's misconduct and the effect it had on his victims, while mitigating circumstances included attorney's diagnoses of major depressive disorder, voyeurism, and other illnesses or disorders, his compliance with treatment, and his claim of responsibility and showing of remorse for his conduct. I.C.A. Rule 32:8.4(b). Iowa Supreme Court Attorney Disciplinary Bd. v. Templeton, 784 N.W.2d 761 (Iowa 2010).

Migraine headaches and depression are mitigating factors in the imposition of attorney discipline for violation of a rule of professional conduct. Iowa Supreme Court Attorney Disciplinary Bd. v. Adams, 749 N.W.2d 666 (Iowa 2008).

Attorney's ceasing his unauthorized practice of law after appearing before judge was not a mitigating circumstance for disciplinary purposes; attorney was bound by the rules not to practice law immediately after he was suspended for failing to comply with applicable continuing legal education (CLE) requirements, and similarly, he was obligated to cooperate with the Disciplinary Administrator's office, and it was reasonable not to give attorney credit as a mitigating factor for simply doing what appellate courts expect from licensed attorneys, who already have agreed to follow the Rules of Professional Conduct in order to practice their profession. In re Woodring, 289 Kan. 173, 210 P.3d 120 (2009).

Attorney's depression and financial difficulties were not mitigating factors for disciplinary purposes, given that attorney did not comply with American Bar Association (ABA) Standard setting forth four factors that must be shown in order for mental disability to qualify as a mitigating factor; attorney failed to make a showing as to any of these elements, and he had ample notice and opportunity to submit evidence about his condition, but came to the disciplinary hearing unprepared to do so. In re Woodring, 289 Kan. 173, 210 P.3d 120 (2009).

Attorney's failure to make restitution to clients legitimately overwhelmed other mitigating factors in disciplinary proceeding. In re Woodring, 289 Kan. 173, 210 P.3d 120 (2009).

Attorney, who submitted only one letter and failed to subpoena any character witnesses, did not establish his previous good character and reputation in the community in order for them to be considered as mitigating factors for disciplinary purposes. In re Woodring, 289 Kan. 173, 210 P.3d 120 (2009).

Interim suspension based upon attorney's conviction of a serious crime was not the functional equivalent of a disciplinary record, for purposes of determining, once conviction was final, whether the mitigating factor of no prior disciplinary record was present and what discipline was warranted by attorney's crime. In re Maxwell, 44 So. 3d 668 (La. 2010).

Mitigating factors to be considered, in determining sanction for attorney who failed to file a personal injury lawsuit on client's behalf and subsequently made false statements about the matter during disciplinary proceedings, were that attorney had no a prior disciplinary record, had personal or emotional problems, and expressed remorse. In re Hebert, 9 So. 3d 846 (La. 2009).

Attorney's misconduct, which included neglecting legal matters, failing to communicate with his clients, failing to refund unearned fees, failing to place disputed funds in trust account, failing to provide accountings to

his clients, engaging in conduct constituting a conflict of interest, commingling client funds with his own personal funds, demonstrating a lack of candor toward a tribunal, communicating with a person he knew to be represented by counsel, and engaging in dishonest and deceitful conduct, warranted a suspension from the practice of law for three years, even though attorney had no prior disciplinary record, where attorney displayed dishonest or selfish motive, engaged in a pattern of misconduct, had multiple offenses, refused to acknowledge the wrongful nature of his conduct, which was directed at vulnerable victims, and he had substantial experience in the practice of law. In re Peters, 959 So. 2d 846 (La. 2007).

Because of the specific, strict, and affirmative record-keeping obligations placed on attorneys in the maintenance and operation of their escrow accounts containing the trust funds of clients and third parties, the failure to maintain those records to document an attorney's claim of how and when those funds were received and expended, as well as an attorney's claimed authorization to make disbursements, may be disbelieved and an adverse inference drawn where such required corroboration is not forthcoming. Attorney Grievance Com'n of Maryland v. Nwadike, 416 Md. 180, 6 A.3d 287 (2010).

The appropriate sanction for attorney misconduct depends upon the facts and circumstances of each case, including consideration of any mitigating factors. Attorney Grievance Com'n of Maryland v. Shryock, 408 Md. 105, 968 A.2d 593 (2009).

The absence of a selfish or dishonest motive is a mitigator for purposes of determining the appropriate sanction for attorney misconduct. Attorney Grievance Com'n v. Taylor, 405 Md. 697, 955 A.2d 755 (2008).

The sanction for an attorney's violation of the rules of professional conduct depends on the facts and circumstances of each case, including a consideration of any mitigating factors. Attorney Grievance Com'n of Maryland v. Ugwuonye, 405 Md. 351, 952 A.2d 226 (2008).

Mitigating factors to be considered in imposing sanctions for attorney misconduct include: absence of a prior disciplinary record; absence of a dishonest or selfish motive; personal or emotional problems; timely good faith efforts to make restitution or to rectify consequences of misconduct; full and free disclosure to disciplinary board or cooperative attitude toward proceedings; inexperience in the practice of law; character or reputation; physical or mental disability or impairment; delay in disciplinary proceedings; interim rehabilitation; imposition of other penalties or sanctions; remorse; and finally, remoteness of prior offenses. Attorney Grievance Com'n v. Whitehead, 405 Md. 240, 950 A.2d 798 (2008).

Conduct of attorney, in depositing client funds in his general operating account rather than an escrow account, knowingly and willfully misappropriating entrusted funds, and lying to clients, warranted disbarment, though attorney had cooperated with Bar Counsel in the investigation of his conduct, as cooperation with Bar Counsel was not a factor considered in mitigation as it was required, disbarment ordinarily was the sanction for intentional dishonest conduct, and attorney had a prior disciplinary offense, which resulted in attorney's suspension, for misusing an attorney trust account, violating conflict of interest rules, and failing to timely respond to Bar Counsel requests. Attorney Grievance Com'n of Maryland v. Webster, 402 Md. 448, 937 A.2d 161 (2007).

Lack of harm to the client can be a mitigating factor when determining the appropriate sanction for attorney misconduct. In re Disciplinary Action Against Fett, 790 N.W.2d 840 (Minn. 2010).

Mitigating factors do not constitute a defense to a finding of attorney misconduct; rather, they constitute factors that may justify a reduction in the degree of discipline to be imposed. In re Ehler, 319 S.W.3d 442 (Mo. 2010).

Attorney showed that recovery from his bipolar disorder arrested his misconduct of misappropriating client funds and that a recurrence of his misconduct was unlikely, as required for attorney's bipolar disorder to constitute mitigating factor in attorney disciplinary proceeding; physician stated that attorney was compliant with his medication and that if he continued taking it, a recurrence was unlikely, and physician stated that he would continue to monitor attorney, and attorney agreed in his brief to continued monitoring of his condition for a five-year probationary period. In re Belz, 258 S.W.3d 38 (Mo. 2008).

Thirty-day suspension was appropriate sanction for attorney's misconduct in failing to complete a matter entrusted to him, failing to communicate with the client, and failing to return the unearned portion of client's fee until after complaint was filed against him, even though attorney was contending with a series of personal and family health issues; attorney failed to seek assistance on a matter about which he had little experience, this failure occurred before the bulk of his personal and family health problems began, and those problems were not

so severe as to totally excuse or mitigate his failure to promptly communicate with his client. State ex rel. Counsel for Discipline of Nebraska Supreme Court v. Barnes, 275 Neb. 914, 750 N.W.2d 668 (2008).

In lawyer disciplinary proceedings, disbarment is the presumptive sanction for misappropriation of client funds; however, mitigating circumstances can support the penalty of indefinite suspension. Disciplinary Counsel v. Zapor, 127 Ohio St. 3d 372, 2010-Ohio-5769, 939 N.E.2d 1230 (2010).

Indefinite suspension, rather than disbarment, was appropriate sanction for attorney who engaged in misconduct that included misappropriating client funds, deceiving clients that their cases were pending, failing to provide notice that he lacked malpractice insurance, failing to assist enforcing disciplinary system, and failing to comply with a court order; there was significant mitigating evidence that attorney suffered from mental disability that was causally related to his misconduct, that he was receiving assistance he needed to resolve his mental-health problems, that he expressed serious remorse, and that he was likely to suffer criminal consequences as a result of his conduct. Toledo Bar Assn. v. Baker, 122 Ohio St. 3d 45, 2009-Ohio-2371, 907 N.E.2d 1172 (2009).

Mitigating factors to be considered in determining sanction for attorney who assisted non-lawyers in the unauthorized practice of law and commingled his own funds with those of clients, were that attorney had no prior record of discipline, had cooperated in the disciplinary proceedings, had established his good character and reputation apart from his misconduct as evidenced by letters or testimony from judges, attorneys, and clients, had made restitution to clients, and had demonstrated a devotion to charitable and pro bono work. Mahoning Cty. Bar Assn. v. Palombaro, 121 Ohio St. 3d 351, 2009-Ohio-1223, 904 N.E.2d 529 (2009).

Indefinite suspension from practice of law was warranted for attorney whose misconduct included neglect of entrusted legal matters and failure to refund retainers to clients; mitigating circumstances included that his previous disciplinary record involved only attorney-registration noncompliance and that he had suffered a stroke, and six aggravating circumstances included a pattern of misconduct, multiple offenses, and a lack of cooperation in disciplinary process. Cleveland Bar Association v. Davis, 121 Ohio St. 3d 337, 2009-Ohio-764, 904 N.E.2d 517 (2009).

Six-month suspension from practice of law was appropriate sanction in disciplinary proceeding for attorney who failed to cooperate in a grievance investigation; attorney had a prior disciplinary violation resulting in a suspension as an aggravating factor, and mitigating factors existed that included lack of a dishonest or selfish motive, absence of harm to a client, absence of a pattern of misconduct, eventual cooperation in the disciplinary process, and admission of wrongful nature of his conduct. Cleveland Metro. Bar Assn. v. Jaffe, 121 Ohio St. 3d 260, 2009-Ohio-763, 903 N.E.2d 628 (2009).

Indefinite suspension, rather than disbarment, was appropriate sanction for attorney who engaged in misconduct over a period of years that included misappropriating clients' money and neglecting their cases and who lied to investigators; there was significant mitigating evidence that attorney had made contributions to community by routinely taking cases pro bono, pursuing civil rights actions, and providing assistance when city experienced racial unrest, that chemical dependence had contributed to his misconduct, that he had been free of drugs and alcohol for over one year, and that he was rated a nine by treatment counsel on a scale of ten in terms of prognosis for continued sobriety. Cincinnati Bar Assn. v. Lawson, 119 Ohio St. 3d 58, 2008-Ohio-3340, 891 N.E.2d 749 (2008).

Attorney's violations of Code of Professional Responsibility, including provision prohibiting conduct involving fraud, deceit, dishonesty, or misrepresentation, warranted one-year suspension from practice of law stayed on conditions; mitigating circumstances included that attorney had been in practice for 27 years, primarily representing domestic relations clients unable to afford counsel, attorney's only prior disciplinary sanction was nearly 20 years old, attorney's commitment to those less fortunate promoted public confidence in the legal system, and attorney cooperated completely in disciplinary process, acknowledging wrongdoing and expressing concomitant remorse. Dayton Bar Assn. v. Ellison, 118 Ohio St. 3d 128, 2008-Ohio-1808, 886 N.E.2d 836 (2008).

Two-year suspension, with last year stayed if attorney complied with conditions relating to his rehabilitation and his clients' restitution, and with one-year probation period following reinstatement, was appropriate disciplinary sanction for attorney's misconduct in accepting a settlement offer without his client's knowledge, obtaining settlement proceeds with forged client endorsements, charging excessive fees, and failing to account for client funds, where until the grievances, attorney had practiced without incident for over 30 years, and letters

from attorneys and a former colleague, attesting to attorney's good character, were submitted. Cleveland Bar Assn. v. Mishler, 118 Ohio St. 3d 109, 2008-Ohio-1810, 886 N.E.2d 818 (2008).

Suspension of attorney's license for 18 months, with 12-month stayed, was appropriate sanction for attorney's misconduct as guardian of ward's person and estate in claiming reimbursement for ward's expenditures that she could not substantiate, attempting to conceal the discrepancy through illegitimate lawsuits and falsified evidence, and failing to provide her current address for her attorney registration, given mitigating factors of no prior disciplinary record and attorney's reputation for dedication to the elderly under her care, and aggravating factors of engaging in a pattern of misconduct and attorney's recalcitrance in acknowledging her wrongdoing. Cleveland Bar Assn. v. Mitchell, 118 Ohio St. 3d 98, 2008-Ohio-1822, 886 N.E.2d 222 (2008).

Attorney's actions in knowingly dishonoring his notary jurat and signing his clients' names to various settlement-related documents without authority warranted six-month suspension from practice of law, stayed on conditions, where attorney had no prior disciplinary record, did not act out of self-interest, cooperated in disciplinary process, and established his good character and reputation apart from events underlying disciplinary proceeding, and, despite his commission of more than one infraction, was willing to accept responsibility for his mistakes. Disciplinary Counsel v. Roberts, 117 Ohio St. 3d 99, 2008-Ohio-505, 881 N.E.2d 1236 (2008).

Failing to properly notarize a document, although a violation of the provision of the Code of Professional Responsibility prohibiting conduct involving fraud, deceit, dishonesty, or misrepresentation, for which an actual suspension usually follows, may warrant a lesser sanction depending on the presence of mitigating factors. Disciplinary Counsel v. Roberts, 117 Ohio St. 3d 99, 2008-Ohio-505, 881 N.E.2d 1236 (2008).

To establish mental disability as a mitigating factor in disciplinary proceedings, a lawyer whose diagnosed mental disability has contributed to his misconduct must provide competent proof that the disabling symptoms are fully managed currently; evidence suggesting that the lawyer may be able to practice competently and in accordance with ethical and professional standards is not nearly enough. Disciplinary Counsel v. Parker, 116 Ohio St. 3d 64, 2007-Ohio-5635, 876 N.E.2d 556 (2007).

Lack of knowledge of the rules of professional conduct and disciplinary proceedings raises its own concerns and should be considered in fashioning an appropriate discipline; however, in the absence of deceitful motive, such ignorance may be considered a mitigating factor. State ex rel. Oklahoma Bar Ass'n v. Combs, 2008 OK 96, 2008 WL 4724447 (Okla. 2008).

Suspension from the practice of law for two years and one day was the appropriate sanction for misconduct of attorney, acting as trustee, in failing to keep contemporaneous records for work performed on the trust, borrowing $8000 from the trust and lending trust moneys to friends, failing to investigate customary rate for trust services, failing to timely provide accounting when requested to do so, and commingling trust funds with other funds in his client trust account. State ex rel. Oklahoma Bar Ass'n v. Franklin, 2007 OK 18, 163 P.3d 507 (Okla. 2007).

Mitigating factor of absence of a dishonest or selfish motive did not apply in determining appropriate sanction for attorney's professional misconduct in connection with her ex parte appearance to obtain contempt order and writ of restitution on behalf of her clients; attorney's actions were dishonest, in that she made multiple false and misleading statements to the court during her ex parte appearance. In re Disciplinary Proceeding Against Ferguson, 246 P.3d 1236 (Wash. 2011).

Personal financial problems are generally not considered mitigators in fashioning a sanction for attorney misconduct. In re Disciplinary Proceeding Against Hicks, 166 Wash. 2d 774, 214 P.3d 897 (2009).

Attorney's waiver of fees from client, after checks from client trust fund were late and one check bounced, was not timely and did not constitute restitution, and thus mitigating factor of timely good faith effort to make restitution did not apply when determining appropriate sanction for misconduct arising out of management of client trust fund, where attorney waived the fee after the Washington State Bar Association (WSBA) conducted two audits and commenced disciplinary proceedings, and the letter sent by attorney to his client did not include an apology and did not mention the delay in payments. In re Disciplinary Proceeding Against Trejo, 163 Wash. 2d 701, 185 P.3d 1160 (2008).

Attorney's age was not a mitigating factor in discipline, where his misconduct spanned the previous twenty years. Burtch, In re Disciplinary Proceeding Against, 162 Wash. 2d 873, 175 P.3d 1070 (2008).

[END OF SUPPLEMENT]

[FN1] In re Staples, 259 Or. 406, 486 P.2d 1281 (1971).
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[FN2] People v. McGrath, 833 P.2d 731 (Colo. 1992).
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[FN3] Howard v. State Bar, 51 Cal. 3d 215, 270 Cal. Rptr. 856, 793 P.2d 62 (1990); In re Disciplinary Action Against Wylie, 464 N.W.2d 720 (Minn. 1991).
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[FN4] In re Dansby, 274 Ga. 393, 553 S.E.2d 157 (2001).
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[FN5] In re Brock, 270 Kan. 635, 17 P.3d 361 (2001), reinstatement granted, 271 Kan. 1033, 28 P.3d 1017 (2001).
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[FN6] Matter of Wechsler, 165 A.D.2d 39, 565 N.Y.S.2d 489 (1st Dep't 1991).
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[FN7] Porter v. State Bar, 52 Cal. 3d 518, 276 Cal. Rptr. 384, 801 P.2d 1135 (1990).
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[FN8] Matter of Brooks, 175 Ariz. 142, 854 P.2d 776 (1993).
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[FN9] In re Brock, 270 Kan. 635, 17 P.3d 361 (2001), reinstatement granted, 271 Kan. 1033, 28 P.3d 1017 (2001).
-

[FN10] Allen County Bar Assn. v. Chamberlain, 80 Ohio St. 3d 271, 1997-Ohio-301, 685 N.E.2d 1231 (1997).
-

[FN11] Howard v. State Bar, 51 Cal. 3d 215, 270 Cal. Rptr. 856, 793 P.2d 62 (1990).
-

[FN12] In re Disciplinary Action Against Hanvik, 609 N.W.2d 235 (Minn. 2000), reinstatement granted, 665 N.W.2d 510 (Minn. 2003).
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[FN13] Lawyer Disciplinary Bd. v. Kupec, 202 W. Va. 556, 505 S.E.2d 619 (1998).
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[FN14] Attorney Grievance Com'n of Maryland v. Williams, 335 Md. 458, 644 A.2d 490 (1994).
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[FN15] Matter of Anonymous, 698 N.E.2d 808 (Ind. 1998).
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END OF DOCUMENT

7 Am. Jur. 2d Attorneys at Law § 66

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Attorneys at Law
Rachel M. Kane, M.A., J.D.

II. Judicial Supervision of Legal Profession
B. Disciplinary Proceedings
4. Grounds for Discipline
b. Misconduct as an Attorney
(3) In Relation to Clients
(c) Negligence; Inattention to Duty

Topic Summary Correlation Table References

§ 66. Generally

West's Key Number Digest

West's Key Number Digest, Attorney and Client 44(1)

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Negligence, inattention, or professional incompetence of attorney in handling client's affairs in criminal matters as ground for disciplinary action—modern cases, 69 A.L.R.4th 410

Negligence, inattention, or professional incompetence of attorney in handling client's affairs in personal injury or property damage actions as ground for disciplinary action—modern cases, 68 A.L.R.4th 694

Negligence, inattention, or professional incompetence of attorney in handling client's affairs in family law matters as ground for disciplinary action—modern cases, 67 A.L.R.4th 415

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Disciplinary action against attorney or accountant for misconduct related to preparation of tax returns for others, 81 A.L.R.3d 1140

A lawyer must provide competent representation to a client, which requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.[FN1] In addition, a lawyer must act with reasonable diligence and promptness in representing a client.[FN2] "Professional neglect," as a basis for attorney discipline, involves indifference and a consistent failure to perform those obligations that a lawyer has assumed or a conscious disregard for the responsibilities a lawyer owes a client; it is more than ordinary negligence and usually involves multiple acts or omissions.[FN3] It also may involve procrastination,[FN4] such as a lawyer doing little or nothing to advance the interests of a client.[FN5] Generally, neglect of legal matters warrant discipline.[FN6] Thus, inattention to or neglect of a client's affairs may warrant disbarment,[FN7] suspension,[FN8] or censure.[FN9]

CUMULATIVE SUPPLEMENT

Cases:

Disbarment was warranted in disciplinary proceeding for attorney who broke numerous Bar rules by entering a sex-for-fees arrangement with client, altered evidence and caused a witness to unknowingly give false testimony, charged his clients excessive fees and stole their money, failed to maintain trust account, neglected his clients and failed to prosecute their cases, labored under conflict of interest, misrepresented facts to multiple courts, and engaged in an ongoing pattern of egregious misconduct by being dilatory, deceitful, and evasive throughout disciplinary process. The Florida Bar v. Tipler, 8 So. 3d 1109 (Fla. 2009).

Attorney's misconduct relating to the mismanagement of a personal injury matter involving one client and her children, which included attorney's failure to keep client informed as to status of her case, accepting settlement offers without client's approval, failing to diligently pursue claims on behalf of client's children, neglecting to follow through with client's legal claims involving requests for public assistance, and "buying peace" with client by giving client money from attorney's personal funds, as was necessary due to attorney's failure to account for client's settlement proceeds, warranted disbarment. State Bar Rules and Regulations, Rule 4–102(d), Rules 1.4, 1.8(e), 1.15(I), 1.15(II), 3.2, 8.4(a)(4). In re Ballew, 387 Ga. 371, 695 S.E.2d 573 (2010).

Attorney's conduct in misrepresenting status of tax matters to the district court with respect to an estate he was representing and misrepresenting to court and estate beneficiaries the amount of time it would take to complete remaining work in another probate matter constituted violation of rule of professional conduct prohibiting attorney from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, rule prohibiting conduct prejudicial to administration of justice, and rule prohibiting conduct that adversely reflected on fitness to practice law. I.C.A. 32:8.4(d); I.C.A. Rule 32.DR 1–102(A)(4–6) (2004). Iowa Supreme Court Attorney Disciplinary Bd. v. Ackerman, 786 N.W.2d 491 (Iowa 2010).

Evidence established that attorney neglected two civil cases in which he served as plaintiffs' counsel, in violation of professional responsibility rule prohibiting neglect of client matters; both cases were replete with classic earmarks of neglect, including numerous requests by opposing counsel for attorney to take action, numerous demands by trial court for attorney to take action, and court filings by attorney offering excuses for

inaction based on a busy trial schedule or other demands of the practice of law, and attorney dismissed one of the cases just hours before a scheduled hearing regarding imposition of sanctions for failing to provide discovery within court-imposed deadline. I.C.A. Rule 32.DR 6–101(A)(3) (2004). Iowa Supreme Court Attorney Disciplinary Bd. v. Cohrt, 784 N.W.2d 777 (Iowa 2010).

Public reprimand was warranted as punishment for attorney's conduct in failing to take appropriate steps to prosecute an appeal for client and in thereafter failing to respond to appellate court's orders to show cause in the matter, which conduct violated rules of professional conduct, as attorney admitted, requiring an attorney to provide competent representation, to act with reasonable diligence and promptness, and to refrain from disobeying an obligation under the rules of a tribunal. McAdam v. Kentucky Bar Ass'n, 262 S.W.3d 640 (Ky. 2008).

Suspension of 181 days was warranted for attorney who failed to prepare a final divorce decree in a noncontested divorce proceeding and failed to respond complaint against her, in violation of rules of professional conduct requiring attorney to act with diligence in representing client, requiring attorney to communicate adequately with client, and requiring attorney to respond to complaints in disciplinary actions. Kentucky Bar Ass'n v. Quesinberry, 260 S.W.3d 786 (Ky. 2008).

Five-year suspension was warranted as disciplinary sanction for attorney's misconduct, which included failure to act with reasonable diligence in six clients' cases, failure to return to four clients unearned advance-paid attorney fees after termination of representation, and failure to communicate with four clients, where attorney had, in the last three years, received three private admonitions for the same types of misconduct. Kentucky Bar Association v. Hammond, 241 S.W.3d 310 (Ky. 2007).

Disbarment was warranted for attorney who neglected client's bankruptcy matter, failed to refund an unearned fee and unused costs, failed to return client's documents upon termination of representation, engaged in violent criminal conduct by hitting girlfriend with his hands and a beer bottle, failed to cooperate in disciplinary investigation, and practiced law while ineligible to do so. In re Willis, 8 So. 3d 548 (La. 2009).

Attorney's conduct, informing client in personal injury matter that he had filed legal documents when he had not, failing to timely file petition for damages, failing to return client's telephone calls, failing to meet with client at scheduled times, converting client's settlement check for his own use, and failing to respond to disciplinary complaint filed as a result of misconduct, violated rules of professional conduct including those prohibiting failure to provide competent representation to a client, failure to timely return an unearned fee, failure to hold client's property separate, failure to make reasonable efforts to expedite litigation, knowing disobedience of an obligation under the rules of a tribunal, knowingly making a false statement of material fact in connection with a disciplinary matter, and knowing failure to respond to a lawful demand for information from a disciplinary authority. In re Engolio, 7 So. 3d 1162 (La. 2009).

Two-year suspension was appropriate sanction for attorney's misconduct in neglecting client's legal matter, failing to properly terminate the attorney-client relationship, failing to adequately communicate with client, and failing to return client's file and unearned fee. In re Booth, 6 So. 3d 158 (La. 2009).

Attorney intentionally and repeatedly failed to cooperate with Bar Counsel's inquires during investigation into allegations of misconduct in violation of Rule of Professional Conduct prohibiting attorney from knowingly failing to respond to a lawful demand for information from disciplinary authority. Attorney Grievance Com'n of Maryland v. Pawlak, 408 Md. 288, 969 A.2d 311 (2009).

Indefinite suspension was warranted for attorney who violated Rules of Professional Conduct regarding competence and diligence, and prohibiting conduct that was prejudicial to the administration of justice and knowingly failing to respond to disciplinary authority in investigation; attorney repeatedly failed to follow through on his promise to family and heirs that he would petition for appointment as substitute personal representative for estate, and he subsequently failed to follow through on his promise to hearing judge that he would attempt to "make things right" in the matter. Attorney Grievance Com'n of Maryland v. Pawlak, 408 Md. 288, 969 A.2d 311 (2009).

Ninety-day suspension from the practice of law was the appropriate disciplinary sanction for attorney who was negligent in client acceptance procedures, failed to represent clients diligently, and failed to communicate with client in a timely manner; no evidence showed that attorney harbored dishonest or deceitful motives in his representation of clients, and attorney offered many remedial measures and procedures implemented in his

practice after the complaints were filed that led to disciplinary proceeding. Attorney Grievance Com'n of Maryland v. Ugwuonye, 405 Md. 351, 952 A.2d 226 (2008).

Conduct of attorney who represented client on a personal injury claim and in bankruptcy proceeding, in failing to include the claim as asset in the bankruptcy petition, failing to notify the trustee of the settlement and deducting his fee from the settlement without first securing the permission of the bankruptcy court, which violated Rules of Professional Conduct governing competent representation, reasonable diligence, unreasonable fees, segregating client funds and taking reasonable steps to protect a client's interest upon termination of representation, warranted indefinite suspension, where attorney's misconduct was due neither to dishonesty nor to criminal conduct but rather due to lack of diligence as well as incompetence in bankruptcy matters, attorney had not been subject to a prior disciplinary proceeding, and attorney had not yet obtained approval for his fee from the bankruptcy court. Attorney Grievance Com'n v. Nichols, 405 Md. 207, 950 A.2d 778 (2008).

Suspension from the practice of law for a period of 90 days, stayed with conditions, was warranted as discipline for attorney who admitted professional misconduct in failing to diligently pursue client matters and failing to communicate with clients, despite attorney's stipulation with Director of the Office of Lawyers Professional Responsibility to recommend that the appropriate discipline was a public reprimand; petition was the sixth time that attorney has been disciplined for failing to diligently pursue client matters and communicate with clients, and prior admonitions and private probations had been inadequate to protect the public. In re Disciplinary Action Against Kraker, 755 N.W.2d 734 (Minn. 2008).

One-year suspension from practice of law, none stayed, was appropriate sanction for attorney's failure to timely file income tax returns and failure to pay income taxes due, resulting in criminal convictions, and his failure to report employees' income to Internal Revenue Service, in violation of Code of Professional Conduct; pattern on misconduct occurred over period of five years, attorney made conscious decision not to file tax returns or to withhold taxes from employees in attempt to delay collection of his taxes, and he used $72,000 fee from settlement of personal injury suit to buy car and boat rather than to pay tax debt. Disciplinary Counsel v. Large, 122 Ohio St. 3d 35, 2009-Ohio-2022, 907 N.E.2d 1162 (2009).

A lawyer's neglect of legal matters and failure to cooperate in the ensuing disciplinary investigation generally warrants an indefinite suspension from the practice of law. Cleveland Bar Association v. Davis, 121 Ohio St. 3d 337, 2009-Ohio-764, 904 N.E.2d 517 (2009).

Conditionally stayed two-year suspension from practice was appropriate sanction for attorney who failed to do any work on case and to return unearned fee to client, failed to return money to another client when directed to do so by bar association after arbitration of fee dispute, and failed to respond to a certified letter of inquiry from bar association concerning issues raised during arbitration proceeding; factors in mitigation included that attorney practiced law for 35 years without disciplinary incident and had distinguished career that included ten years in state Attorney General's office, was diagnosed with major depression for which he was receiving treatment, and had shown much remorse for his misconduct. Disciplinary Counsel v. McShane, 121 Ohio St. 3d 169, 2009-Ohio-746, 902 N.E.2d 980 (2009).

A two-year suspension with a partial stay on rigorous conditions for treatment of a mitigating mental disability is an appropriate sanction for a lawyer who has repeatedly allowed a client's case to languish, especially when cases are lost to the statute of limitations. Columbus Bar Assn. v. DiAlbert, 120 Ohio St. 3d 37, 2008-Ohio-5218, 896 N.E.2d 137 (2008).

Attorney's conduct in failing to return unearned fees and a case file to a client following his suspension for violating professional rules, in violation of professional rule requiring lawyers to promptly pay or deliver funds and property to which a client is entitled, warranted imposition of six-month suspension. Cuyahoga Cty. Bar Assn. v. Freedman, 119 Ohio St. 3d 571, 2008-Ohio-5220, 895 N.E.2d 837 (2008).

Two-year suspension with one year stayed on conditions was appropriate sanction for attorney who engaged in a deliberate effort to deceive others by forging his wife's signature on a power of attorney to obtain a loan, lying about the authenticity of the forged signature to the attorney who notarized it, and fabricating letters to cover up his wrongdoing, where attorney had no explanation for what he described as his bizarre and uncharacteristic behavior, except to say that he had lied to avoid losing his wife and their daughter, and attorney conceded his depressive disorder did not contribute to cause his duplicity; there was nothing from which to conclude that attorney would not repeat his wrongdoing. Cincinnati Bar Assn. v. Farrell, 119 Ohio St. 3d 529, 2008-Ohio-4540, 895 N.E.2d 800 (2008).

Attorney violated disciplinary rules relating to handling a legal matter without adequate preparation, neglecting an entrusted legal matter, failing to carry out contract of employment, prejudicing or damaging client during professional relationship, maintaining complete records and accounting for client's property, and prompt payment or delivery of client funds, where client hired lawyer to represent her in a dispute with former employer and paid attorney $500, attorney did not do the work he had promised and client had to try to resolve dispute on her own, and attorney had neither accounted to client for her money nor returned any unearned fee as of date of disciplinary hearing. Cincinnati Bar Assn. v. Lawson, 119 Ohio St. 3d 58, 2008-Ohio-3340, 891 N.E.2d 749 (2008).

Attorney violated professional conduct rule relating to prompt refunding of unearned fees when attorney failed after withdrawing from criminal case to repay unearned portion of $3,000 to client's mother. Cincinnati Bar Assn. v. Lawson, 119 Ohio St. 3d 58, 2008-Ohio-3340, 891 N.E.2d 749 (2008).

Attorney violated professional conduct rules relating to competent representation, reasonable diligence and promptness, prompt delivery of client property, steps to protect client's interest upon terminating representation, and prompt refund of unearned fees, where client hired attorney to defendant him in criminal case and paid attorney a total of $4,000, attorney did nothing in client's case for nearly six months except file an appearance, move for continuances, and meet twice with a prosecutor, and attorney withdrew from case without providing client's new attorney the case file or promptly refunding unearned portions of $4,000 fee. Cincinnati Bar Assn. v. Lawson, 119 Ohio St. 3d 58, 2008-Ohio-3340, 891 N.E.2d 749 (2008).

Attorney's misconduct during representation of client on a civil rights action against client's employer, in failing to send settlement paperwork to client's employer, failing to revoke settlement within revocation period and thus locking client into a settlement which she no longer wanted, and keeping fee paid by client to meet with employer even though employer refused to meet with him, violated rules of professional responsibility prohibiting a lawyer from neglecting an entrusted legal matter, prohibiting a lawyer from intentionally failing to carry out a contract of employment entered into with the client for professional services, and prohibiting a lawyer from intentionally prejudicing or damaging his client during the course of the professional relationship. Toledo Bar Assn. v. Mason, 118 Ohio St. 3d 412, 2008-Ohio-2704, 889 N.E.2d 539 (2008).

Attorney's misconduct while defending client against felony and misdemeanor charges, in failing to appear for a scheduled court date, failing to appear at pretrial, failing to inform client of pretrial, and failing to return exculpatory evidence to client so that client's new attorney could use them for client's defense, violated rules of professional responsibility prohibiting a lawyer from neglecting an entrusted legal matter, prohibiting a lawyer from intentionally failing to carry out a contract of employment entered into with the client for professional services, and prohibiting a lawyer from intentionally prejudicing or damaging his client during the course of the professional relationship. Toledo Bar Assn. v. Mason, 118 Ohio St. 3d 412, 2008-Ohio-2704, 889 N.E.2d 539 (2008).

Two-year suspension, with final six months of suspension stayed on conditions, including continued compliance with Ohio Lawyers Assistance Program (OLAP) contract for assistance with drug and alcohol addiction, was appropriate disciplinary sanction for attorney's misconduct, which included neglect of client matters in four cases. Columbus Bar Assn. v. Hayes, 118 Ohio St. 3d 336, 2008-Ohio-2466, 889 N.E.2d 109 (2008).

Attorney's conduct in misfiling paperwork and failing to comply with trial court's resulting show-cause order violated disciplinary rule providing that a lawyer shall not neglect an entrusted legal matter. Akron Bar Assn. v. Markovich, 117 Ohio St. 3d 313, 2008-Ohio-862, 883 N.E.2d 1046 (2008).

Attorney's conduct in falsely representing that he had witnessed client's signature when notarizing the signature, and failing to promptly pay client all of the settlement proceeds to which she was entitled, constituted a violation of the Disciplinary Rules. Cleveland Bar Assn. v. Kraus, 116 Ohio St. 3d 302, 2007-Ohio-6458, 878 N.E.2d 1028 (2007).

Attorney's conduct in failing to promptly address client's request for an owed refund constituted a violation of the Disciplinary rules. Cleveland Bar Assn. v. Kraus, 116 Ohio St. 3d 302, 2007-Ohio-6458, 878 N.E.2d 1028 (2007).

Attorney's misconduct, in failing to review documents, failing to advise clients of conflicts of interest, failing to timely respond to complaints and inquiries, failing to act with diligence in obtaining an order of substitution, failing to file response to summary judgment motion, submitting false documents to Office of

Disciplinary Counsel, failing to competently and diligently pursue the malpractice claim, and settling a client's claims without withholding or paying the costs and fees owed under a lien to a prior attorney, violated rules of professional conduct governing competence, scope of representation, diligence, communication, fees, safekeeping of property, conflicts of interest, prohibited transactions, meritorious claims and contentions, candor to the tribunal, expediting litigation disobedience of obligation under the rules, failure to comply with discovery requests, disciplinary matters, dishonesty, fraud, deceit, or misrepresentation, and conduct prejudicial to the administration of justice. In re Pennington, 380 S.C. 49, 668 S.E.2d 402 (2008).

Attorney's misconduct, failing to keep clients informed of the status of their cases, failing to properly record deeds in closing loans on behalf of clients, failing to surrender papers and property to clients at the end of his representation, failing to render a full accounting of client funds, and failing to refund to clients advance payments that he had not earned, constituted grounds for discipline and violated the Rules of Professional Conduct requiring a lawyer to provide competent representation to a client, requiring a lawyer to act with reasonable diligence and promptness in representing a client, requiring a lawyer to keep client reasonably informed about status of a matter and promptly comply with reasonable requests for information, requiring a lawyer upon termination of representation to take steps to extent reasonably practicable to protect client interests, and prohibiting lawyer from violating Rules of Professional Conduct. In re McDowell, 378 S.C. 371, 662 S.E.2d 591 (2008).

Conduct of attorney in settling client's personal injury claim without her consent and despite knowledge that she was still receiving medical treatment for her injuries violated rule of professional conduct governing competence, rule governing scope of representation and allocation of authority between client and lawyer, and rule governing communication. In re White, 378 S.C. 333, 663 S.E.2d 21 (2008), reinstatement granted, 380 S.C. 200, 669 S.E.2d 588 (2008).

Conduct of attorney, who failed to investigate client's alleged incompetency before filing guardianship petition against her, in failing to surrender papers and property to which the client was entitled, and in refusing to turn over client file to client's new counsel until after the guardianship was dismissed, violated rule of professional conduct requiring an attorney to take steps to the extent reasonably practicable to protect a client's interests; attorney failed to return client file despite several requests, and attorney's conduct imposed extra cost upon client for her new attorney to recreate the file and attendant estate planning documents. In re Disciplinary Proceeding Against Eugster, 166 Wash. 2d 293, 209 P.3d 435 (2009), as corrected, (Sept. 23, 2009).

Attorney violated Rule of Professional Conduct (RPC) requiring that she act with reasonable diligence and promptness in representing a client, by failing to proceed with an appeal on client's behalf, when her fee agreement stated she would represent him in both his postconviction motion and appeal, and by failing to properly terminate her representation and protect the client's interests while the matter was pending, which resulted in the lapsing of his time for filing an appeal. In re Disciplinary Proceedings Against Joan M. Boyd, 2009 WI 59, 318 Wis. 2d 281, 767 N.W.2d 226 (2009).

In view of attorney's extensive disciplinary history, his one-year suspension, for serious misconduct such as failing to act with reasonable diligence and promptness and failing to promptly disburse client funds, would not be retroactive to end of prior suspension, but rather, would be effective prospectively. In re Disciplinary Proceedings Against Mandelman, 2009 WI 40, 317 Wis. 2d 215, 765 N.W.2d 788 (2009).

Attorney's failure to respond to client's requests for detailing billing reflecting the work attorney performed in representing client in criminal prosecution, following client's termination of attorney's services, violated professional rule requiring lawyers to promptly respond to a client's request for information concerning fees and expenses. In re Disciplinary Proceedings Against Ryan, 2009 WI 39, 317 Wis. 2d 196, 766 N.W.2d 186 (2009).

Two-year suspension, with additional requirements that attorney pay full costs of disciplinary proceeding and that he obtain prescribed numbers of continuing legal education (CLE) credits in criminal law and legal ethics, was warranted for attorney's failure in representing clients in postconviction proceedings to act with reasonable diligence and promptness and for other violations of professional conduct rules occurring during his representation of those clients; all but one of the clients were indigent, and indigent, incarcerated persons were a vulnerable group that lacked significant options in terms of alternative representation. Lucius, In re Disciplinary Proceedings Against, 2008 WI 12, 307 Wis. 2d 255, 744 N.W.2d 605 (2008).

Attorney's conduct in failing to file fiduciary income tax returns, failing to conclude probate of over six years, filing a final account with the court that underreported his income, and misreporting to the court that tax

problems caused delays in concluding the estate violated the professional rules that required a lawyer to act with reasonable diligence and promptness in representing a client, and prohibited a lawyer from making a false statement of fact or law to a tribunal. In re Disciplinary Proceedings Against Losby, 2008 WI 8, 306 Wis. 2d 303, 743 N.W.2d 819 (2008).

Six-month suspension plus imposition of costs, rather than public reprimand, was warranted for 21 counts of attorney misconduct involving fees, communication, prohibited transactions, scope or representation, diligence, candor toward a tribunal, dishonesty, misrepresentation, competence and termination of representation; although attorney was sole practitioner who had been hospitalized and had experienced death in family, he had prior disciplinary history, clients suffered frustration and stress when they did not receive reasonable information and explanations, and misleading communications or misrepresentations to clients, Office of Lawyer Regulation (OLR), or court impaired the functioning of the legal system as a whole. In re Disciplinary Proceedings Against Nunnery, 2009 WI 89, 769 N.W.2d 858 (Wis. 2009).

[END OF SUPPLEMENT]

[FN1] Rule 1.1, ABA Model Rules of Professional Conduct.

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[FN2] Rule 1.3, ABA Model Rules of Professional Conduct.

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[FN3] Iowa Supreme Court Attorney Disciplinary Bd. v. Rickabaugh, 728 N.W.2d 375 (Iowa 2007).

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[FN4] Iowa Supreme Court Attorney Disciplinary Bd. v. Tompkins, 733 N.W.2d 661 (Iowa 2007).

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[FN5] Iowa Supreme Court Attorney Discipline Bd. v. Earley, 729 N.W.2d 437 (Iowa 2007).

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[FN6] Disciplinary Counsel v. Saumer, 86 Ohio St. 3d 312, 1999-Ohio-107, 715 N.E.2d 124 (1999); In re Allen, 366 S.C. 174, 621 S.E.2d 356 (2005).

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[FN7] The Florida Bar v. Prevatt, 609 So. 2d 37 (Fla. 1992).

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[FN8] Matter of Gershater, 256 Kan. 512, 886 P.2d 343 (1994).

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[FN9] Matter of O'Brien-Reyes, 177 Ariz. 362, 868 P.2d 945 (1994).

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§ 67. Abandonment of practice or cause

West's Key Number Digest

West's Key Number Digest, Attorney and Client 44(1)

An attorney's failure to perform services for which he or she has been retained is grounds for discipline.[FN1] An attorney who abandons his or her practice without making proper arrangements for the conduct of his or her clients' affairs is subject to disciplinary action.[FN2]

CUMULATIVE SUPPLEMENT

Cases:

Attorney violated disciplinary rule prohibiting neglect of an entrusted legal matter, where attorney was retained to represent client in guardianship case and accepted flat fee of $1,000, which included a filing fee, attorney filed nothing in court for six months and failed to respond to client's inquiries about his progress, and client eventually filed the necessary paperwork herself, paying the $240 filing fee. Akron Bar Assn. v. Markovich, 117 Ohio St. 3d 313, 2008-Ohio-862, 883 N.E.2d 1046 (2008).

[END OF SUPPLEMENT]

[FN1] Matter of Carmichael, 263 Ga. 227, 430 S.E.2d 585 (1993).
- As to the right of an attorney to withdraw from representation, see § 181.
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[FN2] Matter of Disciplinary Proceedings Against Archie, 192 Wis. 2d 71, 531 N.W.2d 320 (1995).
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Topic Summary Correlation Table References

§ 68. Aggravating factors

West's Key Number Digest

West's Key Number Digest, Attorney and Client 44(1), 59.5(4)

Among the factors which have significant weight in the decision to discipline an attorney for neglecting the interests of clients are—

— ignoring a client's request for information as to the status of his or her litigation.[FN1]

— failing to diligently pursue a client's criminal appeal.[FN2]

— issuing a worthless check to a client out of the attorney's personal account.[FN3]

— engaging in an adulterous relationship with a client in a divorce case.[FN4]

— gross negligence.[FN5]

— failure to cooperate in, or attempting to thwart or impede, disciplinary proceedings.[FN6]

— the prior history of the attorney's misconduct.[FN7]

It is improper for a referee in an attorney disciplinary proceeding to consider an attorney's refusal to acknowledge the wrongful nature of his or her conduct as an aggravating factor in determining the recommended discipline, since the attorney's claim of innocence cannot be used against him or her.[FN8]

CUMULATIVE SUPPLEMENT

Cases:

Disbarment was appropriate disciplinary sanction for attorney whose misconduct included abandoning each client after doing some work on their cases, failing to file appropriate pleadings, motions, or responses in the clients' cases, which led to dismissal of their cases or appeals or interruption of their negotiations, refusing or failing to communicate with those clients about the status of their cases despite requests that he do so, and failing to withdraw from representation of those clients. In re Levy, 284 Ga. 281, 664 S.E.2d 195 (2008).

Attorney's conduct in agreeing to represent clients in matters pertaining to child support and bond modification request only to fail to communicate with clients or perform work on their behalf warranted disbarment from practice of law; aggravating factors included attorney's failure to respond to State Bar or to Investigative Panel during investigation, attorney's indifference to making restitution to either client, attorney's pattern of misconduct, and attorney's failure to pay bar dues and complete continuing legal education requirements. In re Thomas, 282 Ga. 514, 651 S.E.2d 740 (2007).

Suspension for not less than three years, with readmission subject to conditions, including showing of genuine remorse and of proper understanding of ethical standards imposed on members of the bar, was appropriate disciplinary sanction for attorney's misconduct, which included conflicts of interest in actively participating in preparation of client's will naming attorney as primary beneficiary and attorney's son as contingent beneficiary, in commencing a proceeding to appoint the attorney as guardian for the client just a few days after execution of will, and in entering into transaction with another client while other client was facing federal and state charges for drug possession, in which transaction other client transferred his condominium and its contents to attorney; aggravating circumstances were attorney's history of other ethical violations, including making an improper loan to a client and committing the federal felony of filing a false tax return. In re Colman, 885 N.E.2d 1238 (Ind. 2008).

There was ample evidence presented in disciplinary proceeding to support the hearing panel's determinations regarding the aggravating factors of dishonest or selfish motive, vulnerability of the victims, and indifference to making restitution; even though he was suspended from the practice of law, attorney appeared in court because he was struggling financially, and this alone was sufficient to justify conclusion that his motive was selfish and his intent was to misrepresent to the court that he was licensed, attorney had not repaid his victims, and it was difficult to believe attorney could not reimburse victims for any of the money he owed them. In re Woodring, 289 Kan. 173, 210 P.3d 120 (2009).

Aggravating factors to be considered in determining sanction for attorney who failed to communicate with client regarding representation in driving while intoxicated (DWI) prosecution and neglected client matter in litigation against car dealer that sold an allegedly defective car, were that attorney had prior disciplinary offenses, a pattern of misconduct, multiple offenses, refused to acknowledge the wrongful nature of his conduct, and had substantial experience in the practice of law. In re Scott, 31 So. 3d 978 (La. 2010).

Suspension of one year and one day was warranted for attorney who failed to cooperate in disciplinary investigation and made numerous misrepresentations to Office of Disciplinary Counsel (ODC), in view of the numerous aggravating factors present in the case, especially attorney's continued failure to acknowledge wrongful nature of her conduct. In re Parks, 9 So. 3d 106 (La. 2009).

Two-year suspension was warranted for attorney who failed to maintain adequate accounting records as trustee of inter vivos trust, to account for loss of over $8,000 in trust funds, to keep beneficiary's curator informed about financial status of trust, and to obtain approval of fee he charged as compensation, and who neglected another matter and failed to communicate with client and to provide an accounting and refund of any unearned fee; aggravating factors included pattern of misconduct, multiple offenses, vulnerability of victim, and substantial experience in practice of law, and mitigation included personal or emotional problems and lack of prior disciplinary record. In re Demoruelle, 9 So. 3d 94 (La. 2009).

Disbarment, as opposed to a reprimand or short-term suspension, was warranted for attorney whose misconduct included systematically concealing from his client and the court that the statute of limitations had expired on client's personal injury claim and thereby precluding client from acquiring recompense for her severe injury, despite mitigating factors of remorse and the absence of any personal benefit to attorney, in light of aggravating factors that included a prior disciplinary violation, multiple offenses, and indifference to making restitution. Md.Rule 16–812, Rules of Prof.Conduct, Rules 1.1, 1.3, 1.4(a, b), 3.3(a)(1), 8.4(a, c, d). Attorney Grievance Com'n of Maryland v. Bleecker, 414 Md. 147, 994 A.2d 928 (2010).

Given the importance placed on maintaining the public's confidence, the attorney's prior grievance history, the attorney's remorse for the misconduct, and the likelihood of the conduct being repeated are relevant considerations in a discipline action. Attorney Grievance Com'n of Maryland v. Parsons, 404 Md. 175, 946 A.2d 437 (2008).

The fact that misconduct occurs while an attorney is already on probation suggests that a more serious sanction may be needed to prevent such misconduct from recurring. In re Disciplinary Action Against Letourneau, 792 N.W.2d 444 (Minn. 2011).

Although non-cooperation with Office of Lawyers Professional Responsibility warrants indefinite suspension on its own, it also increases the sanction imposed when accompanied by other misconduct. In re Disciplinary Action Against Aitken, 787 N.W.2d 152 (Minn. 2010).

Disbarment of attorney was warranted for attorney's misconduct in failing to correctly calculate and disburse client funds, failing to promptly respond to client requests for information, and failing to maintain her trust account, in light of aggravating factors that attorney had previously been disciplined and was on probation for prior offenses at time some of the misconduct occurred, attorney's conduct showed a dishonest and selfish motive, she engaged in a pattern of misconduct, and she demonstrated an indifference to making restitution. V.A.M.R. 4, Rules of Prof.Conduct, Rules 4–1.1, 4–1.3, 4–1.4, 4–1.15, 4–8.4. In re Ehler, 319 S.W.3d 442 (Mo. 2010).

Aggravating factors to be considered in determining sanction for attorney who failed to appear or was tardy in appearing in numerous hearing, and in leaving a hearing early despite judge's specific instruction to remain, were that attorney had engaged in a pattern of misconduct involving multiple offenses and had failed to cooperate in the disciplinary process. Mahoning County Bar Ass'n v. Sakmar, 127 Ohio St. 3d 244, 2010-Ohio-5720, 938 N.E.2d 355 (2010).

Although as an aggravating factor attorney, who commingled personal and client funds in his client trust account, engaged in a pattern of misconduct, as mitigating factors, attorney had no previous record of professional discipline, incorporated a new accounting system for his practice, and cooperated fully in the disciplinary proceedings, no client suffered significant financial harm due to attorney's misconduct, and attorney had good character and reputation, as shown by his charitable work on behalf of victims of Huntington's disease, disadvantaged clients, and his church. Disciplinary Counsel v. Johnston, 121 Ohio St. 3d 403, 2009-Ohio-1432, 904 N.E.2d 892 (2009).

Aggravating factors to be considered in determining sanction for attorney who assisted non-lawyers in the unauthorized practice of law and commingled his own funds with those of clients, were that attorney engaged in a pattern of misconduct and committed multiple offenses. Mahoning Cty. Bar Assn. v. Palombaro, 121 Ohio St. 3d 351, 2009-Ohio-1223, 904 N.E.2d 529 (2009).

Despite the mitigating effect of attorney's having no prior disciplinary record, his cooperation during the disciplinary proceedings, and the remorse he insisted he had shown, the balance of mitigating and aggravating factors did not weigh in attorney's favor, for purposes of imposing sanction for his misconduct in engaging in a deliberate effort to deceive others with his fabrications and forgery, where self-interest motivated attorney's fabrications and forgery, and attorney engaged in a pattern of misconduct and committed multiple offenses, had not made restitution, did not present evidence of his good character and reputation, and did not prove that his mental disability contributed to cause his misconduct. Cincinnati Bar Assn. v. Farrell, 119 Ohio St. 3d 529, 2008-Ohio-4540, 895 N.E.2d 800 (2008).

Before making a final determination as to which sanction to impose for attorney misconduct, Supreme Court weighs evidence of the aggravating and mitigating factors listed in the Rules and Regulations Governing Procedure on Complaints and Hearings Before the Board of Commissioners on Grievances and Discipline. Cincinnati Bar Assn. v. Farrell, 119 Ohio St. 3d 529, 2008-Ohio-4540, 895 N.E.2d 800 (2008).

Permanent disbarment was appropriate sanction for attorney who converted funds from his employer to his own personal use, repeatedly failed to perform work for clients, failed to cooperate with the disciplinary process by failing to provide a handwriting sample for analysis by a handwriting examiner, deceived his clients and abandoned their cases, and had also had his license to practice law previously suspended for failure to comply with attorney registration requirements; breaches of duty to his clients, the public, and the legal profession, coupled with the aggravating effect of his disciplinary record, made disbarment appropriate. Disciplinary Counsel v. Zigan, 118 Ohio St. 3d 180, 2008-Ohio-1976, 887 N.E.2d 334 (2008).

In determining the appropriate sanction to impose for attorney misconduct, the Supreme Court weighs aggravating and mitigating factors listed in the Rules and Regulations Governing Procedure on Complaints and Hearings Before the Board of Commissioners on Grievances and Discipline to determine whether circumstances warrant a more lenient or a more exacting disposition. Disciplinary Counsel v. Tomlan, 118 Ohio St. 3d 1, 2008-Ohio-1471, 885 N.E.2d 895 (2008).

Conduct of attorney, in undertaking representation of client in divorce and child custody cases without disclosing to client that his license was suspended for failing to comply with requirements for continuing legal education (CLE) and failing to comply with attorney-registration requirements, violated professional responsibility rule prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation. Disciplinary Counsel v. Higgins, 117 Ohio St. 3d 473, 2008-Ohio-1509, 884 N.E.2d 1070 (2008).

Attorney's failure to respond to orders to show cause issued by bankruptcy court, or to orders finding him in contempt and ordering return of client fees, together with his failure to respond in disciplinary proceedings, warranted permanent disbarment, where attorney engaged in pattern of misconduct involving multiple offenses, refused to acknowledge his wrongful conduct, failed to make restitution, and failed to cooperate in disciplinary process, and had been previously subjected to indefinite suspension for nearly identical conduct, and record contained no evidence weighing in favor of leniency. Cuyahoga Cty. Bar Assn. v. Wagner, 117 Ohio St. 3d 456, 2008-Ohio-1200, 884 N.E.2d 1053 (2008).

Attorney's offering to refund $200 filing fee to client if she would drop her grievance against attorney for failing to comply with show-cause order violated disciplinary rule providing that a lawyer shall not attempt to exonerate himself or limit his liability to a client for personal malpractice. Akron Bar Assn. v. Markovich, 117 Ohio St. 3d 313, 2008-Ohio-862, 883 N.E.2d 1046 (2008).

Disciplinary history is a factor that may be taken into account when the Supreme Court is tailoring the appropriate discipline for a lawyer's misdeeds. State ex rel. Oklahoma Bar Ass'n v. Combs, 2008 OK 96, 2008 WL 4724447 (Okla. 2008).

One-year suspension from practice of law was appropriate sanction for attorney's misconduct in connection with his representation of multiple clients, including providing dilatory responses relating to client matters, using worthless check drawn on unapproved trust account to reimburse client for unearned fees, repeatedly failing to maintain his trust account properly, tendering worthless checks to United States Court of Appeals, failing to file appeal for client or inform her of his oversight, filing of frivolous appeals, practicing law while his license was suspended, and failing to notify clients and tribunals that his license was suspended; in aggravation, victims were vulnerable, and attorney had prior disciplinary offense, selfish motive by failing to return unearned fees, pattern of neglect and dilatory conduct constituting multiple offenses, refusal to acknowledge wrongful nature of conduct, and indifference to making restitution to clients. Sup.Ct.Rules, Rule 8, Rules of Prof.Conduct, Rules 1.3, 1.4(a, b), 1.15(a), 4.4(a), 8.1(b). Flowers v. Board of Professional Responsibility, 314 S.W.3d 882 (Tenn. 2010).

Vulnerability of attorney's clients who were targeted in living trust scam was an aggravating factor in deciding whether to alter presumptive sanction of disbarment; many of the victims were elderly couples, some of whom actually lacked testamentary capacity. In re Disciplinary Proceeding Against Shepard, 239 P.3d 1066 (Wash. 2010).

Hearing officer in attorney disciplinary proceeding could consider attorney's pattern of misconduct, as an aggravating factor, even though it was not charged in the formal complaint. Burtch, In re Disciplinary Proceeding Against, 162 Wash. 2d 873, 175 P.3d 1070 (2008).

Evidence of attorney's pattern of misconduct was admissible to show aggravating factor in discipline and to show mental state, knowledge, or intent, when he committed the misconduct; the prior disciplinary proceedings involved similar conduct to that at issue in the proceeding, demonstrating that attorney, at a minimum, had

knowledge his actions were ethical violations which could lead to sanctions. Burtch, In re Disciplinary Proceeding Against, 162 Wash. 2d 873, 175 P.3d 1070 (2008).

[END OF SUPPLEMENT]

[FN1] Matter of Dill, 253 Kan. 195, 853 P.2d 696 (1993).
- As to the failure to communicate with a client, see § 58.
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[FN2] In re Juarez, 24 P.3d 1040 (Wash. 2001).
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[FN3] In re Grady, 782 So. 2d 570 (La. 2001).
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[FN4] Matter of McBratney, 320 S.C. 416, 465 S.E.2d 733 (1996).
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[FN5] Matter of Hollis, 134 N.J. 124, 631 A.2d 545 (1993).
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[FN6] Matter of Disciplinary Proceedings Against Figlesthaler, 177 Wis. 2d 480, 501 N.W.2d 450 (1993).
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[FN7] Office of Disciplinary Counsel v. Passyn, 537 Pa. 371, 644 A.2d 699 (1994).
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[FN8] The Florida Bar v. Corbin, 701 So. 2d 334 (Fla. 1997).
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§ 69. Mitigating factors

West's Key Number Digest

West's Key Number Digest, Attorney and Client 44(1), 59.5(5)

Among the factors which have significant weight in the decision to mitigate the discipline imposed upon an attorney for neglecting the interests of clients are the personal misfortunes of an attorney,[FN1] previous good character,[FN2] previous good reputation as an attorney,[FN3] zeal in undertaking pro bono work,[FN4] absence of an evil or fraudulent intent,[FN5] acceptance of full responsibility,[FN6] sincere effort at atonement,[FN7] cooperative attitude during the disciplinary proceedings,[FN8] and willingness of the attorney to reimburse his or her client for any loss suffered because of the attorney's negligence, inattention, or professional incompetence.[FN9] In addition, neglect of client matters cannot be found if the acts or omissions complained of were inadvertent or the result of an error of judgment made in good faith.[FN10] Moreover, attorneys are held to a high standard of conduct, but absent injury or other factors, a single mistake does not show a lack of reasonable diligence or promptness.[FN11]

An attorney's drug addiction will not be considered in mitigation where the attorney only seeks treatment after engaging in the misconduct and after an investigation is initiated, since addiction to a drug attributable to the intentional use of that drug does not warrant the imposition of a lesser sanction.[FN12] In addition, an attorney's health problems are not mitigators for his or her misconduct; rather, if the attorney's health was severe enough to prevent him or her from providing adequate representation, it was the attorney's ethical duty to inform his or her clients of his or her condition and arrange for alternate counsel.[FN13] An attorney's alleged physical and emotional disabilities are not a mitigating factor as to an attorney's lack of diligence, where the attorney does not show the problems are severe or that they affect his or her ability to comply with professional conduct rules.[FN14] Moreover, evidence that an attorney is being treated for a bipolar condition will not be considered in mitigation in an attorney disciplinary proceeding, in the absence of sufficient evidence showing the attorney has been rehabilitated and the misconduct is unlikely to recur.[FN15]

The fact that an attorney yielded to his or her clients' wishes when the attorney should have counseled them with respect to their duties under the law is not a mitigating factor in an attorney's disciplinary proceeding.[FN16]

Neither the position of an attorney as an employee, nor pressure to retain a client in a competitive legal environment, can justify an attorney's abdication of the duty of counseling.[FN17]

CUMULATIVE SUPPLEMENT

Cases:

Personal illnesses, such as depression, do not excuse a lawyer's misconduct but can be "mitigating factors" and influence approach to discipline. Iowa Supreme Court Attorney Disciplinary Bd. v. Marks, 759 N.W.2d 328 (Iowa 2009).

Mitigating factors to be considered in determining sanction for attorney who neglected a legal matter, failed to communicate with a client, misrepresented the status of a case to a client, and failed to properly supervise a non-lawyer assistant, which led to his failure to promptly remit funds to a third-party medical provider, were that attorney had personal or emotional problems, made a full and free disclosure to the disciplinary board, had a cooperative attitude toward the proceedings, showed remorse, and there had been a delay in the disciplinary proceedings. In re Serrett, 35 So. 3d 256 (La. 2010).

Conditionally stayed one-year suspension, as opposed to conditionally stayed two-year suspension, was appropriate for attorney's misconduct that included neglect of entrusted legal matter, failure to promptly deliver funds to client, neglect or refusal to assist in disciplinary investigation, and attempt to have neighbor dismiss disciplinary complaint against him; despite aggravating factor of multiple offenses, mitigating factors included attorney's diagnosis with bipolar affective disorder and alcohol dependency that both significantly contributed to his misconduct, his successful completion of treatment program, and his sobriety over the previous two years. Rules of Prof.Conduct, Rule 8.4(d, h); Government of the Bar Rule V, § 4(G); BCDG Proc.Reg. 10(B); Code of Prof.Resp., DR 1–102(A)(5, 6), DR 6–101(A)(3), DR 7–101(A)(2), DR 9–102(B)(4) (2006). Disciplinary Counsel v. Chambers, 125 Ohio St. 3d 414, 2010-Ohio-1809, 928 N.E.2d 1061 (2010).

In making a final determination of sanction to impose for attorney misconduct, the Supreme Court weighs evidence of the aggravating and mitigating factors listed in section of rules relating to complaints and hearings before the Board of Commissioners on Grievances and Discipline. Cleveland Bar Association v. Davis, 121 Ohio St. 3d 337, 2009-Ohio-764, 904 N.E.2d 517 (2009).

Despite the mitigating effect of attorney's having no prior disciplinary record, his cooperation during the disciplinary proceedings, and the remorse he insisted he had shown, the balance of mitigating and aggravating factors did not weigh in attorney's favor, for purposes of imposing sanction for his misconduct in engaging in a deliberate effort to deceive others with his fabrications and forgery, where self-interest motivated attorney's fabrications and forgery, and attorney engaged in a pattern of misconduct and committed multiple offenses, had not made restitution, did not present evidence of his good character and reputation, and did not prove that his mental disability contributed to cause his misconduct. Cincinnati Bar Assn. v. Farrell, 119 Ohio St. 3d 529, 2008-Ohio-4540, 895 N.E.2d 800 (2008).

Before making a final determination as to which sanction to impose for attorney misconduct, Supreme Court weighs evidence of the aggravating and mitigating factors listed in the Rules and Regulations Governing Procedure on Complaints and Hearings Before the Board of Commissioners on Grievances and Discipline. Cincinnati Bar Assn. v. Farrell, 119 Ohio St. 3d 529, 2008-Ohio-4540, 895 N.E.2d 800 (2008).

Twelve-month suspension from practice of law, stayed on condition of good behavior, was appropriate sanction for attorney who violated disciplinary rules against dishonest conduct and creation of false evidence in handling client's time-barred workers' compensation claim; mitigating evidence included attorney's lack of a disciplinary record, his full cooperation in the disciplinary process, including reporting his own misconduct, and his good character and reputation apart from the incident in question. Disciplinary Counsel v. Niermeyer, 119 Ohio St. 3d 99, 2008-Ohio-3824, 892 N.E.2d 434 (2008).

In disciplinary cases involving drug addiction, the Supreme Court tailors the sanction, when appropriate, to assist in and monitor the attorney's recovery. Cincinnati Bar Assn. v. Lawson, 119 Ohio St. 3d 58, 2008-Ohio-3340, 891 N.E.2d 749 (2008).

Attorney's conduct in providing frivolous legal advice to client, engaging in criminal trespass with client, and making misrepresentations to further that conduct warranted 90-day suspension from practice of law in light of aggravating factor of 40 years' experience in practice of law and mitigating factors of no prior disciplinary record, no dishonest or selfish motive, and a cooperative attitude towards disciplinary proceedings. Rules of Prof.Conduct, Rules 3.1, 4.1(a), 8.4(a)(2, 3). In re Smith, 348 Or. 535, 236 P.3d 137 (2010).

Additional penalties or sanctions imposed did not amount to permissible mitigating factor, in fashioning adequate sanction for attorney's misconduct, where nothing in record or hearing officer's decision indicated that additional penalties or sanctions were imposed. In re Disciplinary Proceeding Against Hicks, 166 Wash. 2d 774, 214 P.3d 897 (2009).

[END OF SUPPLEMENT]

[FN1] The Florida Bar v. Condon, 632 So. 2d 70 (Fla. 1994).

- Though an attorney's personal problems may contribute to misconduct, such personal problems do not excuse the misconduct. Iowa Supreme Court Attorney Discipline Bd. v. Earley, 729 N.W.2d 437 (Iowa 2007).

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[FN2] People v. Bobbitt, 859 P.2d 902 (Colo. 1993).
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[FN3] People v. Bobbitt, 859 P.2d 902 (Colo. 1993).
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[FN4] Amante v. State Bar, 50 Cal. 3d 247, 266 Cal. Rptr. 648, 786 P.2d 375 (1990).
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[FN5] People v. Bobbitt, 859 P.2d 902 (Colo. 1993).
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[FN6] Warren Cty. Bar Ass'n v. Bunce, 81 Ohio St. 3d 112, 689 N.E.2d 566 (1998).
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[FN7] Dayton Bar Assn. v. Baker, 86 Ohio St. 3d 40, 1999-Ohio-345, 711 N.E.2d 661 (1999).
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[FN8] People v. Bobbitt, 859 P.2d 902 (Colo. 1993).
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[FN9] The Florida Bar v. Marcus, 616 So. 2d 975 (Fla. 1993).
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[FN10] Iowa Supreme Court Attorney Disciplinary Bd. v. Joy, 728 N.W.2d 806 (Iowa 2007).
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[FN11] In re PRB Docket No. 2006-167, 925 A.2d 1026 (Vt. 2007).
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[FN12] In re Marshall, 762 A.2d 530 (D.C. 2000).
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[FN13] The Florida Bar v. Feige, 937 So. 2d 605 (Fla. 2006).
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[FN14] In re Disciplinary Action Against Landon, 1999 ND 202, 600 N.W.2d 856 (N.D. 1999).
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[FN15] In re Carlton, 2000-NMSC-001, 128 N.M. 419, 993 P.2d 736 (2000).
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[FN16] Office of Disciplinary Counsel v. Hardesty, 80 Ohio St. 3d 444, 1997-Ohio-329, 687 N.E.2d 417 (1997).
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[FN17] Office of Disciplinary Counsel v. Hardesty, 80 Ohio St. 3d 444, 1997-Ohio-329, 687 N.E.2d 417 (1997).
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Method employed in collecting debt due client as ground for disciplinary action against attorney, 93 A.L.R.3d 880

Attorney's splitting fees with other attorney or layman as ground for disciplinary proceeding, 6 A.L.R.3d 1446

An attorney may be disciplined for actions that contravene the ethics of the profession even though the conduct is neither criminal nor calculated to obstruct justice.[FN1] It is misconduct justifying disciplinary action for an attorney to—
— represent parties with conflicting interests.[FN2]

— allow his or her name to be used by others who are themselves disbarred.[FN3]

— split fees with a layperson except with the estate of a deceased lawyer.[FN4]

— accept a portion of another attorney's contingent fee as a referral fee where the client never consented in writing to the fee.[FN5]

— form a partnership with a nonlawyer if any of the activities of the firm constitute the practice of law.[FN6]

— misrepresent his or her educational background on a resume.[FN7]

— engage in acts of intimidation[FN8] or revenge[FN9] toward a former client.

— pay kickbacks to a public official in exchange for employment.[FN10]

An attorney may be disciplined for dealing directly with an adverse party over the objection or without the knowledge of the attorney of record for the adverse party.[FN11]

In addition, nothing in the rules of professional conduct prohibits an attorney's ex parte communication with a former employee of an adversary who was not within that adversary's litigation control group and who was not otherwise represented by counsel.[FN12]

CUMULATIVE SUPPLEMENT

Cases:

The California Rule of Professional Conduct prohibiting ex parte contacts with represented parties aims to prevent a member of the State Bar of California acting as an attorney and representing a client from improperly contacting an opposing party that is represented by counsel. Cal.Prof.Conduct Rule 2–100. HTC Corp. v. Technology Properties Ltd., 715 F. Supp. 2d 968 (N.D. Cal. 2010).

Generally, in context of attorney disciplinary proceeding, misrepresentation requires proof of an attorney's intent to deceive. I.C.A. Rule 32:8.4(c). Iowa Supreme Court Attorney Disciplinary Bd. v. Thomas, 794 N.W.2d 290 (Iowa 2011).

Attorney's nearly verbatim copying of seventeen pages of a published writing without attribution in a twenty-one page brief filed in support of a motion to disqualify special counsel in bankruptcy proceedings violated rule of professional conduct prohibiting lawyers from engaging in conduct involving misrepresentation. I.C.A. Rule 32:8.4(c). Iowa Supreme Court Attorney Disciplinary Bd. v. Cannon, 789 N.W.2d 756 (Iowa 2010).

Attorney violated professional conduct rules prohibiting conduct prejudicial to the administration of justice and prohibiting a lawyer from threatening to present criminal charges solely to obtain an advantage in a civil matter, where attorney threatened a complainant with criminal prosecution and a defamation suit to prevent him from pressing forward with a disciplinary complaint. State Bar Articles of Incorporation, Art. 16, Rules of Prof.Conduct, Rules 8.4(d, g), LSA–R.S. foll. 37:222. In re Robinson, 46 So. 3d 662 (La. 2010).

Conduct of attorney in signing name of client's husband to settlement check from personal injury case without his consent and without an agreement to represent him violated rule of professional conduct governing fraudulent conduct. In re White, 378 S.C. 333, 663 S.E.2d 21 (2008), reinstatement granted, 380 S.C. 200, 669 S.E.2d 588 (2008).

[END OF SUPPLEMENT]

[FN1] In re Schwartz, 298 So. 2d 355 (Fla. 1974).

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[FN2] § 55.

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[FN3] The Florida Bar v. Stein, 916 So. 2d 774 (Fla. 2005).

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[FN4] Rule 5.4(a)(1), (2), ABA Model Rules of Professional Conduct.

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[FN5] The Florida Bar v. Carson, 737 So. 2d 1069 (Fla. 1999).

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[FN6] Rule 5.4(b), ABA Model Rules of Professional Conduct.

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[FN7] Matter of Norwood, 80 A.D.2d 278, 438 N.Y.S.2d 788 (1st Dep't 1981).

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[FN8] Akron Bar Assn. v. Holder, 105 Ohio St. 3d 443, 2005-Ohio-2695, 828 N.E.2d 621 (2005).

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[FN9] In re Cudzik, 738 So. 2d 1054 (La. 1999).

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[FN10] Mahoning Cty. Bar Assn. v. Sinclair, 105 Ohio St. 3d 65, 2004-Ohio-7014, 822 N.E.2d 360 (2004).

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[FN11] In re Conduct of Schenck, 320 Or. 94, 879 P.2d 863 (1994).

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[FN12] Klier v. Sordoni Skanska Const. Co., 337 N.J. Super. 76, 766 A.2d 761 (App. Div. 2001).

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§ 71. Acting as attorney and witness

West's Key Number Digest

West's Key Number Digest, Attorney and Client 38

A.L.R. Library

Attorney as witness for client in civil proceedings—modern state cases, 35 A.L.R.4th 810

A lawyer must not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless the testimony relates to an uncontested issue; the testimony relates to the nature and value of legal services rendered in the case; or disqualification of the lawyer would work substantial hardship on the client.[FN1] In addition, a lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by rule.[FN2]

The advocate-witness disqualification rules provide guidance, not binding authority, for courts in determining whether a party's counsel, at its adversary's instance, should be disqualified during litigation.[FN3]

Allowing an attorney to testify as a witness may result in his or her disqualification as an advocate, but not as a witness with relevant testimony.[FN4] A determination whether an attorney ought to testify, and therefore should withdraw from a case, ordinarily is based on an evaluation of all pertinent factors, including the significance of the matters to which the attorney might testify, the weight the testimony might have in resolving such matters, and the availability of other witnesses or documentary evidence by which these matters may be independently established.[FN5]

Observation: The professional rule prohibiting a lawyer from acting as an advocate and a witness in the same trial is to prevent evils that arise when a lawyer dons the hat of both advocate and witness for his or her own client as such dual role can prejudice the opposing side or create a conflict of interest.[FN6]

Concerns behind the rule prohibiting a lawyer from acting as advocate and witness in the same trial are not implicated where a state attorney is called as a witness for the other side on a Brady claim in a postconviction evidentiary hearing before a judge.[FN7]

CUMULATIVE SUPPLEMENT

Cases:

Introduction, at defendant's trial on racketeering conspiracy and other charges related to his association in an organized crime family, of a recorded conversation in which an alleged family associate and government informant and a co-defendant discussed the possibility that defense counsel would be arrested and lose his law license, standing alone, did not require counsel's disqualification, on the grounds that counsel would become an unsworn witness at trial; the recorded conversation does not directly suggest that counsel had engaged in any criminal conduct, and it did not support the government's claim that counsel had firsthand knowledge of what it meant to be an associate of the crime family. U.S.C.A. Const.Amend. 6. U.S. v. Scarpaci, 731 F. Supp. 2d 341 (S.D. N.Y. 2010).

Attorney who acted as investigator and prosecuting attorney in the time leading up to an attorney disciplinary hearing was not disqualified from testifying at the hearing, under rule of professional conduct prohibiting lawyer from acting as an advocate at a trial in which the lawyer is likely to be a necessary witness; respondent attorney could not ask Hearing Panel of Commission on Lawyer Conduct to adjudicate an opposing attorney's compliance with Rules of Ethics, investigating attorney was included on respondent's witness list

submitted prior to the hearing, and her testimony at trial was limited to presentation of facts, documents, and statements by respondent obtained in course of investigation. Appellate Court Rule 407, Rules of Prof.Conduct, Rule 3.7. In re Crews, 698 S.E.2d 785 (S.C. 2010).

[END OF SUPPLEMENT]

[FN1] Rule 3.7(a), ABA Model Rules of Professional Conduct.
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[FN2] Rule 3.7(b), ABA Model Rules of Professional Conduct.
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[FN3] Ahrens v. Chisena, 40 A.D.3d 787, 836 N.Y.S.2d 278 (2d Dep't 2007).
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[FN4] Graves v. Dudley Maples, L.P., 950 So. 2d 1017 (Miss. 2007).
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[FN5] People v. Dunkle, 36 Cal. 4th 861, 32 Cal. Rptr. 3d 23, 116 P.3d 494 (2005), cert. denied, 547 U.S. 1100, 126 S. Ct. 1884, 164 L. Ed. 2d 571 (2006).
- A prosecutor did not violate the witness-advocate rule, where the prosecutor, after receiving an autopsy report, telephoned a medical examiner and asked him to look at a projection of the autopsy photograph showing a bullet in the victim's body, though at a second deposition, the medical examiner, after reviewing the projection, changed his opinion regarding the color of the bullet; the prosecutor did not directly testify at the guilt phase of the capital murder trial, nor did he testify indirectly by allegedly implying, during direct examination of the medical examiner, that he had special knowledge or insight. Parker v. State, 904 So. 2d 370 (Fla. 2005), as revised on denial of reh'g, (June 2, 2005).
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[FN6] Scott v. State, 717 So. 2d 908 (Fla. 1998).
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[FN7] Scott v. State, 717 So. 2d 908 (Fla. 1998).
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§ 72. Defamation of and other conduct toward litigants or attorneys

West's Key Number Digest

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Disciplinary measures are proper when an attorney slanders another attorney with the intent to deprive the latter of clients.[FN1] Open disrespect shown for an opposing attorney coupled with personal attacks upon him or her throughout trial proceedings may subject an attorney to disciplinary action.[FN2]
Observation: The First Amendment does not protect those who make harassing or threatening remarks about the judiciary or opposing counsel.[FN3]

[FN1] Leimer v. Hulse, 352 Mo. 451, 178 S.W.2d 335 (1944).
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[FN2] State v. Turner, 217 Kan. 574, 538 P.2d 966, 87 A.L.R.3d 337 (1975).
- Rule 3.5(d), ABA Model Rules of Professional Conduct, enjoins lawyers from engaging in conduct intended to disrupt a tribunal.
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[FN3] The Florida Bar v. Sayler, 721 So. 2d 1152 (Fla. 1998).
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§ 73. Solicitation of business

West's Key Number Digest

West's Key Number Digest, Attorney and Client 38

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Validity of state judicial or bar association rule forbidding use of law firm name unless it contains exclusively names of persons who are or were members of that state's bar, as it applies to out-of-state law firm, 33 A.L.R.4th 404

Modern status of law regarding solicitation of business by or for attorney, 5 A.L.R.4th 866

Lawyer publicity as breach of legal ethics, 4 A.L.R.4th 306

Rights of attorneys leaving firm with respect to firm clients, 1 A.L.R.4th 1164

Attorneys at law: disciplinary proceeding based upon attorney's naming of himself or associate as executor or attorney for executor in will drafted by him, 57 A.L.R.3d 703

A lawyer must not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited, if the prospective client has made known to the lawyer a desire not to be solicited by the lawyer, or the solicitation involves coercion, duress or harassment.[FN1] An attorney is subject to discipline for soliciting legal business, either personally or through others.[FN2] In addition, forming a corporation whose sole purpose is to find potential clients and direct them to the attorney and paying employees of the corporation will violate the rule prohibiting a lawyer from compensating or giving anything of value to a person or organization to recommend or secure the lawyer's employment by a client.[FN3]
Observation: The rules against direct solicitation of prospective clients are prophylactic measures which are intended to prevent harm before it occurs.[FN4]

An attorney's improper solicitation of clients in violation of disciplinary rules does not independently constitute a tort.[FN5]

[FN1] Rule 7.3(b), ABA Model Rules of Professional Conduct.
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[FN2] Matter of Rapport, 186 A.D.2d 344, 588 N.Y.S.2d 436 (3d Dep't 1992).
- The outside of an attorney's self-mailing brochure to people ticketed for traffic offenses or charged with

driving under the influence did not violate the bar rule prohibiting a lawyer from making a written communication seeking employment by a specific prospective client in a specific matter which reveals the nature of the prospective client's legal problem on the outside of the communication; the outside of the brochure, which identified the sender as "The Ticket Clinic," with a picture of a stop sign and roadway, along with the words "Don't Just Roll Over Fight Back," did not lead inescapably to the conclusion that the recipient had been charged with a particular offense, and nothing distinguished the brochure from numerous other unsolicited, seemingly random bulk mail advertisements. The Florida Bar v. Gold, 937 So. 2d 652 (Fla. 2006).
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[FN3] Cincinnati Bar Assn. v. White, 79 Ohio St. 3d 491, 1997-Ohio-160, 684 N.E.2d 29 (1997).
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[FN4] In re Broome, 815 So. 2d 1 (La. 2002).
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[FN5] Fred Siegel Co., L.P.A. v. Arter & Hadden, 85 Ohio St. 3d 171, 1999-Ohio-260, 707 N.E.2d 853 (1999).
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§ 74. Solicitation of business—Constitutional limitations on regulation of solicitation

West's Key Number Digest

West's Key Number Digest, Attorney and Client 38

Statutes that prohibit solicitation of employment by attorneys are constitutional.[FN1] Thus, a state may, consistent with the First Amendment, require that a lawyer file with a state agency any letter soliciting possible clients, thus giving the state the opportunity to supervise mailing and penalize abuses.[FN2]

However, there is no broad constitutional prohibition against the regulation of lawyer advertising,[FN3] and certain forms of solicitation may be protected by the constitutional rights of freedom of speech, press, or association,[FN4] which may not be abridged except on a matter of compelling state interest.[FN5] Thus, a state may not categorically prohibit lawyers from soliciting legal business for pecuniary gain by sending truthful and nondeceptive letters to potential clients known to face particular legal problems.[FN6]

CUMULATIVE SUPPLEMENT

Cases:

State Bar discipline of attorneys who engage in solicitation and enforcement of the antisolicitation statute is excepted from the litigation privilege. Action Apartment Ass'n, Inc. v. City of Santa Monica, 41 Cal. 4th 1232, 63 Cal. Rptr. 3d 398, 163 P.3d 89 (2007).

[END OF SUPPLEMENT]

[FN1] Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 98 S. Ct. 1912, 56 L. Ed. 2d 444 (1978); In re Primus, 436 U.S. 412, 98 S. Ct. 1893, 56 L. Ed. 2d 417 (1978).
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[FN2] Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 108 S. Ct. 1916, 100 L. Ed. 2d 475 (1988).
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[FN3] The Florida Bar v. Gold, 937 So. 2d 652 (Fla. 2006).
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[FN4] Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 98 S. Ct. 1912, 56 L. Ed. 2d 444 (1978); In re Primus, 436 U.S. 412, 98 S. Ct. 1893, 56 L. Ed. 2d 417 (1978).
- As to advertising by attorneys, see § 77.
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[FN5] In re Primus, 436 U.S. 412, 98 S. Ct. 1893, 56 L. Ed. 2d 417 (1978).
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[FN6] Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 108 S. Ct. 1916, 100 L. Ed. 2d 475 (1988).
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§ 75. Solicitation of criminal representation

West's Key Number Digest

West's Key Number Digest, Attorney and Client 38

An attorney may be disciplined for soliciting criminal business, whether personally[FN1] or indirectly.[FN2] It cannot be said, however, that a lawyer may never volunteer his or her services to a defendant in need of assistance, or where important issues are involved in the case.[FN3]

[FN1] Attorney Grievance Com'n of Maryland v. Gregory, 311 Md. 522, 536 A.2d 646 (1988).
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[FN2] Matter of Kassner, 93 A.D.2d 87, 461 N.Y.S.2d 11 (1st Dep't 1983).
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[FN3] In re Ades, 6 F. Supp. 467 (D. Md. 1934).
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§ 76. Ambulance chasing

West's Key Number Digest

West's Key Number Digest, Attorney and Client 38

A.L.R. Library

Modern status of law regarding solicitation of business by or for attorney, 5 A.L.R.4th 866

"Ambulance chasing" describes the activities of laypersons who learn of accidents resulting in death or personal injury and who seek to induce the injured party or the relatives of the deceased to employ a particular attorney to conduct the litigation arising from the accident, and also embraces the conduct of attorneys who employ laypersons for these purposes as well as the personal solicitation of cases by an attorney.[FN1]

An attorney may contact an accident victim for legitimate investigative purposes and is not barred from representing the victim if requested to do so.[FN2]

The policy behind the prohibition of ambulance chasing is the protection of citizens from the probability of fraud, deception, and overreaching.[FN3]

[FN1] Kelley v. Boyne, 239 Mich. 204, 214 N.W. 316, 53 A.L.R. 273 (1927).
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[FN2] Rose v. State Bar, 49 Cal. 3d 646, 262 Cal. Rptr. 702, 779 P.2d 761 (1989).
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[FN3] Rubin v. Green, 4 Cal. 4th 1187, 17 Cal. Rptr. 2d 828, 847 P.2d 1044 (1993).
- As to the right of labor unions and civil rights organizations to recommend or furnish counsel to their members, see § 10.
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§ 77. Advertising

West's Key Number Digest

West's Key Number Digest, Attorney and Client 38

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Propriety of Radio and Television Attorney Advertisements, 20 A.L.R.6th 385

Advertising as ground for disciplining attorney, 30 A.L.R.4th 742 (§§ 10(a), 10(b), 10(c) superseded in part by Propriety of Radio and Television Attorney Advertisements, 20 A.L.R.6th 385)

Lawyer publicity as breach of legal ethics, 4 A.L.R.4th 306

Attorney at law: publication and distribution of announcement of new or changed associations or addresses, change of firm name, or the like as ground for disciplinary action, 53 A.L.R.3d 1261

Trial Strategy

False Advertising Under Lanham Act § 43(a)(1)(B), 44 Am. Jur. Proof of Facts 3d 1

Lawyers may constitutionally advertise the prices at which certain routine legal services will be performed.[FN1] Thus, an attorney may solicit legal business through printed advertising containing truthful and nondeceptive information and advice regarding the legal rights of potential clients,[FN2] and may advertise the availability and terms of routine legal services.[FN3]

However, advertising that is false, deceptive, or misleading is subject to restraint.[FN4] A lawyer must not make a false or misleading communication about the lawyer or the lawyer's services.[FN5] A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.[FN6]

The Supreme Court has established some general principles governing the state regulation of lawyer solicitations for pecuniary gain. Thus, commercial speech that is not false or deceptive and does not concern unlawful activities may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest.[FN7] In addition, since state regulation of commercial speech may extend only as far as the interest it serves, state rules that are designed to prevent the potential for deception and confusion may be no broader than reasonably necessary to prevent the perceived evil.[FN8]
Observation: An attorney may advertise his or her certification as a trial specialist by the National Board of Trial Advocacy where the statement is true and no person was misled or deceived thereby.[FN9]

While the initial publication of independently authored news articles about an attorney does not violate bar rules on lawyer advertising, an attorney's republication or circulation of such news articles in direct mail solicitations can constitute ethical misconduct under the bar rules on lawyer advertising.[FN10]

CUMULATIVE SUPPLEMENT

Cases:

New York rule prohibiting attorney advertising containing attention-getting techniques unrelated to attorney competence did not materially advance state's interest in preventing misleading advertising, as required to satisfy First Amendment limitations on regulation of commercial speech; there was no evidence that the sorts of irrelevant advertising components proscribed by the provision were, in fact, misleading. U.S.C.A. Const.Amend. 1; 22 NYCRR 1200.50(c)(5). Alexander v. Cahill, 598 F.3d 79 (2d Cir. 2010).

Public reprimand and 30-day suspension of license to practice law, probated upon certain conditions including public apology and compliance with professional rules, was warranted as punishment for attorney's conduct in posting a website offering legal services in conjunction with grief counseling following fatal airplane crash, and in directing staff to e-mail the website address to certain people directly, which conduct violated rules of professional conduct, as attorney admitted, regarding advertising requirements and proper supervision of employees, and prohibiting contact for 30 days after mass disaster, and prohibiting false or deceptive advertising. Anderson v. Kentucky Bar Ass'n, 262 S.W.3d 636 (Ky. 2008).

[END OF SUPPLEMENT]

[FN1] Bates v. State Bar of Arizona, 433 U.S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977).
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[FN2] Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 105 S. Ct. 2265, 85 L. Ed. 2d 652 (1985).
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[FN3] Leoni v. State Bar, 39 Cal. 3d 609, 217 Cal. Rptr. 423, 704 P.2d 183 (1985).
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[FN4] Bates v. State Bar of Arizona, 433 U.S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977).
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[FN5] Rule 7.1, ABA Model Rules of Professional Conduct.
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[FN6] Rule 7.1, ABA Model Rules of Professional Conduct.
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[FN7] Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 108 S. Ct. 1916, 100 L. Ed. 2d 475 (1988).
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[FN8] Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 108 S. Ct. 1916, 100 L. Ed. 2d 475 (1988).
- In furtherance of its interest in preventing deception of consumers, a state may require attorneys who advertise their availability on a contingent fee basis to disclose that clients will have to pay costs even if their suits are unsuccessful. Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 105 S. Ct. 2265, 85 L. Ed. 2d 652 (1985).
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[FN9] Peel v. Attorney Registration and Disciplinary Com'n of Illinois, 496 U.S. 91, 110 S. Ct. 2281, 110 L. Ed. 2d 83 (1990).
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[FN10] The Florida Bar v. Gold, 937 So. 2d 652 (Fla. 2006).
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§ 78. Use of assumed or trade name

West's Key Number Digest

West's Key Number Digest, Attorney and Client 38

A.L.R. Library

Use of assumed or trade name as ground for disciplining attorney, 26 A.L.R.4th 1083

An attorney may be subject to discipline for the use and advertising of trade names in a way that misleads the public concerning the identity, responsibility, and status of those practicing at the facility.[FN1] Thus, for example, an attorney is subject to disbarment for naming legal clinics after their geographic locations and advertising them without always disclosing his or her identity and association with the clinics.[FN2]

However, a disciplinary board may determine not to sanction attorneys who are practicing under a trade name where the attorneys are not aware of the disciplinary rule prohibiting the practice of law under a trade name, and discontinue use of the trade name immediately upon notification of the disciplinary violation.[FN3]

[FN1] Matter of Sekerez, 458 N.E.2d 229 (Ind. 1984), reinstatement granted, 553 N.E.2d 844 (Ind. 1990).
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[FN2] Matter of Sekerez, 458 N.E.2d 229 (Ind. 1984), reinstatement granted, 553 N.E.2d 844 (Ind. 1990).
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[FN3] Attorney Grievance Com'n of Maryland v. Powers, 300 Md. 25, 475 A.2d 1167 (1984).
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§ 79. Judicial officer

West's Key Number Digest

West's Key Number Digest, Attorney and Client 38

A.L.R. Library

Consorting with, or maintaining social relations with, criminal figure as ground for disciplinary action against judge, 15 A.L.R.5th 923

Misconduct in capacity as judge as basis for disciplinary action against attorney, 57 A.L.R.3d 1150

An attorney may be disciplined for misconduct in the exercise of a judicial office[FN1] where the acts involved moral turpitude in some form.[FN2]

Discipline has been imposed upon an attorney acting in a judicial capacity for—

— misconduct consisting of the wrongful receipt of funds by means of extortion, bribery, and acceptance of loans.[FN3]

— disposing of matters relating to clients so clients would be satisfied with the legal services provided by the attorney's firm.[FN4]

— encouraging clients to commit burglaries and purchasing goods, known to be stolen, from clients.[FN5]

— use of official stationery in connection with a private transaction.[FN6]

— engaging in ticket-fixing involving false records, false reports, favoritism, violation of court rules, and a cover-up.[FN7]

— tampering with the jury list and providing lenient treatment to a convicted felon in exchange for political assistance to a candidate for public office.[FN8]

[FN1] Cincinnati Bar Ass'n v. Heitzler, 32 Ohio St. 2d 214, 61 Ohio Op. 2d 451, 291 N.E.2d 477, 57 A.L.R.3d 1134 (1972).

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[FN2] In re Mattera, 34 N.J. 259, 168 A.2d 38 (1961).

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[FN3] Matter of Rosado, 171 A.D.2d 6, 574 N.Y.S.2d 371 (2d Dep't 1991).

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[FN4] Matter of Tabak, 266 Ind. 271, 362 N.E.2d 475 (1977).

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[FN5] Matter of Wireman, 270 Ind. 344, 367 N.E.2d 1368 (1977).

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[FN6] Matter of Vasser, 75 N.J. 357, 382 A.2d 1114 (1978).

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[FN7] Matter of DeLucia, 76 N.J. 329, 387 A.2d 362 (1978).

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[FN8] State ex rel. Oklahoma Bar Ass'n v. Haworth, 1979 OK 34, 593 P.2d 765 (Okla. 1979).

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§ 80. Attorney for public entity

West's Key Number Digest

West's Key Number Digest, Attorney and Client 38

Failure to prosecute criminal offenses, giving active encouragement to violations of the law,[FN1] meeting ex parte with an incarcerated defendant known to be represented by counsel,[FN2] and other acts against good morals and in violation of the attorney's oath of office while serving as the prosecuting attorney are sufficient to justify disbarment or suspension of an attorney from practice.[FN3]

[FN1] In re Simpson, 9 N.D. 379, 83 N.W. 541 (1900), reinstatement granted, 11 N.D. 526, 93 N.W. 918 (1903).
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[FN2] Matter of Disciplinary Proceedings Against Dumke, 171 Wis. 2d 47, 489 N.W.2d 919 (1992).
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[FN3] Disciplinary Counsel v. DiCarlantonio, 68 Ohio St. 3d 479, 1994-Ohio-144, 628 N.E.2d 1355 (1994).
- As to attorney's oath of office, see § 16.
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§ 81. Other offices

West's Key Number Digest

West's Key Number Digest, Attorney and Client 38

An attorney may be disciplined for making a false jurat or acknowledgment in his or her capacity as a notary public.[FN1] However, an attorney is not liable for fraud based on allegations that he or she knowingly notarized and filed documents with a lapsed notary commission in an effort to deceive the court as to the documents' authenticity, where the pleadings do not show that the plaintiff would have been successful in the underlying case absent the attorney's alleged fraud.[FN2]

[FN1] State ex rel. Nebraska State Bar Ass'n v. Butterfield, 169 Neb. 119, 98 N.W.2d 714 (1959).
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[FN2] Parks v. Leahey & Johnson, P.C., 81 N.Y.2d 161, 597 N.Y.S.2d 278, 613 N.E.2d 153 (1993).
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Topic Summary Correlation Table References

§ 82. Generally

West's Key Number Digest

West's Key Number Digest, Attorney and Client 45

An attorney will be subject to disciplinary proceedings for activities that are outside his or her professional work[FN1] when his or her conduct is indicative of moral unfitness for the profession.[FN2]

A lawyer may not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.[FN3] However, what may not legally be characterized as an act of fraud, deceit or misrepresentation may evince "dishonesty" within the meaning of the rule of professional conduct.[FN4] In addition, an attorney can be disciplined for failing to disclose completely essential matters in business transactions with nonclients[FN5] as well as for failing to file personal federal income tax returns.[FN6]

CUMULATIVE SUPPLEMENT

Cases:

Engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation normally requires an actual suspension from the practice of law. Columbus Bar Assn. v. Shea, 117 Ohio St. 3d 55, 2008-Ohio-263, 881 N.E.2d 847 (2008).

[END OF SUPPLEMENT]

[FN1] In re Lynch, 238 S.W.2d 118 (Ky. 1951).
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[FN2] Marquette v. State Bar, 44 Cal. 3d 253, 242 Cal. Rptr. 886, 746 P.2d 1289 (1988).
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[FN3] Rule 8.4(c), ABA Model Rules of Professional Conduct.
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[FN4] In re Scanio, 919 A.2d 1137 (D.C. 2007).
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[FN5] The Florida Bar v. Schultz, 712 So. 2d 386 (Fla. 1998).
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[FN6] Dayton Bar Assn. v. Millonig, 84 Ohio St. 3d 403, 1999-Ohio-468, 704 N.E.2d 568 (1999).

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§ 83. Alcohol or drug abuse

West's Key Number Digest

West's Key Number Digest, Attorney and Client 45

A.L.R. Library

Misconduct involving intoxication as ground for disciplinary action against attorney, 1 A.L.R.5th 874

Bar admission or reinstatement of attorney as affected by alcoholism or alcohol abuse, 39 A.L.R.4th 567

Alcohol or drug abuse by an attorney may be grounds for discipline.[FN1] While substance abuse in no way justifies or excuses attorney misconduct, the fact that an attorney has acknowledged the condition, voluntarily sought treatment, and terminated use of the substance may under some circumstances be considered as mitigating factors in a disciplinary proceeding.[FN2] Thus, an attorney's chemical dependency will not qualify as a mitigating factor in imposing a sanction if the attorney does not demonstrate a commitment to sobriety and refuses to seek rehabilitative assistance.[FN3]

Operating a motor vehicle under the influence of intoxicants is a ground for disciplinary action.[FN4]

CUMULATIVE SUPPLEMENT

Cases:

Mitigating factors weighing in favor of lenience, to be considered in determining sanction for attorney who was convicted of drug possession, failed to appear at a client's court appearance, and practiced law in violation of a court order, were that attorney demonstrated a cooperative attitude at the hearing, there was no proof that clients were substantially harmed by his conduct, attorney had no prior disciplinary record, attorney's chemical dependence or mental disability contributed to cause his misconduct, attorney demonstrated remorse for his conduct, attorney volunteered as a law clerk at organization that assisted clients with criminal records, mental health issues, and drug and alcohol problems to be able to reenter the work force, and attorney was committed to remaining sober and controlling his mental health, attending alcohol dependency support meetings, refraining from using drugs or alcohol, and complying with the recommended treatments from a clinical psychologist. Disciplinary Counsel v. Jarabek, 121 Ohio St. 3d 257, 2009-Ohio-748, 903 N.E.2d 624 (2009).

[END OF SUPPLEMENT]

[FN1] Matter of Disciplinary Proceeding Against Curran, 115 Wash. 2d 747, 801 P.2d 962, 1 A.L.R.5th 1183 (1990).
- As to alcoholism or drug abuse as a mitigating factor in a disciplinary proceeding, see § 69.
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[FN2] State ex rel. Nebraska State Bar Ass'n v. Pullen, 260 Neb. 125, 615 N.W.2d 474 (2000).
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[FN3] Disciplinary Counsel v. Brown, 87 Ohio St. 3d 316, 1999-Ohio-74, 720 N.E.2d 525 (1999).
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[FN4] People v. Fahselt, 807 P.2d 586 (Colo. 1991).
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§ 84. Sexual conduct

West's Key Number Digest

West's Key Number Digest, Attorney and Client 45

A.L.R. Library

Sexual misconduct as ground for disciplining attorney or judge, 43 A.L.R.4th 1062

The supreme court of the state will not attempt to establish guidelines for the sexual activities of the bench and bar.[FN1] However, sexual misconduct has been deemed conduct adversely reflecting on an attorney's fitness to practice law and has been grounds for attorney discipline.[FN2] Attorneys have been disciplined for—

— engaging in a sexual relationship with a client.[FN3]

— misdemeanor sexual offenses involving minors.[FN4]

— sexual assault against a child.[FN5]

— sexual exploitation of minors.[FN6]

— solicitation of sexual favors in exchange for legal fees.[FN7]

— masturbating in the presence of a client.[FN8]

— making obscene phone calls.[FN9]

— possession of sexually explicit materials using minors.[FN10]

— making sexually inappropriate comments to a marriage dissolution client.[FN11]

— initiating nonconsensual sexual contact with a client.[FN12]

— a sexual relationship with a party who had contested matters pending before the attorney as a family court judge.[FN13]

— making an uninvited sexual advance toward a client.[FN14]

— sexual battery.[FN15]

— nonconsensual touching of genitals of young clients and office visitors.[FN16]

— advising clients and potential clients that physical examinations were a necessary part of the attorney's representation and repeatedly fondling and touching them to the detriment of their psychological well-being.[FN17]

— sexual abuse against the attorney's relative who is a minor.[FN18]

— indecent liberties.[FN19]

— making sexually explicit and suggestive comments and questions to clients during office conferences.[FN20]

— conviction in a foreign state on felony rape charges.[FN21]

— conviction of possessing[FN22] or importing child pornography and trading obscene photographs.[FN23]

Under conflict of interest rules, a lawyer must not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.[FN24]

CUMULATIVE SUPPLEMENT

Cases:

Attorney's conduct in mishandling one client's petition for postconviction relief coupled with his attempt to have sexual relations with another client, in violation of professional rules, warranted 180-day suspension from the practice of law. In re Bash, 880 N.E.2d 1182 (Ind. 2008).

Attorney's conduct in attempting to have sexual relations with his client whom he represented in divorce action violated his ethical duty to the client and, when coupled with attorney's failure to withdraw from representation following his sexual advances, violated professional rules prohibiting lawyers from representing clients when such representation would be materially limited by a lawyer's self-interest, that being attorney's desire to engage in a sexual relationship with client. In re Bash, 880 N.E.2d 1182 (Ind. 2008).

Permanent disbarment from the practice of law was warranted for attorney who engaged in misconduct when, while on interim suspension from the practice of law, he received and handled client funds, gave clients legal advice and negotiated the settlement of their personal injury claims, refused to respect authority of court, and used his position as an attorney on numerous occasions to obtain sexual gratification at the expense of his client's interests. State Bar Articles of Incorporation, Art. 16, Rules of Prof.Conduct, Rules 1.7(a)(2), 5.5(a, b), (e)(4), 8.4(b–d), LSA–R.S. foll. 37:222. In re Hammond, 56 So. 3d 199 (La. 2011).

Attorney's failure to appreciate negative impact of sexual relationship with client while he was representing her in employment discrimination suit, which suit was based on employee's transfer to different position when employer learned of her sexual relationship with married supervisor, together with attorney's summary dismissal of client's concerns about relationship's impact on her representation, violated Rules of Professional Conduct requiring lawyers to explain matters to client to extent reasonably necessary to permit client to make informed decisions about representation, regardless of whether or not attorney was aware of inherent conflict of interest. Attorney Grievance Com'n of Maryland v. Hall, 408 Md. 306, 969 A.2d 953 (2009).

Attorney's sexual relationship with client he was simultaneously representing in employment discrimination suit created inherent conflict with client's interests that materially limited his representation of her case, in violation of Rules of Professional Conduct; client's suit was based on transfer to different position after employer discovered she was having sexual relationship with married supervisor, and had employer learned of sexual relationship with attorney, employer would have likely highlighted fact, which would have raised serious questions about merits of discrimination claim. Md.Rule 16-812, Rules of Prof.Conduct, Rule 1.7(b). Attorney Grievance Com'n of Maryland v. Hall, 408 Md. 306, 969 A.2d 953 (2009).

Indefinite suspension from practice of law, for which attorney could apply for readmission not less than 24 months from date of suspension order, was appropriate sanction for attorney's violations of Rules of

Professional Conduct by engaging in sexual relationship with client while representing her in employment discrimination suit, despite inherent conflict of interest and his awareness of client's fragile emotional state. Attorney Grievance Com'n of Maryland v. Hall, 408 Md. 306, 969 A.2d 953 (2009).

Public reprimand was warranted for attorney who engaged in sexual relationship with client while representing her in divorce case, in violation of rules prohibiting a lawyer from soliciting or engaging in sexual activity with a client unless a consensual sexual relationship existed prior to the client-lawyer relationship, providing that a lawyer's continued representation of a client creates a conflict of interest if there is a substantial risk that the lawyer's ability to represent the client will be materially limited by the lawyer's own personal interests, and prohibiting a lawyer from engaging in conduct that adversely reflects on the lawyer's fitness to practice law. Rules of Prof.Conduct, Rules 1.7(a)(2), 1.8(j), 8.4(h). Disciplinary Counsel v. Detweiler, 127 Ohio St. 3d 73, 2010-Ohio-5033, 936 N.E.2d 498 (2010).

Attorney's inappropriate communication with a client violated disciplinary rule against engaging in conduct that adversely reflects on fitness to practice law, where attorney, after showing photographs of scantily clad female client to another attorney while they were lunching, phoned client and asked her to send something so he would have an incentive to do well in hearing that afternoon. Code of Prof.Resp., DR 1–102(A)(6) (2006). Cleveland Metro. Bar Assn. v. Lockshin, 125 Ohio St. 3d 529, 2010-Ohio-2207, 929 N.E.2d 1028 (2010).

Counsel's conduct in engaging in a sexual relationship with client, who was depressed, was taking prescription medication for anxiety, and showed signs of anorexia, violated the professional rule that required a lawyer representing a client with diminished capacity to maintain a normal client-lawyer relationship with the client. In re Hoffmeyer, 376 S.C. 221, 656 S.E.2d 376 (2008).

[END OF SUPPLEMENT]

[FN1] Matter of Wood, 265 Ind. 616, 358 N.E.2d 128 (1976).

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[FN2] Disciplinary Counsel v. Paxton, 66 Ohio St. 3d 163, 1993-Ohio-99, 610 N.E.2d 979 (1993).

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[FN3] In re Alongi, 794 A.2d 605 (D.C. 2002); Iowa Supreme Court Attorney Disciplinary Bd. v. Morrison, 727 N.W.2d 115 (Iowa 2007).

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[FN4] Office of Disciplinary Counsel v. Christie, 536 Pa. 394, 639 A.2d 782 (1994).

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[FN5] People v. Espe, 967 P.2d 159 (Colo. 1998).

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[FN6] In re Conn, 715 N.E.2d 379 (Ind. 1999).

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[FN7] In re Touchet, 753 So. 2d 820 (La. 2000).

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[FN8] The Florida Bar v. McHenry, 605 So. 2d 459 (Fla. 1992).

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[FN9] The Florida Bar v. Helinger, 620 So. 2d 993 (Fla. 1993).

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[FN10] In re Disciplinary Action Against McCarthy, 523 N.W.2d 665 (Minn. 1994).

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[FN11] In re Wilson, 982 P.2d 840 (Colo. 1999).

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[FN12] The Florida Bar v. Senton, 882 So. 2d 997 (Fla. 2004).
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[FN13] Matter of Mendenhall, 316 S.C. 196, 447 S.E.2d 858 (1994).
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[FN14] In re Ashy, 721 So. 2d 859 (La. 1998), reinstatement granted, 802 So. 2d 1251 (La. 2001).
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[FN15] Matter of Brooks, 264 Ga. 583, 449 S.E.2d 87 (1994).
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[FN16] Matter of Wells, 572 N.E.2d 1290 (Ind. 1991).
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[FN17] Kentucky Bar Association v. Belker, 997 S.W.2d 470 (Ky. 1999).
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[FN18] Iowa Supreme Court Bd. of Professional Ethics and Conduct v. Blazek, 590 N.W.2d 501 (Iowa 1999).
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[FN19] Matter of Wilson, 251 Kan. 252, 832 P.2d 347 (1992) (child); Matter of Bellino, 308 S.C. 130, 417 S.E.2d 535 (1992), reinstatement granted, 320 S.C. 282, 465 S.E.2d 573 (1995) (adults).
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[FN20] Matter of Disciplinary Proceedings Against Heilprin, 168 Wis. 2d 1, 482 N.W.2d 908 (1992).
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[FN21] Matter of Rose, 165 A.D.2d 400, 568 N.Y.S.2d 162 (2d Dep't 1991).
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[FN22] In re Mc Broom, 158 N.J. 258, 729 A.2d 429 (1999).
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[FN23] Matter of Disciplinary Proceedings Against Bruckner, 161 Wis. 2d 385, 467 N.W.2d 780 (1991).
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[FN24] Rule 1.8(j), ABA Model Rules for Professional Conduct.
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§ 85. Political activities

West's Key Number Digest

West's Key Number Digest, Attorney and Client 45

A.L.R. Library

Election campaign activities as ground for disciplining attorney, 26 A.L.R.4th 170

A lawyer is bound by the code of professional responsibility in every capacity in which the lawyer acts, whether he or she is acting as an attorney or not, and is subject to discipline even when involved in nonlegal matters, including campaigns for nonjudicial public office.[FN1]

An attorney's derogatory comments against his or her opponent while a candidate for judicial office and unfair comments on judicial decisions rendered by that opponent constitute unethical conduct.[FN2] An attorney will be censured for publishing a political advertisement that contains false, deceptive, and misleading statements about the attorney's opponent for political office.[FN3] An attorney may be disbarred for making public attribution of unethical and illegal conduct on the part of other attorneys during a campaign for a public office where the attorney knew or should have known that the charges were unfounded and the attorney showed no signs of remorse.[FN4]

A lawyer must not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.[FN5]

[FN1] In re Comfort, 159 P.3d 1011 (Kan. 2007).

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[FN2] Matter of Riley, 142 Ariz. 604, 691 P.2d 695 (1984).

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[FN3] State v. Russell, 227 Kan. 897, 610 P.2d 1122 (1980).

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[FN4] State ex rel. Nebraska State Bar Ass'n v. Michaelis, 210 Neb. 545, 316 N.W.2d 46, 26 A.L.R.4th 154 (1982).

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[FN5] Rule 8.2(a), ABA Model Rules of Professional Conduct.

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§ 86. Generally

West's Key Number Digest

West's Key Number Digest, Attorney and Client 39

A.L.R. Library

Plea of nolo contendere or non vult contendere, 89 A.L.R.2d 540

An attorney should refrain from any illegal conduct, as anything short of this lessens public confidence in the legal profession, because obedience to the law exemplifies respect for the law.[FN1] Thus, an attorney who turns to crime and is convicted of theft offenses, or engages in conduct that involves moral turpitude or adversely reflects on the attorney's fitness to practice law,[FN2] should be disbarred.[FN3] It is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.[FN4] However, the commission of some crimes, standing alone, does not implicate an attorney's fitness to practice law, and in such a case, moral turpitude cannot be imputed from the conviction alone and inquiry must be made into the circumstances surrounding the commission of the crime.[FN5]

Definition: Moral turpitude consists of an act of baseness, vileness, or depravity in the private and social duties which a person owes to a fellow human being, or to society in general, contrary to the accepted and customary rule of right and duty between persons,[FN6] or acts done contrary to justice, honesty, modesty, or good morals.[FN7]

CUMULATIVE SUPPLEMENT

Cases:

Attorney's conduct in assaulting his wife, which led to criminal charge for assault, violated the professional rule that prohibited a lawyer form committing a criminal act that reflected adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. In re Enna, 971 A.2d 110 (Del. 2009).

Attorney's conduct in assaulting his wife, which led to criminal charge for assault, violated the professional rule that prohibited a lawyer from committing a criminal act that reflected adversely on the lawyer's honesty, trustworthiness of fitness as a lawyer in other respects. In re Enna, 971 A.2d 110 (Del. 2009).

Attorney's conviction in Pennsylvania of intimidation of a witness involved moral turpitude per se, and thus disbarment was mandated; conviction required intent or knowledge that his conduct would obstruct, impede, impair, prevent or interfere with the administration of criminal justice. In re Luvara, 942 A.2d 1125 (D.C. 2008).

An attorney's commission of a crime does not necessarily constitute a violation of the ethical rule prohibiting conduct prejudicial to the administration of justice. I.C.A. Rule, 32.DR 1–102(A)(5) (2004). Iowa Supreme Court Attorney Disciplinary Bd. v. Polsley, 796 N.W.2d 881 (Iowa 2011).

Suspended attorney who engaged in the unauthorized practice of law with regard to a foreclosure action, a criminal act, violated rule of professional conduct prohibiting a lawyer from committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. Attorney Grievance Com'n of Maryland v. Shryock, 408 Md. 105, 968 A.2d 593 (2009).

Attorney's convictions of carrying a concealed weapon and six misdemeanor counts of aggravated menacing, which resulted when attorney became involved in physical altercation with six people in strip club parking lot, during which attorney pointed pistol with laser sight at all six people one at a time, violated provisions of the code of professional conduct that prohibited lawyer from engaging in illegal conduct involving moral turpitude and conduct that adversely reflects on his fitness to practice law. Disciplinary Counsel v. LoDico, 118 Ohio St. 3d 316, 2008-Ohio-2465, 888 N.E.2d 1097 (2008).

Attorney's convictions for compelling prostitution and possessing criminal tools, which resulted from attorney's attempt to arrange a sexual encounter with an underage girl, violated of provisions of the code of professional responsibility prohibiting lawyer from engaging in illegal conduct involving moral turpitude and conduct that adversely reflects on his fitness to practice law. Disciplinary Counsel v. Goldblatt, 118 Ohio St. 3d 310, 2008-Ohio-2458, 888 N.E.2d 1091 (2008).

An attorney may not dispute the essential facts regarding a prior criminal conviction for the purposes of a disciplinary proceeding. ELC 10.14(c). In re Disciplinary Proceeding Against Smith, 170 Wash. 2d 721, 246 P.3d 1224 (2011).

[END OF SUPPLEMENT]

[FN1] Disciplinary Counsel v. Connor, 105 Ohio St. 3d 100, 2004-Ohio-6902, 822 N.E.2d 1235 (2004).

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[FN2] Disciplinary Counsel v. Rocker, 85 Ohio St. 3d 397, 1999-Ohio-401, 709 N.E.2d 113 (1999).

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[FN3] Disciplinary Counsel v. Bein, 105 Ohio St. 3d 62, 2004-Ohio-7012, 822 N.E.2d 358 (2004).

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[FN4] Rule 8.4(b), ABA Model Rules of Professional Conduct.

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[FN5] In re Strick, 43 Cal. 3d 644, 238 Cal. Rptr. 397, 738 P.2d 743 (1987).
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[FN6] Matter of Colson, 412 A.2d 1160 (D.C. 1979).
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[FN7] In re Alkow, 64 Cal. 2d 838, 51 Cal. Rptr. 912, 415 P.2d 800, 21 A.L.R.3d 882 (1966).
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§ 87. Homicide; assault

West's Key Number Digest

West's Key Number Digest, Attorney and Client 39

A.L.R. Library

Homicide or assault as ground for disciplinary measures against attorney, 21 A.L.R.3d 887

Conduct by an attorney amounting to murder constitutes a ground for disciplinary action which, in all cases, has resulted in disbarment.[FN1] Conviction of an attorney for manslaughter has resulted in the attorney's suspension or disbarment.[FN2] An assault committed by an attorney is sometimes held not to involve moral turpitude or circumstances showing the attorney's unfitness to practice and, thus, not to warrant disciplinary

measures.[FN3] However, under other circumstances, an assault committed by an attorney has been held to constitute grounds for disciplinary action.[FN4]

[FN1] Ex parte Wall, 107 U.S. 265, 2 S. Ct. 569, 27 L. Ed. 552 (1883); Disciplinary Counsel v. Rocker, 85 Ohio St. 3d 397, 1999-Ohio-401, 709 N.E.2d 113 (1999).

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[FN2] In re Nevill, 39 Cal. 3d 729, 217 Cal. Rptr. 841, 704 P.2d 1332 (1985).

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[FN3] Turton v. State Bar of Texas, 775 S.W.2d 712 (Tex. App. San Antonio 1989), writ denied, (May 30, 1990).

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[FN4] People v. Knight, 883 P.2d 1055 (Colo. 1994); Matter of Disciplinary Proceedings Against Beaver, 181 Wis. 2d 12, 510 N.W.2d 129, 58 A.L.R.5th 855 (1994).

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§ 88. Narcotics offenses

West's Key Number Digest

West's Key Number Digest, Attorney and Client 39

A.L.R. Library

Narcotics conviction as crime of moral turpitude justifying disbarment or other disciplinary action against attorney, 99 A.L.R.3d 288

Narcotics offenses are generally deemed crimes of moral turpitude[FN1] warranting disciplinary action,[FN2] such as disbarment,[FN3] against an attorney convicted thereof[FN4] An attorney will be disciplined for conviction of—

— the purchase, possession,[FN5] or distribution of cocaine.[FN6]

— possession with the intent to distribute marijuana.[FN7]

— criminal sale of a controlled substance.[FN8]

— offenses involving heroin.[FN9]

— offenses involving amphetamines.[FN10]

— procuring dangerous drugs by deception.[FN11]

— attempting to purchase drugs from an undercover officer.[FN12]

— obtaining a physician's forged signature on a prescription.[FN13]

[FN1] In re Lee, 755 A.2d 1034 (D.C. 2000); Committee on Professional Ethics and Conduct of Iowa State Bar Ass'n v. Shuminsky, 359 N.W.2d 442 (Iowa 1984).

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[FN2] Committee on Professional Ethics and Conduct of Iowa State Bar Ass'n v. Shuminsky, 359 N.W.2d 442 (Iowa 1984).

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[FN3] In re Lee, 755 A.2d 1034 (D.C. 2000).

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[FN4] Committee on Professional Ethics and Conduct of Iowa State Bar Ass'n v. Shuminsky, 359 N.W.2d 442 (Iowa 1984).

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[FN5] In re Scott, 52 Cal. 3d 968, 277 Cal. Rptr. 201, 802 P.2d 985 (1991); In re Parker, 267 Kan. 779, 985 P.2d 124 (1999); In re Edwards, 752 So. 2d 801 (La. 1999).

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[FN6] In re Scott, 52 Cal. 3d 968, 277 Cal. Rptr. 201, 802 P.2d 985 (1991).

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[FN7] In re Dechowitz, 741 A.2d 1061 (D.C. 1999).

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[FN8] In re Valentin, 710 A.2d 879 (D.C. 1998).

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[FN9] Matter of Murray, 245 Ga. 822, 268 S.E.2d 329 (1980).
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[FN10] Matter of Morris, 251 Kan. 592, 834 P.2d 384 (1992), reinstatement granted, 272 Kan. 1, 30 P.3d 1001 (2001).
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[FN11] Disciplinary Counsel v. Wolf, 110 Ohio St. 3d 411, 2006-Ohio-4709, 853 N.E.2d 1169 (2006).
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[FN12] The Florida Bar v. Roberts, 626 So. 2d 658 (Fla. 1993).
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[FN13] Matter of Disciplinary Proceedings Against Armstrong, 144 Wis. 2d 385, 424 N.W.2d 208 (1988) (dentist).
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§ 89. Offenses related to taxation

West's Key Number Digest

West's Key Number Digest, Attorney and Client 39

A.L.R. Library

Disciplinary action against attorney or accountant for misconduct related to preparation of tax returns for others, 81 A.L.R.3d 1140

Federal income tax conviction as involving moral turpitude warranting disciplinary action against attorney, 63 A.L.R.3d 476

An attorney's conviction of violating federal income tax laws may involve moral turpitude warranting disciplinary action.[FN1]

Observation: Even if the conviction was not per se a conviction of an offense involving moral turpitude, an attorney may be disciplined if the acts leading to the conviction involved fraud, deceit, dishonesty, and misrepresentation.[FN2]

If the willfulness of the attorney was apparent in his or her evasion of income taxes and there was an absence of substantial mitigating circumstances, the offense is one involving moral turpitude warranting at least suspension from practice.[FN3]

An attorney's conviction of filing false and fraudulent federal income tax returns may involve moral turpitude[FN4] and warrant disciplinary action,[FN5] although it is generally not considered as serious as the crime of tax evasion.[FN6]

Similarly, while some courts have held that an attorney's conviction of failure to file federal income tax returns establishes both conduct involving dishonesty[FN7] and professional[FN8] or nonprofessional misconduct warranting the disciplinary action,[FN9] others have held to the contrary.[FN10]

A court may discipline an attorney for failure to file state income tax returns[FN11] and for conviction of a crime relating to the preparation and filing of tax returns for others.[FN12]

[FN1] In re Chira, 42 Cal. 3d 904, 231 Cal. Rptr. 560, 727 P.2d 753 (1986).

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[FN2] Matter of Wines, 135 Ariz. 203, 660 P.2d 454 (1983).

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[FN3] Matter of Catalfo, 181 A.D.2d 213, 586 N.Y.S.2d 256 (1st Dep't 1992).

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[FN4] Statewide Grievance Committee v. Shluger, 230 Conn. 668, 646 A.2d 781 (1994); In re Gaudin, 785 So. 2d 763 (La. 2001), reinstatement granted, 899 So. 2d 1289 (La. 2005).

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[FN5] In re Shaver, 269 Kan. 171, 4 P.3d 581 (2000); In re Gaudin, 785 So. 2d 763 (La. 2001), reinstatement granted, 899 So. 2d 1289 (La. 2005); In re Bok, 163 N.J. 499, 750 A.2d 87 (2000); In re Klarman, 22 A.D.3d 953, 802 N.Y.S.2d 267 (3d Dep't 2005).

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[FN6] In re Gaudin, 785 So. 2d 763 (La. 2001), reinstatement granted, 899 So. 2d 1289 (La. 2005).

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[FN7] Attorney Grievance Com'n of Maryland v. Atkinson, 357 Md. 646, 745 A.2d 1086 (2000).

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[FN8] In re Disciplinary Action Against Vaught, 583 N.W.2d 924 (Minn. 1998).

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[FN9] In re Disciplinary Action Against Singer, 630 N.W.2d 404 (Minn. 2001), reinstatement denied, 2007 WL 2128362 (Minn. 2007); Toledo Bar Assn. v. Abood, 104 Ohio St. 3d 655, 2004-Ohio-7015, 821 N.E.2d 560 (2004), reinstatement granted, 106 Ohio St. 3d 1205, 2005-Ohio-4100, 832 N.E.2d 730 (2005); Matter of Disciplinary Proceedings Against Thomas, 187 Wis. 2d 332, 522 N.W.2d 781 (1994).

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[FN10] In re Grimes, 51 Cal. 3d 199, 270 Cal. Rptr. 855, 793 P.2d 61 (1990).
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[FN11] Matter of Disciplinary Proceedings Against Thomas, 187 Wis. 2d 332, 522 N.W.2d 781 (1994).
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[FN12] In re Distefano, 13 Cal. 3d 476, 119 Cal. Rptr. 105, 531 P.2d 417 (1975).
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§ 90. Violation of securities regulations

West's Key Number Digest

West's Key Number Digest, Attorney and Client 39

A.L.R. Library

Violation of securities regulations as ground of disciplinary action against attorney, 18 A.L.R.3d 1408

A violation of state or federal securities regulations generally constitutes a ground for disciplinary action against an attorney at law.[FN1] Under statutes requiring discipline of attorneys for conviction of a felony or misdemeanor involving moral turpitude, the court's finding that moral turpitude existed appears to be a condition precedent to disciplinary action against the attorney, and in some instances it has been found that the

attorney's actions involved moral turpitude,[FN2] and sometimes it has been found that no moral turpitude was shown regardless of the fact of conviction in criminal proceedings.[FN3]

[FN1] In re Wampler, 637 So. 2d 92 (La. 1994).
- A felony conviction for securities fraud warranted disbarment for five years in light of aggravating circumstances, i.e., prior admonishment for conflict of interest in a stock sale transaction, prior suspension for the felony conviction giving rise to the present case, and substantial experience in the practice of law; the lone mitigating circumstance of good character and reputation failed to outweigh the aggravating circumstances and was insufficient to overcome the presumptive sanction of disbarment. The Florida Bar v. Greene, 926 So. 2d 1195 (Fla. 2006).
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[FN2] Cincinnati Bar Ass'n v. Shott, 10 Ohio St. 2d 117, 39 Ohio Op. 2d 110, 226 N.E.2d 724 (1967).
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[FN3] In re Gygi, 273 Or. 443, 541 P.2d 1392 (1975).
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§ 91. Other crimes and offenses

West's Key Number Digest

West's Key Number Digest, Attorney and Client 39

A.L.R. Library

Sexual misconduct as ground for disciplining attorney or judge, 43 A.L.R.4th 1062

An attorney may be subject to disciplinary action for conviction of—

— forgery[FN1] or conspiracy to commit forgery.[FN2]

— mail or wire fraud.[FN3]

— money laundering.[FN4]

— felony racketeering.[FN5]

— federal bankruptcy fraud.[FN6]

— battery.[FN7]

— carrying a concealed weapon.[FN8]

— public indecency.[FN9]

— bribery.[FN10]

— extortion or solicitation of a bribe.[FN11]

— theft.[FN12]

— theft of mail matter.[FN13]

— theft by deception.[FN14]

— criminal contempt.[FN15]

— making a false statement.[FN16]

— conspiracy to commit immigration fraud.[FN17]

— perjury.[FN18]

— falsification of reimbursement vouchers.[FN19]

— loitering and prowling.[FN20]

— unauthorized entry of property or criminal trespass.[FN21]

— larceny, including petit larceny.[FN22]

— theft of services.[FN23]

When an attorney has been convicted of a felony, the presumptive discipline is disbarment.[FN24]

CUMULATIVE SUPPLEMENT

Cases:

Attorney's conviction for conspiracy, mail fraud, and wire fraud stemming from his submission of fraudulent claims for settlement funds in class action lawsuit, in violation of professional rule prohibiting lawyers from participating in criminal activity, warranted permanent disbarment. 18 U.S.C.A. §§ 371, 1341, 1343; State Bar Discipline Rule 6. Mississippi Bar v. Arledge, 37 So. 3d 607 (Miss. 2009).

[END OF SUPPLEMENT]

[FN1] In re Tonzola, 162 N.J. 296, 744 A.2d 162 (2000).
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[FN2] Office of Lawyer Disciplinary Counsel v. Galford, 202 W. Va. 587, 505 S.E.2d 650 (1998).
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[FN3] In re Laub, 810 A.2d 413 (D.C. 2002); The Florida Bar v. Greene, 926 So. 2d 1195 (Fla. 2006); In re Adams, 762 So. 2d 617 (La. 2000); In re Disciplinary Action Against Koss, 611 N.W.2d 14 (Minn. 2000); In re Boylan, 162 N.J. 289, 744 A.2d 158 (2000).
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[FN4] In re Adams, 762 So. 2d 617 (La. 2000); In re Flores, 23 A.D.3d 79, 802 N.Y.S.2d 114 (1st Dep't 2005).
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[FN5] In re Disciplinary Action Against Koss, 611 N.W.2d 14 (Minn. 2000).
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[FN6] In re McIntosh, 268 Kan. 73, 991 P.2d 403 (1999).
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[FN7] The Florida Bar v. Schreiber, 631 So. 2d 1081 (Fla. 1994), dismissed, 676 So. 2d 1369 (Fla. 1996) and reinstatement granted, 698 So. 2d 840 (Fla. 1997).
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[FN8] In re Hickey, 50 Cal. 3d 571, 268 Cal. Rptr. 170, 788 P.2d 684 (1990).
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[FN9] In re Edmiston, 729 N.E.2d 97 (Ind. 2000).
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[FN10] Matter of Strier, 190 A.D.2d 140, 598 N.Y.S.2d 200 (1st Dep't 1993).
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[FN11] Matter of Limehouse, 307 S.C. 278, 414 S.E.2d 783 (1992).
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[FN12] In re Tonzola, 162 N.J. 296, 744 A.2d 162 (2000).
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[FN13] Matter of Marinangeli, 191 A.D.2d 93, 600 N.Y.S.2d 230 (1st Dep't 1993).
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[FN14] In re Cohen, 742 A.2d 896 (D.C. 1999).
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[FN15] Matter of Mulderig, 182 A.D.2d 85, 586 N.Y.S.2d 827 (2d Dep't 1992).
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[FN16] Matter of Disciplinary Proceedings Against McBride, 184 Wis. 2d 604, 516 N.W.2d 421 (1994).
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[FN17] Matter of Markovitch, 191 A.D.2d 116, 600 N.Y.S.2d 634 (1st Dep't 1993).
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[FN18] Disciplinary Counsel v. Camera, 68 Ohio St. 3d 478, 1994-Ohio-199, 628 N.E.2d 1353 (1994), reinstatement granted, 78 Ohio St. 3d 1222, 678 N.E.2d 1221 (1997).
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[FN19] Disciplinary Counsel v. Pizzedaz, 68 Ohio St. 3d 486, 1994-Ohio-197, 628 N.E.2d 1359 (1994).
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[FN20] Office of Disciplinary Counsel v. Zdrok, 538 Pa. 41, 645 A.2d 830 (1994), reinstatement granted, 540 Pa. 65, 656 A.2d 83 (1995).
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[FN21] Matter of Guardino, 183 A.D.2d 352, 591 N.Y.S.2d 413 (2d Dep't 1992).
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[FN22] Matter of Disciplinary Proceedings Against McBride, 184 Wis. 2d 604, 516 N.W.2d 421 (1994).
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[FN23] In re Krouner, 748 A.2d 924 (D.C. 2000).
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[FN24] The Florida Bar v. Cohen, 908 So. 2d 405 (Fla. 2005).
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§ 92. Effect of appeal or probation

West's Key Number Digest

West's Key Number Digest, Attorney and Client 39

A.L.R. Library

Disciplinary action against attorney prior to exhaustion of appellate review of conviction, 76 A.L.R.3d 1061

Under statutes or court rules requiring disciplinary action against an attorney upon his or her conviction of a crime,[FN1] such action may be initiated prior to the exhaustion of appellate review of the conviction.[FN2] The effect of a conviction of a felony as a ground for disbarring or suspending an attorney is not changed by the pendency of proceedings to review the conviction.[FN3] However, some courts, taking the view that a conviction is not final until all avenues of direct appeal have been exhausted, have held that disciplinary action against an attorney based upon a statute or rule requiring such action when an attorney has been convicted of a crime, may not be initiated prior to the exhaustion of appellate review of the conviction.[FN4]

Where the conduct in which the attorney had been engaged reflected poorly on his or her conduct as a citizen and officer of the court, the attorney may be suspended even though the conviction based upon the conduct is reversed on appeal.[FN5]

In the absence of a controlling statute, granting probation to an attorney convicted of a crime does not affect the question of whether the attorney should be suspended or disbarred because of the conviction.[FN6]

CUMULATIVE SUPPLEMENT

Cases:

Attorney's conduct in driving recklessly and leaving the scene of an accident warranted disciplinary action, even though attorney's convictions for that conduct were set aside both for the interest of justice and in exchange for waiving an appeal; it was the conduct that warranted discipline, not the technicality of the conviction. In re Frahm, 241 P.3d 1010 (Kan. 2010).

[END OF SUPPLEMENT]

[FN1] §§ 86 to 96.

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[FN2] In re Sauer, 390 Mich. 449, 213 N.W.2d 102, 76 A.L.R.3d 1054 (1973) (holding, however, that pendency of appeal is mitigating factor).

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[FN3] Committee on Legal Ethics of West Virginia State Bar v. Grubb, 187 W. Va. 608, 420 S.E.2d 744 (1992).

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[FN4] In re Strick, 34 Cal. 3d 891, 196 Cal. Rptr. 509, 671 P.2d 1251 (1983).

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[FN5] The Florida Bar v. Turner, 369 So. 2d 581 (Fla. 1979).
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[FN6] In re Allen, 52 Cal. 2d 762, 344 P.2d 609 (1959).
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§ 93. Effect of pardon

West's Key Number Digest

West's Key Number Digest, Attorney and Client 39

A.L.R. Library

Pardon as defense to disbarment of attorney, 59 A.L.R.3d 466

Pardon as restoring public office or license or eligibility therefor, 58 A.L.R.3d 1191

Generally a pardon for a criminal offense committed by an attorney is not a defense in disciplinary proceedings against the attorney based on the conviction[FN1] or on the acts constituting the criminal offense.[FN2]

A pardon for the crime of which an attorney has been convicted and disbarred may not automatically restore the attorney's license to practice law[FN3] and an attorney may be required to file an appropriate application for reinstatement.[FN4]

Some statutes provide that an applicant for admission to the bar who was disbarred in another state for the commission of a crime and has since been pardoned must first be readmitted in such other state before his or her application may be considered.[FN5]

[FN1] Louisiana State Bar Ass'n v. Edwards, 322 So. 2d 123 (La. 1975).
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[FN2] In re Prisock, 244 Miss. 417, 143 So. 2d 434 (1962).
- As to the effect of pardon on the right or license to practice law, see Am. Jur. 2d, Pardon and Parole § 62.
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[FN3] Feinstein v. State Bar of Cal., 39 Cal. 2d 541, 248 P.2d 3 (1952).
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[FN4] In re Borders, 797 A.2d 716 (D.C. 2002).
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[FN5] In re Kimball, 40 A.D.2d 252, 339 N.Y.S.2d 302 (2d Dep't 1973), order rev'd on other grounds, 33 N.Y.2d 586, 347 N.Y.S.2d 453, 301 N.E.2d 436 (1973).
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§ 94. Conviction in another jurisdiction

West's Key Number Digest

West's Key Number Digest, Attorney and Client 39

A.L.R. Library

Attorney's conviction in foreign or federal jurisdiction as ground for disciplinary action, 98 A.L.R.3d 357

Where a statute requires or authorizes disbarment of an attorney following his or her conviction of a crime, the determination of whether a conviction in a federal court or a court of another state was for an offense of sufficient gravity, or of the character necessary, to require disbarment is to be made under the laws of the state where the disciplinary proceeding is initiated.[FN1]

Some states have reciprocal discipline provisions under which an attorney who is disciplined in a foreign jurisdiction may receive the same discipline in that state[FN2] unless there is clear and convincing evidence that one of the enumerated exceptions of the rule governing disciplinary proceedings applies.[FN3]

[FN1] Cahn v. Joint Bar Ass'n Grievance Committee for Second and Eleventh Judicial Districts, 52 N.Y.2d 479, 438 N.Y.S.2d 753, 420 N.E.2d 945 (1981).

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[FN2] Matter of Disciplinary Proceedings Against Sneed, 176 Wis. 2d 126, 499 N.W.2d 668 (1993).

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[FN3] In re George, 726 A.2d 1237 (D.C. 1999).

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§ 95. Propriety of proceeding prior to or pending criminal prosecution

West's Key Number Digest

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In the absence of a binding statute, if the conduct charged as a ground for disbarring an attorney falls within the sphere of his or her professional duty, the court may proceed against the attorney without awaiting the result of any criminal prosecution.[FN1] Thus, criminal conviction of an attorney is not a condition precedent to an attorney disciplinary proceeding when the facts themselves warrant discipline.[FN2] Accordingly, if the crime charged affects the moral character of the attorney, or indicates a lack of honesty, integrity, and fidelity, the court may proceed with disciplinary proceedings before conviction.[FN3] If the evidence is conflicting and any doubt of the attorney's guilt exists, the case will be determined initially by a jury; but where the case is clear and the denial is evasive, the court may exercise its authority.[FN4]

[FN1] People ex rel. Black v. Smith, 290 Ill. 241, 124 N.E. 807, 9 A.L.R. 183 (1919).
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[FN2] In re Disciplinary Action Against Buresh, 2007 ND 8, 726 N.W.2d 210 (N.D. 2007).
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[FN3] In re Prisock, 244 Miss. 417, 143 So. 2d 434 (1962).
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[FN4] Ex parte Wall, 107 U.S. 265, 2 S. Ct. 569, 27 L. Ed. 552 (1883).
- As to the right to a jury trial in attorney discipline proceedings, see § 104.
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§ 96. Effect of acquittal, dismissal, or nolle prosequi

West's Key Number Digest

West's Key Number Digest, Attorney and Client 39

A.L.R. Library

Effect of acquittal or dismissal in criminal prosecution as barring disciplinary action against attorney, 76 A.L.R.3d 1028

An acquittal in a criminal proceeding against an attorney generally will not bar disciplinary proceedings against the attorney arising out of substantially the same facts.[FN1] Unless a statute requires that disbarment proceedings be based on a criminal conviction, the failure to initiate a prosecution,[FN2] the dismissal of the charge,[FN3] on the entry of nolle prosequi[FN4] will not constitute a defense to disciplinary proceedings where the misconduct charged falls within the sphere of the attorney's official duties, and shows his or her unfitness to be entrusted with the obligations of the profession.[FN5] Accordingly, an attorney's acquittal of a criminal charge will not support a plea of res judicata or double jeopardy in defense to a disciplinary action arising out of the same facts.[FN6] However, acquittal of a criminal charge is a factor which should be taken into account, as part of the totality of the circumstances, by the court hearing the issue of the attorney's fitness to practice law.[FN7]

[FN1] The Florida Bar v. Musleh, 453 So. 2d 794 (Fla. 1984).
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[FN2] Cate v. Rivers, 246 S.C. 35, 142 S.E.2d 369 (1965).
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[FN3] Emslie v. State Bar, 11 Cal. 3d 210, 113 Cal. Rptr. 175, 520 P.2d 991 (1974).
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[FN4] In re Wolfe's Disbarment, 288 Pa. 331, 135 A. 732, 50 A.L.R. 380 (1927).
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[FN5] Iowa State Bar Ass'n v. Kraschel, 260 Iowa 187, 148 N.W.2d 621 (1967).
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[FN6] In re Pennica, 36 N.J. 401, 177 A.2d 721 (1962); Ohio State Bar Ass'n v. Weaver, 41 Ohio St. 2d 97, 70 Ohio Op. 2d 175, 322 N.E.2d 665, 76 A.L.R.3d 1023 (1975).
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[FN7] Wong v. State Bar, 15 Cal. 3d 528, 125 Cal. Rptr. 482, 542 P.2d 642 (1975).
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§ 97. Generally

West's Key Number Digest

West's Key Number Digest, Attorney and Client 37.1

One member of a law firm is not subject to disbarment or other discipline because of the misconduct of his or her partner which occurred without his or her knowledge, consent, or participation.[FN1] Where an attorney is found to have been negligent in failing to oversee or review the books, records, and recordkeeping practices of his or her law firm, and such negligence contributes to conversion of escrow funds by another partner in the firm, the attorney's lack of knowledge of the wrong by his or her partner may be a mitigating factor in determining the discipline to impose on the attorney.[FN2]

Members of a law firm cannot disavow access to confidential information of any one attorney's client.[FN3] To allow one member of a law firm to dispute the existence of an attorney-client relationship acknowledged by another member of the same firm would put a client at a serious disadvantage in dealing with the firm.[FN4]

CUMULATIVE SUPPLEMENT

Cases:

Attorney who had marketing contract with out-of-state law firm, in connection with marketing and sale of living trusts and other estate-planning services, was accountable for firm's actions, and thus attorney violated rule prohibiting a lawyer from using any advertisement that is false, fraudulent, or misleading or that contains unverifiable claims where advertisements at issue were misleading, false, and unverifiable; attorney did not attempt to supervise direct-mail marketing by firm, and there was evidence that attorney had actual knowledge

of information in firm's marketing materials. Columbus Bar Assn. v. Willette, 117 Ohio St. 3d 433, 2008-Ohio-1198, 884 N.E.2d 581 (2008), reinstatement granted, 2008-Ohio-5448, 2008 WL 4601668 (Ohio 2008).

[END OF SUPPLEMENT]

[FN1] Matter of Kassner, 93 A.D.2d 87, 461 N.Y.S.2d 11 (1st Dep't 1983).
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[FN2] Matter of Falanga, 180 A.D.2d 83, 583 N.Y.S.2d 472 (2d Dep't 1992).
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[FN3] In re EPIC Holdings, Inc., 985 S.W.2d 41 (Tex. 1998).
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[FN4] In re EPIC Holdings, Inc., 985 S.W.2d 41 (Tex. 1998).
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§ 98. Mental or emotional illness

West's Key Number Digest

West's Key Number Digest, Attorney and Client 46

A.L.R. Library

Mental or emotional disturbance as defense to or mitigation of charges against attorney in disciplinary proceeding, 26 A.L.R.4th 995

Validity and application of regulation requiring suspension or disbarment of attorney because of mental or emotional illness, 50 A.L.R.3d 1259

Trial Strategy

Mental or Emotional Disturbance as Defense or Mitigating Factor in Attorney Disciplinary Proceeding, 46 Am. Jur. Proof of Facts 2d 563

Proof of narcissistic personality disorder in mitigation of neglect and misrepresentation charges. Mental or Emotional Disturbance as Defense or Mitigating Factor in Attorney Disciplinary Proceeding, 46 Am. Jur. Proof of Facts 2d 563 §§ 15 to 26

Nonprofessional misconduct. Defending Lawyers in Disciplinary Proceedings, 31 Am. Jur. Trials 633 § 6

Forms

Am. Jur. Pleading and Practice Forms, Attorneys at Law § 59

A lawyer must withdraw from employment if his or her mental or physical condition materially impairs the lawyer's ability to represent the client.[FN1] Such a rule is not so vague in its terminology as to amount to an infringement upon due process guaranties.[FN2] Under such a rule, an ethics committee may request the supreme court to order an attorney to undergo a medical examination.[FN3]

In some cases mental illness has been rejected as a defense or matter in mitigation of professional misconduct,[FN4] resulting in disbarment[FN5] or suspension.[FN6] However, an attorney must present sufficient evidence to establish that his or her misconduct was solely caused by his or her mental condition.[FN7] Thus, mental disability can be considered as a mitigating factor in attorney discipline cases when: there is medical evidence that the attorney is affected by a chemical dependency or mental disability; the chemical dependency or mental disability caused the misconduct; the attorney's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and the recovery arrested the misconduct and recurrence of that misconduct is unlikely.[FN8] Similarly, to establish depression as a mitigating factor in a proceeding to discipline an attorney, the attorney must show: (1) medical evidence that he or she is affected by depression, (2) that the depression was a direct and substantial contributing cause to the misconduct, and (3) that treatment of the depression will substantially reduce the risk of further misconduct.[FN9] Nevertheless, an attorney's failure to demonstrate a prolonged period of rehabilitation precludes consideration of his or her depression as a mitigating factor in his or her disciplinary proceeding.[FN10]

Where an attorney has been suspended after a claim that mental or emotional disturbance caused or contributed to the misconduct which precipitated the disciplinary proceedings, the suspension may be terminated upon proof of rehabilitation.[FN11]

CUMULATIVE SUPPLEMENT

Cases:

Determination of whether treatment of attorney's psychological disorder made attorney's misconduct unlikely to recur in the future, as a factor in determining whether attorney was entitled to mitigation of discipline for intentional misconduct, required consideration of expert opinion that treatment made misconduct less likely to occur, rather than giving attorney the opportunity to be "tested in real life". In re Disciplinary Action Against Mayne, 783 N.W.2d 153 (Minn. 2010).

In absence of evidence that attorney suffered from any mental disability or chemical dependency at time of ethical violations, Supreme Court presumes that attorney was healthy and unhindered in that regard, when determining the appropriate attorney disciplinary sanction. Disciplinary Counsel v. Hoskins, 119 Ohio St. 3d 17, 2008-Ohio-3194, 891 N.E.2d 324 (2008).

[END OF SUPPLEMENT]

[FN1] Rule 1.16(a)(2), ABA Model Rules of Professional Conduct.
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[FN2] In re Chipley, 254 S.C. 588, 176 S.E.2d 412, 50 A.L.R.3d 1253 (1970).
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[FN3] In re M., 59 N.J. 304, 282 A.2d 37, 52 A.L.R.3d 1322 (1971).
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[FN4] Iowa Supreme Court Bd. of Professional Ethics and Conduct v. Thompson, 595 N.W.2d 132 (Iowa 1999); Matter of Disciplinary Proceeding Against Petersen, 120 Wash. 2d 833, 846 P.2d 1330 (1993).
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[FN5] Matter of Disciplinary Proceeding Against Petersen, 120 Wash. 2d 833, 846 P.2d 1330 (1993).
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[FN6] Matter of Fisher, 174 A.D.2d 236, 580 N.Y.S.2d 228 (1st Dep't 1992).
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[FN7] People v. Katz, 58 P.3d 1176 (Colo. O.P.D.J. 2002).
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[FN8] In re Hull, 767 A.2d 197 (Del. 2001).
- An attorney's regular attendance at a depression support group for attorneys had some mitigating value when determining the discipline for the attorney's neglect of five clients' cases, though no mental disability had been a causal factor in the attorney's misconduct. In re Fairchild, 777 N.E.2d 726 (Ind. 2002).
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[FN9] State ex rel. Counsel for Discipline of Nebraska Supreme Court v. Thompson, 264 Neb. 831, 652 N.W.2d 593 (2002).
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[FN10] In re Neal, 2001-NMSC-007, 130 N.M. 139, 20 P.3d 121 (2001).
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[FN11] Matter of Rogers, 263 Ga. 314, 431 S.E.2d 366 (1993), reinstatement granted, 265 Ga. 767, 462 S.E.2d 377 (1995).
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§ 99. Entrapment

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A.L.R. Library

Entrapment as a defense in proceedings to revoke or suspend license to practice law or medicine, 61 A.L.R.3d 357

Although entrapment may be a defense to disbarment proceedings,[FN1] in most cases the assertion of it as a defense has been unsuccessful.[FN2] To establish entrapment as a defense to disciplinary proceedings, a lawyer must show that he or she had no intent to violate his or her obligations as an attorney and that the purpose to do so was instilled by his or her accusers.[FN3]

[FN1] In re Horwitz, 360 Ill. 313, 196 N.E. 208 (1935).
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[FN2] In re Porcelli, 77 Ill. 2d 473, 34 Ill. Dec. 158, 397 N.E.2d 830 (1979).
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[FN3] State ex rel. Nebraska State Bar Ass'n v. Rhodes, 177 Neb. 650, 131 N.W.2d 118 (1964).
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§ 100. Other defenses

West's Key Number Digest

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A.L.R. Library

Attorneys at law: delay in prosecution of disciplinary proceeding as defense or mitigating circumstance, 93 A.L.R.3d 1057

Other defenses that attorneys have attempted to assert in disciplinary proceedings against them include duress,[FN1] lack of a prior disciplinary record,[FN2] statute of limitations, passage of time, or laches,[FN3] double jeopardy,[FN4] and restitution.[FN5]

A lawyer cannot insulate himself or herself from discipline by characterizing questionable or misleading statements as opinions.[FN6]

[FN1] In re Arnoff, 22 Cal. 3d 740, 150 Cal. Rptr. 479, 586 P.2d 960 (1978).
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[FN2] In re Bloom, 44 Cal. 3d 128, 241 Cal. Rptr. 726, 745 P.2d 61 (1987).
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[FN3] Committee on Professional Ethics and Conduct of the Iowa State Bar Ass'n v. Hall, 463 N.W.2d 30 (Iowa 1990).
- As to limitations and laches generally, see § 103.
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[FN4] In re Crooks, 51 Cal. 3d 1090, 275 Cal. Rptr. 420, 800 P.2d 898 (1990).
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[FN5] Carter v. Anger, 122 R.I. 482, 409 A.2d 137 (1979).
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[FN6] In re Comfort, 159 P.3d 1011 (Kan. 2007).
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§ 101. Nature of proceeding

West's Key Number Digest

West's Key Number Digest, Attorney and Client 49

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Appointment of counsel for attorney facing disciplinary charges, 86 A.L.R.4th 1071

Basically, the disciplinary proceeding is an inquiry into the conduct of an attorney to determine whether action should be taken by the court to protect the public or the dignity of the court.[FN1] Proceedings before a grievance committee are closely akin to proceedings before a grand jury, since the purpose of the proceeding is solely to determine whether there is probable cause to proceed further.[FN2] Attorney disciplinary proceedings are designed to maintain high standards of conduct, protect the public, preserve the integrity of the profession, and deter future misconduct.[FN3]

Some courts regard disciplinary proceedings as administrative in nature.[FN4] Many courts regard them as civil rather than criminal in nature,[FN5] some style them quasi-criminal,[FN6] and others declare that they are neither civil nor criminal in nature but are special proceedings, sui generis.[FN7]

There is no right to an appointment of pauper counsel at public expense in an attorney disciplinary proceeding.[FN8]

Because attorney disciplinary proceedings are civil, disciplinary rules need not satisfy the higher degree of specificity required of criminal statutes in order to survive a vagueness challenge.[FN9]

A referee has discretion to decide whether to grant or deny motions in an attorney disciplinary case.[FN10] In addition, as in ordinary civil proceedings, a referee has the authority, in an attorney disciplinary proceeding, to grant summary relief when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[FN11]

CUMULATIVE SUPPLEMENT

Cases:

Judges of the Superior Court, who possess the inherent authority to regulate attorney conduct and to discipline the members of the bar, have empowered the statewide grievance committee to file presentments in Superior Court seeking judicial sanctions against those claimed to be guilty of misconduct; in carrying out these responsibilities, the statewide grievance committee is an arm of the court. Statewide Grievance Committee v. Johnson, 108 Conn. App. 74, 946 A.2d 1256 (2008), certification denied, 288 Conn. 915, 954 A.2d 187 (2008).

Hearing officers should be guided in their evidentiary and procedural rulings by the principle that disciplinary proceedings are neither civil nor criminal. Burtch, In re Disciplinary Proceeding Against, 162 Wash. 2d 873, 175 P.3d 1070 (2008).

[END OF SUPPLEMENT]

[FN1] Smith v. Grievance Committee, State Bar of Tex. for Dist. 14-A, 475 S.W.2d 396 (Tex. Civ. App. Corpus Christi 1972).

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[FN2] Mississippi State Bar v. Young, 509 So. 2d 210 (Miss. 1987).

- The action of the board of governors of the bar association in attorney disciplinary proceedings is essentially a screening process; a final decision of guilt can only be made by the supreme court, and it is done on the basis of a de novo consideration of the pleadings and the trial record. Kentucky Bar Ass'n v. Craft, 208 S.W.3d 245 (Ky. 2006).

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[FN3] In re Lawrence, 954 So. 2d 113 (La. 2007).

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[FN4] Dahlman v. State Bar, 50 Cal. 3d 1088, 269 Cal. Rptr. 525, 790 P.2d 1322 (1990).

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[FN5] Ex parte Wall, 107 U.S. 265, 2 S. Ct. 569, 27 L. Ed. 552 (1883); In re Attorney Discipline System, 19 Cal. 4th 582, 79 Cal. Rptr. 2d 836, 967 P.2d 49 (1998).

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[FN6] In re Ruffalo, 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968).

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[FN7] Ohio State Bar Ass'n v. Illman, 45 Ohio St. 2d 159, 74 Ohio Op. 2d 284, 342 N.E.2d 688 (1976).

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[FN8] In re McCord, 722 N.E.2d 820 (Ind. 2000).

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[FN9] Commission for Lawyer Discipline v. Benton, 980 S.W.2d 425 (Tex. 1998).
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[FN10] The Florida Bar v. Roth, 693 So. 2d 969 (Fla. 1997).
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[FN11] The Florida Bar v. Gold, 937 So. 2d 652 (Fla. 2006).
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§ 102. Who may institute proceeding

West's Key Number Digest

West's Key Number Digest, Attorney and Client 51

Forms

Am. Jur. Pleading and Practice Forms, Attorneys at Law §§ 28 to 32 (Complaint or petition—By bar association—In disciplinary proceeding)

Any interested person may institute a disciplinary proceeding.[FN1] These persons include a client injured by an attorney's act,[FN2] the state's attorney,[FN3] or a bar association or its committee.[FN4] A committee on professional standards has a duty to consider and cause to be investigated all matters called to its attention, whether by complaint or otherwise.[FN5]

The court, on its own initiative, may institute proceedings for the suspension or disbarment of an attorney when it appears that the attorney is unworthy to continue as an officer of the court.[FN6]

[FN1] Wilbur v. Howard, 70 F. Supp. 930 (E.D. Ky. 1947), judgment rev'd on other grounds, 166 F.2d 884 (C.C.A. 6th Cir. 1948) (citizens).

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[FN2] State v. Peck (State Report Title: In re Disbarment of Peck), 88 Conn. 447, 91 A. 274 (1914).

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[FN3] Lenihan v. Commonwealth, 165 Ky. 93, 176 S.W. 948 (1915).

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[FN4] Maddy v. First Dist. Committee of Virginia State Bar, 205 Va. 652, 139 S.E.2d 56 (1964).

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[FN5] Matter of Glavin, 180 A.D.2d 966, 580 N.Y.S.2d 545 (3d Dep't 1992).

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[FN6] Rapoport v. Berman, 49 A.D.2d 930, 373 N.Y.S.2d 652 (2d Dep't 1975).

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§ 103. Limitations and laches

West's Key Number Digest

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Disciplinary proceedings are not barred by general statutes of limitations.[FN1] Mere lapse of time is no defense unless specific prejudice is shown.[FN2] In addition, mere delay in attorney disciplinary proceedings does not result in dismissal.[FN3] However, proceedings instituted a long time after the commission of the act complained of are regarded with disfavor,[FN4] since it is essential that the bar and the public perceive the process of the discipline of an attorney as fair, orderly, and rational, and implicit in this perception is the timely and efficient resolution of complaints.[FN5] A delay in bringing disciplinary proceedings against an attorney does not necessarily warrant a reduction in the recommended sanction; instead, it is to be placed into context as but one mitigating factor to be balanced against a number of aggravating factors.[FN6]

[FN1] Wells v. State Bar, 20 Cal. 3d 708, 144 Cal. Rptr. 133, 575 P.2d 285 (1978).
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[FN2] In re Conduct of Weidner, 320 Or. 336, 883 P.2d 1293 (1994).
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[FN3] In re McBride, 449 Mass. 154, 865 N.E.2d 1110 (2007).
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[FN4] In re Bridwell, 25 Utah 2d 1, 474 P.2d 116 (1970).
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[FN5] In re Grossman, 448 Mass. 151, 859 N.E.2d 423 (2007).
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[FN6] In re Disciplinary Proceeding Against Boelter, 139 Wash. 2d 81, 985 P.2d 328 (1999).
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§ 104. Right to jury

West's Key Number Digest

West's Key Number Digest, Attorney and Client 47.1

Forms

Am. Jur. Pleading and Practice Forms, Attorneys at Law § 15 (Notice of formal hearing—Pursuant to court order referring issues to bar association for investigation—Following attorney's conviction of criminal offense)

Am. Jur. Pleading and Practice Forms, Attorneys at Law § 16 (Order—To show cause why attorney should not be disciplined—Before local committee)

Am. Jur. Pleading and Practice Forms, Attorneys at Law § 17 (Order—To show cause why attorney should not be disciplined—Before local committee—Notice to show cause previously issued)

Am. Jur. Pleading and Practice Forms, Attorneys at Law § 18 (Order—By state bar committee—For formal hearing after preliminary investigation—To show cause why attorney should not be disciplined)

Am. Jur. Pleading and Practice Forms, Attorneys at Law § 40 (Notice—By court—Of hearing on complaint or petition of bar association—Misconduct charge)

Am. Jur. Pleading and Practice Forms, Attorneys at Law § 42 (Order—Directing accused attorney to appear and answer complaint)

Am. Jur. Pleading and Practice Forms, Attorneys at Law § 52 (Order—To show cause why attorney should not be disbarred)

In the absence of a controlling statute,[FN1] procedural due process does not require that the attorney have a jury trial in a disciplinary proceeding.[FN2] A statute may, however, validly provide for a jury trial.[FN3]

[FN1] Houtchens v. State, 63 S.W.2d 1011 (Tex. Comm'n App. 1933).
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[FN2] Ex parte Wall, 107 U.S. 265, 2 S. Ct. 569, 27 L. Ed. 552 (1883).
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[FN3] Houtchens v. State, 63 S.W.2d 1011 (Tex. Comm'n App. 1933).
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§ 105. Due process requirements; notice and opportunity to be heard

West's Key Number Digest

West's Key Number Digest, Attorney and Client 48

An attorney is entitled to due process in disciplinary proceedings concerning his or her conduct.[FN1] Due process in disciplinary proceedings requires that the attorney be given notice of the proceeding and an opportunity to defend at a hearing, and that the proceeding be essentially fair.[FN2] Due process requires that, in an attorney disciplinary proceeding, the attorney must be notified of clear and specific charges and must be afforded an opportunity to anticipate, prepare, and present a defense.[FN3] The precise procedural protections of due process vary, depending upon the circumstances, because due process is a flexible concept unrestricted by any bright-line rules.[FN4]

An attorney is not denied due process where he or she voluntarily leaves the hearing with full knowledge that the proceedings will continue in his or her absence.[FN5] There is no denial of due process where an attorney is served with a complaint and requests for admissions before the bar files the complaint in the supreme court where the rules do not require that the complaint be filed before it is served.[FN6] In addition, an attorney's due process rights are not violated, even though the attorney is not allowed to attend a grievance committee meeting, if the attorney is served with notice of the bar's charges and is afforded an opportunity in the disciplinary hearing to be heard.[FN7]

A statute providing for automatic disbarment of an attorney for conviction of an offense involving moral turpitude does not violate due process if the attorney has notice of the disbarment proceedings, and is able to present his or her position to the board on professional responsibility and argue that his or her crimes did not involve moral turpitude.[FN8]

What is important is that the disciplinary board's recommendations put the attorney on notice of the charges he or she must answer to the satisfaction of the court.[FN9] As to the discipline imposed, due process requires that an attorney facing discipline be permitted to explain the circumstances of the alleged offense and to offer testimony in mitigation of any penalty to be imposed.[FN10]

Where the evidence at the hearing discloses misconduct not charged in the original notice, the bar may move to amend the notice to conform to the proof, but if no such motion is made, the attorney may be disciplined only for the misconduct alleged in the original notice.[FN11]

An attorney may be temporarily suspended without a pre-suspension hearing where the risk of erroneous deprivation is minimized by provisions allowing the attorney to continue his or her existing practice for a specified time and allow for immediate hearing and prompt resolution of the matter.[FN12]

Due process requires a court to provide notice and opportunity to be heard to an attorney prior to imposing a lifetime ban on the attorney's pro hac vice status in the court's local division.[FN13]

CUMULATIVE SUPPLEMENT

Cases:

Attorney suspended from practice of law was not deprived of due process by state court disciplinary procedure, as would warrant imposition of different discipline in reciprocal discipline proceeding, for attorney's ethics violation in misleading lower court in underlying inheritance action by filing motion to withdraw funds consigned in lower court for client, but failing to disclose that client had died and misstating that there were no minors involved, since attorney had full notice and opportunity to be heard in state court disciplinary proceeding. In re Oliveras Lopez De Victoria, 561 F.3d 1 (1st Cir. 2009).

Attorney was not denied due process at presentment before trial court in disciplinary proceeding by admission of complainant's testimony at earlier hearing before reviewing committee; complainant was unavailable, and attorney had a full and fair opportunity to and in fact did cross examine complainant at hearing before review committee. Statewide Grievance Committee v. Johnson, 108 Conn. App. 74, 946 A.2d 1256 (2008), certification denied, 288 Conn. 915, 954 A.2d 187 (2008).

Attorney was properly notified of disciplinary proceeding, and the Supreme Court had jurisdiction to proceed, where hearing notification was sent by both regular and certified mail to attorney's last address on file with the Clerk of Appellate Courts and both mailings were returned, marked "not deliverable as addressed," and same notice was mailed to Colorado address that attorney had listed in a responsive pleading in a prior disciplinary action, and that notice was also returned, marked "return to sender." Sup.Ct.Rules, Rule 215. In re Lober, 241 P.3d 81 (Kan. 2010).

Supreme Court observes due process in exercising disciplinary jurisdiction over an attorney, but disciplinary proceedings are not encumbered by technical rules and formal requirements. U.S.C.A. Const.Amend. 14. In re Disciplinary Action against Garcia, 792 N.W.2d 434 (Minn. 2010).

Attorney's conviction for two misdemeanor counts of theft warranted immediate suspension of attorney's license under disciplinary rule authorizing immediate suspension pending final disposition of disciplinary proceeding predicated upon conviction for serious crime. In re Disciplinary Action Against Fisher, 2008 ND 151, 754 N.W.2d 802 (N.D. 2008).

The standards of due process in an attorney disciplinary proceeding are not equal to those in a criminal matter. Disciplinary Counsel v. Heiland, 116 Ohio St. 3d 521, 2008-Ohio-91, 880 N.E.2d 467 (2008).

[END OF SUPPLEMENT]

[FN1] The Florida Bar v. Carricarte, 733 So. 2d 975 (Fla. 1999).

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[FN2] Bradley v. Fisher, 80 U.S. 335, 20 L. Ed. 646, 1871 WL 14737 (1871); Jaen v. Coca-Cola Co., 157 F.R.D. 146, 31 Fed. R. Serv. 3d 178 (D.P.R. 1994).

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[FN3] In re Disciplinary Proceeding Against Marshall, 160 Wash. 2d 317, 157 P.3d 859 (2007).

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[FN4] Steinert v. Winn Group, Inc., 440 F.3d 1214 (10th Cir. 2006).

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[FN5] Colangelo v. State Bar, 53 Cal. 3d 1255, 283 Cal. Rptr. 181, 812 P.2d 200 (1991).

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[FN6] The Florida Bar v. Daniel, 626 So. 2d 178 (Fla. 1993).

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[FN7] The Florida Bar v. Committe, 916 So. 2d 741 (Fla. 2005), cert. denied, 547 U.S. 1098, 126 S. Ct. 1890, 164 L. Ed. 2d 569 (2006).
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[FN8] In re Krouner, 920 A.2d 1039 (D.C. 2007).
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[FN9] Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 105 S. Ct. 2265, 85 L. Ed. 2d 652 (1985).
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[FN10] The Florida Bar v. Carricarte, 733 So. 2d 975 (Fla. 1999).
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[FN11] Edwards v. State Bar, 52 Cal. 3d 28, 276 Cal. Rptr. 153, 801 P.2d 396 (1990).
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[FN12] In re Lamm, 116 N.C. App. 382, 448 S.E.2d 125 (1994), decision aff'd, 341 N.C. 196, 458 S.E.2d 921 (1995).
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[FN13] Lasar v. Ford Motor Co., 399 F.3d 1101 (9th Cir. 2005), cert. denied, 546 U.S. 873, 126 S. Ct. 381, 163 L. Ed. 2d 167 (2005).
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§ 106. Due process requirements; notice and opportunity to be heard—Presumption of innocence

West's Key Number Digest

In disciplinary proceedings, an attorney is presumed to be innocent[FN1] and the state has the burden of proving misconduct.[FN2]

Caution: There is some authority that holds that unless an attorney fairly explains his or her entire connection with the transaction that is the subject of the charge, the attorney will be presumed unable to do so.[FN3]

An attorney's submission of a resignation during the pendency of a disciplinary proceeding is tantamount to an admission of the charges contained in the petition.[FN4]

[FN1] In re Damisch, 38 Ill. 2d 195, 230 N.E.2d 254 (1967).

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[FN2] Franklin v. State Bar, 41 Cal. 3d 700, 224 Cal. Rptr. 738, 715 P.2d 699 (1986).

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[FN3] In re Shufer, 12 A.D.2d 208, 209 N.Y.S.2d 545 (1st Dep't 1961).

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[FN4] § 31.

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§ 107. Failure to answer

West's Key Number Digest

If a lawyer does not answer the formal charges, the factual allegations of those charges are deemed admitted; thus, an office of disciplinary counsel bears no additional burden to prove the factual allegations contained in the formal charges after those charges have been deemed admitted.[FN1] If no answer is filed to the formal charges in an attorney disciplinary proceeding, or if the answer does not raise an issue of fact or law, the court may, in its discretion, dispose of the matter on its own motion or on a motion for judgment on the pleadings.[FN2]

CUMULATIVE SUPPLEMENT

Cases:

Attorney who failed to file an answer to formal disciplinary charges was in default and was deemed, therefore, to have admitted all factual allegations of the formal charges against him and the charges of misconduct. In re Tullis, 375 S.C. 190, 652 S.E.2d 395 (2007).

[END OF SUPPLEMENT]

[FN1] In re Phelps, 953 So. 2d 45 (La. 2007).
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[FN2] State ex rel. Counsel for Discipline of Nebraska Supreme Court v. Petersen, 272 Neb. 975, 725 N.W.2d 845 (2007).
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§ 108. Discovery

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West's Key Number Digest, Attorney and Client 53

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Admissibility of lie detector test results, or of offer or refusal to take test, in attorney disciplinary proceeding, 79 A.L.R.4th 576

Discovery or inspection of state bar records of complaints against or investigations of attorneys, 83 A.L.R.3d 777

The court's power to control disciplinary proceedings authorizes it to make pretrial discovery, as prescribed by statute for civil proceedings, available in a disciplinary proceeding.[FN1]

Where a grand jury witness appears in a state attorney disciplinary proceeding, the attorney who is the subject of the proceeding is entitled to disclosure of the witness's grand jury testimony upon showing that the need to have the grand jury minutes outweighs the need for grand jury secrecy.[FN2]

A court may strike an attorney's pleadings, enter a default judgment, and disbar an attorney as a discovery sanction in a disciplinary proceeding.[FN3]

In disbarment proceedings, a transcript of the proceeding before the grievance committee is privileged and not subject to discovery.[FN4]

CUMULATIVE SUPPLEMENT

Cases:

Hearing committee had good cause to restrict the matters into which attorney could inquire during depositions in attorney disciplinary proceedings, where attorney sought throughout the proceedings to uncover what he perceived to be the mishandling of a probate case and the operation of a certain educational institution, which matters were not relevant to whether attorney engaged in misconduct and which concerns did not justify violations of the rules of professional conduct. NMRA, Rule 17–311. In Matter of Convisser, 2010-NMSC-037, 242 P.3d 299 (N.M. 2010), cert. denied, 131 S. Ct. 204 (2010).

[END OF SUPPLEMENT]

[FN1] Committee on Professional Ethics and Conduct of Iowa State Bar Ass'n v. Roberts, 246 N.W.2d 259 (Iowa 1976).

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[FN2] Matter of Federal Grand Jury Proceedings, 760 F.2d 436 (2d Cir. 1985).

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[FN3] Sutton v. State Bar of Texas, 750 S.W.2d 853 (Tex. App. El Paso 1988), writ denied, (Oct. 26, 1988).
- Office of professional conduct was entitled to a restraining order relieving it of any obligation to respond to discovery requests of an attorney subject to a disciplinary proceeding, where the attorney's interrogatories

would not lead to discovery of admissible evidence, were cumulative, and called for the office's work product, and where the attorney's discovery request was signed by the attorney himself rather than his attorney of record. In re Discipline of Pendleton, 2000 UT 77, 11 P.3d 284 (Utah 2000).
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[FN4] Greenspan v. State, 618 S.W.2d 939 (Tex. Civ. App. Fort Worth 1981), writ refused n.r.e..
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§ 109. Right to subpoena witnesses

West's Key Number Digest

West's Key Number Digest, Attorney and Client 53

An attorney may not subpoena witnesses, including justices, in order to compel them to attend a session of the subcommittee examining the attorney's appeal from an earlier decision of the grievance committee, where a court rule provides that such subpoenas can be issued only by the clerk of a court in the name of the presiding judge.[FN1]

[FN1] Matter of Hanft, 180 A.D.2d 634, 580 N.Y.S.2d 33 (2d Dep't 1992).
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§ 110. Evidence; admissibility

West's Key Number Digest

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Admissibility of lie detector test results, or of offer or refusal to take test, in attorney disciplinary proceeding, 79 A.L.R.4th 576

Use, in attorney or physician disciplinary proceeding, of evidence obtained by wrongful police action, 20 A.L.R.4th 546

The rules governing the admissibility of evidence in other judicial proceedings are generally applicable to a disciplinary proceeding.[FN1] However, the referee in a bar discipline proceeding is not bound by the technical rules of evidence and is authorized to consider any evidence deemed relevant in resolving the factual question.[FN2] Thus, one court found no problem with the use of hearsay in disciplinary matters because the reliability of hearsay varies widely and even uncorroborated hearsay, without more, may support an agency's decision, provided that such is permitted by statute.[FN3] Another court has held that the exclusionary rule would not prevent the admission of relevant evidence concerning an attorney's criminal conduct even though the conviction was overturned on the ground that the evidence was obtained in violation of the attorney's right to privacy, where the court found that grounds justifying the exclusionary rule were not served by forbidding the admission of the evidence at the disciplinary hearing.[FN4]

Evidence that would otherwise be hearsay may be admitted if not offered to prove the truth of the matter asserted.[FN5] In addition, memory may be refreshed by using a writing that is not admissible into evidence.[FN6]

Although a referee may not go behind a conviction to determine the attorney's guilt of an ethical violation, a referee may consider evidence concerning the circumstances behind a conviction in determining the recommended discipline.[FN7]

Where a disciplinary proceeding is based on acts disclosed in the record of a civil action in which the attorney was a party, the record of the other cause is admissible in the disciplinary proceeding.[FN8] Nontestimonial evidence from other civil proceedings to which an attorney was a party are admissible in a disciplinary proceeding against the attorney where the factual issues in the underlying proceeding and the disciplinary proceeding are essentially identical.[FN9]

A foreign jurisdiction's adjudication of guilt will be accepted as conclusive proof of guilt of the misconduct charged unless the attorney demonstrates why the foreign judgment is not valid.[FN10]

A statement made during a disciplinary proceeding enjoys an absolute privilege against a civil action based thereon as long as the statement is relevant and material to the proceeding.[FN11]

Evidence of unethical conduct, not squarely within the scope of a bar's accusations, is admissible in an attorney disciplinary proceeding, and such unethical conduct, if established by clear and convincing evidence, should be reported, as it is relevant to the question of an attorney's fitness to practice law and thus relevant to the discipline to be imposed.[FN12]

A federal statutory directive that state laws and rules governing attorney conduct must apply to federal government attorneys to the same extent and in the same manner as other attorneys in that state does not require exclusion of otherwise admissible evidence in federal court even if it is obtained in violation of state professional conduct rules.[FN13]

CUMULATIVE SUPPLEMENT

Cases:

Hearing judge's findings in attorney disciplinary proceeding must be supported by clear and convincing evidence. Attorney Grievance Com'n of Maryland v. Zuckerman, 403 Md. 695, 944 A.2d 525 (2008).

To establish a lawyer's professional misconduct in a disciplinary proceeding, relator must prove a violation of the disciplinary rules with clear and convincing evidence. Akron Bar Assn. v. Catanzarite, 119 Ohio St. 3d 313, 2008-Ohio-4063, 893 N.E.2d 835 (2008).

Certain documents produced in the course of investigation of respondent attorney, including a trust account ledger for client's account and a statement for client's checking account, did not constitute hearsay in attorney disciplinary matter; attorney provided the documents in response to a subpoena, such that the documents were presumably what the attorney represented as his own work and records, and because attorney prepared and submitted the documents, he arguably manifested a belief in the validity of the documents. Rules of Evid., Rule 801(d)(2). In re Crews, 698 S.E.2d 785 (S.C. 2010).

Proposed testimony regarding problems attorney encountered with other attorney, who subsequently represented attorney's former client in personal injury case, was irrelevant in attorney disciplinary proceeding; since Commission on Lawyer Conduct Panel was only considering formal charges against attorney, testimony presented was properly confined to attorney's representation of client, and given that other attorney was called as witness, attorney's counsel was able to attack her credibility and establish any potential bias or prejudice other attorney may have had against attorney. In re White, 378 S.C. 333, 663 S.E.2d 21 (2008), reinstatement granted, 380 S.C. 200, 669 S.E.2d 588 (2008).

Proposed testimony regarding problems attorney encountered with new counsel for attorney's former client prior to that counsel's representation of former client in legal malpractice action against attorney was irrelevant in attorney disciplinary proceeding, where panel was only considering the formal charges against attorney and such testimony did not relate to attorney's representation of client. In re White, 378 S.C. 76, 661 S.E.2d 376 (2008), opinion withdrawn and superseded on denial of reh'g, 378 S.C. 333, 663 S.E.2d 21 (2008), reinstatement granted, 669 S.E.2d 588 (S.C. 2008) and withdrawn from bound volume.

Hearing officer in attorney disciplinary proceeding could omit portions of expert testimony on standard of care and was not required to give any weight to the testimony that was admitted; one expert was judge who had been retired for twenty-four years, another expert improperly referred to rules of lawyer discipline as only

general guidelines, no expert had specialty in ethics, and attorney failed to show that any expert was more knowledgeable that hearing officer. Burtch, In re Disciplinary Proceeding Against, 162 Wash. 2d 873, 175 P.3d 1070 (2008).

Attorney's decision to call his own character and reputation witness at the beginning of disciplinary hearing opened the door on the subject of his character; thus, allowing later witnesses to testify concerning attorney's reputation as a lawyer and his reputation for honesty was rebuttal testimony after attorney's own character witness testified. Burtch, In re Disciplinary Proceeding Against, 162 Wash. 2d 873, 175 P.3d 1070 (2008).

Extrinsic evidence in the form of newspaper article and documents about a prior sanction against attorney was admissible in disciplinary proceeding to help officer determine credibility of the witnesses and the mental state of attorney during multiple acts of misconduct. Burtch, In re Disciplinary Proceeding Against, 162 Wash. 2d 873, 175 P.3d 1070 (2008).

The evidence rules do not require strict adherence in attorney disciplinary hearing, although generally the rules do apply. Burtch, In re Disciplinary Proceeding Against, 162 Wash. 2d 873, 175 P.3d 1070 (2008).

Probative value of newspaper article about prior sanction against attorney outweighed any prejudicial effect in disciplinary proceeding; the substance of the article was brought in by testimony later during attorney's cross-examination regarding the case addressed in the article, the article was probative to show conduct during judicial proceedings at issue, and the hearing officer was not as easily prejudiced as a jury would be in a criminal or civil proceeding. Burtch, In re Disciplinary Proceeding Against, 162 Wash. 2d 873, 175 P.3d 1070 (2008).

Evidence of attorney's reputation for honesty in the community was admissible to rebut testimony of attorney's character witness in attorney disciplinary proceeding. ER 404(a)(1). Burtch, In re Disciplinary Proceeding Against, 162 Wash. 2d 873, 175 P.3d 1070 (2008).

[END OF SUPPLEMENT]

[FN1] Emslie v. State Bar, 11 Cal. 3d 210, 113 Cal. Rptr. 175, 520 P.2d 991 (1974).

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[FN2] The Florida Bar v. Fredericks, 731 So. 2d 1249 (Fla. 1999).

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[FN3] Conway v. State Bar, 47 Cal. 3d 1107, 255 Cal. Rptr. 390, 767 P.2d 657, 80 A.L.R.4th 101 (1989).

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[FN4] People v. Harfmann, 638 P.2d 745, 20 A.L.R.4th 539 (Colo. 1981).

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[FN5] Goldman v. State Bar, 20 Cal. 3d 130, 141 Cal. Rptr. 447, 570 P.2d 463 (1977).

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[FN6] In re Berman, 48 Cal. 3d 517, 256 Cal. Rptr. 802, 769 P.2d 984 (1989).

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[FN7] The Florida Bar v. Cohen, 908 So. 2d 405 (Fla. 2005).

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[FN8] In re Disciplinary Action Against Perry, 494 N.W.2d 290 (Minn. 1992).

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[FN9] Rosenthal v. State Bar, 43 Cal. 3d 612, 238 Cal. Rptr. 377, 738 P.2d 723 (1987).

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[FN10] The Florida Bar v. Friedman, 646 So. 2d 188 (Fla. 1994).

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[FN11] Hecht v. Levin, 66 Ohio St. 3d 458, 1993-Ohio-110, 613 N.E.2d 585 (1993).
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[FN12] The Florida Bar v. Nowacki, 697 So. 2d 828 (Fla. 1997).
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[FN13] U.S. v. Lowery, 166 F.3d 1119, 51 Fed. R. Evid. Serv. 253 (11th Cir. 1999).
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AMJUR ATTNYS § 110

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7 Am. Jur. 2d Attorneys at Law § 111

American Jurisprudence, Second Edition
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Attorneys at Law
Rachel M. Kane, M.A., J.D.

II. Judicial Supervision of Legal Profession
B. Disciplinary Proceedings
6. Procedure

Topic Summary Correlation Table References

§ 111. Evidence; admissibility—Sufficiency; standard of proof

West's Key Number Digest

West's Key Number Digest, Attorney and Client 53(2)

An attorney has no less rights than any other party, and as such, his or her discipline must be based upon more than speculation.[FN1] The courts have used different expressions to indicate the degree or quantum of proof necessary to justify disbarment or suspension of an attorney. Courts have held: that a convincing preponderance,[FN2] a clear preponderance,[FN3] or fair preponderance of the evidence is sufficient;[FN4] that competent, substantial evidence is required;[FN5] that the evidence is full, clear, and convincing;[FN6] that substantial, clear, convincing, and satisfactory evidence is needed;[FN7] or that clear and convincing evidence is essential.[FN8] Proof beyond a reasonable doubt, as in criminal cases, is not required.[FN9]

Because evidence that was not presented to the bar is virtually impossible to evaluate in the absence of cross-examination, the supreme court will generally not consider it.[FN10]

Although a referee's recommendations for attorney discipline are subject to review by the state supreme court, they come to the court with a presumption of correctness.[FN11] The burden is upon one seeking a review of a recommendation of a state bar disciplinary board to show that its findings are not supported by the

evidence or that its recommendation is erroneous or unlawful.[FN12] This rule does not violate either the principle of presumption of innocence or the command of the Fourteenth Amendment that the state prove every element of an offense beyond a reasonable doubt.[FN13]

CUMULATIVE SUPPLEMENT

Cases:

Special judge did not abuse his discretion, in disbarment proceedings, in excluding exhibits evidencing attorney's pattern of writing checks on trust account to pay for personal obligations, to extent such exhibits were generated outside time span covered by disbarment complaint, especially given that attorney was not afforded prior notice of such exhibits and pleadings were not amended to reflect such exhibits. Ligon v. Dunklin, 368 Ark. 443, 247 S.W.3d 498 (2007).

District of Columbia requires proof of attorney misconduct by clear and convincing evidence. In re Zakroff, 934 A.2d 409 (D.C. 2007).

Disciplinary commission carries the burden of proof to demonstrate attorney misconduct by clear and convincing evidence. Admission and Discipline Rule 23(14)(h). In re Cueller, 880 N.E.2d 1209 (Ind. 2008).

Record in attorney disciplinary proceedings supported finding that attorney made knowingly false statements to disciplinary commission, where evidence concerning two of attorney's three statements to commission showed intent to mislead commission into believing that attorney's trust fund problem was isolated and already-remedied event rather than ongoing, systematic failure. In re Cueller, 880 N.E.2d 1209 (Ind. 2008).

A "convincing preponderance of the evidence," as required to support a finding of attorney misconduct, is less than proof beyond a reasonable doubt, but more than the preponderance standard required in the usual civil case. Iowa Supreme Court Attorney Disciplinary Bd. v. Bowles, 794 N.W.2d 1 (Iowa 2011).

Attorney disciplinary board has the burden to prove disciplinary violations by a convincing preponderance of the evidence; this burden is less than proof beyond a reasonable doubt, but more than the preponderance standard required in the usual civil case. Iowa Supreme Court Attorney Disciplinary Bd. v. Plumb, 766 N.W.2d 626 (Iowa 2009).

The Supreme Court Attorney Disciplinary Board must prove ethical violations in an attorney disciplinary proceeding by a convincing preponderance of the evidence; this burden of proof is greater than that in a civil case but less than that in a criminal case. Iowa Supreme Court Attorney Disciplinary Bd. v. Barry, 762 N.W.2d 129 (Iowa 2009).

Attorney Disciplinary Board has the burden of proving attorney disciplinary violations by a convincing preponderance of the evidence; this burden is less than proof beyond a reasonable doubt, but more than the preponderance standard required in the usual civil case. Iowa Supreme Court Attorney Disciplinary Bd. v. Ireland, 748 N.W.2d 498 (Iowa 2008).

Any attorney misconduct must be established by clear and convincing evidence. In re Woodring, 289 Kan. 173, 210 P.3d 120 (2009).

Attorney misconduct must be established by substantial, clear, convincing, and satisfactory evidence; the touchstone of the clear and convincing standard is that the evidence must establish that the truth of the facts asserted is highly probable. In re Swanson, 288 Kan. 185, 200 P.3d 1205 (2009).

Attorney misconduct must be established by substantial, clear, convincing, and satisfactory evidence. In re Nelson, 288 Kan. 179, 200 P.3d 1262 (2009).

Attorney misconduct must be established by substantial, clear, convincing, and satisfactory evidence. In re Crow, 285 Kan. 1110, 179 P.3d 1093 (2008).

Attorney misconduct must be established by substantial, clear, convincing, and satisfactory evidence, in an attorney disciplinary proceeding. In re Bishop, 285 Kan. 1097, 179 P.3d 1096 (2008).

Attorney misconduct must be established by substantial, clear, convincing, and satisfactory evidence. In re Trester, 285 Kan. 404, 172 P.3d 31 (2007).

In an attorney disciplinary proceeding in which the lawyer does not answer the formal charges, if the legal conclusion the Office of Disciplinary Counsel (ODC) seeks to prove (i.e., a violation of a specific rule) is not readily apparent from deemed admitted facts, additional evidence may need to be submitted in order to prove

the legal conclusions that flow from the admitted factual allegations. Sup.Ct.Rules, Rule 19, Lawyer Disciplinary Enforcement Rule, § 11(E)(3), 8 LSA–R.S. In re Hackett, 42 So. 3d 972 (La. 2010).

Hearing judge's finding, that attorney who allegedly submitted to his law firm requests for reimbursement for expenditures he had not actually made or in excess of the amounts he had actually incurred did not intend to cheat or deceive either his client or his firm, was not clearly erroneous merely because judge did not find it appropriate to draw one or more permissible inferences which might have been drawn from the evidence by another trier of the facts, or because attorney admitted that the manner in which he presented the reimbursement requests left something to be desired. Attorney Grievance Com'n of Maryland v. Walter, 407 Md. 670, 967 A.2d 783 (2009).

In attorney discipline proceedings, burden is on Bar Counsel to establish the allegations by clear and convincing evidence. Attorney Grievance Com'n v. Taylor, 405 Md. 697, 955 A.2d 755 (2008).

Clear and convincing evidence supported hearing judge's finding of fact, in attorney disciplinary proceeding, that attorney's impetus for repaying conservatorship $600,000 that he withdrew, without court approval, to purchase an investment property for attorney and his business partner was in response to questions raised by the Probate Division of the Superior Court of the District of Columbia; attorney's counsel represented during opening statements in proceeding that attorney got an inquiry from the probate department about the mortgage that secured the $600,000 loan, attorney thought about this and said, "you know, they asked the question how—maybe they know something about this stuff I shouldn't have done," and those representations were supported by a letter from the Estate Auditor directing attorney to file additional documents relating to the mortgage. Attorney Grievance Com'n v. Whitehead, 405 Md. 240, 950 A.2d 798 (2008).

Hearing judge's finding in disciplinary action that attorney miscalculated client's child support obligation was supported by clear and convincing evidence; client testified that he had attorney recalculate obligations on five different occasions because the calculations were done incorrectly based on information he discovered in his own research and in conversations with his ex-wife. Attorney Grievance Com'n of Maryland v. Kreamer, 404 Md. 282, 946 A.2d 500 (2008).

Clear and convincing evidence, for purposes of the burden of proof in an attorney discipline case, must be more than a mere preponderance but not beyond a reasonable doubt. Attorney Grievance Com'n v. Saridakis, 402 Md. 413, 936 A.2d 886 (2007).

At an attorney disciplinary hearing, the Director of the Office of Lawyers Professional Responsibility bears the burden of proving misconduct by clear and convincing evidence. In re Disciplinary Action Against Houge, 764 N.W.2d 328 (Minn. 2009).

In a lawyer disciplinary proceeding, professional misconduct must be proven by a preponderance of the evidence before discipline will be imposed. In re Madison, 282 S.W.3d 350 (Mo. 2009).

Clear and convincing evidence did not support referee's finding that attorney violated disciplinary rule prohibiting a lawyer from failing to communicate with client or failing to diligently work on her case; record was almost entirely silent on issues. State ex rel. Counsel for Discipline of Nebraska Supreme Court v. Wintroub, 277 Neb. 787, 765 N.W.2d 482 (2009).

Disciplinary charges against an attorney must be established by clear and convincing evidence. State ex rel. Counsel for Discipline of Nebraska Supreme Court v. Wright, 277 Neb. 709, 764 N.W.2d 874 (2009).

The evidence of attorney misconduct warranting discipline does not have to be undisputed to be clear and convincing. In re Disciplinary Action Against Light, 2009 ND 83, 765 N.W.2d 536 (N.D. 2009).

Disciplinary counsel must prove each alleged violation of the attorney disciplinary rules by clear and convincing evidence. In re Disciplinary Action Against Stensland, 2009 ND 77, 764 N.W.2d 438 (N.D. 2009).

Attorney professional misconduct must be shown by clear and convincing evidence. Disciplinary Counsel v. Hoskins, 119 Ohio St. 3d 17, 2008-Ohio-3194, 891 N.E.2d 324 (2008).

Clients' testimony that they received telephone call from telemarketer for out-of-state law firm regarding use of living trusts for estate planning supported finding that attorney, who had contract with firm under which attorney would market and sell living trusts and other estate-planning services in Ohio and law firm would be attorney's sole agent for marketing, sales, and preparing estate-planning packages, violated rule barring a lawyer from soliciting legal business by telephone; although attorney claimed that it was not firm's usual practice to contact consumers by telephone without having received a return postcard, attorney was unable to produce such

postcard. Columbus Bar Assn. v. Willette, 117 Ohio St. 3d 433, 2008-Ohio-1198, 884 N.E.2d 581 (2008), reinstatement granted, 2008-Ohio-5448, 2008 WL 4601668 (Ohio 2008).

In disciplinary proceedings against attorney, documents disbarring attorney in Colorado for conversion of client's trust fund were prima facie evidence that he committed the acts described therein, and thus attorney had the burden of proving that the findings forming the basis of the Colorado disbarment were not supported by the evidence or that the findings were not sufficient grounds for discipline in Oklahoma. State ex rel. Oklahoma Bar Ass'n v. Rymer, 2008 OK 50, 187 P.3d 725 (Okla. 2008).

In an attorney discipline proceeding, the State Bar must establish misconduct by clear and convincing evidence, in other words, evidence establishing that the truth of the facts asserted is highly probable. In re Conduct of Campbell, 345 Or. 670, 202 P.3d 871 (2009).

In attorney disciplinary proceedings, the disciplinary violation must be proven by clear and convincing evidence. In re Gray, 381 S.C. 406, 673 S.E.2d 442 (2009).

Clear and convincing evidence supported finding that attorney submitted fabricated documents to Office of Disciplinary Counsel (ODC), in violation of rules of professional conduct prohibiting attorney from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, and prohibiting attorney from engaging in conduct prejudicial to the administration of justice; attorney's secretary testified in detail about the circumstances surrounding the faxing of the backdated documents to ODC, format of the falsified letters did not match the format typically used by secretary, properties on electronic version of the documents indicated they were prepared at a time when the secretary's cell phone records showed she was not in the office, and attorney's disciplinary history revealed a pattern of attempting to place blame on his staff for his own conduct. Appellate Court Rule 407, Rules of Prof.Conduct, Rules 8.4(d0), 8.4(e). In re Pennington, 380 S.C. 49, 668 S.E.2d 402 (2008).

An attorney disciplinary violation must be proven by clear and convincing evidence. In re Pennington, 380 S.C. 49, 668 S.E.2d 402 (2008).

An attorney disciplinary violation must be proven by clear and convincing evidence. In re White, 378 S.C. 333, 663 S.E.2d 21 (2008), reinstatement granted, 380 S.C. 200, 669 S.E.2d 588 (2008).

An attorney disciplinary violation must be proven by clear and convincing evidence. In re White, 378 S.C. 76, 661 S.E.2d 376 (2008), opinion withdrawn and superseded on denial of reh'g, 378 S.C. 333, 663 S.E.2d 21 (2008), reinstatement granted, 669 S.E.2d 588 (S.C. 2008) and withdrawn from bound volume.

Disciplinary counsel has the burden of establishing acts of misconduct by clear preponderance of the evidence, not clear, cogent, and convincing evidence. Burtch, In re Disciplinary Proceeding Against, 162 Wash. 2d 873, 175 P.3d 1070 (2008).

Attorney did not demonstrate insufficient evidence for hearing officer's factual findings in disciplinary case, where attorney failed to make separate assignments of error for each challenged finding of fact and made conclusory remarks that none of the testimony of witnesses supported the findings of fact. Burtch, In re Disciplinary Proceeding Against, 162 Wash. 2d 873, 175 P.3d 1070 (2008).

Evidence in attorney disciplinary proceeding supported referee's conclusions regarding attorney's failure to communicate with client about status of employment discrimination cases; referee was entitled to believe client's version. In re Disciplinary Proceedings Against Nunnery, 2009 WI 89, 769 N.W.2d 858 (Wis. 2009).

Evidence in attorney disciplinary proceeding supported referee's conclusions regarding attorney's failure to communicate with clients about real estate discrimination and denial of credit claims; referee was entitled to believe client's testimony that attorney never explained reason for conclusion that no viable claim existed against bank. In re Disciplinary Proceedings Against Nunnery, 2009 WI 89, 769 N.W.2d 858 (Wis. 2009).

[END OF SUPPLEMENT]

[FN1] Kentucky Bar Ass'n v. Craft, 208 S.W.3d 245 (Ky. 2006).

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[FN2] Iowa Supreme Court Attorney Disciplinary Bd. v. Joy, 728 N.W.2d 806 (Iowa 2007).
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[FN3] In re Disciplinary Proceeding Against Marshall, 160 Wash. 2d 317, 157 P.3d 859 (2007).
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[FN4] Matter of Capoccia, 59 N.Y.2d 549, 466 N.Y.S.2d 268, 453 N.E.2d 497 (1983).
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[FN5] The Florida Bar v. Greene, 926 So. 2d 1195 (Fla. 2006).
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[FN6] In re Disciplinary Action Against Nelson, 733 N.W.2d 458 (Minn. 2007).
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[FN7] In re Comfort, 159 P.3d 1011 (Kan. 2007).
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[FN8] In re Pharr, 950 So. 2d 636 (La. 2007); State ex rel. Counsel for Discipline of Nebraska Supreme Court v. Petersen, 272 Neb. 975, 725 N.W.2d 845 (2007).
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[FN9] Maddy v. First Dist. Committee of Virginia State Bar, 205 Va. 652, 139 S.E.2d 56 (1964).
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[FN10] Baca v. State Bar, 52 Cal. 3d 294, 276 Cal. Rptr. 169, 801 P.2d 412 (1990).
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[FN11] The Florida Bar v. Roberts, 626 So. 2d 658 (Fla. 1993).
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[FN12] Connor v. State Bar, 50 Cal. 3d 1047, 269 Cal. Rptr. 742, 791 P.2d 312 (1990).
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[FN13] Rosenthal v. Justices of the Supreme Court of California, 910 F.2d 561 (9th Cir. 1990).
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7 Am. Jur. 2d Attorneys at Law § 112

American Jurisprudence, Second Edition
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Attorneys at Law
Rachel M. Kane, M.A., J.D.

II. Judicial Supervision of Legal Profession

Topic Summary Correlation Table References

§ 112. Protection against self-incrimination

West's Key Number Digest

West's Key Number Digest, Attorney and Client 47.1

A.L.R. Library

Extent and determination of attorney's right or privilege against self-incrimination in disbarment or other disciplinary proceedings—post-Spevack cases, 30 A.L.R.4th 243

Use in disbarment proceeding of testimony given by attorney in criminal proceeding under grant of immunity, 62 A.L.R.3d 1145

Forms

Am. Jur. Pleading and Practice Forms, Attorneys at Law § 51 (Waiver of immunity—By accused attorney)

An attorney may invoke the constitutional privilege against self-incrimination in a disciplinary proceeding, and the mere assertion of this right is not of itself a ground for disbarment.[FN1] However, in a disciplinary proceeding an attorney does not have the constitutional privilege of withholding testimony that cannot lead to criminal prosecution but bears only on his or her right to continue to practice law.[FN2] An attorney who is a sole practitioner and who is required to produce all documents relating to certain named clients is entitled to assert the privilege against self-incrimination, but an attorney who is practicing as a professional corporation and who is required to produce office files of certain named clients cannot claim the privilege in the files of the corporation.[FN3]

Under statutes empowering the court to require a witness to testify or produce evidence and immunizing the witness from being confronted with such testimony or evidence in a subsequent criminal proceeding, the compelled testimony or evidence indicating misconduct on the part of an attorney/witness may nevertheless be used against him or her in disbarment proceedings,[FN4] since disciplinary proceedings do not involve the imposition of a penalty or forfeiture within the meaning of the penal laws.[FN5]

An attorney is not entitled to automatic protection from future use of testimony given in a disciplinary proceeding; rather that protection is afforded only where the testimony was given after the attorney's assertion of a valid Fifth Amendment privilege and a grant of immunity by the court from future use of that testimony or its fruits in a criminal proceeding.[FN6]

[FN1] Spevack v. Klein, 385 U.S. 511, 87 S. Ct. 625, 17 L. Ed. 2d 574 (1967).
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[FN2] Tucker v. Virginia State Bar, 233 Va. 526, 357 S.E.2d 525 (1987).
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[FN3] In re Zisook, 88 Ill. 2d 321, 58 Ill. Dec. 786, 430 N.E.2d 1037, 30 A.L.R.4th 228 (1981).
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[FN4] Segretti v. State Bar, 15 Cal. 3d 878, 126 Cal. Rptr. 793, 544 P.2d 929 (1976).
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[FN5] Matter of Shannon, 179 Ariz. 52, 876 P.2d 548 (1994), opinion modified on other grounds, 181 Ariz. 307, 890 P.2d 602 (1994).
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[FN6] In re March, 71 Ill. 2d 382, 17 Ill. Dec. 214, 376 N.E.2d 213 (1978).
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§ 113. Judgment and award of costs; enforcement

West's Key Number Digest

West's Key Number Digest, Attorney and Client 56, 59

Forms

Am. Jur. Pleading and Practice Forms, Attorneys at Law § 53 (Judgment or decree—Ordering suspension of attorney)

Am. Jur. Pleading and Practice Forms, Attorneys at Law § 54 (Judgment or decree—Ordering disbarment of attorney—Costs to be paid by attorney)

Am. Jur. Pleading and Practice Forms, Attorneys at Law § 55 (Judgment or decree—Ordering disbarment—Pursuant to report by referee)

A final judgment of disbarment rendered by a court of competent jurisdiction is binding on all the courts of the state and constitutes an adjudication that, at the time it was rendered, the person so disbarred was not a proper person to hold the office of attorney.[FN1]

When professional discipline is imposed on an attorney, costs may be awarded against the attorney.[FN2] The general policy is that upon a finding of attorney misconduct it is appropriate to impose all costs, including the expenses of counsel for the office of lawyer regulation upon the disciplined lawyer.[FN3] Ultimately, and as part of the discipline imposed, the costs of disbarment proceedings may fall upon an attorney found guilty of unprofessional conduct.[FN4] Where, however, the bar takes an excessively broad approach to a disciplinary proceeding and fails to abandon counts against the attorney which could not be proved, each party should bear its own costs even though the proceeding results in the disbarment of the attorney.[FN5] If the state bar fails to prove allegations by clear and convincing evidence, costs should not be assessed against the attorney in a disciplinary proceeding.[FN6] However, since an attorney's resignation from membership in a bar while disciplinary proceedings are pending is tantamount to disbarment, the attorney may be ordered to pay the bar association's costs for investigating the grievances against the attorney.[FN7]

Costs, if appropriate, should be assessed in attorney disciplinary proceedings according to the following factors: (1) the amount assessed should be consistent with those imposed on other practitioners for similar acts of professional misconduct, (2) the attorney's previous record of professional behavior should be considered, and (3) the assessment should best serve the public and the integrity of the bar.[FN8]

The court has final discretionary authority to award costs in attorney disciplinary proceedings.[FN9]

[FN1] In re Keenan, 310 Mass. 166, 37 N.E.2d 516, 137 A.L.R. 766 (1941).

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[FN2] State ex rel. Oklahoma Bar Ass'n v. O'Neal, 2007 OK 13, 154 P.3d 1270 (Okla. 2007).

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[FN3] In re Disciplinary Proceedings against Tobin, 2007 WI 50, 730 N.W.2d 896 (Wis. 2007).

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[FN4] The Florida Bar v. Wilson, 616 So. 2d 953 (Fla. 1993).

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[FN5] The Florida Bar v. McCain, 361 So. 2d 700 (Fla. 1978).

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[FN6] State ex rel. Oklahoma Bar Ass'n v. Albert, 2007 OK 31, 2007 WL 1417160 (Okla. 2007).

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[FN7] State ex rel. Oklahoma Bar Ass'n v. O'Neal, 2007 OK 13, 154 P.3d 1270 (Okla. 2007).

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[FN8] State ex rel. Oklahoma Bar Ass'n v. Albert, 2007 OK 31, 2007 WL 1417160 (Okla. 2007).

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[FN9] The Florida Bar v. Martinez-Genova, 959 So. 2d 241 (Fla. 2007).

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7 Am. Jur. 2d Attorneys at Law § 114

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II. Judicial Supervision of Legal Profession
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Topic Summary Correlation Table References

§ 114. Review

West's Key Number Digest

West's Key Number Digest, Attorney and Client 56

As a general rule, because a referee in an attorney disciplinary proceeding is in the best position to judge the credibility of witnesses,[FN1] the court will not second-guess a referee's recommended discipline as long as that discipline is authorized under the state standards for imposing lawyer sanctions and has a reasonable basis in existing case law.[FN2] When reviewing a referee's recommended attorney discipline, the court's scope of review is broader than that afforded to the referee's findings of fact because the court has the ultimate responsibility to determine the appropriate sanction.[FN3] However, since the court has exclusive authority and wide latitude in determining disciplinary sanctions over lawyers,[FN4] a referee's recommendation for discipline receives less deference by the court than a referee's guilt finding.[FN5] Thus, although a referee's recommendation in an attorney disciplinary proceeding is persuasive, the court does not grant it the same deference as it does to guilt recommendations, because the ultimate responsibility for determining the appropriate sanction rests with the court.[FN6] It has been stated elsewhere that the court may impose whatever sanction it deems appropriate, regardless of the referee's recommendation, since the court does not accord the referee's recommendation as to appropriate attorney discipline great weight or consider it conclusive, and that the court is entitled to impose discipline more or less severe than the discipline recommended by the referee.[FN7] Similarly, another court has stated that recommendations of a bar association board of governors are advisory in nature, and the court makes an independent review of the record and findings of fact.[FN8] It has also been stated that, although the court generally accords great weight to a review department's recommendation, its findings and recommendations are merely advisory.[FN9]

Although the attorney sanctions for professional misconduct standards are not binding on the court, they promote the consistent and uniform application of disciplinary measures, and the court will not reject a recommendation arising from application of the standards unless it has grave doubts as to the propriety of the recommended discipline.[FN10] The ultimate decision regarding attorney discipline rests with the court, which has not hesitated to impose a harsher sanction than that recommended by the review department, and when the facts have warranted doing so, the court has even rejected a recommendation of suspension and disbarred the attorney.[FN11] While the court's scope of review over disciplinary recommendations of a referee is broader

than that afforded to the referee's findings of fact, the referee's recommendation of discipline is nevertheless afforded a presumption of correctness unless the recommendation is clearly erroneous or not supported by the evidence.[FN12]

Unlike a referee's factual findings in an attorney disciplinary proceeding, which are entitled to deference from the court, a referee's order granting summary relief in an attorney disciplinary proceeding is reviewed de novo by the court.[FN13]

CUMULATIVE SUPPLEMENT

Cases:

Criminal defendant lacked statutory aggrievement, as basis for standing to appeal to the Superior Court from, decision of grievance panel from Statewide Grievance Committee, dismissing, for lack of probable cause, criminal defendant's attorney disciplinary complaint against assistant state's attorney, relating to attorney's conduct during criminal defendant's direct appeal of his conviction; state statutes did not provide for appellate review of Committee's decisions, rules of practice allowed an attorney, but not a complainant, to appeal to the Superior Court with respect to a decision by the Committee reprimanding the attorney, and rules of practice provided that a grievance panel's dismissal of a disciplinary complaint, due to lack of probable cause, would be final and unreviewable absent an allegation in disciplinary complaint that the attorney committed a crime. Lewis v. Slack, 110 Conn. App. 641, 955 A.2d 620 (2008), certification denied, 289 Conn. 953, 961 A.2d 417 (2008).

In absence of allegation or demonstration of a specific, personal, and legal interest in decision of grievance panel from Statewide Grievance Committee, criminal defendant lacked classical aggrievement, as basis for standing to appeal to the Superior Court from, decision of grievance panel dismissing, for lack of probable cause, criminal defendant's attorney disciplinary complaint against assistant state's attorney, relating to attorney's conduct during criminal defendant's direct appeal of his conviction. Lewis v. Slack, 110 Conn. App. 641, 955 A.2d 620 (2008), certification denied, 289 Conn. 953, 961 A.2d 417 (2008).

Generally, the Supreme Court will not second-guess a referee's recommended attorney discipline as long as it has a reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Sanctions. The Florida Bar v. Glueck, 985 So. 2d 1052 (Fla. 2008).

Generally, Supreme Court will not second-guess the referee's recommended discipline as long as it has a reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Sanctions. The Florida Bar v. Brown, 978 So. 2d 107 (Fla. 2008).

Absent an abuse of discretion, Supreme Court will uphold a referee's award of costs in a disciplinary proceeding. The Florida Bar v. Brown, 978 So. 2d 107 (Fla. 2008).

Where neither party filed a petition for review of the hearing officer's findings in the attorney disciplinary proceeding, the Supreme Court would accept and adopt those findings but would reserve final judgment as to misconduct and disciplinary sanction. In re Powell, 893 N.E.2d 729 (Ind. 2008).

Review process in attorney disciplinary cases involves de novo examination of all matters presented to the supreme court, but the hearing officer's findings receive emphasis due to the unique opportunity for direct observation of witnesses. In re Cueller, 880 N.E.2d 1209 (Ind. 2008).

The Grievance Commission's findings and recommendations are given respectful consideration in review of attorney disciplinary proceedings, but the Supreme Court is not bound by them. Iowa Supreme Court Attorney Disciplinary Bd. v. Monroe, 784 N.W.2d 784 (Iowa 2010).

Hearing panel's recommendation for discipline is advisory only, and it does not constrain appellate court from imposing a greater or lesser penalty on attorney. In re Woodring, 289 Kan. 173, 210 P.3d 120 (2009).

Lawyer disciplinary guidelines are illustrative in nature and do not constitute an exclusive list of conduct for which an attorney may be permanently disbarred. In re O'Keefe, 46 So. 3d 1240 (La. 2010).

Factual findings by the hearing judge in attorney disciplinary proceeding will not be interfered with by Court of Appeals if they are founded on clear and convincing evidence. Attorney Grievance Com'n of Maryland v. Pawlak, 408 Md. 288, 969 A.2d 311 (2009).

Proposed conclusions of law made by the hearing judge in an attorney disciplinary proceeding, such as whether the Maryland Rules of Professional Conduct were violated, are considered de novo by the court of appeals. Attorney Grievance Com'n of Maryland v. Kimmel, 405 Md. 647, 955 A.2d 269 (2008).

Even though conducting an independent review of the record in attorney discipline proceeding, the Court of Appeals accepts the hearing judge's findings of fact unless they are found to be clearly erroneous. Attorney Grievance Com'n of Maryland v. Ugwuonye, 405 Md. 351, 952 A.2d 226 (2008).

Failure of attorney to present argument in support of an exception in attorney discipline proceeding is a sufficient basis on which to overrule the exception or, at least, not consider it. Attorney Grievance Com'n of Maryland v. Ugwuonye, 405 Md. 351, 952 A.2d 226 (2008).

Court of Appeals' consideration of the hearing judge's conclusions of law, such as whether provisions of the Rules of Professional Conduct were violated, is essentially de novo in an attorney disciplinary proceeding. Attorney Grievance Com'n v. Whitehead, 405 Md. 240, 950 A.2d 798 (2008).

In the Court of Appeals' review of the record in attorney disciplinary action, the hearing judge's findings of fact generally will be accepted unless they are clearly erroneous. Attorney Grievance Com'n of Maryland v. Kreamer, 404 Md. 282, 946 A.2d 500 (2008).

In attorney disciplinary proceedings, the hearing committee's determination of attorney's intent with respect to alleged misconduct is treated as a determination of credibility, which the Supreme Judicial Court will not reject unless it can be said with certainty that the finding was wholly inconsistent with another implicit finding. In re Murray, 455 Mass. 872, 920 N.E.2d 862 (2010).

Even where one of the parties in an attorney disciplinary action orders a transcript of the disciplinary proceedings, the Supreme Court gives great deference to a referee's findings and will not reverse those findings unless they are clearly erroneous, especially in cases where the referee's findings rest on disputed testimony or on an attorney's credibility, demeanor, or sincerity. 52 M.S.A., Lawyers Prof.Resp., Rule 14(e). In re Disciplinary Action Against Aitken, 787 N.W.2d 152 (Minn. 2010).

The Supreme Court will ordinarily defer to credibility determination by the panel of the Board of Commissioners on Grievances and Discipline in its independent review, in an attorney discipline proceeding, unless the record weighs heavily against those findings. Columbus Bar Assn. v. Willette, 117 Ohio St. 3d 433, 2008-Ohio-1198, 884 N.E.2d 581 (2008), reinstatement granted, 2008-Ohio-5448, 2008 WL 4601668 (Ohio 2008).

Supreme Court will defer to the credibility determinations of a panel of the Board of Commissioners on Grievances and Discipline in its independent review of attorney discipline cases unless the record weighs heavily against those determinations. Disciplinary Counsel v. Heiland, 116 Ohio St. 3d 521, 2008-Ohio-91, 880 N.E.2d 467 (2008).

The Supreme Court remains the ultimate decision maker concerning attorney discipline, and is not bound by the trial panel's findings, recommendations, or conclusions. State ex rel. Oklahoma Bar Ass'n v. Combs, 2008 OK 96, 2008 WL 4724447 (Okla. 2008).

Supreme Court has the ultimate authority to discipline attorneys, and the manner in which the discipline is given rests entirely with the Supreme Court. In re Johnson, 380 S.C. 76, 668 S.E.2d 416 (2008).

Findings of the Commission on Lawyer Conduct Panel are entitled to great weight in an attorney disciplinary proceeding, particularly when the inferences drawn from the testimony in the record depend largely on the credibility of witnesses. In re Johnson, 380 S.C. 76, 668 S.E.2d 416 (2008).

In an attorney discipline case, the Supreme Court is not bound by the Commission on Lawyer Conduct panel's recommendation and may make its own findings of fact and conclusions of law. In re Pennington, 380 S.C. 49, 668 S.E.2d 402 (2008).

The Supreme Court may make its own findings of fact and conclusions of law on review in an attorney disciplinary matter. In re White, 378 S.C. 333, 663 S.E.2d 21 (2008), reinstatement granted, 380 S.C. 200, 669 S.E.2d 588 (2008).

Although the Supreme Court is not bound by the findings of Commission on Lawyer Conduct Panel and Committee in an attorney disciplinary matter, these findings are entitled to great weight, particularly when the inferences to be drawn from the testimony depend on the credibility of witnesses. In re White, 378 S.C. 333, 663 S.E.2d 21 (2008), reinstatement granted, 380 S.C. 200, 669 S.E.2d 588 (2008).

The Supreme Court reviews judgments for violations of the rules governing the legal profession in light of its inherent power and fundamental right to prescribe and administer rules pertaining to the licensing and admission of attorneys. Board of Professional Responsibility v. Allison, 284 S.W.3d 316 (Tenn. 2009).

While the Disciplinary Board's recommended sanctions should be accorded great deference by the Supreme Court, the Court retains the ultimate authority for determining the appropriate sanction for an attorney's misconduct. In re Disciplinary Proceeding Against Hicks, 166 Wash. 2d 774, 214 P.3d 897 (2009).

State bar association disciplinary board is free to adopt, modify, or reverse the hearing officer's findings, conclusions, or recommendations. Burtch, In re Disciplinary Proceeding Against, 162 Wash. 2d 873, 175 P.3d 1070 (2008).

In an attorney disciplinary case, the Supreme Court gives considerable weight to the hearing officer's findings of fact, especially in regard to the credibility of witnesses, and will uphold those findings so long as they are supported by substantial evidence. Burtch, In re Disciplinary Proceeding Against, 162 Wash. 2d 873, 175 P.3d 1070 (2008).

A unanimous decision of state bar association disciplinary board will be upheld in the absence of a clear reason for departure. Burtch, In re Disciplinary Proceeding Against, 162 Wash. 2d 873, 175 P.3d 1070 (2008).

Evidentiary rulings made by the hearing officer in an attorney disciplinary proceeding will be reviewed for abuse of discretion. Burtch, In re Disciplinary Proceeding Against, 162 Wash. 2d 873, 175 P.3d 1070 (2008).

The hearing officer's denials of motions for mistrial are reviewed for an abuse of discretion in attorney disciplinary proceeding. Burtch, In re Disciplinary Proceeding Against, 162 Wash. 2d 873, 175 P.3d 1070 (2008).

While Supreme Court reviews and evaluates the entire record, it ordinarily will not disturb the findings of fact made upon conflicting evidence in attorney disciplinary proceeding. Burtch, In re Disciplinary Proceeding Against, 162 Wash. 2d 873, 175 P.3d 1070 (2008).

In determining the sanction to be imposed for attorney misconduct, Supreme Court will utilize the American Bar Association's (ABA) Standards for Imposing Lawyer Sanctions as a basic, but not conclusive, guide. Burtch, In re Disciplinary Proceeding Against, 162 Wash. 2d 873, 175 P.3d 1070 (2008).

In determining the sanction to be imposed for attorney misconduct, Supreme Court first looks at the ethical duties violated, then examines the lawyer's mental state followed by consideration of the actual or potential injuries caused by the misconduct, and then asks if there are any aggravating or mitigating factors. Burtch, In re Disciplinary Proceeding Against, 162 Wash. 2d 873, 175 P.3d 1070 (2008).

Supreme Court will generally adopt the state bar association disciplinary board's recommended sanction unless the sanction departs significantly from sanctions imposed in other comparable cases or the board was not unanimous in its decision. Burtch, In re Disciplinary Proceeding Against, 162 Wash. 2d 873, 175 P.3d 1070 (2008).

A de novo standard applies to a review of the adjudicatory record made before the Lawyer Disciplinary Board as to questions of law, questions of application of the law to the facts, and questions of appropriate sanctions. Lawyer Disciplinary Bd. v. Cavendish, 700 S.E.2d 779 (W. Va. 2010).

Pursuant to the obligation to supervise and regulate the practice of law, Supreme Court determines the appropriate level of discipline independently, regardless of the referee's recommendation. In re Disciplinary Proceedings Against Knight, 2008 WI 13, 307 Wis. 2d 273, 745 N.W.2d 77 (2008).

Supreme Court will adopt a referee's findings of fact in an attorney disciplinary proceeding unless they are clearly erroneous. Lucius, In re Disciplinary Proceedings Against, 2008 WI 12, 307 Wis. 2d 255, 744 N.W.2d 605 (2008).

Referee's conclusions of law in attorney disciplinary proceeding are reviewed de novo. Lucius, In re Disciplinary Proceedings Against, 2008 WI 12, 307 Wis. 2d 255, 744 N.W.2d 605 (2008).

Conclusions of law in a lawyer disciplinary proceeding are reviewed de novo. In re Disciplinary Proceedings Against Reitz, 2009 WI 90, 769 N.W.2d 566 (Wis. 2009).

Supreme Court will adopt a referee's findings of fact concerning a lawyer disciplinary matter unless they are clearly erroneous. In re Disciplinary Proceedings Against Reitz, 2009 WI 90, 769 N.W.2d 566 (Wis. 2009).

Supreme Court determines de novo the appropriate level of discipline of an attorney, giving no conclusive weight to the referee's recommendation. In re Disciplinary Proceedings Against Nunnery, 2009 WI 89, 769 N.W.2d 858 (Wis. 2009).

No deference is granted to referee's conclusions of law in an attorney discipline case, and they are reviewed de novo. In re Disciplinary Proceedings Against Nunnery, 2009 WI 89, 769 N.W.2d 858 (Wis. 2009).

[END OF SUPPLEMENT]

[FN1] The Florida Bar v. Senton, 882 So. 2d 997 (Fla. 2004).
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[FN2] The Florida Bar v. Greene, 926 So. 2d 1195 (Fla. 2006).
- Absent a showing that a referee's findings in an attorney disciplinary proceeding are clearly erroneous or lacking in evidentiary support, the court is precluded from reweighing the evidence and substituting its judgment for that of the referee. The Florida Bar v. Senton, 882 So. 2d 997 (Fla. 2004).
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[FN3] The Florida Bar v. Greene, 926 So. 2d 1195 (Fla. 2006).
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[FN4] In re Tenenbaum, 918 A.2d 1109 (Del. 2007).
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[FN5] The Florida Bar v. Feige, 937 So. 2d 605 (Fla. 2006).
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[FN6] The Florida Bar v. Cohen, 908 So. 2d 405 (Fla. 2005).
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[FN7] In re Disciplinary Proceedings Against Nunnery, 2007 WI 1, 298 Wis. 2d 289, 725 N.W.2d 613 (2007).
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[FN8] Kentucky Bar Ass'n v. Craft, 208 S.W.3d 245 (Ky. 2006).
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[FN9] In re Silverton, 36 Cal. 4th 81, 29 Cal. Rptr. 3d 766, 113 P.3d 556 (2005).
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[FN10] In re Silverton, 36 Cal. 4th 81, 29 Cal. Rptr. 3d 766, 113 P.3d 556 (2005).
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[FN11] In re Silverton, 36 Cal. 4th 81, 29 Cal. Rptr. 3d 766, 113 P.3d 556 (2005).
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[FN12] The Florida Bar v. Barcus, 697 So. 2d 71 (Fla. 1997).
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[FN13] The Florida Bar v. Gold, 937 So. 2d 652 (Fla. 2006).
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END OF DOCUMENT

American Jurisprudence, Second Edition
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Attorneys at Law
Rachel M. Kane, M.A., J.D.

II. Judicial Supervision of Legal Profession
B. Disciplinary Proceedings
7. Reinstatement of Disbarred Attorney

Topic Summary Correlation Table References

§ 115. Generally; procedure

West's Key Number Digest

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Pardon as restoring public office or license or eligibility therefor, 58 A.L.R.3d 1191

Reinstatement of attorney after disbarment, suspension, or resignation, 70 A.L.R.2d 268 (secs. 43 to 45 superseded in part by Pardon as restoring public office or license or eligibility therefor, 58 A.L.R.3d 1191)

Forms

Am. Jur. Pleading and Practice Forms, Attorneys at Law § 57 (Application—For reinstatement—By disbarred attorney—General form)

Am. Jur. Pleading and Practice Forms, Attorneys at Law § 58 (Application—For reinstatement—By disbarred attorney—Rehabilitation through psychological treatment)

Am. Jur. Pleading and Practice Forms, Attorneys at Law § 59 (Application—For reinstatement—By disbarred attorney—Reinstatement to practice in another jurisdiction)

Am. Jur. Pleading and Practice Forms, Attorneys at Law § 60 (Application—For reinstatement—By disbarred attorney—Pardon of felony crime)

Disbarment of an attorney is not necessarily a permanent status.[FN1] However, a resigning member of the bar will be bound by an agreement not to seek reinstatement, so long as it is freely and voluntarily made.[FN2] Because disbarment is not permanent, the court cannot make an ad hoc decision that some disbarment misconduct is so serious that the individual can be permanently barred from reinstatement.[FN3] The procedure to be followed by an attorney seeking reinstatement, and the court or body with jurisdiction to pass on the application, may be prescribed by a statute or a court rule.[FN4] Public policy does not require that disciplinary

board hearings on applications for reinstatement to practice be open to the public.[FN5] The court that has disbarred an attorney has the inherent power to reinstate him or her to the practice of law.[FN6] The court retains absolute discretion to grant or deny an application for readmission after disbarment.[FN7] The court's fundamental inquiry in addressing a petition for reinstatement to the practice of law is whether the attorney has rehabilitated himself or herself in conduct and character since the suspension was imposed.[FN8] Readmission of a previously disbarred attorney carries with it the duty of the court to protect itself against the readmission of an officer who cannot command trust and confidence.[FN9] Thus, though the doors to the practice of law are never permanently closed on a disbarred attorney, the court owes a duty to the legal profession as well as the general public to ensure that if the doors are opened, it is done so as a matter of justice.[FN10]

Former members of the bar who have been disbarred or have resigned with prejudice and who seek re-admission or reinstatement may be required not only to establish their present moral fitness and knowledge of the law[FN11] but also to take and pass a professional responsibility examination,[FN12] the bar examination,[FN13] continuing legal education ethics classes,[FN14] or a bar review course,[FN15] or must present medical evidence of competence to practice.[FN16]

Some courts hold that the procedure for reinstatement of a disbarred attorney is controlled by the rule in force at the time of the disbarment rather than the rule existing at the time of his or her application for reinstatement,[FN17] while others hold that the rules in effect at the time the attorney files a petition for reinstatement apply.[FN18]

On the court's review of a referee's recommendation that a suspended attorney be reinstated, the burden is on the state bar to demonstrate that the referee's recommendation is erroneous or unjustified.[FN19] However, a disbarred lawyer who seeks to resume the practice of law has the burden of proving, by clear and convincing evidence, that he or she should be reinstated.[FN20]

CUMULATIVE SUPPLEMENT

Cases:

Whatever the authorities in original disciplining jurisdiction may decide regarding an attorney's fitness to resume the practice of law, the Court of Appeals reserves that decision to itself based on the proceedings required by the District of Columbia's rules. In re Gonzalez, 967 A.2d 658 (D.C. 2009).

Attorney's "home states," for purposes of his application for readmission to Florida Bar, were Republic of Palau, Federated States of Micronesia and District of Columbia, where attorney was disbarred for misrepresentations made with regard to his status as suspended attorney, rather than Florida, where attorney was initially suspended for trust account violations and later disbarred through reciprocal discipline. Florida Bd. of Bar Examiners re Webster, 3 So. 3d 1058 (Fla. 2009).

Attorney, suspended from Florida Bar for trust account violations, subsequently disbarred from Republic of Palau, Federated States of Micronesia and the District of Columbia for engaging in practice of law while suspended in Florida, and then disbarred in Florida through reciprocal discipline, was ineligible to apply for readmission in Florida unless he obtained reinstatement to foreign bars where he committed misconduct. Florida Bd. of Bar Examiners re Webster, 3 So. 3d 1058 (Fla. 2009).

Reinstatement of attorney's license to practice law, following suspension for failure to pay bar dues, was appropriate after attorney tendered amount representing satisfaction of dues for current year, back dues, and $250.00 fee, where attorney had no disciplinary investigations, complaints, or charges pending against her, and she never practiced in Kentucky. Evanswood v. Kentucky Bar Ass'n, 250 S.W.3d 603 (Ky. 2008).

Attorney's application for restoration to membership in state bar was deemed timely filed, and completion of written examination administered by state Board of Bar Examiners was not required for restoration, despite certain omissions from attorney's application, where information and documentation omitted was readily available and was submitted approximately one month after submission of application. Delaney v. Kentucky Bar Ass'n, 245 S.W.3d 763 (Ky. 2008).

Finding that disbarred attorney engaged in professional misconduct since his disbarment and that he therefore constituted a risk to the integrity of the bar if reinstated was amply supported by attorney's own

testimony and the personal statement accompanying his petition for reinstatement. In re Williams, 2010 ME 121, 8 A.3d 666 (Me. 2010).

An attorney petitioning for reinstatement must first demonstrate that he has met the general reinstatement conditions imposed in the Supreme Court's suspension order. In re Disciplinary Action Against Holker, 765 N.W.2d 633 (Minn. 2009).

The main inquiry in determining whether or not to grant reinstatement of suspended attorney is whether the attorney has rehabilitated himself. Wong v. The Mississippi Bar, 5 So. 3d 369 (Miss. 2008).

Attorney was not entitled to reinstatement, following three-year suspension, since attorney petitioned for reinstatement almost two years prematurely, and record indicated that he had made no effort to comply with rule of discipline governing reinstatement, nor with mandate of Supreme Court in order suspending him. In re Shah, 5 So. 3d 352 (Miss. 2008).

Prior to reinstatement, the petitioner must: (1) state the cause or causes for suspension or disbarment; (2) give the name and current address of all persons, parties, firms, or legal entities who suffered pecuniary loss due to the improper conduct; (3) make full amends and restitution; (4) show that he has the necessary moral character for the practice of law; and (5) demonstrate the requisite legal education to be reinstated to the privilege of practicing law. Stewart v. The Mississippi Bar, 5 So. 3d 344 (Miss. 2008).

Disbarred attorney's petition for reinstatement met the jurisdictional prerequisites for consideration; petition was filed more than three years after Supreme Court ordered attorney's disbarment, attorney took and passed the Multi-State Professional Responsibility Exam with a scaled score of not less than 80, and while attorney had not taken the State Bar Exam, nothing in the rules of discipline required him to take it prior to petitioning for reinstatement, and it was Supreme Court's practice to grant reinstatement on the condition that the petitioner subsequently pass the bar exam. Stewart v. The Mississippi Bar, 5 So. 3d 344 (Miss. 2008).

In considering an application for reinstatement to the practice of law, the supreme court owes a solemn duty to protect the public and the legal profession, which consideration must be performed without regard to feelings of sympathy for the applicant. State ex rel. Counsel for Discipline of Nebraska Supreme Court v. Scott, 275 Neb. 194, 745 N.W.2d 585 (2008).

As the court that disbarred attorney, Supreme Court had inherent power to reinstate him to the practice of law. State ex rel. Nebraska State Bar Ass'n v. Kinney, 274 Neb. 412, 740 N.W.2d 607 (2007).

Supreme Court owes a solemn duty to protect the public and the legal profession when considering an application for reinstatement to the practice of law. State ex rel. Nebraska State Bar Ass'n v. Kinney, 274 Neb. 412, 740 N.W.2d 607 (2007).

Attorney, who was disbarred after he embezzled nearly $23,000 from his employer's law firm, met his burden of establishing good moral character to warrant reinstatement, even though attorney had filed for bankruptcy 11 years before applying for reinstatement; attorney had effectively addressed his drug and alcohol problems, paid restitution to his employer, established a responsible work history, volunteered for many charitable organizations, and offered letters and testimony from lawyers and others supporting his reinstatement. State ex rel. Nebraska State Bar Ass'n v. Kinney, 274 Neb. 412, 740 N.W.2d 607 (2007).

Besides moral reformation, an applicant for reinstatement after disbarment must also otherwise be eligible for admission to the bar as in an original application. State ex rel. Nebraska State Bar Ass'n v. Kinney, 274 Neb. 412, 740 N.W.2d 607 (2007).

Reinstatement of disbarred attorney, who had not practiced law in 20 years, would be conditioned upon his successfully passing the state bar exam; attorney had engaged in law-related employment and attended continuing education programs, but the only actual continuing legal education he had had was a 3-hour ethics seminar. State ex rel. Nebraska State Bar Ass'n v. Kinney, 274 Neb. 412, 740 N.W.2d 607 (2007).

The Supreme Court considers and weighs the following eight factors on a case-by-case basis in making an attorney reinstatement decision: 1) the applicant's present moral fitness; 2) the applicant's demonstrated consciousness of the conduct's wrongfulness and the disrepute it has brought upon the legal profession; 3) the applicant's extent of rehabilitation; 4) the original misconduct's seriousness; 5) applicant's conduct after resignation; 6) time elapsed since the applicant's resignation; 7) the applicant's character, maturity, and experience when suspended; and 8) the applicant's present legal competence. In re Reinstatement of Pacenza, 2009 OK 9, 204 P.3d 58 (Okla. 2009).

In making a reinstatement decision, the Supreme Court disregards feelings of sympathy, recognizing that the petitioner's burden of proof to overcome suspension and gain reinstatement is a heavy one. In re Reinstatement of Pacenza, 2009 OK 9, 204 P.3d 58 (Okla. 2009).

Lawyer's commission of a felony or other grave misconduct is not an insurmountable barrier to reinstatement to the practice of law; rather, the decision whether to reinstate one to the bar is made on a case-by-case basis, with each case reviewed on its own merits and demerits, and the decision to be made bottomed on the evidence presented and the circumstances peculiar to that case. In re Reinstatement of Hird, 2008 OK 25, 184 P.3d 535 (Okla. 2008).

Each application for reinstatement to the state bar association must be considered on its own merits and will fail or succeed on the evidence presented and the particular circumstances of that individual's case. In re Reinstatement of Pate, 2008 OK 24, 184 P.3d 528 (Okla. 2008).

An applicant for reinstatement as active member of the Bar is expected to honor scrupulously all financial obligations. In re Reinstatement of Gunter, 344 Or. 368, 182 P.3d 187 (2008), opinion modified on reconsideration, 344 Or. 540, 186 P.3d 286 (2008).

With respect to good moral character, as element for reinstatement as active member of the Bar, an attorney must prove that he is in all respects a person who possesses the sense of ethical responsibility and the maturity of character to withstand the many temptations which he will confront in the practice of law. In re Reinstatement of Gunter, 344 Or. 368, 182 P.3d 187 (2008), opinion modified on reconsideration, 344 Or. 540, 186 P.3d 286 (2008).

Attorney's conduct, in signing home loan applications that left the liability information blank, and in relying on mortgage broker to fill in that section with information from attorney's credit report, did not show a lack of good moral character, for purposes of reinstatement as active member of the Bar, pursuant to reinstatement application filed four years after attorney had submitted a nondisciplinary resignation; mortgage broker, consistent with his normal practice, had instructed attorney and his wife to leave the liability information blank. In re Reinstatement of Gunter, 344 Or. 368, 182 P.3d 187 (2008), opinion modified on reconsideration, 344 Or. 540, 186 P.3d 286 (2008).

Supreme Court examines judgments regarding reinstatement of attorneys to the practice of law in light of the Court's inherent power an essential and fundamental right to administer the rules pertaining to the licensing of attorneys. Hughes v. Board of Professional Responsibility of Supreme Court of Tennessee, 259 S.W.3d 631 (Tenn. 2008).

Disbarment was appropriate for attorney's failure to pay restitution to client as ordered by disciplinary board, meritless defense to client's suit, failure to act diligently regarding another client, failure to adequately explain fee agreement, charge of unreasonable fees, failure to return unearned fees, and false statements to court and board; both clients were vulnerable, attorney had prior disciplinary record, other aggravating factors existed, and no mitigating factors existed. Burtch, In re Disciplinary Proceeding Against, 162 Wash. 2d 873, 175 P.3d 1070 (2008).

Disbarment is the presumptive sanction for cumulatively advancing a meritless defense in district court, failing to pay restitution as ordered by the state bar association disciplinary board, failing to adequately explain fee agreement, charging unreasonable fees, and failing to return unearned fees. Burtch, In re Disciplinary Proceeding Against, 162 Wash. 2d 873, 175 P.3d 1070 (2008).

Disbarment is presumptive sanction for false statements to court and state bar association disciplinary board. Burtch, In re Disciplinary Proceeding Against, 162 Wash. 2d 873, 175 P.3d 1070 (2008).

Attorney, who was suspended from practice of law for eighteen months as discipline for misconduct that resulted in federal criminal conviction for tax evasion, was entitled to reinstatement conditioned upon attorney's providing full trust account records to the Office of Lawyer Registration for a period of two years following her reinstatement; attorney was genuinely remorseful for her misconduct, while attorney failed to list real estate proceeds as income and did not identify certain collections actions as pending litigation on her reinstatement questionnaire, attorney explained that proceeds were never in her possession and that failure to identify collection actions, in which attorney was a plaintiff, was due to nature of arrangement in which the collection matters were handled for her, and although attorney did not comply with letter of client trust account rules, no indication existed that attorney ever misappropriated client funds. In re Disciplinary Proceedings Against Washington, 2008 WI 66, 310 Wis. 2d 377, 750 N.W.2d 891 (2008).

Attorney, whose license to practice law had been revoked, was not entitled to reinstatement of his law license; while attorney had taken some positive steps to atone for his misconduct, which resulted in convictions for embezzlement and making false entries in bankruptcy estates, he still owed large sums of money to his former law firm, and he had apparently failed to ever determine exactly how much he owed firm, which constituted a failure to completely face up to his obligations. In re Disciplinary Proceedings Against Jennings, 2009 WI 26, 762 N.W.2d 648 (Wis. 2009).

Suspended attorney, a former state senator, whose misconduct consisted of committing criminal acts that reflected adversely on his honesty, trustworthiness, and fitness as a lawyer, satisfied the legal requirements for the reinstatement of his license to practice law, and thus reinstatement application would be granted; attorney fully complied with terms of suspension and had paid costs of disciplinary proceedings, attorney completed necessary number of continuing legal education hours, including ethics credits, public hearing was not contentious, attorney's conduct since suspension was exemplary, attorney testified convincingly about circumstances that led to conviction and about his future plans, five witnesses attested to attorney's character, attorney had no history of prior discipline, and attorney's misconduct, though a serious breach of public trust, did not relate to work as a practicing lawyer representing clients. In re Disciplinary Proceedings Against Burke, 2008 WI 119, 756 N.W.2d 564 (Wis. 2008).

Suspended attorney seeking reinstatement of license to practice law must demonstrate that the required representations in the reinstatement petition are substantiated. In re Disciplinary Proceedings Against Burke, 2008 WI 119, 756 N.W.2d 564 (Wis. 2008).

An attorney petitioning for reinstatement of law license must demonstrate that the representations of the reinstatement petition, as set forth in rule describing conduct and conditions attorney must show, are substantiated. In re Disciplinary Proceedings Against Chvala, 2008 WI 117, 755 N.W.2d 613 (Wis. 2008).

Petition for reinstatement, whether it follows a suspension or a revocation, is not an automatic procedure, and in all cases of revocation or license suspension of six months or more, the individual's eligibility and fitness to practice law is carefully scrutinized, first by Office of Lawyer Regulation (OLR), then by a referee, and finally by Supreme Court; the person seeking reinstatement must demonstrate that he or she has the moral character to practice law, that his or her resumption of the practice of law will not be detrimental to the administration of justice or subversive of the public interest, and the person seeking reinstatement must also demonstrate compliance with various other conditions as set forth in the rules or by order of the court. In re Disciplinary Proceedings Against George, 2008 WI 21, 746 N.W.2d 236 (Wis. 2008).

[END OF SUPPLEMENT]

[FN1] In re Hiss, 368 Mass. 447, 333 N.E.2d 429 (1975) (disavowed on other grounds by, Aetna Cas. & Sur. Co. v. Niziolek, 395 Mass. 737, 481 N.E.2d 1356 (1985)).

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[FN2] The Florida Bar, 358 So. 2d 1355 (Fla. 1978).

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[FN3] In re Reinstatement of Wiederholt, 24 P.3d 1219 (Alaska 2001).

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[FN4] The Florida Bar re Hipsh, 586 So. 2d 311 (Fla. 1991).

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[FN5] Philadelphia Newspapers, Inc. v. Disciplinary Bd. of Supreme Court, 468 Pa. 382, 363 A.2d 779 (1976).

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[FN6] Broome v. Mississippi Bar, 603 So. 2d 349 (Miss. 1992).

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[FN7] In re Gros, 815 So. 2d 799 (La. 2002).

- The deference accorded to a recommendation by the board of professional responsibility with regard to a

suspended attorney's petition for reinstatement is even greater where the attorney's position has the active support of the office of bar counsel. In re Roxborough, 775 A.2d 1063 (D.C. 2001).

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[FN8] McGuire v. The Mississippi Bar, 798 So. 2d 476 (Miss. 2001).

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[FN9] Scholl v. Kentucky Bar Ass'n, 213 S.W.3d 687 (Ky. 2007).

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[FN10] Scholl v. Kentucky Bar Ass'n, 213 S.W.3d 687 (Ky. 2007).

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[FN11] Bonner v. Disciplinary Bd. of Alabama State Bar, 401 So. 2d 734 (Ala. 1981).

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[FN12] Bonner v. Disciplinary Bd. of Alabama State Bar, 401 So. 2d 734 (Ala. 1981); In re Oberhauser, 585 N.W.2d 790 (Minn. 1998).

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[FN13] In re Byars, 271 Ga. 119, 515 S.E.2d 834 (1999); Zalman v. Kentucky Bar Ass'n, 82 S.W.3d 831 (Ky. 2002).

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[FN14] In re Bennett, 270 Kan. 523, 15 P.3d 834 (2001); Zalman v. Kentucky Bar Ass'n, 82 S.W.3d 831 (Ky. 2002).

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[FN15] Application of Cochran, 228 Kan. 1, 618 P.2d 322 (1980).

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[FN16] In re Disciplinary Action Against Fuller, 621 N.W.2d 460 (Minn. 2001).

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[FN17] The Florida Bar, In re, 307 So. 2d 162 (Fla. 1975).

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[FN18] In re Byars, 271 Ga. 119, 515 S.E.2d 834 (1999).

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[FN19] The Florida Bar ex rel. McGraw, 903 So. 2d 905 (Fla. 2005).

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[FN20] In re Richman, 191 Ill. 2d 238, 246 Ill. Dec. 365, 730 N.E.2d 45 (2000).

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Topic Summary Correlation Table References

§ 116. Considerations affecting right to reinstatement

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Conditioning reinstatement of attorney upon reaffirmation of debt discharged in bankruptcy, 39 A.L.R.4th 586

Bar admission or reinstatement of attorney as affected by alcoholism or alcohol abuse, 39 A.L.R.4th 567

Disbarment is not intended primarily as punishment of an attorney, but as a measure of protection for the public and the profession; hence, a belief that the attorney has been sufficiently punished is not a warrant for his or her reinstatement.[FN1]

Evidence of moral change is only one factor to consider in an attorney reinstatement case; other factors to be considered are: (1) the attorney's recognition of the wrongfulness of his or her conduct; (2) the length of time since the misconduct and the disbarment or suspension; (3) the seriousness of the original misconduct; (4) the existence of physical or mental illness or pressures that are susceptible to correction; and (5) the attorney's intellectual competency to practice law.[FN2] Other factors include restitution;[FN3] proof that the attorney's return to the practice of law will not be detrimental to the integrity and standing of the bar or the administration of justice, or subversive of the public interest;[FN4] the reestablishment of the reputation of the attorney by his or her restoration to a useful and constructive place in society;[FN5] unimpeachable character; and evidence of lack of malice and ill feeling toward those involved in bringing the disciplinary proceedings.[FN6]
Observation: Caution should be exercised in ordering reinstatement of a suspended attorney to the practice of law where substantial amounts in restitution remain to be paid.[FN7]

The criteria for reinstatement of a suspended attorney include a petitioner's strict compliance with the specific conditions of a previous disciplinary order.[FN8] In addition, the seriousness of past misconduct by an attorney petitioning for reinstatement to the bar is unquestionably an important consideration which cannot be minimized by subsequent exemplary conduct, since there are certain infractions that are so serious that the attorney committing them should never be readmitted to the practice of law.[FN9] However, it has been stated that the seriousness of a disbarred attorney's misconduct only rarely precludes further consideration of the attorney's petition for reinstatement to the practice of law.[FN10]

The mere passage of time is not a sufficient ground for reinstatement of a disbarred attorney.[FN11]
Practice Tip: Personal and professional references are important and often reliable sources of evidence of the moral character of a suspended attorney applying for reinstatement.[FN12]

CUMULATIVE SUPPLEMENT

Cases:

Supreme Court would accept recommendation of Bar Association Disciplinary Board to deny attorney's petition for reinstatement, though Supreme Court was particularly impressed with attorney's record of community service in working as an emergency medical technician, in light of the customary deference afforded to findings of Disciplinary Board, which heard attorney's testimony under oath and concluded that he lacked insight into the reasons for the conduct that led to his disbarment, and in view of the presumption against reinstatement and the heavy burden imposed on an attorney seeking reinstatement. In re Reinstatement of Wiederholt, 182 P.3d 1047 (Alaska 2008), as modified on denial of reh'g, (May 19, 2008).

Attorney who had been reciprocally disbarred for intentional misappropriation of funds in Maryland was not entitled to reinstatement; attorney had failed to resolve a judgment obtained by client for the misappropriated funds, and failed to repay Maryland Client Protection Fund for payments it made to client an account of the misappropriation. In re Hollis, 968 A.2d 1037 (D.C. 2009).

Steps taken to remedy losses by a lawyer disbarred for misappropriation of client funds are of special concern in deciding whether the lawyer should be reinstated to the practice of law. In re Hollis, 968 A.2d 1037 (D.C. 2009).

Processing an application or petition for readmission or reinstatement to bar does not create any such right to readmission or reinstatement, or even a right to full consideration of said application or petition, if applicant or petitioner remains disbarred or suspended in relevant foreign jurisdiction. Florida Bd. of Bar Examiners re Webster, 3 So. 3d 1058 (Fla. 2009).

Where attorney suffering from Asperger's Disorder sought reinstatement following six-month suspension and was unable to recognize the serious injury which his conduct inflicted, attorney's return to the practice of criminal law would be conditioned upon his developing a relationship with another criminal prosecutor with whom he could meet on a monthly basis to review pending cases; although attorney was receiving therapy to assist him in developing appropriate social relationships and in understanding social clues, attorney would always process information differently than individuals without the disorder. In re Campbell, 231 P.3d 562 (Kan. 2010).

There was no requirement, when the Character and Fitness Committee and the Kentucky Bar Association Board of Governors considered disbarred attorney's application for reinstatement, that those regulatory bodies focus exclusively on present events and overlook significant and troubling criminal conduct occurring more than ten years earlier. Burns v. Kentucky Bar Ass'n, 318 S.W.3d 591 (Ky. 2010).

Finding that disbarred attorney engaged in professional misconduct since his disbarment and that he therefore constituted a risk to the integrity of the bar if reinstated was amply supported by attorney's own testimony and the personal statement accompanying his petition for reinstatement. In re Williams, 2010 ME 121, 8 A.3d 666 (Me. 2010).

Evidence of moral change, in context of a suspended attorney's petition for reinstatement, comes from an observed record of appropriate conduct by the attorney, as well as the attorney's own state of mind and his values. In re Petition for Reinstatement of Dedefo, 781 N.W.2d 1 (Minn. 2010).

In addition to moral change, Supreme Court, in an attorney reinstatement case, considers: (1) attorney's recognition of the wrongfulness of his conduct, (2) length of time since the original misconduct and the suspension, (3) seriousness of the original misconduct, (4) existence of physical or mental illness or pressures that are susceptible to correction, and (5) attorney's intellectual competency to practice law. In re Disciplinary Action Against Holker, 765 N.W.2d 633 (Minn. 2009).

In an attorney reinstatement proceeding, evidence of moral change comes from an observed record of appropriate conduct by the attorney, but also must come from the attorney's own state of mind and his values. In re Disciplinary Action Against Holker, 765 N.W.2d 633 (Minn. 2009).

Supreme Court considers the following factors when determining whether to grant a suspended attorney's petition for reinstatement to the practice of law: (1) the attorney's recognition of the wrongfulness of his conduct; (2) the length of time since the original misconduct and the suspension; (3) the seriousness of the

original misconduct; (4) the existence of physical or mental illness or pressures that are susceptible to correction; and (5) the attorney's intellectual competency to practice law. In re Reinstatement of Mose, 754 N.W.2d 357 (Minn. 2008).

In considering disbarred attorney's petition for reinstatement, the ultimate inquiry for Supreme Court is whether attorney has demonstrated sufficient rehabilitation in character and conduct for consideration of readmission. Stewart v. The Mississippi Bar, 5 So. 3d 344 (Miss. 2008).

Attorney who had been suspended from the practice of law was entitled to reinstatement, with limitations that her practice be in association with an experienced supervising lawyer and she continue treatment for bipolar disorder; attorney had fully complied with terms and conditions of all applicable disciplinary orders and rules, she recognized wrongfulness and seriousness of her misconduct for which she was suspended, and attorney's subsequently diagnosed bipolar disorder contributed to injury of her clients, for which attorney was under treatment. In re Reinstatement of Sundby, 2007 ND 185, 741 N.W.2d 728 (N.D. 2007).

Supreme Court must look beyond a petition for attorney reinstatement and consider a petitioner's past and stated future conduct in determining a petitioner's fitness for reinstatement especially when such conduct may jeopardize petitioner's good standing. Disciplinary Proceedings Rule 11.5, 5 O.S.A. Ch. 1, App. 1–A. In re Reinstatement of Mooreland-Rucker, 2010 OK 43, 237 P.3d 784 (Okla. 2010).

Rehabilitation of an attorney is not the sole consideration in reinstatement proceedings; it is the duty of the court to safeguard the interests of the public, the courts, and the legal profession. In re Reinstatement of Hird, 2008 OK 25, 184 P.3d 535 (Okla. 2008).

In reviewing the evidence submitted in support of an application for reinstatement to the practice of law, the Supreme Court considers: (1) the present moral fitness of the applicant; (2) the applicant's demonstrated consciousness of wrongful conduct and the disrepute which that conduct brought to the profession; (3) the extent of applicant's rehabilitation; (4) the seriousness of the original misconduct; (5) applicant's conduct after the resignation; (6) the time which has elapsed since the resignation or discipline; (7) applicant's character, maturity and experience at the time of discipline or resignation; and (8) applicant's present competence in legal skills. In re Reinstatement of Pate, 2008 OK 24, 184 P.3d 528 (Okla. 2008).

On an application for reinstatement to the practice of following a disbarment or resignation stemming from abuse of alcohol and drugs, the Supreme Court must be particularly concerned with evidence showing the extent of applicant's rehabilitation, his conduct since he resigned, the treatment received for the condition, and the time which has elapsed since the resignation. In re Reinstatement of Pate, 2008 OK 24, 184 P.3d 528 (Okla. 2008).

Evidence of past conduct, if rationally connected to the attorney's fitness to practice law, may be relevant to the issue of whether the attorney presently is of good moral character, as element for reinstatement as active member of the Bar. In re Reinstatement of Gunter, 344 Or. 368, 182 P.3d 187 (2008), opinion modified on reconsideration, 344 Or. 540, 186 P.3d 286 (2008).

Fact that attorney had not yet fully paid his restitution obligations did not preclude reinstatement of his license to practice law. In re Disciplinary Proceedings Against George, 2010 WI 116, 789 N.W.2d 577 (Wis. 2010).

An attorney petitioning for reinstatement of law license must demonstrate that the representations of the reinstatement petition, as set forth in rule describing conduct and conditions attorney must show, are substantiated. In re Disciplinary Proceedings Against Chvala, 2008 WI 117, 755 N.W.2d 613 (Wis. 2008).

Attorney whose license to practice law had been suspended for six months was entitled to conditional reinstatement; evidence showed that attorney had satisfied all criteria for reinstatement, conditioned upon a report from a treating psychiatrist or psychologist that it was safe and appropriate for attorney to resume the practice of law and clearly delineating the counseling, treatment, and medications that were reasonably necessary for attorney to continue the practice of law, and conditioned on monitoring of attorney's trust account practices and medications. In re Disciplinary Proceedings Against Scanlan, 2008 WI 116, 754 N.W.2d 844 (Wis. 2008).

[END OF SUPPLEMENT]

[FN1] State ex rel. Sorensen v. Goldman, 182 Neb. 126, 153 N.W.2d 451 (1967).
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[FN2] In re Reinstatement of Jellinger, 728 N.W.2d 917 (Minn. 2007).
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[FN3] In re Reinstatement of Wiederholt, 24 P.3d 1219 (Alaska 2001); In re Reinstatement of Montgomery, 2000 ND 127, 612 N.W.2d 278 (N.D. 2000).
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[FN4] In re Reinstatement of Wiederholt, 24 P.3d 1219 (Alaska 2001).
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[FN5] Avila v. People, 52 P.3d 230 (Colo. O.P.D.J. 2002).
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[FN6] In re Reinstatement of Montgomery, 2000 ND 127, 612 N.W.2d 278 (N.D. 2000).
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[FN7] In re Roxborough, 775 A.2d 1063 (D.C. 2001).
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[FN8] The Florida Bar ex rel. McGraw, 903 So. 2d 905 (Fla. 2005).
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[FN9] In re Richman, 191 Ill. 2d 238, 246 Ill. Dec. 365, 730 N.E.2d 45 (2000).
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[FN10] In re Reinstatement of Ramirez, 719 N.W.2d 920 (Minn. 2006).
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[FN11] In re Richman, 191 Ill. 2d 238, 246 Ill. Dec. 365, 730 N.E.2d 45 (2000).
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[FN12] In re Starr, 330 Or. 385, 9 P.3d 700 (2000).
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II. Judicial Supervision of Legal Profession

Topic Summary Correlation Table References

§ 117. Burden of showing present good character

West's Key Number Digest

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There is a presumption against reinstatement after disbarment.[FN1] Thus, when a disbarred attorney applies for reinstatement, the attorney has the burden of proof of fitness to practice law.[FN2] The attorney must use persuasive evidence to prove, after the expiration of a reasonable length of time, that he or she appreciates the significance of the dereliction, has lived a consistent life of probity and integrity, and possesses the good character necessary to guarantee uprightness and honor in professional dealings, and therefore is worthy to be restored.[FN3] An attorney applying for reinstatement must establish by clear and convincing evidence that he or she has undergone such a moral change as now to render him or her a fit person to enjoy the public confidence and trust once forfeited.[FN4] In addition, a disbarred attorney seeking reinstatement has the burden of demonstrating by clear and convincing evidence that he or she has the knowledge of law, competency, and moral qualifications requisite to the practice of law, and that his or her reinstatement will not be detrimental to the state bar, the administration of justice, or the public interest.[FN5] Stated differently, an applicant for reinstatement to practice of law bears the burden of demonstrating that he or she has so rehabilitated himself or herself that in spite of his or her past failings, he or she has become worthy of trust and confidence and would be a credit and not a detriment to the profession of law.[FN6] The disbarred or suspended attorney who seeks to be reinstated bears a heavy burden and must demonstrate not only by words but also by deeds that he or she can undertake the practice of law without endangering the public or the reputation of the profession.[FN7] A disbarred attorney petitioning for reinstatement to the practice of law is required to provide stronger proof of good character and trustworthiness than is required in the original application for admission to practice.[FN8] An attorney must present clear and convincing evidence of reformation and good moral character for re-admission to the bar.[FN9]

Practice Tip: Because a disbarred attorney who seeks reinstatement bears the burden of proof, a bar association is not required to present any witnesses to support its contention that reinstatement would be detrimental to the integrity and standing of the bar, the administration of justice, or is subversive to the public interest.[FN10]

While reinstatement after disbarment is the rare exception to the rule, a disbarred attorney who meets the heavy burden of demonstrating his or her rehabilitation will be reinstated.[FN11]

CUMULATIVE SUPPLEMENT

Cases:

Suspended attorney seeking reinstatement failed to meet his burden of demonstrating his entitlement to reinstatement, at time of hearing on his petition, by clear and convincing evidence. Nichols v. Alabama State Bar, 981 So. 2d 398 (Ala. 2007).

Suspended attorney did not, on petition for reinstatement, meet his burden of showing by clear and convincing evidence that his petition should be granted, and thus petition would be denied, where, while he was suspended, attorney used signage having the initials "J.D.," engaged in the practice of law by attempting to negotiate mold and fungus issues with realty company on behalf of real estate purchasers and engaged in the practice of law by representing claimants on workers' compensation claims, attorney was aware that some people viewed his actions as engaging in the unauthorized practice of law but did not question whether there might be some merit to that view, and attorney did not timely file affidavit indicating he had complied with

disciplinary order suspending him from the practice of law. Office of Disciplinary Counsel v. Gould, 119 Haw. 265, 195 P.3d 1197 (2008).

An attorney petitioning for reinstatement must first demonstrate that he has met the general reinstatement conditions imposed in the Supreme Court's suspension order. In re Disciplinary Action Against Holker, 765 N.W.2d 633 (Minn. 2009).

Attorney, who had been indefinitely suspended from practice of law for a minimum of six months for misconduct in connection with his handling of a probate matter, was not entitled to reinstatement to practice of law, as he failed to establish that he had undergone such a moral change as now to render him fit to enjoy public confidence and trust once forfeited; attorney accepted responsibility numerous times during his testimony at reinstatement hearing, but, within the same answer, he also made an excuse or shifted blame to another, and attorney minimized several aspects of his misconduct, emphasizing that case that gave rise to his suspension was only one case out of thousands, and that his office normally did not work with such files. In re Disciplinary Action Against Holker, 765 N.W.2d 633 (Minn. 2009).

Once an attorney petitioning for reinstatement has met the general reinstatement conditions imposed in Supreme Court's suspension order, he must then establish, by clear and convincing evidence, that he has undergone such a moral change as now to render him a fit person to enjoy the public confidence and trust once forfeited. In re Disciplinary Action Against Holker, 765 N.W.2d 633 (Minn. 2009).

An attorney petitioning for reinstatement must first demonstrate that he has met the general reinstatement conditions imposed in the Supreme Court's suspension order. Once an attorney petitioning for reinstatement has met the general reinstatement conditions imposed in Supreme Court's suspension order, he must then establish, by clear and convincing evidence, that he has undergone such a moral change as now to render him a fit person to enjoy the public confidence and trust once forfeited. In re Disciplinary Action Against Holker, 765 N.W.2d 633 (Minn. 2009).

A suspended attorney applying for reinstatement to the practice of law must show he has met the reinstatement conditions the Supreme Court imposed in its suspension order, and establish by clear and convincing evidence that she or he has undergone such a moral change as now to render him a fit person to enjoy the public confidence and trust once forfeited. In re Reinstatement of Mose, 754 N.W.2d 357 (Minn. 2008).

Suspended attorney, who had failed to competently and diligently represent clients, failed to show he was competent to return to practice of law, as required for reinstatement; while attorney successfully completed the bar exam and 60.5 credit hours of continuing legal education, attorney had been suspended for over 16 years, attorney had no experience with the rigors of full-time employment, legal or otherwise, since he last practiced law, and while attorney did have a one-year position volunteering at advocacy organization for tenants for a few hours a week, attorney's supervisor admitted that attorney's position did not involve many of the skills necessary for the practice of law. In re Reinstatement of Mose, 754 N.W.2d 357 (Minn. 2008).

Standard applied to a suspended attorney applying for reinstatement requires stronger proof of good character and trustworthiness than is required in original application for admission to practice. In re Reinstatement of Mose, 754 N.W.2d 357 (Minn. 2008).

Suspended attorney, who had failed to competently and diligently represent clients, failed to demonstrate that he had undergone such a moral change that clients could have complete confidence in his competence and fidelity, as required for reinstatement; when asked about his intentional lies to his clients, attorney stated that he was "very sorry" but also characterized his deceptive statements as "inaccurate statements" or "misstatements," thus indicating an ongoing unwillingness to recognize the wrongfulness of his conduct, attorney apologized but offered no explanation for much of his intentional conduct, including why he kept client retainers when he was suspended from the practice of law, attorney failed to make restitution to two clients, and attorney failed to disclose to his suspension to witness who testified on his behalf at panel hearing. In re Reinstatement of Mose, 754 N.W.2d 357 (Minn. 2008).

Attorney, who was disbarred based on a felony conviction for conspiracy to commit extortion under color of official right, failed to demonstrate sufficient rehabilitation of character to warrant reinstatement, where the evidence of attorney's civic and community involvement centered around gratuities made by his family-owned hotel, including hosting pool parties and reserving blocks of rooms for hurricane cleanup workers, but included little or no information regarding the nature or extent of attorney's personal involvement, and attorney

performed no community service beyond what was required of him during his sentencing for the underlying felony and indicated no intent to do so in the future; due to the seriousness of attorney's offense, the civic, church, and charitable involvement offered lacked sufficient substance to clearly show a fundamental change in attorney's character. Stewart v. The Mississippi Bar, 5 So. 3d 344 (Miss. 2008).

Disbarred attorney seeking reinstatement carries the burden of proving that he has rehabilitated himself and has established the requisite moral character to entitle him to the privilege of practicing law. Stewart v. The Mississippi Bar, 5 So. 3d 344 (Miss. 2008).

To be reinstated, disbarred attorney had to show that his actions, beyond being good deeds of a general nature, evidenced a fundamental change in his character. Stewart v. The Mississippi Bar, 5 So. 3d 344 (Miss. 2008).

An attorney seeking reinstatement to the practice of law has the burden to demonstrate by clear and convincing evidence that he has been sufficiently rehabilitated and possesses the requisite moral character to be reinstated. In re Prisock, 5 So. 3d 319 (Miss. 2008).

Applicant for reinstatement after disbarment must show that he or she is currently competent to practice law in State. State ex rel. Nebraska State Bar Ass'n v. Kinney, 274 Neb. 412, 740 N.W.2d 607 (2007).

The proof of good character required under an application for reinstatement after disbarment must exceed that required under an original application for admission to the bar because it must overcome the former adverse judgment of the applicant's character. State ex rel. Nebraska State Bar Ass'n v. Kinney, 274 Neb. 412, 740 N.W.2d 607 (2007).

A disbarred attorney has the burden of proof to establish good moral character to warrant reinstatement. State ex rel. Nebraska State Bar Ass'n v. Kinney, 274 Neb. 412, 740 N.W.2d 607 (2007).

The more egregious the misconduct that led to his disbarment, the heavier the applicant for reinstatement's burden to prove his or her present fitness to practice law. State ex rel. Nebraska State Bar Ass'n v. Kinney, 274 Neb. 412, 740 N.W.2d 607 (2007).

Applicant for reinstatement after disbarment can overcome burden of proving good moral character by clear and convincing evidence. State ex rel. Nebraska State Bar Ass'n v. Kinney, 274 Neb. 412, 740 N.W.2d 607 (2007).

Evidence of attorney's good work in church and in community, in seeking reinstatement to state bar association, did not demonstrate clear and convincing evidence he understood and was remorseful for significant damage he caused couple to incur in real estate transaction, or that he possessed good moral character or competency in law, as former colleagues and judicial officer questioned his legal abilities and integrity; while attorney submitted eight letters and narrative statements of two individuals in support of his reinstatement, president of county bar association received telephone calls and letters from other local attorneys opposing attorney's reinstatement, lawyer who was involved in cause with attorney and judge whom attorney listed as potential witness did not recommend his reinstatement, and while one county district attorney found attorney aggressive and conscientious yet had no opinion on reinstatement, one county district attorney did not believe attorney could be trusted and "hoped" he would not be reinstated. In re Reinstatement of Pacenza, 2009 OK 9, 204 P.3d 58 (Okla. 2009).

Attorney seeking reinstatement to state bar association failed to demonstrate true remorse for financial damage he caused couple in transaction for purchase of real property and later settlement arising from transaction, and did not recognize they had not been fully reimbursed for damage; while attorney stated at reinstatement hearing that he did everything to make couple whole, he entered into settlement agreement with couple that left them with loss of approximately $75,000, he only contacted couple on morning of reinstatement hearing to express his regrets for poor treatment he caused them, he attempted to show at hearing that couple was not damaged to extent they claimed rather than show he had attempted to ease their losses, and attorney stated suspension imposed was "excessive" and "harsh". In re Reinstatement of Pacenza, 2009 OK 9, 204 P.3d 58 (Okla. 2009).

Reinstatement to the practice of law is not automatically granted on evidence that the applicant has engaged only in proper conduct, even where no contrary evidence is presented. In re Reinstatement of Hird, 2008 OK 25, 184 P.3d 535 (Okla. 2008).

Attorney seeking reinstatement to practice of law following resignation therefrom failed to establish current competency and learning for admission to the bar, where attorney's work as paralegal occurred shortly after his

release from prison, approximately 14 years prior to his application for reinstatement, attorney had taken only three hours of continuing legal education in approximately seven years since denial of his first petition for reinstatement, and attorney's work as human resources manager and landman, although related to various aspects of law, did not evidence current competency and learning required for admission to the bar. In re Reinstatement of Hird, 2008 OK 25, 184 P.3d 535 (Okla. 2008).

Reinstatement to the practice of law is not automatically granted on evidence, even if undisputed, showing the applicant has engaged in only proper conduct during suspension; an applicant must affirmatively establish that if reinstated his or her conduct will conform to the high standards required of a member of the bar. In re Reinstatement of Pate, 2008 OK 24, 184 P.3d 528 (Okla. 2008).

Burden placed on an applicant seeking reinstatement to the practice of law is the same whether applicant was disbarred or resigned from the bar pending disciplinary proceedings. In re Reinstatement of Pate, 2008 OK 24, 184 P.3d 528 (Okla. 2008).

Attorney who filed application for reinstatement four years after attorney had submitted a nondisciplinary resignation had to prove that he had overcome and would not again be influenced by the specific character flaw that led to the nondisciplinary resignation. In re Reinstatement of Gunter, 344 Or. 368, 182 P.3d 187 (2008), opinion modified on reconsideration, 344 Or. 540, 186 P.3d 286 (2008).

The evidence necessary to demonstrate that a disbarred attorney is morally qualified to practice law, as required for reinstatement, requires more than conclusory statements; it should also include specific facts and circumstances which have arisen since one's conviction that demonstrate either rehabilitation or remorse. Hughes v. Board of Professional Responsibility of Supreme Court of Tennessee, 259 S.W.3d 631 (Tenn. 2008).

Attorney who was disbarred following his convictions for bribery and conspiracy to commit bribery showed by clear and convincing evidence that he had the legal competency to practice law, as required for reinstatement; record showed that during his disbarment, attorney had completed more hours of legal education than what was required, that attorney studied independently at a college law library during the two years before his incarceration, reading the advance sheets and studying case law, and that attorney continued his studies at the law library since his release. Hughes v. Board of Professional Responsibility of Supreme Court of Tennessee, 259 S.W.3d 631 (Tenn. 2008).

Disbarred attorney seeking reinstatement to the practice of law must clearly and convincingly show that he or she (1) has the moral qualifications and (2) legal competency to be admitted to the practice of law in this state and, further, that (3) reinstatement will not be detrimental to the integrity and standing of the bar or administration of justice, or subversive to the public interest. Hughes v. Board of Professional Responsibility of Supreme Court of Tennessee, 259 S.W.3d 631 (Tenn. 2008).

Attorney whose license was suspended for conduct in his capacity as state senator satisfied license reinstatement requirements; attorney had practiced law for more than 20 years without ever having been subject to professional discipline prior to his current suspension, and, although attorney's professional misconduct arose in the course of his work as a state senator and was a serious breach of the public trust, it did not directly relate to his work as a practicing lawyer representing clients. In re Disciplinary Proceedings Against Chvala, 2008 WI 117, 755 N.W.2d 613 (Wis. 2008).

An attorney petitioning for reinstatement of law license must demonstrate that the representations of the reinstatement petition, as set forth in rule describing conduct and conditions attorney must show, are substantiated. In re Disciplinary Proceedings Against Chvala, 2008 WI 117, 755 N.W.2d 613 (Wis. 2008).

[END OF SUPPLEMENT]

[FN1] In re Reinstatement of Wiederholt, 24 P.3d 1219 (Alaska 2001).

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[FN2] In re Spence, 275 Ga. 202, 563 S.E.2d 129 (2002).

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[FN3] Toledo Bar Ass'n v. DeMars, 56 Ohio St. 3d 90, 564 N.E.2d 431 (1990).
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[FN4] In re Reinstatement of Jellinger, 728 N.W.2d 917 (Minn. 2007).
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[FN5] In re Reinstatement of Wiederholt, 24 P.3d 1219 (Alaska 2001).
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[FN6] Bowling v. Kentucky Bar Ass'n, 54 S.W.3d 160 (Ky. 2001).
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[FN7] In re Quintana, 2001-NMSC-021, 130 N.M. 627, 29 P.3d 527 (2001).
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[FN8] In re Reinstatement of Ramirez, 719 N.W.2d 920 (Minn. 2006).
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[FN9] Toledo Bar Ass'n v. DeMars, 56 Ohio St. 3d 90, 564 N.E.2d 431 (1990).
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[FN10] In re Reinstatement of Wiederholt, 24 P.3d 1219 (Alaska 2001).
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[FN11] In re Reinstatement of Ramirez, 719 N.W.2d 920 (Minn. 2006).
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7 Am. Jur. 2d Attorneys at Law § 118

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Rachel M. Kane, M.A., J.D.

II. Judicial Supervision of Legal Profession
B. Disciplinary Proceedings
7. Reinstatement of Disbarred Attorney

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Krivinskas, "Don't File"; Rehabilitating Unauthorized Practice of Law-Based Policies in the Credit Counseling Industry, 79 Am. Bankr. L.J. 51 (2005)

Pouladian & Reed, "You Are Now Free to Move About the Country": Why Bankruptcy Lawyers Should Be Free to Engage in Multijurisdictional Practice, 52 UCLA L. Rev. 937 (2005)

The court reviews reinstatement cases de novo,[FN1] and will not reverse the findings of fact of a board of law examiners unless they are clearly erroneous.[FN2] However, a hearing panel's findings in support of a recommendation concerning a petition for reinstatement to the bar are given significant weight on appeal.[FN3]

In reviewing a bar association disciplinary board's decision on an attorney's petition for reinstatement, the court employs the same standard used in reviewing attorney discipline proceedings, as reinstatement is a part of attorney discipline.[FN4]

CUMULATIVE SUPPLEMENT

Cases:

Supreme Court exercises its judgment independently concerning a recommendation by Disciplinary Board with respect to an attorney's petition for reinstatement, and Supreme court also independently reviews the entire record, but it affords great weight to Disciplinary Board's findings of fact. In re Reinstatement of Wiederholt, 182 P.3d 1047 (Alaska 2008), as modified on denial of reh'g, (May 19, 2008).

The deference owed by Supreme Court to findings of fact by Bar Association Disciplinary Board concerning an attorney's petition for reinstatement derives from the responsibility to conduct disciplinary

proceedings which Supreme Court has delegated to the Bar Association. In re Reinstatement of Wiederholt, 182 P.3d 1047 (Alaska 2008), as modified on denial of reh'g, (May 19, 2008).

While Court of Appeals must ultimately determine whether an attorney meets the criteria for reinstatement after disbarment, the recommendations of the Board on Professional Responsibility and the Hearing Committee are entitled to great weight. In re Hollis, 968 A.2d 1037 (D.C. 2009).

In an attorney reinstatement proceeding, although the Supreme Court duly considers the recommendation of the panel of the lawyers professional responsibility board when a transcript of the panel hearing is ordered, the findings of fact and conclusions are not conclusive; however, the Court will uphold the panel's factual findings if they have evidentiary support in the record and are not clearly erroneous, and will defer to the credibility assessments of lower courts and tribunals. In re Disciplinary Action Against Holker, 765 N.W.2d 633 (Minn. 2009).

As a general rule, in an attorney reinstatement case, the Supreme Court will defer to a finding of the panel of the lawyers professional responsibility board that an attorney's testimony that he has undergone the requisite moral change is not credible. In re Disciplinary Action Against Holker, 765 N.W.2d 633 (Minn. 2009).

In an attorney reinstatement proceeding, although the Supreme Court duly considers the recommendation of the panel of the lawyers professional responsibility board when a transcript of the panel hearing is ordered, the findings of fact and conclusions are not conclusive; however, the Court will uphold the panel's factual findings if they have evidentiary support in the record and are not clearly erroneous, and will defer to the credibility assessments of lower courts and tribunals. 52 M.S.A., Lawyers Prof. Resp., Rule 14(e). In re Disciplinary Action Against Holker, 765 N.W.2d 633 (Minn. 2009).

Supreme Court independently reviews the entire record to determine whether a suspended attorney should be reinstated. In re Reinstatement of Mose, 754 N.W.2d 357 (Minn. 2008).

In determining whether to grant a suspended attorney's petition for reinstatement, Supreme Court defers to the credibility assessments of lower courts and tribunals. In re Reinstatement of Mose, 754 N.W.2d 357 (Minn. 2008).

Supreme Court will uphold factual findings of hearing panel in attorney reinstatement case if they have evidentiary support in the record and are not clearly erroneous. In re Reinstatement of Mose, 754 N.W.2d 357 (Minn. 2008).

In proceeding in which suspended attorney sought reinstatement to the practice of law, the hearing panel's findings were not binding on the Supreme Court, where attorney ordered a transcript of the hearing. In re Reinstatement of Mose, 754 N.W.2d 357 (Minn. 2008).

Supreme Court reviews attorney petitions for reinstatement under a de novo standard and is not bound by any manifest-error or substantial-evidence rule. Stewart v. The Mississippi Bar, 5 So. 3d 344 (Miss. 2008).

In reviewing an attorney's petition for reinstatement to the practice of law, the Supreme Court sits as trier of fact and therefore is not bound by substantial evidence or manifest error rules. In re Prisock, 5 So. 3d 319 (Miss. 2008).

The Supreme Court reviews an attorney's petition for reinstatement to the practice of law de novo. In re Prisock, 5 So. 3d 319 (Miss. 2008).

Supreme court is not bound by the hearing panel's recommendation in an attorney disciplinary proceeding and may make its own findings of fact and conclusions of law. In re Hazzard, 377 S.C. 482, 661 S.E.2d 102 (2008), reinstatement granted, 2008 WL 5120038 (S.C. 2008).

Appellate court rule, prohibiting an attorney from appearing as counsel in any "hearing" in a case pending before a court of the state until the attorney's required trial experiences have been approved by the Supreme Court, encompassed a lawyer's appearance at pretrial and status conferences. In re Curry, 373 S.C. 620, 647 S.E.2d 179 (2007).

When none of the first three grounds for reversal of hearing panel's decision to grant a disbarred attorney's petition for reinstatement to the practice of law are present, the panel's decision should be upheld unless the decision was either arbitrary or capricious, characterized by an abuse, or clearly unwarranted exercise, of discretion or lacking in support by substantial and material evidence. Hughes v. Board of Professional Responsibility of Supreme Court of Tennessee, 259 S.W.3d 631 (Tenn. 2008).

A trial court's review of a hearing panel's decision to grant a disbarred attorney's petition for reinstatement to practice law is limited to the transcript of the evidence before the hearing panel and its findings and judgment

unless allegations of irregularities in the procedure before the hearing panel are made. Hughes v. Board of Professional Responsibility of Supreme Court of Tennessee, 259 S.W.3d 631 (Tenn. 2008).

Amended standard of review for reviewing hearing panel's judgment in proceeding on a disbarred attorney's petition for reinstatement to the practice of law was procedural and remedial in nature, and thus, the rule applied retroactively to case that was pending when the amended standard took effect. Hughes v. Board of Professional Responsibility of Supreme Court of Tennessee, 259 S.W.3d 631 (Tenn. 2008).

[END OF SUPPLEMENT]

[FN1] In re Reinstatement of Hird, 2001 OK 28, 21 P.3d 1043 (Okla. 2001).
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[FN2] Shochet v. Arkansas Bd. of Law Examiners, 335 Ark. 176, 979 S.W.2d 888 (1998).
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[FN3] In re Dawkins, 432 Mass. 1009, 731 N.E.2d 534 (2000).
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[FN4] In re Reinstatement of Wiederholt, 24 P.3d 1219 (Alaska 2001).
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Propriety of Insurers' Use of Staff Attorneys to Represent Insureds, 2 A.L.R.6th 537

What Constitutes "Unauthorized Practice of Law" by Out-of-State Counsel, 83 A.L.R.5th 497

Validity and construction of contracts by organizations in business of providing expert witnesses, research assistance, and consultation services to attorneys in specific litigation, 70 A.L.R.5th 513

Disciplinary action against attorney for aiding or assisting another person in unauthorized practice of law, 41 A.L.R.4th 361

Layman's assistance to party in divorce proceeding as unauthorized practice of law, 12 A.L.R.4th 656

Trial Strategy

Existence of Attorney-Client Relationship, 48 Am. Jur. Proof of Facts 2d 525

Forms

Am. Jur. Legal Forms 2d §§ 30:119, 30:120

Am. Jur. Pleading and Practice Forms, Appearance §§ 4 to 45

Am. Jur. Pleading and Practice Forms, Attorneys at Law §§ 81 to 89

Law Reviews and Other Periodicals

Buhai, Act Like a Laywer, Be Judged Like a Lawyer: The Standard of Care for the Unlicensed Practice of Law, 2007 Utah L. Rev. 87 (2007)

Kennedy et al., Professionalism: Dealing with Unprofessional Conduct in Bankruptcy, 36 U. Mem. L. Rev. 575 (2006)

Krivinskas, "Don't File"; Rehabilitating Unauthorized Practice of Law-Based Policies in the Credit Counseling Industry, 79 Am. Bankr. L.J. 51 (2005)

Pouladian & Reed, "You Are Now Free to Move About the Country": Why Bankruptcy Lawyers Should Be Free to Engage in Multijurisdictional Practice, 52 UCLA L. Rev. 937 (2005)

The court has the power to regulate the practice of law, and that power encompasses the unauthorized practice of law.[FN1] It is a violation of his or her professional duties for an attorney to assist in the unauthorized practice of law by another,[FN2] or to practice law in a jurisdiction wherein he or she is not authorized to do so.[FN3] Thus, the practice of law by a person who is not a licensed attorney in good standing with the a state bar is prohibited.[FN4]

Rules forbidding lawyers from assisting laypersons in the unauthorized practice of law do not violate due process[FN5] or equal protection guarantees since the state's interests in preserving professional independence and in preventing incompetent legal assistance are adequate justifications for the rules.[FN6] Nor does a ban on the unauthorized practice of law implicate the First Amendment because it is directed at conduct, not speech.[FN7] Accordingly, the fact that a ban on the unauthorized practice of law touches on the legal content of the advice offered or the pleadings drafted by an unlicensed person is of no constitutional significance, since it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.[FN8]

In determining what constitutes the practice of law, the court must keep the public interest of primary concern, both in terms of the protection of the public as well as in ensuring that the regulation of the practice of law is not so strict that the public good suffers.[FN9] The purpose of prohibiting the unauthorized practice of law is to protect the public from incompetence in the preparation of legal documents and to prevent harm resulting from inaccurate legal advice.[FN10] Confining the practice of law to licensed attorneys is designed to protect the public from the potentially severe consequences of following advice on legal matters from unqualified persons; it is not intended to reserve to attorneys activities that may safely be conducted by laypersons.[FN11]

The “practice of law” is generally defined as doing and performing services in a court of justice in any matter pending therein throughout its various stages and in conformity with the adopted rules of procedure.[FN12] Since the court is vested with the exclusive authority to regulate the practice of law, the court has the power to define what constitutes the practice of law.[FN13] The character of the actions taken by the

individual in question is a significant factor in the determination of what constitutes the practice of law.[FN14] One of the touchstones of a state's ban on the unauthorized practice of law is an unlicensed person offering advice or judgment about legal matters to another person for use in a specific legal setting.[FN15] Unauthorized practice of law consists of rendering legal services for another by any person not admitted to practice in the state; thus, with limited exceptions, only a licensed attorney may provide legal advice, file pleadings and other legal papers in court, or manage court actions on another's behalf.[FN16] The unauthorized practice of law also includes representation on another's behalf during discovery, settlement negotiations, and pretrial conferences to resolve claims of legal liability, by any person not admitted to practice law in the state.[FN17]

While the tribunal before which the individual appears is not determinative in deciding what comprises the practice of law, i.e., whether or not the tribunal is called a "court" or the controversy "litigation," the nature of the proceedings in which the individual is acting is not to be wholly discounted.[FN18]

Suspended attorneys, disbarred attorneys, and attorneys who have resigned in the face of disciplinary charges are not members of a state bar for purposes of rules governing the investigation and prosecution of the unlicensed practice of law, but are instead "nonlawyers or nonattorneys" subject to the jurisdiction of the court if they engage in the unlicensed practice of law.[FN19]

Receipt of compensation is not necessary to engage in the unlicensed practice of law, and thus nonlawyers will be enjoined from giving legal advice regardless of whether they received compensation.[FN20]

Activities of nonlawyers in giving legal advice do not constitute protected speech.[FN21]

A referee's findings of fact in a report regarding the unlicensed practice of law are presumed correct and will be upheld unless clearly erroneous and lacking in evidentiary support.[FN22] Thus, a party seeking review in a proceeding concerning the unlicensed practice of law has the burden of showing that the referee's findings are clearly erroneous or unsupported by the record.[FN23]

Observation: There is no private right of action for the unauthorized practice of law.[FN24]

CUMULATIVE SUPPLEMENT

Cases:

Pro se plaintiff, who was not an attorney admitted to practice before the Court of Federal Claims, could not represent named plaintiffs who were not members of his immediate family without engaging in unauthorized practice of law. Chief War Eagle Family Ass'n & Treaty of 1837 & 1917 Reinstatement v. U.S., 81 Fed. Cl. 234 (2007).

Public accountant's act of meeting with clients to explain various estate planning documents, thereby rendering legal advice, after Supreme Court had issued order directing public accountant to cease and desist the unauthorized practice of law, constituted contempt of cease and desist order, even though accountant had arranged for Delaware lawyer to be present at such meetings to witness the execution of the legal documents, particularly considering false representations made to clients that lawyer played an active role in their estate planning. In re Estep, 933 A.2d 763 (Del. 2007).

Attorney's work at partnership he formed with non-attorneys, which included selection of legal forms to be completed for the partnership's clients, constituted the practice of law, in violation of the Rules of Professional Conduct. The Florida Bar v. Glueck, 985 So. 2d 1052 (Fla. 2008).

For the purposes of the rule of professional conduct prohibiting the unauthorized practice of law, the "practice" of law is the doing or performing of services in a court of justice, in any matter depending therein, throughout its various stages, and in conformity to the adopted rules of procedure, but in a larger sense it includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured, although such matter may or may not be depending in a court. In re Swisher, 285 Kan. 1084, 179 P.3d 412 (2008).

It is incumbent upon the Supreme Court to maintain the integrity of the legal profession by ensuring that those who hold themselves out to the public as attorneys are authorized to do so. Hipwell v. Kentucky Bar Ass'n, 267 S.W.3d 682 (Ky. 2008).

Disbursing mortgage funds does not in and of itself qualify as the practice of law. Real Estate Bar Ass'n for Massachusetts, Inc. v. National Real Estate Information Services, 459 Mass. 512, 946 N.E.2d 665 (2011).

The practice of law is not limited to the conduct of cases in court; it embraces the preparation of pleadings and other papers incident to actions and special proceedings and the management of such actions and proceedings on behalf of clients before judges and courts, and in addition conveyancing, the preparation of legal instruments of all kinds, and in general all advice to clients and all action taken for them in matters connected with the law. Disciplinary Counsel v. Brown, 121 Ohio St. 3d 423, 2009-Ohio-1152, 905 N.E.2d 163 (2009).

The practice of law is restricted to licensed practitioners as a means to protect the public against incompetence, divided loyalties, and other attendant evils that are often associated with unskilled representation. Ohio State Bar Assn. v. Newburn, 119 Ohio St. 3d 96, 2008-Ohio-3823, 892 N.E.2d 431 (2008).

Injunction, but no civil penalty, was warranted for non-attorney who engaged in unauthorized practice of law by preparing two documents that purported to convey easements in real property; non-attorney cooperated in investigation, agreed to stipulate to his wrongdoing, engaged in relatively small number of incidents of unauthorized practice that were comparatively harmless, attempted to convey the easement merely as an incident to his work and did not personally benefit beyond the compensation he received as a surveyor, ceased engaging in the conduct, admitted his wrongdoing, and accepted the recommended injunctive measures. Ohio State Bar Assn. v. Newburn, 119 Ohio St. 3d 96, 2008-Ohio-3823, 892 N.E.2d 431 (2008).

Jurisdiction of the Supreme Court extends to regulating the unauthorized practice of law in order to protect the public from agents who have not been qualified to practice law and who are not amenable to the general discipline of the court. Ohio State Bar Assn. v. Newburn, 119 Ohio St. 3d 96, 2008-Ohio-3823, 892 N.E.2d 431 (2008).

The "unauthorized practice of law" consists of rendering legal services for others by anyone not licensed or registered to practice law. Ohio State Bar Assn. v. Martin, 118 Ohio St. 3d 119, 2008-Ohio-1809, 886 N.E.2d 827 (2008).

The conduct of a non-attorney, in advising others on their legal rights and responsibilities, is the "practice of law," as is the preparation of legal pleadings and other legal papers without the supervision of an attorney licensed in Ohio. Ohio State Bar Assn. v. Martin, 118 Ohio St. 3d 119, 2008-Ohio-1809, 886 N.E.2d 827 (2008).

Unauthorized practice of law by non-lawyer franchisees could not be imputed to their former franchisor under an apparent-agency theory; former franchisor had informed franchisees that they could not practice law without being licensed members of the bar and had advised them to display signs in their store and to inform customers that they were not attorneys and that they were prohibited from offering legal advice, franchisor had instructed franchisees not to select forms or legal procedures for customers and not to tell them how to complete forms, franchisor had warned franchisees that selecting forms and discussing laws or legal procedures with customers would be construed as unauthorized practice of law and had instructed franchisees to refer customers' legal questions to franchisor's supervising attorney or to an attorney of a customer's choice, and franchisees told customers orally and through customer contracts that they were prohibited from offering legal advice. Ohio State Bar Assn. v. Martin, 118 Ohio St. 3d 119, 2008-Ohio-1809, 886 N.E.2d 827 (2008).

An allegation that an individual or entity has engaged in the unauthorized practice of law must be supported by either an admission or other evidence of the specific act or acts upon which the allegation is based. Ohio State Bar Assn. v. Martin, 118 Ohio St. 3d 119, 2008-Ohio-1809, 886 N.E.2d 827 (2008).

Conduct of law school graduate, who never passed Ohio bar examination and who did not possess license to practice law in Ohio, in holding himself out as member of Ohio bar to prospective clients and others, advising a person in corporate structuring strategies, and representing others' interests during settlement negotiations, warranted injunction forbidding law school graduate from holding himself out as licensed attorney, giving legal advice, participating on behalf of others in settlement negotiations, engaging in any other acts constituting practice of law, and ever again applying for admission to Ohio bar, including any application to take the bar examination, and also warranted imposition of $1,000 civil penalty. Disciplinary Counsel v. Robson, 116 Ohio St. 3d 318, 2007-Ohio-6460, 878 N.E.2d 1042 (2007).

The regulation of the practice of law is within the exclusive province of the Supreme Court. Const. Art. 5, § 4; Code 1976, § 40–5–10. Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 698 S.E.2d 244 (Ct. App. 2010).

[END OF SUPPLEMENT]

[FN1] Banks v. U.S., 926 A.2d 158 (D.C. 2007).
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[FN2] Rule 5.5(a), ABA Model Rules of Professional Conduct.
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[FN3] Rule 5.5(a), ABA Model Rules of Professional Conduct.
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[FN4] People v. Shell, 148 P.3d 162 (Colo. 2006), cert. denied, 127 S. Ct. 2881, 167 L. Ed. 2d 1157 (U.S. 2007).
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[FN5] People v. Shell, 148 P.3d 162 (Colo. 2006), cert. denied, 127 S. Ct. 2881, 167 L. Ed. 2d 1157 (U.S. 2007).
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[FN6] Lawline v. American Bar Ass'n, 956 F.2d 1378 (7th Cir. 1992).
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[FN7] People v. Shell, 148 P.3d 162 (Colo. 2006), cert. denied, 127 S. Ct. 2881, 167 L. Ed. 2d 1157 (U.S. 2007).
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[FN8] People v. Shell, 148 P.3d 162 (Colo. 2006), cert. denied, 127 S. Ct. 2881, 167 L. Ed. 2d 1157 (U.S. 2007).
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[FN9] Harkness v. Unemployment Compensation Bd. of Review, 591 Pa. 543, 920 A.2d 162 (2007).
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[FN10] Franklin v. Chavis, 371 S.C. 527, 640 S.E.2d 873 (2007).
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[FN11] Charter One Mortg. Corp. v. Condra, 865 N.E.2d 602 (Ind. 2007).
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[FN12] In re Utz, 48 Cal. 3d 468, 256 Cal. Rptr. 561, 769 P.2d 417 (1989).
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[FN13] Harkness v. Unemployment Compensation Bd. of Review, 591 Pa. 543, 920 A.2d 162 (2007).
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[FN14] Harkness v. Unemployment Compensation Bd. of Review, 591 Pa. 543, 920 A.2d 162 (2007).
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[FN15] People v. Shell, 148 P.3d 162 (Colo. 2006), cert. denied, 127 S. Ct. 2881, 167 L. Ed. 2d 1157 (U.S. 2007).
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[FN16] Cleveland Bar Assn. v. Baron, 106 Ohio St. 3d 259, 2005-Ohio-4790, 834 N.E.2d 343 (2005).
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[FN17] Disciplinary Counsel v. Alexicole, Inc., 105 Ohio St. 3d 52, 2004-Ohio-6901, 822 N.E.2d 348 (2004).
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[FN18] Harkness v. Unemployment Compensation Bd. of Review, 591 Pa. 543, 920 A.2d 162 (2007).
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[FN19] The Florida Bar v. Ross, 732 So. 2d 1037 (Fla. 1998).
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[FN20] The Florida Bar v. Smania, 701 So. 2d 835 (Fla. 1997).
- The fact that a testator's nonlawyer neighbor received no compensation was irrelevant to determining whether he engaged in the practice of law, by filling in the blanks in computer-generated generic will form. Franklin v. Chavis, 371 S.C. 527, 640 S.E.2d 873 (2007).
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[FN21] The Florida Bar v. Smania, 701 So. 2d 835 (Fla. 1997).
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[FN22] The Florida Bar v. Hughes, 697 So. 2d 501 (Fla. 1997).
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[FN23] The Florida Bar v. Eidson, 703 So. 2d 442 (Fla. 1997).
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[FN24] Franklin v. Chavis, 371 S.C. 527, 640 S.E.2d 873 (2007).
- A teacher, as a private individual, lacked a private right of action to compel the office of bar counsel to discipline an attorney who represented a student who allegedly engaged in certain improper conduct with the teacher. In re Request for an Investigation of an Attorney, 449 Mass. 1013, 867 N.E.2d 323 (2007).
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§ 120. Drafting of legal documents in general

West's Key Number Digest

The preparation of legal documents constitutes the "practice of law" when such preparation involves the giving of advice, consultation, explanation, or recommendations on matters of law.[FN1] Even the preparation of standard forms that require no creative drafting may constitute the practice of law if one acts as more than a mere scrivener.[FN2]

The unauthorized practice of law consists of rendering legal services and includes the preparation of legal pleadings and other papers without the supervision of an attorney licensed in the state.[FN3]

Giving legal advice and preparing wills, trusts, powers of attorney, and deeds, by an individual not admitted to the practice of law, constitutes the unauthorized practice of law.[FN4] In addition, a lawyer admitted to practice in another state, but not authorized to practice in the state in question, who counsels state clients on state law and drafts legal documents for them is engaged in the unauthorized practice of law in the state in question.[FN5]

Practice Tip: Briefs filed in a court by a non-lawyer on behalf of another are a nullity; this rule is the product of the state's policy against the unauthorized practice of law.[FN6]

CUMULATIVE SUPPLEMENT

Cases:

Proposition cannot be maintained, that whenever, for compensation, one person gives to another advice that involves some element of law, or performs for another some service that requires some knowledge of law, or drafts for another some document that has legal effect, he is "practicing law"; thus, for an activity to be considered the practice of law such that a non-lawyer cannot perform it without committing the unauthorized practice of law, the activity itself must generally fall wholly within the practice of law. Real Estate Bar Ass'n for Massachusetts, Inc. v. National Real Estate Information Services, 459 Mass. 512, 946 N.E.2d 665 (2011).

Conduct of non-attorney, in preparing documents that purported to convey easements in real property, constituted unauthorized practice of law. Ohio State Bar Assn. v. Newburn, 119 Ohio St. 3d 96, 2008-Ohio-3823, 892 N.E.2d 431 (2008).

The practice of law embraces the preparation of legal documents on another's behalf, including deeds which convey real property. Ohio State Bar Assn. v. Newburn, 119 Ohio St. 3d 96, 2008-Ohio-3823, 892 N.E.2d 431 (2008).

Preparing documents to convey another person's legal interests in property, such as the right of way that is the objective of an easement, constitutes the practice of law. Ohio State Bar Assn. v. Newburn, 119 Ohio St. 3d 96, 2008-Ohio-3823, 892 N.E.2d 431 (2008).

Non-lawyers engaged in unauthorized practice of law regarding customers' bankruptcy case, where non-lawyers explained to customers the differences between certain bankruptcy proceedings, recommended Chapter 7 bankruptcy over Chapter 13 bankruptcy, recommended whether to list certain items in customers' bankruptcy documents, advised customers which sections of documents to fill out, and made corrections to the documents. Ohio State Bar Assn. v. Martin, 118 Ohio St. 3d 119, 2008-Ohio-1809, 886 N.E.2d 827 (2008).

Conduct of two non-attorneys, their closely held corporation, and their business, in giving advice to people about their legal rights, including aid in preparing and completing legal documents, and charging fees for such services, constituted the unauthorized practice of law. Ohio State Bar Assn. v. Martin, 118 Ohio St. 3d 119, 2008-Ohio-1809, 886 N.E.2d 827 (2008).

Current franchisor, for a business in which non-lawyer franchisees gave advice to people about their legal rights, including aid in preparing and completing legal documents, engaged in unauthorized practice of law, where one of franchisor's employees sent e-mails advising franchisee's customer regarding her bankruptcy petition, and franchisor advised franchisees, who in turn advised other customers of franchisees concerning the preparation and appropriateness of certain probate forms. Ohio State Bar Assn. v. Martin, 118 Ohio St. 3d 119, 2008-Ohio-1809, 886 N.E.2d 827 (2008).

[END OF SUPPLEMENT]

[FN1] Franklin v. Chavis, 371 S.C. 527, 640 S.E.2d 873 (2007).
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[FN2] Franklin v. Chavis, 371 S.C. 527, 640 S.E.2d 873 (2007).
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[FN3] Cleveland Bar Assn. v. McKissic, 106 Ohio St. 3d 106, 2005-Ohio-3954, 832 N.E.2d 49 (2005).
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[FN4] Disciplinary Counsel v. Goetz, 107 Ohio St. 3d 22, 2005-Ohio-5830, 836 N.E.2d 556 (2005).
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[FN5] Cleveland Bar Assn. v. Moore, 87 Ohio St. 3d 583, 2000-Ohio-253, 722 N.E.2d 514 (2000).
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[FN6] Forman v. State Dept. of Children & Families, 956 So. 2d 476 (Fla. Dist. Ct. App. 4th Dist. 2007).
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§ 121. Sale of books or forms

West's Key Number Digest

West's Key Number Digest, Attorney and Client 11(1)

A.L.R. Library

Sale of books or forms designed to enable layman to achieve legal results without assistance of attorney as unauthorized practice of law, 71 A.L.R.3d 1000

Forms

Am. Jur. Pleading and Practice Forms, Attorneys at Law § 69 (Complaint or petition—Against publisher of legal form—By state bar association)

The sale of legal forms, without more, does not constitute the unauthorized practice of law.[FN1] A layperson may sell sample legal forms and printed material purporting to explain legal practice and procedure to the public in general.[FN2]

The sale of kits including forms and instructions for filing, together with the giving of advice, has been held by some courts to constitute the unauthorized practice of law.[FN3] On the other hand, taking the view that there can be no practice of law without the establishment of an individual attorney-client relationship, some courts have held that the sale of literature containing specific information on how a layperson may achieve a legal result without consulting an attorney does not constitute the unauthorized practice of law.[FN4]

The sale to customers of copyrighted forms for the organization of certain trusts, and the giving of advice concerning the use of these forms, constitutes the unauthorized practice of law.[FN5]

[FN1] Oregon State Bar v. Gilchrist, 272 Or. 552, 538 P.2d 913 (1975).

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[FN2] Florida Bar v. Brumbaugh, 355 So. 2d 1186 (Fla. 1978).

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[FN3] The Florida Bar v. Furman, 376 So. 2d 378 (Fla. 1979); Akron Bar Assn. v. Singleton, 60 Ohio Misc. 2d 19, 573 N.E.2d 1249 (Bd. Comm'rs on Unauthorized Practice of Law 1990).

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[FN4] State Bar v. Cramer, 399 Mich. 116, 249 N.W.2d 1 (1976) (abrogated on other grounds by, Dressel v. Ameribank, 468 Mich. 557, 664 N.W.2d 151 (2003)); In re Thompson, 574 S.W.2d 365 (Mo. 1978).

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[FN5] People ex rel. Dunbar v. Schmitt, 126 Colo. 546, 251 P.2d 915 (1952).

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§ 122. Assistance in divorce proceeding

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A.L.R. Library

Layman's assistance to party in divorce proceeding as unauthorized practice of law, 12 A.L.R.4th 656

A layperson who places an advertisement offering uncontested divorces for a sum of money holds himself or herself out to the public as a person qualified to practice law.[FN1] A layperson's giving of personal advice peculiar to the dissolution of a specific marriage constitutes the unauthorized practice of law.[FN2] The preparation and drafting by laypersons of pleadings and other documents to be used by persons appearing pro se in divorce proceedings, giving advice as to state laws and procedures, and appearing in court to assist and speak on behalf of such litigants constitutes the unauthorized practice of law.[FN3]

[FN1] McGiffert v. State ex rel. Stowe, 366 So. 2d 680 (Ala. 1978).
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[FN2] State Bar v. Cramer, 399 Mich. 116, 249 N.W.2d 1 (1976) (abrogated on other grounds by, Dressel v. Ameribank, 468 Mich. 557, 664 N.W.2d 151 (2003)).
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[FN3] Delaware State Bar Ass'n v. Alexander, 386 A.2d 652, 12 A.L.R.4th 637 (Del. 1978).
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Topic Summary Correlation Table References

§ 123. Drafting instruments incident to realty transactions

West's Key Number Digest

West's Key Number Digest, Attorney and Client 11(10)

A.L.R. Library

Drafting, or filling in blanks in printed forms, of instruments relating to land by real-estate agents, brokers, or managers as constituting practice of law, 53 A.L.R.2d 788

The drafting of deeds, bonds, mortgages, and other legal instruments associated with the transfer and encumbrance of the title to realty constitutes the unauthorized practice of law when performed by a layperson.[FN1] The filling in of blank deeds and other instruments by a real-estate broker constitutes the practice of law.[FN2]

Caution: Some courts have held that a licensed real-estate broker, a layperson, may in the regular course of business prepare deeds and other instruments incident to real-estate transactions at the request of a customer in connection with real-estate deals being handled by the broker.[FN3]

Some decisions hold that filling blanks in printed forms relating to real estate deals is a mere clerical act[FN4] unless the scrivener determines the kind of legal instrument that should be used for the transaction in question.[FN5]

CUMULATIVE SUPPLEMENT

Cases:

Nothing in the record suggested that multistate real estate settlement services provider or company that drafted deeds for it was engaging in the unauthorized "practice of law" in connection with the preparation of deeds, where provider's clients either supplied their own deed when one was required for a mortgage financing transaction, or requested that provider furnish one, and when deed was requested, provider engaged company that drafted deeds. Real Estate Bar Ass'n for Massachusetts, Inc. v. National Real Estate Information Services, 459 Mass. 512, 946 N.E.2d 665 (2011).

[END OF SUPPLEMENT]

[FN1] State v. Buyers Service Co., Inc., 292 S.C. 426, 357 S.E.2d 15 (1987).
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[FN2] Cleveland Bar Assn. v. Slavin, 62 Ohio Misc. 2d 570, 608 N.E.2d 870 (Bd. Comm'rs on Unauthorized Practice of Law 1993).
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[FN3] Pope County Bar Ass'n, Inc. v. Suggs, 274 Ark. 250, 624 S.W.2d 828 (1981); State Bar v. Guardian Abstract and Title Co., Inc., 92 N.M. 327, 587 P.2d 1338 (1978) (real estate title company).
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[FN4] Oregon State Bar v. Security Escrows, Inc., 233 Or. 80, 377 P.2d 334 (1962).
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[FN5] Hecomovich v. Nielsen, 10 Wash. App. 563, 518 P.2d 1081, 14 U.C.C. Rep. Serv. 674 (Div. 3 1974).
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Topic Summary Correlation Table References

§ 124. Services related to wills; estate planning

West's Key Number Digest

West's Key Number Digest, Attorney and Client 11(1)

A.L.R. Library

Drafting of Will or Other Estate-Planning Activities as Illegal or Unauthorized Practice of Law, 25 A.L.R.6th 323

Sale of books or forms designed to enable layman to achieve legal results without assistance of attorney as unauthorized practice of law, 71 A.L.R.3d 1000

While any adult person desiring to do so may prepare his or her own will,[FN1] drafting and supervising the execution of wills for others is clearly practicing law.[FN2] Likewise, preparing and filing petitions for probate of wills, appointment of administrators and the like is unauthorized practice of law when done voluntarily by persons without a beneficial interest in the corpus of the estate.[FN3]

The assembling, drafting, execution, and funding of a living trust document constitutes the practice of law because a living trust document involves the disposition of property at death and, thus, requires legal expertise; however, non-lawyers may gather the necessary information for the living trust.[FN4]

One not licensed to practice law who advises a particular person as to wills, trusts, and other schemes for the conservation and disposition of his or her estate at death, thereby engages in the unauthorized practice of law,[FN5] whether such advice is offered as a separate service or as an incident to carrying on the business of selling insurance.[FN6]

However, a nonlawyer's preparation for another person of a probate form renouncing the person's right to serve as personal representative of the estate of the person's child, and of a probate form enabling the nonlawyer to serve as personal representative without posting bond, does not constitute the practice of law where the forms are provided to the public by the probate court, and the nonlawyer filled in the blanks with handwritten information, such as names, addresses, and dates.[FN7]

[FN1] State v. Pledger, 257 N.C. 634, 127 S.E.2d 337 (1962).

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[FN2] Cleveland Bar Assn. v. Scali, 62 Ohio Misc. 2d 562, 608 N.E.2d 865 (Bd. Comm'rs on Unauthorized Practice of Law 1991).

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[FN3] Frazee v. Citizens Fidelity Bank & Trust Co., 393 S.W.2d 778 (Ky. 1964).

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[FN4] The Florida Bar re Advisory Opinion-Nonlawyer Preparation of Living Trusts, 613 So. 2d 426 (Fla. 1992).

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[FN5] In re The Florida Bar, 215 So. 2d 613, 34 A.L.R.3d 1298 (Fla. 1968).

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[FN6] Oregon State Bar v. John H. Miller & Co., 235 Or. 341, 385 P.2d 181 (1963).

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[FN7] Franklin v. Chavis, 371 S.C. 527, 640 S.E.2d 873 (2007).

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§ 125. Drafting trust agreements

West's Key Number Digest

West's Key Number Digest, Attorney and Client 11(5)

A.L.R. Library

Trust company's acts as fiduciary as practice of law, 69 A.L.R.2d 404

The conduct of a trust company in occasionally drafting trust agreements to which it is a party, without charging a fee, is properly incidental to its business as trustee, and does not amount to the practice of law.[FN1] A trust company empowered to act as a fiduciary is not engaged in the practice of law when it utilizes the services of an attorney/employee to draft revocable trust agreements containing no testamentary provision wherein the company is designated as trustee.[FN2] However, a trust company may not, through a staff attorney, draft wills, trust instruments, or other documents creating the duties of a trustee.[FN3]

A lawyer who assembles, reviews, executes, and funds a living trust document should be an independent counsel paid by the client and representing the client's interests alone.[FN4]

[FN1] Merrick v. American Security & Trust Co., 107 F.2d 271 (App. D.C. 1939).
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[FN2] Groninger v. Fletcher Trust Co., 220 Ind. 202, 41 N.E.2d 140 (1942).
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[FN3] Frazee v. Citizens Fidelity Bank & Trust Co., 393 S.W.2d 778 (Ky. 1964).
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[FN4] The Florida Bar re Advisory Opinion-Nonlawyer Preparation of Living Trusts, 613 So. 2d 426 (Fla. 1992).

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§ 126. Examining title and rendering opinion thereon

West's Key Number Digest

West's Key Number Digest, Attorney and Client 11(5)

A.L.R. Library

Title examination activities by lending institution, insurance company, or title and abstract company, as illegal practice of law, 85 A.L.R.2d 184

Forms

Am. Jur. Pleading and Practice Forms, Attorneys at Law § 70 (Complaint or petition—By individual attorney—Against title company engaging in unauthorized practice of law)

Rendering opinions on the validity of title constitutes the practice of law.[FN1] Neither due process nor equal protection rights of title companies are violated by construing a statute prohibiting the unauthorized practice of law to prohibit companies from conducting closings or filling in blanks in deeds.[FN2]

CUMULATIVE SUPPLEMENT

Cases:

A post-closing rundown of title to ensure that no encumbrances have been placed on the property prior to recording may constitute the practice of law as part of an over-all determination of marketability of title. Real Estate Bar Ass'n for Massachusetts, Inc. v. National Real Estate Information Services, 459 Mass. 512, 946 N.E.2d 665 (2011).

[END OF SUPPLEMENT]

[FN1] Kentucky State Bar Ass'n v. First Federal Sav. and Loan Ass'n of Covington, 342 S.W.2d 397, 85 A.L.R.2d 178 (Ky. 1960).

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[FN2] Coffee County Abstract and Title Co. v. State ex rel. Norwood, 445 So. 2d 852 (Ala. 1983).

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§ 127. Matters before administrative bodies

West's Key Number Digest

West's Key Number Digest, Attorney and Client 11(4)

A.L.R. Library

Handling, preparing, presenting, or trying workers' compensation claims or cases as practice of law, 58 A.L.R.5th 449

Since the character of the act done determines whether certain conduct constitutes the practice of law,[FN1] if the application of legal knowledge and technique is required, the activity constitutes the practice of law, even if conducted before an administrative board or commission.[FN2] Consequently, a layperson who holds himself or herself out to the public as qualified and able to advise persons seeking to make worker's compensation claims, as to the legal soundness of their claims and their rights as claimants, is engaging in the unauthorized practice of law.[FN3] A fortiori, if such a layperson, on behalf of a claimant, performs acts in the conduct of a worker's compensation proceeding which require a knowledge and skill in the law which cannot be possessed by a person not professionally qualified, because of involving applications of rules and principles of law to the facts as a whole or to the facts appearing at a particular stage thereof, as to both substantive and procedural matters, such person is practicing law.[FN4] However, in some jurisdictions there may be statutory authority for lay representation of worker's compensation claimants.[FN5] Further, the performance of an act in a worker's compensation proceeding which does not require legal knowledge or skill, such as filing a claim on blanks prepared and supplied by the compensation authority, which may be done by any person of ordinary intelligence on behalf of a compensation claimant, does not amount to the practice of law, at least if the proceeding has not become an adversary one.[FN6]

The representation of a party in a contested unfair labor practice proceeding constitutes the practice of law.[FN7]

A non-attorney representing an employer before a referee of an unemployment compensation board of review is not engaging in the practice of law.[FN8]

A state bar may not prohibit authorized, nonlawyer professionals from preparing and presenting documents relating to pension plans to federal agencies before which they are admitted to practice.[FN9]

CUMULATIVE SUPPLEMENT

Cases:

Attorney who was not admitted to practice in state engaged in the unauthorized practice of law when he filed notices of appeal of Workers' Compensation Commission decision, whether or not Commission was court of record and attorney was authorized to appear before it. Clarendon America Ins. Co. v. Hickok, 370 Ark. 41, 257 S.W.3d 43 (2007).

[END OF SUPPLEMENT]

[FN1] §§ 119, 120.

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[FN2] Baron v. City of Los Angeles, 2 Cal. 3d 535, 86 Cal. Rptr. 673, 469 P.2d 353, 42 A.L.R.3d 1036 (1970).

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[FN3] In re Unauthorized Practice of Law in Cuyahoga County, 175 Ohio St. 149, 23 Ohio Op. 2d 445, 192 N.E.2d 54, 2 A.L.R.3d 712 (1963).
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[FN4] Hoffmeister v. Tod, 349 S.W.2d 5 (Mo. 1961).
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[FN5] Bland v. Reed, 261 Cal. App. 2d 445, 67 Cal. Rptr. 859 (2d Dist. 1968).
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[FN6] West Virginia State Bar v. Earley, 144 W. Va. 504, 109 S.E.2d 420 (1959).
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[FN7] The Florida Bar v. Moses, 380 So. 2d 412 (Fla. 1980).
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[FN8] Harkness v. Unemployment Compensation Bd. of Review, 591 Pa. 543, 920 A.2d 162 (2007).
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[FN9] The Florida Bar Re Advisory Opinion—Nonlawyer Preparation of Pension Plans, 571 So. 2d 430 (Fla. 1990).
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§ 128. Preparing tax returns; negotiating with tax officials

West's Key Number Digest

West's Key Number Digest, Attorney and Client 11(11)

A.L.R. Library

Services in connection with tax matters as practice of law, 9 A.L.R.2d 797

Activities designed to secure tax reductions or refunds for others may constitute the unauthorized practice of law.[FN1] Factors that are significant in determining whether such activity constitutes the practice of law are whether the service to the taxpayer involves handling or controlling litigation if necessary,[FN2] whether an intermediary will be interposed between the real party in interest and a lawyer if one is engaged,[FN3] and whether the special knowledge required for the undertaking is legal.[FN4]

Observation: It was intimated, though not decided, in one case that when an accountant deals with a question of law which is only incidental to preparing a tax return, he or she is not engaged in the unauthorized practice of law.[FN5] However, an accountant may not as an independent service render opinions regarding tax liability based on his or her study of authorities in order to construe a tax statute.[FN6] Other jurisdictions have rejected the incidental test and have ruled that an accountant may not give legal advice or do legal work even in connection with his or her regular work as an accountant in tax matters.[FN7]

[FN1] Weber v. Garza, 570 F.2d 511 (5th Cir. 1978).

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[FN2] People ex rel. Courtney v. Association of Real Estate Taxpayers of Illinois, 354 Ill. 102, 187 N.E. 823 (1933).

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[FN3] People ex rel. Holzman v. Purdy, 162 N.Y.S. 65 (Sup 1916).

- Rule 1.8(f)(2), ABA Model Rules of Professional Conduct, provides that a lawyer must not accept compensation for representing a client from one other than the client unless there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship.

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[FN4] Gardner v. Conway, 234 Minn. 468, 48 N.W.2d 788 (1951).

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[FN5] Application of New York County Lawyers' Ass'n, 273 A.D. 524, 78 N.Y.S.2d 209, 9 A.L.R.2d 787 (1st Dep't 1948), order aff'd, 299 N.Y. 728, 87 N.E.2d 451 (1949).

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[FN6] Application of New York County Lawyers' Ass'n, 273 A.D. 524, 78 N.Y.S.2d 209, 9 A.L.R.2d 787 (1st Dep't 1948), order aff'd, 299 N.Y. 728, 87 N.E.2d 451 (1949).

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[FN7] Agran v. Shapiro, 127 Cal. App. 2d Supp. 807, 273 P.2d 619 (App. Dep't Super. Ct. 1954); Gardner v. Conway, 234 Minn. 468, 48 N.W.2d 788 (1951).

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§ 129. Adjusting claims

West's Key Number Digest

West's Key Number Digest, Attorney and Client 11(1)

A.L.R. Library

Activities of insurance adjusters as unauthorized practice of law, 29 A.L.R.4th 1156

An insurance adjuster does not engage in the unauthorized practice of law by providing an estimate of damage and filling out forms because an opinion concerning valuations of property damage does not equate to counseling a client to settle a claim.[FN1]

The counterpart of the claimant adjuster is the independent lay adjuster, not a salaried employee, who usually represents insurance companies against whom claims are directly or indirectly made and investigates and reports to the insurance carrier the facts respecting which a claim is made; the scope of a statute defining the practice of law may in some instances determine whether his or her activities constitute the practice of law.[FN2] A lay adjuster who performs acts which by their nature require a lawyer's training for their proper performance is engaged in the unauthorized practice of law.[FN3]

Efforts of an individual not licensed to practice law in pursuing insurance claims on behalf of others also constitutes the unauthorized practice of law.[FN4]

[FN1] Unauthorized Practice of Law Committee v. Jansen, 816 S.W.2d 813 (Tex. App. Houston 14th Dist. 1991), writ denied, (Jan. 8, 1992).
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[FN2] Wilkey v. State ex rel. Smith, 244 Ala. 568, 14 So. 2d 536, 151 A.L.R. 765 (1943).
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[FN3] Herman v. Prudence Mut. Cas. Co., 41 Ill. 2d 468, 244 N.E.2d 809 (1969).
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[FN4] Cincinnati Bar Assn. v. Cromwell, 82 Ohio St. 3d 255, 1998-Ohio-237, 695 N.E.2d 243 (1998).
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§ 130. Activities of law clerks

West's Key Number Digest

West's Key Number Digest, Attorney and Client 11(1)

A.L.R. Library

Activities of law clerks as illegal practice of law, 13 A.L.R.3d 1137

The functions of an unlicensed law clerk should be limited to work of a preparatory nature, such as research, investigation of details, assemblage of data, and like work that will enable the attorney/employer to carry a given matter to a conclusion through his or her own examination, approval, or additional effort; the activities of a law clerk do not constitute the practice of law so long as they are thus limited.[FN1] On the other hand, an unlicensed law clerk who engages in activities requiring legal knowledge or training, such as handling probate matters, examination of abstract titles, and preparation of wills, leases, mortgages, bills of sales, or contracts, without supervision from his or her employer, thereby engages in the unauthorized practice of law.[FN2]

An inmate law clerk, whose responsibility within the institution is to assist individuals in their own research while utilizing the prison law library, may not be appointed as a spokesperson or advocate for a petitioner in

place of the petitioner's court-appointed attorney because there is no authority which permits a layperson to appear on another person's behalf and to act on his or her behalf unless admitted to so practice.[FN3]

A legal intern's participation at trial, including presentation of the closing argument, does not constitute the unauthorized practice of law, even if the requisite written authorizations for the intern's participation are not filed with the court, if the supervising attorney filed the action and is present throughout the trial.[FN4]

CUMULATIVE SUPPLEMENT

Cases:

Attorney's conduct, with respect to law school graduate, who had not passed the bar examination but who was employed as a paralegal at attorney's law firm, constituted assistance to a nonlawyer's unauthorized practice of law, in violation of professional conduct rule prohibiting an attorney from assisting a person who was not a member of the bar in the performance of activity that constituted the unauthorized practice of law; without supervision from attorney, law school graduate engaged in the ongoing practice of law in employment discrimination cases, with attorney allowing law school graduate to file actions under attorney's name, and with attorney being aware of nature and extent of law school graduate's unsupervised practice of law. S.J.C.Rule 3:07, Rules of Prof.Conduct, Rule 5.5(b). In re Hrones, 457 Mass. 844, 933 N.E.2d 622 (2010).

[END OF SUPPLEMENT]

[FN1] People v. Alexander, 53 Ill. App. 2d 299, 202 N.E.2d 841, 13 A.L.R.3d 1132 (1st Dist. 1964).
- As to membership classification in integrated bar of court law clerk, see § 7.
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[FN2] Crawford v. State Bar of Cal., 54 Cal. 2d 659, 7 Cal. Rptr. 746, 355 P.2d 490 (1960).
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[FN3] Maldonado v. New York State Bd. of Parole, 102 Misc. 2d 880, 424 N.Y.S.2d 589 (Sup 1979).
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[FN4] Hayden v. Elam, 739 So. 2d 1088 (Ala. 1999).
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West's Key Number Digest

West's Key Number Digest, Attorney and Client 11(1)

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Propriety of Insurers' Use of Staff Attorneys to Represent Insureds, 2 A.L.R.6th 537

Prepaid legal services plans, 93 A.L.R.3d 199

Trial Strategy

Existence of Attorney-Client Relationship, 48 Am. Jur. Proof of Facts 2d 525

Forms

Am. Jur. Legal Forms 2d, Insurance § 149:88 (Employment of counsel by company in defense of legal proceedings)

Am. Jur. Pleading and Practice Forms, Attorneys at Law § 68 (Complaint or petition—By bar association committee—Against business association engaged in unauthorized practice of law)

A corporation cannot lawfully engage in the practice of law, and it cannot lawfully engage in the practice of law through its officers who are not licensed to practice law.[FN1] A corporation may properly utilize the services of a staff attorney to conduct its legal affairs.[FN2] However, a corporation may not designate a non-attorney employee to represent it.[FN3] Nevertheless, a corporation's president, as a full-time employee or officer of the corporation, may appear in small claims court on behalf of the corporation, even though the corporation's president is not licensed as an attorney.[FN4]

With certain limited exceptions,[FN5] a corporation may not perform legal services for others,[FN6] or indirectly practice law through the employment of lawyers to perform services for others.[FN7]

In some jurisdictions incorporated prepaid legal care plans have been deemed to be organized for charitable purposes and, thus, to fall within a statutory exception to the laws forbidding practice of law by corporations.[FN8]

A contract for debt collection is unenforceable as calling for the unauthorized practice of law where it authorizes the collection agency to institute legal action to collect specific accounts receivable.[FN9]

CUMULATIVE SUPPLEMENT

Cases:

Corporation and individual who was not admitted to practice law in the state engaged in the unauthorized practice of law by preparing and selling living trust agreements and other estate planning documents to customers in the state. Cincinnati Bar Assn. v. Mid-South Estate Planning, L.L.C., 121 Ohio St. 3d 214, 2009-Ohio-747, 903 N.E.2d 295 (2009).

Limited liability company engaged in unauthorized practice of law when it marketed and sold living trusts and other estate planning documents and provided legal advice regarding estate planning. Cincinnati Bar Assn. v. Mid-South Estate Planning, L.L.C., 121 Ohio St. 3d 212, 2009-Ohio-749, 903 N.E.2d 294 (2009).

Entities, including insurance companies, are excluded from the practice of law. Unauthorized Practice of Law Committee v. American Home Assur. Co., Inc., 261 S.W.3d 24 (Tex. 2008).

[END OF SUPPLEMENT]

[FN1] Disciplinary Counsel v. Alexicole, Inc., 105 Ohio St. 3d 52, 2004-Ohio-6901, 822 N.E.2d 348 (2004).
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[FN2] Arkansas Bar Ass'n v. Union Nat. Bank of Little Rock, 224 Ark. 48, 273 S.W.2d 408 (1954).
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[FN3] Quinn v. Housing Authority of City of Orlando, 385 So. 2d 1167 (Fla. Dist. Ct. App. 5th Dist. 1980).
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[FN4] Babe Houser Motor Co., Inc. v. Tetreault, 270 Kan. 502, 14 P.3d 1149 (2000).
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[FN5] § 133.
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[FN6] Remole Soil Service, Inc. v. Benson, 68 Ill. App. 2d 234, 215 N.E.2d 678 (4th Dist. 1966).
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[FN7] Frazee v. Citizens Fidelity Bank & Trust Co., 393 S.W.2d 778 (Ky. 1964).
- As to validity of lawyer-reference systems, generally, see § 10.
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[FN8] Connors v. Katz, 57 A.D.2d 580, 393 N.Y.S.2d 579, 93 A.L.R.3d 196 (2d Dep't 1977).
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[FN9] Med Controls, Inc. v. Hopkins, 61 Ohio App. 3d 497, 573 N.E.2d 154 (8th Dist. Cuyahoga County 1989).
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§ 132. Handling of probate matters

West's Key Number Digest

West's Key Number Digest, Attorney and Client 11(1)

A.L.R. Library

Necessity that executor or administrator be represented by counsel in presenting matters in probate court, 19 A.L.R.3d 1104

Trust company's acts as fiduciary as practice of law, 69 A.L.R.2d 404

A trust company's conducting probate proceedings through its staff attorneys in matters where the company is designated as executor generally does not constitute the unauthorized practice of law.[FN1] Some decisions qualify this broad statement and require outside counsel if there is a conflict of interest between the fiduciary and the beneficiary.[FN2] Others hold, without qualification, that the trust company must employ outside counsel for these purposes.[FN3]

[FN1] Judd v. City Trust & Sav. Bank, 133 Ohio St. 81, 10 Ohio Op. 95, 12 N.E.2d 288 (1937).
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[FN2] Groninger v. Fletcher Trust Co., 220 Ind. 202, 41 N.E.2d 140 (1942).
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[FN3] Frazee v. Citizens Fidelity Bank & Trust Co., 393 S.W.2d 778 (Ky. 1964).
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§ 133. Professional service corporation

West's Key Number Digest

West's Key Number Digest, Attorney and Client 11(1)

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Issues pertaining to ownership of professional corporation as affected by resignation from corporate practice by active shareholder, 32 A.L.R.4th 921

Restrictions on right of legal services corporation or "public interest" law firm to practice, 26 A.L.R.4th 614

Propriety, under state statutes or bar association or court rules, of formation of multistate law partnership or professional service corporation, 6 A.L.R.4th 1251

Practice by attorneys and physicians as corporate entities or associations under professional service corporation statutes, 4 A.L.R.3d 383

Forms

Am. Jur. Legal Forms 2d, Corporations § 74:852 (Articles or certificate of incorporation for professional corporation—General form)

Am. Jur. Legal Forms 2d, Corporations § 74:860 (Purpose clause—Professional service corporation)

Am. Jur. Legal Forms 2d, Corporations § 74:854 (Articles of incorporation for professional corporation—Certification of authorization to practice profession attached)

Am. Jur. Legal Forms 2d, Corporations § 74:855 (Articles of incorporation for professional corporation—Attorneys)

Am. Jur. Legal Forms 2d, Corporations § 74:862 (Purpose clause—Professional service corporation—Law practice)

Am. Jur. Legal Forms 2d, Judges § 156:14 (Provision—Law partnership agreement—Withdrawal of partner upon election or appointment to judgeship)

Am. Jur. Legal Forms 2d, Judges § 156:15 (Provision—Articles of incorporation for professional law corporation—Termination of right to own stock upon election or appointment to judgeship)

In response to efforts by the legal profession to partake of the advantages of fringe benefit programs such as qualified pension plans, profit-sharing plans, deferred-compensation plans, and insurance coverage, most jurisdictions have authorized the practice of law by professional service corporations.[FN1] Local state law, rather than federal legislation or regulations, governs in determining whether the legal relationships established in the formation of the organization are such that federal standards are met for the purposes of taxation.[FN2]

Even if state legislation exists permitting the organization of a public service corporation for the practice of law, ordinarily there must also be an amendment of the local rules of court governing the bar before such corporations may be formed.[FN3]

Legislation authorizing the practice of law in corporate form in no way detracts from the court's disciplinary powers over the individual attorney as well as the professional association itself,[FN4] and does not relieve the individual practitioner through whom the corporation practices from his or her obligation to abide by all the rules and canons of professional ethics.[FN5]

A lawyer may not practice with or in the form of a professional corporation or association authorized to practice law for a profit if a nonlawyer owns any interest therein or is a corporate director or officer thereof, or has the right to direct or control the professional judgment of a lawyer.[FN6]

A law partnership with attorneys admitted to practice in the forum state may associate with an out-of-state firm if the attorneys indicate on their letterhead that they were the only attorneys in the firm admitted to practice in the state.[FN7]

[FN1] Petition of Bar Ass'n of Hawaii, 55 Haw. 121, 516 P.2d 1267 (1973).
- As to use of assumed or trade name, see § 78.
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[FN2] In re Florida Bar, 133 So. 2d 554, 4 A.L.R.3d 375 (Fla. 1961).
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[FN3] Petition of Bar Ass'n of Hawaii, 55 Haw. 121, 516 P.2d 1267 (1973).
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[FN4] Petition of New Hampshire Bar Ass'n, 110 N.H. 356, 266 A.2d 853 (1970).
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[FN5] In re Florida Bar, 133 So. 2d 554, 4 A.L.R.3d 375 (Fla. 1961).
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[FN6] Rule 5.4(d), ABA Model Rules of Professional Conduct.
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[FN7] Singer Hutner Levine Seeman & Stuart v. Louisiana State Bar Ass'n, 378 So. 2d 423, 6 A.L.R.4th 1244 (La. 1979).

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II. Judicial Supervision of Legal Profession
C. Judicial Prevention of Unauthorized Practice of Law
1. In General; What Constitutes Practice of Law
b. Practice by Corporations

Topic Summary Correlation Table References

§ 134. Legal assistance corporations

West's Key Number Digest

West's Key Number Digest, Attorney and Client 11(1)

A.L.R. Library

Restrictions on right of legal services corporation or "public interest" law firm to practice, 26 A.L.R.4th 614

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer.[FN1] However, the lawyer must not knowingly participate in a decision or action of the organization if participating in the decision or action would be incompatible with the lawyer's obligations to a client under the conflict of interest rule, or where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.[FN2]

A federally funded corporation providing legal assistance to the disadvantaged must be directly controlled and supervised by lawyers responsible to the court for the maintenance of professional standards.[FN3] The

executive staff, and those with the responsibility to hire and discharge staff, must be lawyers.[FN4] However, those who sponsor a legal assistance corporation need not be lawyers.[FN5]

CUMULATIVE SUPPLEMENT

Cases:

Restrictions on lobbying, soliciting clients, and participating in class actions that Congress imposed on legal aid organizations that received federal grants through Legal Services Corporation (LSC) comported with requirements of First Amendment, since Congress did not discriminate against any particular viewpoint or motivating ideology, much less did it aim to suppress ideas inimical to government's own interest; restrictions simply limited specific procedural tools and strategies that grantee attorneys could utilize in course of carrying out their legal advocacy. U.S.C.A. Const.Amend. 1; 45 C.F.R. § 1610.8; 45 C.F.R. § 1642.3 (2007). Legal Aid Services of Oregon v. Legal Services Corp., 608 F.3d 1084 (9th Cir. 2010).

[END OF SUPPLEMENT]

[FN1] Rule 6.3, ABA Model Rules of Professional Conduct.
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[FN2] Rule 6.3(a), (b), ABA Model Rules of Professional Conduct.
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[FN3] Application of Community Action for Legal Services, Inc., 26 A.D.2d 354, 274 N.Y.S.2d 779 (1st Dep't 1966).
- As to the Legal Services Corporation, generally, see Am. Jur. 2d, Welfare Laws § 50.
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[FN4] Application of Community Action for Legal Services, Inc., 26 A.D.2d 354, 274 N.Y.S.2d 779 (1st Dep't 1966).
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[FN5] Application of Community Action for Legal Services, Inc., 26 A.D.2d 354, 274 N.Y.S.2d 779 (1st Dep't 1966).
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Topic Summary Correlation Table References

§ 135. Who may challenge infringing activities

West's Key Number Digest

West's Key Number Digest, Attorney and Client 11(1)

A.L.R. Library

Right of party litigant to defend or counterclaim on ground that opposing party or his attorney is engaged in unauthorized practice of law, 7 A.L.R.4th 1146

Right to enjoin business competitor from unlicensed or otherwise illegal acts or practices, 90 A.L.R.2d 7

Petitions seeking judicial action against persons charged with the unauthorized practice of law may be entertained by the courts when filed by the attorney general,[FN1] by a local bar association or one of its committees,[FN2] on behalf of the state bar or one of its committees,[FN3] or by individual practitioners.[FN4] **Observation:** It has been held that an incorporated county bar association has no standing to sue in its corporate capacity to enjoin the alleged unlawful practice of law by other corporations, on the ground that all actions must be prosecuted in the name of the real party in interest and the bar association as such has no interest, apart from the interests of its members, in policing the practice of law;[FN5] however, at least one court has held that an action to enjoin the practice of law is brought on behalf of the public and that no pecuniary or property interest of the plaintiff bar association need be involved to justify the entry of a decree restraining the defendant from future improper acts.[FN6]

An attorney general's statutory authority to maintain an “action” for conduct prohibited by law as constituting the unlawful practice of law extends only to maintenance of a civil action, and does not allow criminal prosecution; a bar association was similarly authorized by statute to pursue “actions” against violators, where a mandatory statutory remedy of a restraining order is civil in nature, the prior version of the statute was civil in nature, and other statutes specifically authorize “prosecutions” where criminal prosecutions were intended.[FN7]

Even if no defendant files a motion calling attention to the lack of authority under the applicable law for an individual who is not an attorney admitted to practice to appear in a court on behalf of one or more other natural persons or legal entities, the court must take notice of such a lack of authority and make an appropriate order.[FN8]

An Unauthorized Practice of Law Committee's authority to institute legal proceedings to prohibit the unauthorized practice of law is not exclusive.[FN9]

[FN1] Public Service Commission v. Hahn Transp., Inc., 253 Md. 571, 253 A.2d 845 (1969).
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[FN2] Mahoning Cty. Bar Assn. v. Rector, 62 Ohio Misc. 2d 564, 608 N.E.2d 866 (Bd. Comm'rs on Unauthorized Practice of Law 1992).
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[FN3] Huber v. State Bar, 237 Ga. 825, 229 S.E.2d 647 (1976).
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[FN4] Touchy v. Houston Legal Foundation, 432 S.W.2d 690 (Tex. 1968).
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[FN5] Bar Ass'n of Montgomery County v. District Title Ins. Co., 224 Md. 474, 168 A.2d 395 (1961).
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[FN6] Washington State Bar Ass'n v. Washington Ass'n of Realtors, 41 Wash. 2d 697, 251 P.2d 619 (1952).
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[FN7] People v. Romero, 91 N.Y.2d 750, 675 N.Y.S.2d 588, 698 N.E.2d 424 (1998).
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[FN8] Matthews v. Cordeiro, 144 F. Supp. 2d 37 (D. Mass. 2001).
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[FN9] In re Nolo Press/Folk Law, Inc., 991 S.W.2d 768 (Tex. 1999).
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II. Judicial Supervision of Legal Profession
C. Judicial Prevention of Unauthorized Practice of Law
2. Procedure to Restrain Unauthorized Practice

Topic Summary Correlation Table References

§ 136. Methods of restraint

West's Key Number Digest

West's Key Number Digest, Attorney and Client 11(1)

A.L.R. Library

Right to enjoin business competitor from unlicensed or otherwise illegal acts or practices, 90 A.L.R.2d 7

Forms

Am. Jur. Pleading and Practice Forms, Attorneys at Law § 64 (Complaint or petition—By state bar association—Against attorney engaging in unauthorized practice of law)

Am. Jur. Pleading and Practice Forms, Attorneys at Law § 65 (Complaint or petition—By state bar association—Against attorney assisting others in unauthorized practice of law)

Am. Jur. Pleading and Practice Forms, Attorneys at Law §§ 66, 67 (Complaint or petition—By state licensing authority—To enjoin unlicensed individual from unauthorized practice of law)

Am. Jur. Pleading and Practice Forms, Attorneys at Law § 71 (Order—Granting temporary restraining order enjoining unauthorized practice of law)

Am. Jur. Pleading and Practice Forms, Attorneys at Law § 72 (Order—To show cause why layperson should not be punished for contempt and enjoined from unauthorized practice of law)

Am. Jur. Pleading and Practice Forms, Attorneys at Law § 73 (Order or judgment—Permanently enjoining nonlawyer from unauthorized practice of law—Specification of permitted activities)

Am. Jur. Pleading and Practice Forms, Attorneys at Law § 74 (Order or judgment—Holding nonlawyer in contempt of court for unauthorized practice of law)

Various legal methods have been employed in different jurisdictions to suppress the unauthorized practice of law, including injunctions,[FN1] punishment for contempt of court,[FN2] suspension,[FN3] and a monetary penalty.[FN4]

CUMULATIVE SUPPLEMENT

Cases:

The nullity rule does not automatically apply to every instance where a layperson has engaged in the unauthorized practice of law. Downtown Disposal Services, Inc. v. City of Chicago, 347 Ill. Dec. 895, 943 N.E.2d 185 (App. Ct. 1st Dist. 2011).

[END OF SUPPLEMENT]

[FN1] The Florida Bar v. Eidson, 703 So. 2d 442 (Fla. 1997); Cleveland Bar Assn. v. McKissic, 106 Ohio St. 3d 106, 2005-Ohio-3954, 832 N.E.2d 49 (2005).

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[FN2] People v. Shell, 148 P.3d 162 (Colo. 2006), cert. denied, 127 S. Ct. 2881, 167 L. Ed. 2d 1157 (U.S. 2007).

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[FN3] In re Hunter, 273 Kan. 1015, 46 P.3d 1199 (2002), reinstatement granted, 274 Kan. 914, 58 P.3d 112 (2002); Kentucky Bar Ass'n v. Carter, 986 S.W.2d 448 (Ky. 1999).

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[FN4] The Florida Bar v. We The People Forms And Service Center of Sarasota, Inc., 883 So. 2d 1280 (Fla. 2004).

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III. Attorney-Client Relationship
A. Creation and Nature

Topic Summary Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Attorney and Client 63, 64, 105, 106

A.L.R. Library

A.L.R. Index, Attorney or Assistance of Attorney

West's A.L.R. Digest, Attorney and Client 63, 644, 1055, 1066

Forms

Am. Jur. Legal Forms 2d, Attorneys at Law §§ 30:7 to 30:14, 30:16, 30:17, 30:121 to 30:126

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III. Attorney-Client Relationship
A. Creation and Nature

Topic Summary Correlation Table References

§ 137. Generally; retainer

West's Key Number Digest

West's Key Number Digest, Attorney and Client 63, 64, 105, 106

Forms

Am. Jur. Legal Forms 2d, Attorneys at Law § 30:7 (Contract to employ attorney—Fixed fee)

Am. Jur. Legal Forms 2d, Attorneys at Law § 30:8 (Contract to employ law firm—Non-contingent fee—Disclosure by firm to client)

Am. Jur. Legal Forms 2d, Attorneys at Law §§ 30:9 to 30:14 (Contract to employ attorney—Contingent fee)

Am. Jur. Legal Forms 2d, Attorneys at Law §§ 30:16, 30:17 (Contracts to employ attorney—Hourly fee)

Am. Jur. Legal Forms 2d, Attorneys at Law §§ 30:19 to 30:46 (Particular employment agreements)

Am. Jur. Legal Forms 2d, Attorneys at Law §§ 30:121 to 30:126 (Retainers)

An attorney-client relationship is based upon principles of agency, and thus, two factors are essential in establishing such a relationship: (1) the attorney must be authorized to act for the client, and (2) the client must exercise control over the attorney.[FN1] A plaintiff's subjective belief that an attorney-client relationship exists, standing alone, cannot create such a relationship, or a duty of care owed by the attorney to that plaintiff; instead, it is the intent and conduct of the parties that controls the question as to whether an attorney-client relationship has been created.[FN2] An attorney-client relationship is created when (1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney's professional competence, and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance.[FN3]

The authority of an attorney begins with his or her retainer,[FN4] but a formal contract is not necessary to create this relationship.[FN5] While written agreements may be preferable, lack of a writing does not preclude a finding that an attorney-client relationship was formed.[FN6] Determination of the existence of an implied contract for legal services involves an examination of the communications and circumstances surrounding a transaction.[FN7] Whether an attorney-client relationship exists is usually a question of fact that depends on the communications and circumstances.[FN8]

Unless there is an agreement to the contrary, the retention of an attorney in a law firm constitutes the retention of the entire firm.[FN9]

CUMULATIVE SUPPLEMENT

Cases:

There was no evidence that sole member of limited liability company (LLC) and attorney mutually agreed to enter into a contract regarding formation of LLC; member in fact explicitly denied that she requested attorney to assist her with the establishment of LLC. Sloan v. Urban Title Services, Inc., 689 F. Supp. 2d 94 (D.D.C. 2010).

No attorney-client relationship existed with respect to removal proceedings before the Immigration Court, where there was no evidence that client manifested to attorney his intent that attorney provide legal services with respect to the removal proceedings. Attorney Grievance Com'n v. Akpan, 405 Md. 277, 950 A.2d 820 (2008).

Attorney-client relationship was created prior to client's signing retainer agreement, where client gave attorney documents necessary for representation and remitted a $1,300 retainer fee, and attorney accepted the documents and withdrew $600 non-refundable engagement fee. Attorney Grievance Com'n of Maryland v. Kreamer, 404 Md. 282, 946 A.2d 500 (2008).

Ordering named partner in law firm to file an appearance on behalf of firm's client after firm attorney representing client decided to leave practice was improper, because language of the agreement was clear that the agreement was between client and partner's firm, not partner individually, even though partner did not specify that he signed the agreement on behalf of his firm rather than individually. Restatement (Third) of the Law Governing Lawyers § 14 comment. In re Kiley, 459 Mass. 645, 947 N.E.2d 1 (2011).

Written retainer agreement, for attorney's representation of client in civil appeal, was sufficiently clear to demonstrate a meeting of the minds between the parties as to all essential terms of the contract, as required for a binding contract, though the agreement did not specify an exact total price for attorney's services; the agreement contained specified hourly rates, those rates confirmed that the parties agreed that attorney would charge, and client would pay, a reasonable price, and the agreement was explicit as to the services to be rendered and the manner that would be used in determining the price. David J. Sacks, P.C. v. Haden, 266 S.W.3d 447 (Tex. 2008).

No attorney-client relationship existed between former employee and lawyers for employer and former employee's former business partner by virtue of settlement agreement between former employee, employer, former employee's former business partner, pursuant to which former employee acquired a contingent financial interest in former employer's ongoing suit against unrelated third party, as necessary for former employee to

establish claims against lawyers for professional negligence and breach of fiduciary duty; agreement repeatedly identified employer and former business partner, not former employee, as the "client" or "clients" of lawyers, agreement did not obligate former employee to compensate lawyers, and record contained no request by former employee, or agreement by lawyers, to represent former employee. Valls v. Johanson & Fairless, L.L.P., 314 S.W.3d 624 (Tex. App. Houston 14th Dist. 2010).

[END OF SUPPLEMENT]

[FN1] Dunkley v. Shoemate, 350 N.C. 573, 515 S.E.2d 442 (1999).
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[FN2] Zenith Ins. Co. v. Cozen O'Connor, 148 Cal. App. 4th 998, 55 Cal. Rptr. 3d 911 (2d Dist. 2007).
-

[FN3] State ex rel. Stivrins v. Flowers, 273 Neb. 336, 729 N.W.2d 311 (2007).
-

[FN4] Stone v. Bank of Commerce, 174 U.S. 412, 19 S. Ct. 747, 43 L. Ed. 1028 (1899).
-

[FN5] Lister v. State Bar, 51 Cal. 3d 1117, 275 Cal. Rptr. 802, 800 P.2d 1232 (1990).
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[FN6] In re Moore, 449 Mass. 1009, 866 N.E.2d 897 (2007).
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[FN7] McIntosh County Bank v. Dorsey & Whitney, LLP, 726 N.W.2d 108 (Minn. Ct. App. 2007), review granted, (Mar. 20, 2007).
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[FN8] McIntosh County Bank v. Dorsey & Whitney, LLP, 726 N.W.2d 108 (Minn. Ct. App. 2007), review granted, (Mar. 20, 2007).
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[FN9] PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP, 150 Cal. App. 4th 384, 58 Cal. Rptr. 3d 516 (2d Dist. 2007).
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A. Creation and Nature

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§ 138. Relationship as fiduciary and confidential

West's Key Number Digest

West's Key Number Digest, Attorney and Client 63

A.L.R. Library

Crime-Fraud Exception to Attorney-Client Privilege in State Courts—Contemplated Crime, 9 A.L.R.6th 363

Trial Strategy

Proof of Basis for, and Grounds For Lifting, Work Product Protection Against Discovery, 39 Am. Jur. Proof of Facts 3d 1

Proof of Waiver of Attorney-Client Privilege, 32 Am. Jur. Proof of Facts 3d 189

Existence of Attorney-Client Relationship, 48 Am. Jur. Proof of Facts 2d 525

The relationship between an attorney and a client is highly fiduciary in its nature and of a very delicate, exacting, and confidential character, requiring a high degree of fidelity and good faith.[FN1] A fundamental principle in the attorney-client relationship is that the attorney shall maintain the confidentiality of any information learned during the attorney-client relationship.[FN2] The identity of an attorney's clients is sensitive personal information that implicates the clients' rights of privacy; every person has the right to freely confer with and confide in his or her attorney in an atmosphere of trust and serenity.[FN3] Thus, an attorney should not place himself or herself in a position where there may be the temptation to take advantage of information derived from confidential communications.[FN4]

Because of the importance of ethical principles relating to the preservation of confidentiality in the attorney-client relationship, it is the court's duty to safeguard the preservation of the relationship; in doing so, the court helps to maintain public confidence in the legal profession, and assists in protecting the integrity of a judicial proceeding.[FN5]

The attorney-client relationship is an agency relationship;[FN6] the attorney's acts and omissions within the scope of his or her employment are regarded as the client's acts.[FN7] Thus, two factors are essential in establishing such a relationship: (1) the attorney must be authorized to act for the client; and (2) the client must exercise control over the attorney.[FN8]

CUMULATIVE SUPPLEMENT

Statutes:

Fed. R. Evid. 502, as added and effective September 19, 2008, limits the waiver of the attorney-client privilege and work product protection.

Cases:

The fact that a client may chose to confide to others information relating to an attorney's representation of the client does not waive or negate the confidentiality protections of the applicable rules of professional conduct. Rules of Prof.Conduct, Rules 1.6, 1.9, 1.18. In re Anonymous, 932 N.E.2d 671 (Ind. 2010).

[END OF SUPPLEMENT]

[FN1] Pierce v. Lyman, 1 Cal. App. 4th 1093, 3 Cal. Rptr. 2d 236 (2d Dist. 1991).
- As to the attorney-client privilege, see Am. Jur. 2d, Witnesses §§ 325 to 415.
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[FN2] Kala v. Aluminum Smelting & Refining Co., Inc., 81 Ohio St. 3d 1, 1998-Ohio-439, 688 N.E.2d 258 (1998).
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[FN3] Tien v. Superior Court, 139 Cal. App. 4th 528, 43 Cal. Rptr. 3d 121 (2d Dist. 2006).
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[FN4] State v. Tensley, 955 So. 2d 227 (La. Ct. App. 2d Cir. 2007).
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[FN5] Kala v. Aluminum Smelting & Refining Co., Inc., 81 Ohio St. 3d 1, 1998-Ohio-439, 688 N.E.2d 258 (1998).
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[FN6] Nathan A. Watson Co. v. Employers Mut. Cas. Co., 218 S.W.3d 797 (Tex. App. Fort Worth 2007), reh'g overruled, (Mar. 1, 2007).
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[FN7] In re R.B., 225 S.W.3d 798 (Tex. App. Fort Worth 2007), rule 53.7(f) motion granted, (July 9, 2007).
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[FN8] Dunkley v. Shoemate, 350 N.C. 573, 515 S.E.2d 442 (1999).
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7 Am. Jur. 2d Attorneys at Law § 139

III. Attorney-Client Relationship
A. Creation and Nature

Topic Summary Correlation Table References

§ 139. Attorney's duties to client

West's Key Number Digest

West's Key Number Digest, Attorney and Client 63, 105, 106

A.L.R. Library

Crime-Fraud Exception to Attorney-Client Privilege in State Courts—Contemplated Crime, 9 A.L.R.6th 363

Attorney's disclosure, in federal proceedings, of identity of client as violating attorney-client privilege, 84 A.L.R. Fed. 852

Law Reviews and Other Periodicals

Daily, Has the Exception Outgrown the Privilege?: Exploring the Applicability of the Crime-Fraud Exception to the Attorney-Client Privilege, 16 Geo. J. Legal Ethics 583 (2003)

Kedem, Case Comment, Can Attorneys and Clients Conspire? Farese v. Scherer, 342 F.3d 1223 (11th Cir. 2003), 114 Yale L.J. 1819 (2005)

Ruzenski, Notes: Balancing Fundamental Civil Liberties and the Need for Increased Homeland Security: The Attorney-Client Privilege After September 11th, 19 St. John's J. Legal Comment. 467 (2005)

Troxel, Office of Foreign Assets Control Regulations: Making Attorneys Choose Between Compliance and the Attorney-Client Relationship, 24 Rev. Litig. 637 (2005)

Young, Pierce the Privilege or Give ‘Em Shelter? The Applicability of Privilege in Tax Shelter Cases, 5 Nev. L.J. 767 (2005)

An attorney's paramount duty is, and must be, to his or her client.[FN1] In no other agency relationship is a greater duty of trust imposed than in that involving an attorney's duty to his or her client.[FN2] The relation of attorney and client is more than a contract; it superinduces a trust status of the highest order and devolves upon the attorney the imperative duty of dealing with the client only on the basis of the strictest fidelity and honor.[FN3] Thus, in no other agency relationship is a greater duty of trust imposed than in that involving an attorney's duty to his or her client.[FN4] Honesty is basic to the practice of the law; clients must be able to rely unquestioningly on the truthfulness of their counsel.[FN5] In addition, a client has a right to expect loyalty and independent judgment from an attorney,[FN6] since a distinct fundamental value of the legal system is the attorney's obligation of loyalty.[FN7] A lawyer's counseling of a client is more than informing the client about the legal consequences of pursuing a particular objective that the client has already identified and chosen, and

the counsel's responsibilities to the client go beyond preliminary clarification of goals and include helping the client make a deliberately wise choice among them.[FN8] Thus, for example, an attorney who advises a client not to talk to police until he or she has had an opportunity to investigate the case, or who wishes to be present with the client during any police questioning, is carrying out the duty to protect to the extent of his or her ability the rights of the client.[FN9]

The attorney is bound to inform the client promptly of any known information important to him or her.[FN10]

A lawyer must not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is otherwise permitted by rule.[FN11] A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary (1) to prevent reasonably certain death or substantial bodily harm; (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services; (4) to secure legal advice about the lawyer's compliance with the Rules of Professional Conduct; (5) 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; or (6) to comply with other law or a court order.[FN12]

The duties an attorney owes to a client, such as confidences and secrets,[FN13] can extend beyond the termination of representation.[FN14] However, a lawyer's fiduciary duties to a client, although extremely important, extend only to dealings within the scope of the underlying relationship of the parties, and an attorney does not owe a client a duty to inform the client of matters beyond the scope of the representation.[FN15]

An attorney's duty of loyalty and duty to advocate for a criminal defendant do not terminate upon the defendant's conviction.[FN16] Thus, criminal defense attorneys, because of their intimate knowledge of the trial proceedings and their possession of unique information regarding possible post-conviction claims, have an obligation to cooperate with their clients' attempts to challenge their convictions.[FN17]

An attorney who, when his or her criminal client informs the attorney that he or she would perjure himself or herself on the stand, indicates an intent to withdraw from representation does not thereby deprive the client of his or her Sixth Amendment right to counsel or establish the prejudice required for relief based on ineffective assistance of counsel.[FN18]

A lawyer can reasonably limit the duty otherwise owed to a client if the client is adequately informed and consents.[FN19] In addition, lawyers' duties in specific cases vary with the circumstances presented; what constitutes a reasonable degree of care is not to be considered in a vacuum, but with reference to the type of service the attorney undertakes to perform.[FN20]

CUMULATIVE SUPPLEMENT

Cases:

The fiduciary relationship that exists between attorney and client creates a duty of disclosure. Bennett v. Hill-Boren, P.C., 52 So. 3d 364 (Miss. 2011).

A lawyer's duty of absolute loyalty to his client's interests does not end with his retainer; he is enjoined for all time, except as he may be released by law, from disclosing matters revealed to him by reason of the confidential relationship. Foley-Ciccantelli v. Bishop's Grove Condominium Ass'n, Inc., 2011 WI 36, 797 N.W.2d 789 (Wis. 2011).

[END OF SUPPLEMENT]

[FN1] Scheffler v. Adams and Reese, LLP, 950 So. 2d 641 (La. 2007).
- Rule 1.1, ABA Model Rules of Professional Conduct, requires that a lawyer provide competent representation to a client; competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
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[FN2] Scheffler v. Adams and Reese, LLP, 950 So. 2d 641 (La. 2007).
-

[FN3] Scheffler v. Adams and Reese, LLP, 950 So. 2d 641 (La. 2007).
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[FN4] Scheffler v. Adams and Reese, LLP, 950 So. 2d 641 (La. 2007).
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[FN5] In re Outlaw, 917 A.2d 684 (D.C. 2007).
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[FN6] Iowa Supreme Court Attorney Disciplinary Bd. v. Johnston, 732 N.W.2d 448 (Iowa 2007).
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[FN7] Knight v. Ferguson, 149 Cal. App. 4th 1207, 57 Cal. Rptr. 3d 823 (2d Dist. 2007), review denied, (July 11, 2007).
- The loyalty the attorney owes one client cannot be allowed to compromise the duty owed another. Knight v. Ferguson, 149 Cal. App. 4th 1207, 57 Cal. Rptr. 3d 823 (2d Dist. 2007), review denied, (July 11, 2007).
- In no relationship is the maxim that “no man can serve two masters” more rigidly enforced than in the attorney-client relationship. Scheffler v. Adams and Reese, LLP, 950 So. 2d 641 (La. 2007).
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[FN8] Akron Bar Ass'n v. Miller, 80 Ohio St. 3d 6, 1997-Ohio-364, 684 N.E.2d 288 (1997).
-

[FN9] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966).
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[FN10] Baker v. Humphrey, 101 U.S. 494, 25 L. Ed. 1065, 1879 WL 16687 (1879).
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[FN11] Rule 1.6(a), ABA Model Rules of Professional Conduct.
- As to attorney-client privilege, see Am. Jur. 2d, Witnesses §§ 325 to 415.
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[FN12] Rule 1.6(b), ABA Model Rules of Professional Conduct.
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[FN13] Kala v. Aluminum Smelting & Refining Co., Inc., 81 Ohio St. 3d 1, 1998-Ohio-439, 688 N.E.2d 258 (1998).
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[FN14] Rael v. Blair, 2007-NMSC-006, 141 N.M. 232, 153 P.3d 657 (2007).
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[FN15] Joe v. Two 30 Nine Joint Venture, 145 S.W.3d 150 (Tex. 2004).
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[FN16] Hiatt v. Clark, 194 S.W.3d 324 (Ky. 2006), as corrected, (July 5, 2006).
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[FN17] Hiatt v. Clark, 194 S.W.3d 324 (Ky. 2006), as corrected, (July 5, 2006).
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[FN18] Nix v. Whiteside, 475 U.S. 157, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986).
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[FN19] Estate of Albanese v. Lolio, 393 N.J. Super. 355, 923 A.2d 325 (App. Div. 2007).
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[FN20] Estate of Albanese v. Lolio, 393 N.J. Super. 355, 923 A.2d 325 (App. Div. 2007).
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III. Attorney-Client Relationship
A. Creation and Nature

Topic Summary Correlation Table References

§ 140. Attorney's duties to client—Documents in client's file

West's Key Number Digest

West's Key Number Digest, Attorney and Client 63, 105, 106

Allowing an attorney to unilaterally refuse to provide the client with documents created in the course of representation is contrary to the attorney-client relationship,[FN1] since anything in a client's file, which is in the hands of the client's attorney, belongs to the client, with the exception only of the attorney's notes or work product.[FN2]

An attorney's former client is presumptively entitled to inspect and copy any documents which related to its representation and are in counsel's possession, including attorney work product.[FN3]

[FN1] Iowa Supreme Court Attorney Disciplinary Bd. v. Gottschalk, 729 N.W.2d 812 (Iowa 2007).
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[FN2] Womack Newspapers, Inc. v. Town of Kitty Hawk ex rel. Kitty Hawk Town Council, 639 S.E.2d 96 (N.C. Ct. App. 2007), review withdrawn, 361 N.C. 370, 644 S.E.2d 564 (2007).
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[FN3] Wyly v. Milberg Weiss Bershad & Schulman, LLP, 15 Misc. 3d 583, 834 N.Y.S.2d 631 (Sup 2007).
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III. Attorney-Client Relationship
B. Effect of Relation on Transactions between Attorney and Client

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Research References

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West's Key Number Digest, Attorney and Client 122 to 124

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A.L.R. Index, Attorney or Assistance of Attorney

West's A.L.R. Digest, Attorney and Client 122 to 1244

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III. Attorney-Client Relationship
B. Effect of Relation on Transactions between Attorney and Client

Topic Summary Correlation Table References

§ 141. Generally

West's Key Number Digest

West's Key Number Digest, Attorney and Client 122 to 124

A.L.R. Library

Duties, rights, and remedies between attorney and client where attorney purchases property of client at or through tax, execution, or judicial sale, 20 A.L.R.2d 1280

Since all transactions between an attorney and his or her client are closely scrutinized by the courts,[FN1] attorney-client transactions are considered not void, but rather, presumptively unfair, invalid,[FN2] or fraudulent,[FN3] due to a public policy against attorneys using their position of trust and power to take unfair advantage of clients in transactions.[FN4]

A lawyer must not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client; (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.[FN5]

A client's sophistication does not relax the requirements of the rule forbidding transactions between lawyers and their clients unless certain minimum notice is provided, though it may be relevant to its satisfaction.[FN6] The disclosures and notices required by the rule forbidding transactions between lawyers and their clients unless certain minimum notice is provided are meaningless unless the client is given a reasonable amount of time to act upon the information disclosed and seek independent counsel; the definition of a “reasonable opportunity” may depend on the circumstances of any given case, but it will always mean more than the mere physical ability to contact an attorney.[FN7] The disclosure which accompanies an attorney-client transaction must be

complete; attorneys, to defend their actions, must prove they complied with the stringent requirements imposed upon an attorney dealing with his or her client.[FN8] Accordingly, under the rule, the lawyer must establish, (1) there was no undue influence, (2) he or she gave the client exactly the same information or advice as would have been given by a disinterested attorney, and (3) the client would have received no greater benefit had he or she dealt with a stranger.[FN9] The opportunity for the client to seek independent advice must be real and meaningful; it is not enough that at some moment in time an opportunity existed no matter how brief or fleeting that opportunity might have been.[FN10]

An attorney can overcome the presumption of undue influence as to attorney-client transactions with clear and convincing evidence showing that the attorney made a full and frank disclosure of all relevant information; the attorney gave adequate consideration; and the client had independent advice before completing the transaction.[FN11]

Practice Tip: A lawyer has the burden of proving strict compliance with the safeguards of the rule forbidding transactions between lawyers and their clients unless certain minimum notice is provided; full disclosure, opportunity to consult outside counsel, and consent must be proved by the communications between the attorney and the client.[FN12]

Evidence that a client received independent legal advice is a very compelling means of rebutting a presumption of undue influence by an attorney in an attorney-client transaction.[FN13] In showing compliance with the rule forbidding transactions between lawyers and their clients unless certain minimum notice is provided, the burden is upon the lawyer to demonstrate that a real and meaningful opportunity to seek independent counsel was afforded to the client.[FN14]

[FN1] Wright v. Sydow, 173 S.W.3d 534 (Tex. App. Houston 14th Dist. 2004), review denied, (Feb. 25, 2005).
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[FN2] Wright v. Sydow, 173 S.W.3d 534 (Tex. App. Houston 14th Dist. 2004), review denied, (Feb. 25, 2005).
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[FN3] Valley/50th Ave., L.L.C. v. Stewart, 159 Wash. 2d 736, 153 P.3d 186 (2007), as amended, (May 30, 2007).
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[FN4] Tower Investors, LLC v. 111 East Chestnut Consultants, Inc., 371 Ill. App. 3d 1019, 309 Ill. Dec. 686, 864 N.E.2d 927 (1st Dist. 2007).
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[FN5] Rule 1.8(a), ABA Model Rules of Professional Conduct.
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[FN6] Valley/50th Ave., L.L.C. v. Stewart, 159 Wash. 2d 736, 153 P.3d 186 (2007), as amended, (May 30, 2007).
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[FN7] Valley/50th Ave., L.L.C. v. Stewart, 159 Wash. 2d 736, 153 P.3d 186 (2007), as amended, (May 30, 2007).
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[FN8] Valley/50th Ave., L.L.C. v. Stewart, 159 Wash. 2d 736, 153 P.3d 186 (2007), as amended, (May 30, 2007).
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[FN9] Valley/50th Ave., L.L.C. v. Stewart, 159 Wash. 2d 736, 153 P.3d 186 (2007), as amended, (May 30, 2007).
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[FN10] Valley/50th Ave., L.L.C. v. Stewart, 159 Wash. 2d 736, 153 P.3d 186 (2007), as amended, (May 30, 2007).
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[FN11] Tower Investors, LLC v. 111 East Chestnut Consultants, Inc., 371 Ill. App. 3d 1019, 309 Ill. Dec. 686, 864 N.E.2d 927 (1st Dist. 2007).
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[FN12] Valley/50th Ave., L.L.C. v. Stewart, 159 Wash. 2d 736, 153 P.3d 186 (2007), as amended, (May 30, 2007).
-

[FN13] Tower Investors, LLC v. 111 East Chestnut Consultants, Inc., 371 Ill. App. 3d 1019, 309 Ill. Dec. 686, 864 N.E.2d 927 (1st Dist. 2007).
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[FN14] Valley/50th Ave., L.L.C. v. Stewart, 159 Wash. 2d 736, 153 P.3d 186 (2007), as amended, (May 30, 2007).
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III. Attorney-Client Relationship
B. Effect of Relation on Transactions between Attorney and Client

Topic Summary Correlation Table References

§ 142. Transactions concerning subject of retainer

West's Key Number Digest

West's Key Number Digest, Attorney and Client 122 to 124

A lawyer must 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 (1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and contract with a client for a reasonable contingent fee in a civil case.[FN1]

It is presumed that undue influence or fraud attaches to any assignment or conveyance that an attorney takes from his or her client while the relation of attorney and client exists.[FN2]

[FN1] Rule 1.8(i), ABA Model Rules of Professional Conduct.
- An attorney may not take advantage of relations with a client to enter into a contract concerning property in litigation, or in regard to which he or she has advised the client. Stark v. Starr, 94 U.S. 477, 24 L. Ed. 276, 1876 WL 19527 (1876).
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[FN2] Hicks v. Clayton, 67 Cal. App. 3d 251, 136 Cal. Rptr. 512 (4th Dist. 1977).
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III. Attorney-Client Relationship
B. Effect of Relation on Transactions between Attorney and Client

Topic Summary Correlation Table References

§ 143. Gifts to attorney

West's Key Number Digest

West's Key Number Digest, Attorney and Client 122

A.L.R. Library

Undue influence in nontestamentary gift from client to attorney, 24 A.L.R.2d 1288

An inter vivos gift from a client to his or her attorney is presumptively based on fraud and undue influence on the part of the attorney and is therefore invalid.[FN1] The presumption is sufficient to establish a prima facie

case and to place the burden on the attorney to show by clear and convincing evidence that the gift was not induced by undue influence or fraud; otherwise the transaction will be set aside.[FN2]

A gift of all, or nearly all, of the donor's estate at a time when he or she is old, ill, or otherwise in need of financial assistance presents a situation requiring a clear explanation on the part of the donee.[FN3]

A donee's failure to disclose a gift until after the death of the donor, or at least until such time as circumstances force its revelation, induces suspicion that the gift was not made with that degree of freedom from undue influence or fraud required to validate a gift from a client to his or her attorney.[FN4]

[FN1] Cuthbert v. Heidsieck, 364 S.W.2d 583 (Mo. 1963).

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[FN2] McDonald v. Hewlett, 102 Cal. App. 2d 680, 228 P.2d 83, 24 A.L.R.2d 1281 (1st Dist. 1951).

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[FN3] McDonald v. Hewlett, 102 Cal. App. 2d 680, 228 P.2d 83, 24 A.L.R.2d 1281 (1st Dist. 1951).

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[FN4] McDonald v. Hewlett, 102 Cal. App. 2d 680, 228 P.2d 83, 24 A.L.R.2d 1281 (1st Dist. 1951).

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Topic Summary Correlation Table References

§ 144. Bequests from clients

West's Key Number Digest

West's Key Number Digest, Attorney and Client 122, 123

A.L.R. Library

Attorneys at law: disciplinary proceedings for drafting instrument such as will or trust under which attorney-drafter or member of attorney's family or law firm is beneficiary, grantee, legatee, or devisee, 80 A.L.R.5th 597

Wills: undue influence in gift to testator's attorney, 19 A.L.R.3d 575

The mere existence of the attorney-client relationship between the testator and a beneficiary under a will does not of itself raise a presumption that the attorney-beneficiary exercised undue influence to obtain the testamentary gift.[FN1] However, an attorney has an ethical duty to discourage and refuse bequests from a client, particularly when not founded upon any friendship, relationship, or affection.[FN2]

Under various circumstances a presumption of undue influence has arisen where the attorney actively participated in the preparation or execution of a client's will naming him or her as beneficiary.[FN3]

[FN1] Swaringen v. Swanstrom, 67 Idaho 245, 175 P.2d 692 (1946).
- As to disciplinary action against an attorney who allows himself or herself to be named as legatee or devisee in a will he or she draws, see § 54.
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[FN2] Matter of Will of Tank, 132 Misc. 2d 146, 503 N.Y.S.2d 495 (Sur. Ct. 1986).
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[FN3] Estate of Peters, 9 Cal. App. 3d 916, 88 Cal. Rptr. 576 (2d Dist. 1970).
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III. Attorney-Client Relationship
B. Effect of Relation on Transactions between Attorney and Client

Topic Summary Correlation Table References

§ 145. Burden of proving fairness of transaction

West's Key Number Digest

West's Key Number Digest, Attorney and Client 123

A.L.R. Library

Duties, rights, and remedies between attorney and client where attorney purchases property of client at or through tax, execution, or judicial sale, 20 A.L.R.2d 1280

Although the burden is ordinarily on the attorney to show the fairness of his or her dealings with a client and his or her own good faith in connection therewith, where there is no claim of fraud or other wrongdoing, the client, before he or she may invoke that rule, has the burden of showing that the transaction in question arose out of or pertained to the relationship or was connected with the subject matter of the litigation the attorney was handling.[FN1] Then the attorney must show that the transaction was made in good faith, without disadvantage to the client, that it was fair[FN2] and equitable, that the client was fully informed of his or her rights and interest in the subject matter of the transaction and of the nature and effect of the transaction itself, and that the client was able to deal with the attorney at arm's length.[FN3] At a minimum, the rule requires that the attorney suggest seeking independent legal advice from a lawyer.[FN4]

[FN1] Palmer v. Arnett, 352 Mich. 22, 88 N.W.2d 445 (1958).
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[FN2] Laspy v. Anderson, 361 S.W.2d 680 (Mo. 1962).
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[FN3] Hicks v. Clayton, 67 Cal. App. 3d 251, 136 Cal. Rptr. 512 (4th Dist. 1977).
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[FN4] Attorney Grievance Com'n of Maryland v. Parker, 389 Md. 142, 884 A.2d 104 (2005).
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Topic Summary Correlation Table References

§ 146. Burden of proving fairness of transaction—Testamentary gifts

West's Key Number Digest

West's Key Number Digest, Attorney and Client 123(2)

A.L.R. Library

Wills: undue influence in gift to testator's attorney, 19 A.L.R.3d 575

When a presumption of undue influence arises in the case of a bequest to a testator's attorney, the burden of proof to overcome the presumption is upon the attorney.[FN1] However, the existence of the presumption does not relieve the contestants from their duty of establishing undue influence by clear, cogent, and convincing evidence.[FN2]

[FN1] In re Hopper's Estate, 9 N.J. 280, 88 A.2d 193 (1952).
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[FN2] In re Smith's Estate, 68 Wash. 2d 145, 411 P.2d 879, 19 A.L.R.3d 559 (1966), corrected on other grounds, 416 P.2d 124 (Wash. 1966).
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West's Key Number Digest, Attorney and Client 68 to 104

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A.L.R. Index, Attorney or Assistance of Attorney

West's A.L.R. Digest, Attorney and Client 68 to 1044

Trial Strategy

Client's Ratification of Stipulation Made by Counsel, 13 Am. Jur. Proof of Facts 2d 505

Forms

Am. Jur. Legal Forms 2d, Attorneys at Law §§ 30:48 to 30:75, 30:77, 30:80 to 30:82, 30:84, 30:85, 30:87, 30:139

Am. Jur. Legal Forms 2d, Compromise and Settlement § 63:9

Am. Jur. Legal Forms 2d, Judgments § 157:24

Am. Jur. Legal Forms 2d, Release § 223:96

Am. Jur. Pleading and Practice Forms, Attorneys at Law §§ 80 to 82

Am. Jur. Pleading and Practice Forms, Judgments §§ 106, 507

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1. In General

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§ 147. Power to bind client, generally

West's Key Number Digest

West's Key Number Digest, Attorney and Client 68

A.L.R. Library

Attorney's submission of dispute to arbitration, or amendment of arbitration agreement, without client's knowledge or consent, 48 A.L.R.4th 127

Forms

Am. Jur. Legal Forms 2d, Attorneys at Law §§ 30:48 to 30:75 (Optional provisions; Purpose of employment)

Am. Jur. Pleading and Practice Forms, Judgments § 106 (Affidavit—By attorney—Stating authority to make or accept offer of judgment)

Under long-standing agency principles, it is recognized a client is bound by the actions and inactions of that client's attorney which occur within the scope of the attorney's authority.[FN1] The attorney's acts and omissions within the scope of his or her employment are regarded as the client's acts.[FN2] An attorney's authority to represent his or her purported client is presumed in the absence of a strong factual showing to the contrary.[FN3] Thus, an order entered with the consent of counsel is binding on the client in the absence of fraud, accident, mistake, or collusion of counsel.[FN4]

A lawyer may not act beyond the scope of the contemplated representation without additional authorization from the client.[FN5]

Where an attorney has authority to negotiate and execute an agreement, the attorney has implied authority to modify the agreement as necessary to implement the settlement of claims.[FN6] Where an attorney lacks the authority of the parties named in the pleadings to take action, such as to institute a temporary injunction proceeding, the proceeding must be terminated.[FN7]

A client's failure to object timely to his or her attorney's action taken without the client's consent may be deemed to be acquiesced in by the client.[FN8]

CUMULATIVE SUPPLEMENT

Cases:

By the rules of agency, any knowledge and actions of a client's attorneys are attributed to the client. In re Caffey, 384 B.R. 297 (Bankr. S.D. Ala. 2008).

There is a prima facie presumption that an attorney has authority to bind his client by his actions relating to the conduct of litigation. Janusz v. Gilliam, 404 Md. 524, 947 A.2d 560 (2008).

[END OF SUPPLEMENT]

[FN1] Dvorak v. Dvorak, 2007 ND 79, 732 N.W.2d 698 (N.D. 2007).
- Inherent in the adversary system is the imperative that choices made by counsel are binding on the defendant. Com. v. Rodgers, 448 Mass. 538, 862 N.E.2d 727 (2007).
-

[FN2] In re R.B., 225 S.W.3d 798 (Tex. App. Fort Worth 2007), rule 53.7(f) motion granted, (July 9, 2007).
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[FN3] In re Helen W., 150 Cal. App. 4th 71, 57 Cal. Rptr. 3d 914 (4th Dist. 2007) (authority to file notice of appeal).
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[FN4] Rieffel v. Rieffel, 281 Ga. 891, 644 S.E.2d 140 (2007).
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[FN5] Joe v. Two 30 Nine Joint Venture, 145 S.W.3d 150 (Tex. 2004).
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[FN6] I.C.C. v. Holmes Transp., Inc., 983 F.2d 1122 (1st Cir. 1993).
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[FN7] Sloan v. Rivers, 693 S.W.2d 782 (Tex. App. Fort Worth 1985).
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[FN8] Nelson v. Boone, 78 Haw. 76, 890 P.2d 313 (1995).
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Topic Summary Correlation Table References

§ 148. Giving and receiving notices

West's Key Number Digest

West's Key Number Digest, Attorney and Client 77, 78

Notice given by an attorney is the act of the client,[FN1] and each party is bound by the action of the party's attorney.[FN2] Notice to the attorney is notice to the client[FN3] if the notice, or knowledge of it, relates to the proceedings for which the attorney has been employed.[FN4]

[FN1] Taylor v. Parkview Memorial Ass'n, 317 Mich. 164, 26 N.W.2d 748, 171 A.L.R. 507 (1947).
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[FN2] Irwin v. Department of Veterans Affairs, 498 U.S. 89, 111 S. Ct. 453, 112 L. Ed. 2d 435, 1 A.D.D. 455, 18 Fed. R. Serv. 3d 1 (1990).
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[FN3] Dvorak v. Dvorak, 2007 ND 79, 732 N.W.2d 698 (N.D. 2007).
-

[FN4] Brodeur v. Industrial Claim Appeals Office, 159 P.3d 810 (Colo. Ct. App. 2007).
- An attorney's affidavit stating the date that he first received notice of the judgment was competent evidence as to when the client first received notice and the period to appeal began to run, since the client did not separately receive notice and the attorney's lack of knowledge of the judgment was imputed to the client. Nathan A. Watson Co. v. Employers Mut. Cas. Co., 218 S.W.3d 797 (Tex. App. Fort Worth 2007), reh'g overruled, (Mar. 1, 2007).
- As to imputation of knowledge to client, see § 153.
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Topic Summary Correlation Table References

§ 149. Collection of claims

West's Key Number Digest

West's Key Number Digest, Attorney and Client 77, 78

A.L.R. Library

Authority of agent to indorse and transfer commercial paper, 37 A.L.R.2d 453

Forms

Am. Jur. Legal Forms 2d, Attorneys at Law § 30:77 (To collect claims and to sue for possession of real estate)

Am. Jur. Legal Forms 2d, Release § 223:96 (Payment of consideration to attorney for releasor)

Am. Jur. Pleading and Practice Forms, Judgments § 507 (Clerk's entry of satisfaction—On warrant of attorney)

An attorney has authority to receive payment of a debt or claim he or she is employed to collect or to enforce.[FN1]

A lawyer employed to collect a claim has no implied authority to indorse and transfer a negotiable instrument received from the debtor and made payable to the client, even where the attorney is specifically authorized to compromise his or her client's claims and collect the proceeds.[FN2]

[FN1] Pace v. Reid, 158 Miss. 145, 130 So. 294 (1930).

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[FN2] The Florida Bar v. Allstate Ins. Co., 391 So. 2d 238, 30 U.C.C. Rep. Serv. 1054 (Fla. Dist. Ct. App. 3d Dist. 1980).

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III. Attorney-Client Relationship
C. Authority of Attorney
1. In General

Topic Summary Correlation Table References

§ 150. Delegation of authority

West's Key Number Digest

West's Key Number Digest, Attorney and Client 79

The confidence reposed in an attorney is personal and cannot be delegated to another without the consent of the client.[FN1] However, a defendant in a criminal proceeding is not denied effective assistance of counsel by the fact that the attorney appointed to represent the defendant delegates some of the trial duties to his or her partner without the express permission of the court or the defendant, where there is no objection to the unappointed partner's participation.[FN2]

CUMULATIVE SUPPLEMENT

Cases:

Lawyers are cautioned against engaging unaffiliated counsel without the client's consent, because such improprieties at least implicate a violation of an attorney's duty to preserve client secrets and confidences and may also impinge on standards demanding an attorney's undivided loyalty to the client. Cleveland Bar Assn. v. Mishler, 118 Ohio St. 3d 109, 2008-Ohio-1810, 886 N.E.2d 818 (2008).

[END OF SUPPLEMENT]

[FN1] In re Co-operative Law Co., 198 N.Y. 479, 92 N.E. 15 (1910).
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[FN2] Rice v. State, 753 S.W.2d 726 (Tex. App. Beaumont 1988), petition for discretionary review refused, (Oct. 19, 1988).
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1. In General

Topic Summary Correlation Table References

§ 151. Employment of associate counsel

West's Key Number Digest

West's Key Number Digest, Attorney and Client 78

A.L.R. Library

Vicarious liability of attorneys for acts of associated counsel, 35 A.L.R.5th 717

Forms

Am. Jur. Legal Forms 2d, Attorneys at Law §§ 30:80 to 30:82 (Provision—Employment agreement—To employ associate counsel)

An attorney ordinarily has no implied authority, by virtue of his or her employment, to engage assistant or associate counsel at the client's expense.[FN1]

There may be coupled with an attorney's retainer an express authority to engage other counsel, or the client may be held bound by his or her attorney's act in this regard on the doctrine of ratification.[FN2] Knowledge by the client that his or her attorney is being assisted by other counsel who appear in the case does not by itself warrant a finding of ratification unless the client is informed that the assistants are employed on his or her credit, and with that knowledge permits the employment to continue.[FN3]

[FN1] Skeen v. Peterson, 113 Utah 483, 196 P.2d 708 (1948).
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[FN2] Young v. Bridwell, 20 Utah 2d 332, 437 P.2d 686 (1968).
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[FN3] Young v. Bridwell, 20 Utah 2d 332, 437 P.2d 686 (1968).
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C. Authority of Attorney
1. In General

Topic Summary Correlation Table References

§ 152. Effect of client's ratification of, or estoppel to deny, attorney's acts; laches

West's Key Number Digest

West's Key Number Digest, Attorney and Client 103

Circumstances may indicate that the client has ratified unauthorized acts of his or her attorney,[FN1] or that the client is estopped to deny authority of the attorney to do the act in question.[FN2] Ratification may arise from adoption and approval of the attorney's act,[FN3] or from his or her acceptance and retention of the fruits of an unauthorized act.[FN4] A client ratifies the actions of his or her attorney by not repudiating the acts once the client has knowledge of them, or by accepting the benefits of those acts.[FN5] Thus, where a party stands by silently and lets his or her attorney act in the party's behalf in dealing with another in a situation where the attorney may be presumed to have authority, the party is estopped from denying the agent's apparent authority to a third person.[FN6]

[FN1] Stark v. Starr, 94 U.S. 477, 24 L. Ed. 276, 1876 WL 19527 (1876).
-

[FN2] Robb v. Vos, 155 U.S. 13, 15 S. Ct. 4, 39 L. Ed. 52 (1894).
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[FN3] Stark v. Starr, 94 U.S. 477, 24 L. Ed. 276, 1876 WL 19527 (1876).
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[FN4] Robb v. Vos, 155 U.S. 13, 15 S. Ct. 4, 39 L. Ed. 52 (1894).
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[FN5] Kulchawik v. Durabla Mfg. Co., 371 Ill. App. 3d 964, 309 Ill. Dec. 503, 864 N.E.2d 744 (1st Dist. 2007).
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[FN6] Kulchawik v. Durabla Mfg. Co., 371 Ill. App. 3d 964, 309 Ill. Dec. 503, 864 N.E.2d 744 (1st Dist. 2007).
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III. Attorney-Client Relationship
C. Authority of Attorney
2. Matters Imputed to Client

Topic Summary Correlation Table References

§ 153. Generally

West's Key Number Digest

West's Key Number Digest, Attorney and Client 63

A.L.R. Library

Imputation of knowledge of agent acting for both parties to transaction, 4 A.L.R.3d 224

Notice or knowledge of an attorney, acquired during the time he or she is acting within the scope of his or her employment, is imputed to the client.[FN1] In the context of an enduring attorney-client relationship, knowledge acquired by the attorney is imputed to the client[FN2] as a matter of law.[FN3]
Observation: A person generally is held to know what his or her attorney knows and should communicate to him or her, and the fact that the attorney has not actually communicated his or her knowledge to the client is immaterial.[FN4]

In addition, an attorney's lack of knowledge of a judgment can be imputed to the client, and, thus, the time to appeal could be extended to begin when an attorney received late notice of the judgment.[FN5]

However, if an attorney is the agent of a collection agency, and not of the creditor, knowledge of the attorney is not imputed to the creditor.[FN6]

CUMULATIVE SUPPLEMENT

Cases:

Under the constructive notice doctrine applicable on a motion to amend a complaint to add a new defendant government official, the court can impute knowledge of the lawsuit to the new defendant through his attorney, when the attorney also represented the officials originally sued, and so long as there is some showing that the attorney knew that the new defendant would be added to the existing suit. Abdell v. City of New York, 759 F. Supp. 2d 450 (S.D. N.Y. 2010).

An attorney is presumed to know the law, and an attorney's knowledge is imputed to the client if it relates to the proceedings for which the attorney has been employed. Murry v. GuideOne Specialty Mut. Ins. Co., 194 P.3d 489 (Colo. Ct. App. 2008).

[END OF SUPPLEMENT]

[FN1] Armstrong v. Ashley, 204 U.S. 272, 27 S. Ct. 270, 51 L. Ed. 482 (1907).
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[FN2] American Flood Research, Inc. v. Jones, 192 S.W.3d 581 (Tex. 2006).
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[FN3] Boote v. Shivers, 198 S.W.3d 732 (Tenn. Ct. App. 2005), appeal denied, (Apr. 24, 2006).
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[FN4] Boote v. Shivers, 198 S.W.3d 732 (Tenn. Ct. App. 2005), appeal denied, (Apr. 24, 2006).
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[FN5] Nathan A. Watson Co. v. Employers Mut. Cas. Co., 218 S.W.3d 797 (Tex. App. Fort Worth 2007), reh'g overruled, (Mar. 1, 2007).
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[FN6] Hoover v. Wise, 91 U.S. 308, 23 L. Ed. 392, 1875 WL 17952 (1875).
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Topic Summary Correlation Table References

§ 154. Professional negligence or incompetency of attorney

West's Key Number Digest

West's Key Number Digest, Attorney and Client 63

Professional negligence, unskillfulness, or incompetency of counsel is imputed to his or her client, who is bound thereby, under the rule that the acts and omissions of an attorney acting within the scope of his or her authority are regarded as the acts of the person he or she represents.[FN1] Thus, the court generally will not relieve a party against the fault or negligence of his or her attorney.[FN2]

[FN1] Texas Employer's Ins. Ass'n v. Tobias, 614 S.W.2d 901 (Tex. Civ. App. Eastland 1981), dismissed, (July 22, 1981).
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[FN2] Putnam v. Day, 89 U.S. 60, 22 L. Ed. 764, 1874 WL 17468 (1874).
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Topic Summary Correlation Table References

§ 155. Acts of attorney in own interest or in fraud of client

West's Key Number Digest

West's Key Number Digest, Attorney and Client 63

Where the attorney is acting in his or her own interest or in fraud of the client, there is an exception to the general rule that knowledge of an attorney is imputable to the client.[FN1] However, knowledge of the attorney will be imputed to the client despite the attorney's fraud insofar as third parties who had no knowledge of or connection with the fraud are concerned.[FN2]

[FN1] Farnsworth v. Hazelett, 197 Iowa 1367, 199 N.W. 410, 38 A.L.R. 814 (1924).
- As to the rule that the knowledge of an attorney is imputed to the client, see § 153.
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[FN2] Armstrong v. Ashley, 204 U.S. 272, 27 S. Ct. 270, 51 L. Ed. 482 (1907).
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7 Am. Jur. 2d Attorneys at Law § 156

§ 156. Express or implied authority necessary

West's Key Number Digest

West's Key Number Digest, Attorney and Client 88

Forms

Am. Jur. Legal Forms 2d, Attorneys at Law §§ 30:84, 30:85 (Authority to appear)

No person has the right to appear as another's attorney without the other's authority,[FN1] whether the other is a natural person or a corporation.[FN2] The authority may be express or implied, and the authority may be given by an agent of the party for whom the appearance is made.[FN3]

An attorney is impliedly authorized to stipulate to and to waive procedural matters on behalf of a client.[FN4]

[FN1] Pueblo of Santa Rosa v. Fall, 273 U.S. 315, 47 S. Ct. 361, 71 L. Ed. 658 (1927); Dunkley v. Shoemate, 350 N.C. 573, 515 S.E.2d 442 (1999).

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[FN2] Pueblo of Santa Rosa v. Fall, 273 U.S. 315, 47 S. Ct. 361, 71 L. Ed. 658 (1927).

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[FN3] Hannah v. Hannah, 94 Ill. App. 2d 372, 236 N.E.2d 783 (3d Dist. 1968).

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[FN4] State v. Varnell, 137 Wash. App. 925, 155 P.3d 971 (Div. 2 2007).

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Topic Summary Correlation Table References

§ 157. Presumption of authority

West's Key Number Digest

West's Key Number Digest, Attorney and Client 88

The entry of appearance by an attorney is itself presumptive evidence of his or her authority to represent the person for whom he or she appears.[FN1] The presumption is rebuttable,[FN2] but the appearance of an attorney for one of the parties is generally deemed sufficient proof of his or her authority for the opposite party and for the court.[FN3]

In a civil proceeding, a client is bound by statements of his or her attorney made in open court when the statements are made in the client's presence and are not denied by the client.[FN4]

[FN1] Hill v. Mendenhall, 88 U.S. 453, 22 L. Ed. 616, 1874 WL 17477 (1874).

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[FN2] State ex rel. A. M. T. v. Weinstein, 411 S.W.2d 267 (Mo. Ct. App. 1967).

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[FN3] Osborn v. Bank of U.S., 22 U.S. 738, 6 L. Ed. 204, 1824 WL 2682 (1824).

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[FN4] Sweat v. Sweat, 281 Ga. 543, 641 S.E.2d 1 (2007).

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Topic Summary Correlation Table References

§ 158. Challenge of authority, in general

West's Key Number Digest

West's Key Number Digest, Attorney and Client 71

A.L.R. Library

Disqualification of attorney because member of his firm is or ought to be a witness in case—modern cases, 5 A.L.R.4th 574

Forms

Am. Jur. Pleading and Practice Forms, Attorneys at Law § 80 (Notice of motion—To compel attorney to show authority to act for party)

Am. Jur. Pleading and Practice Forms, Attorneys at Law § 81 (Motion—Challenging authority of attorney to act for party)

Am. Jur. Pleading and Practice Forms, Attorneys at Law § 82 (Affidavit—In support of challenge to attorney's authority to act for party)

The question of an attorney's authority to represent an alleged client can only be raised on a motion directly made for that purpose.[FN1]

The authority of an attorney to appear for the plaintiff can be challenged by the defendant only in that suit, and then the question must be raised in limine by a rule on the attorney to show his or her authority; however, the question cannot be raised after filing a demurrer or an answer.[FN2] The question cannot be raised in a subsequent action by a collateral attack on a decree recovered by the attorney in the former litigation.[FN3]

[FN1] Miranosky v. Parson, 152 W. Va. 241, 161 S.E.2d 665 (1968).
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[FN2] Cooper v. Little, 29 Tenn. App. 685, 201 S.W.2d 210 (1946).
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[FN3] Cooper v. Little, 29 Tenn. App. 685, 201 S.W.2d 210 (1946).
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3. Court Appearances

Topic Summary Correlation Table References

§ 159. Burden of proving lack of authority

West's Key Number Digest

West's Key Number Digest, Attorney and Client 71, 72

The presumption in favor of the authority of an attorney to appear in a lawsuit can be overcome only by clear, satisfactory, and convincing proof,[FN1] or, at least, by a clear preponderance of the evidence.[FN2]

The burden of overcoming the presumption is on the party denying the authority of the attorney.[FN3]

[FN1] Sachs v. Title Ins. & Trust Co., 305 Ky. 154, 202 S.W.2d 384 (1947).
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[FN2] Blake v. Blake, 17 Utah 2d 369, 412 P.2d 454 (1966).
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[FN3] Miranosky v. Parson, 152 W. Va. 241, 161 S.E.2d 665 (1968).
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Topic Summary Correlation Table References

§ 160. Waiver of original process

West's Key Number Digest

West's Key Number Digest, Attorney and Client 90

In the absence of a controlling statute,[FN1] an attorney may not, without express authority, accept or waive service of original process by which jurisdiction of the court over the person of the client is first established.[FN2]

[FN1] Multnomah Lumber & Box Co. v. Weston Basket & Barrel Co., 54 Or. 22, 99 P. 1046 (1909).
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[FN2] Bardahl Mfg. Corp. v. District Court In and For Jefferson County, 150 Colo. 312, 372 P.2d 447 (1962).
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Topic Summary Correlation Table References

§ 161. Giving and receiving notices; verification of pleadings

West's Key Number Digest

West's Key Number Digest, Attorney and Client 89

An attorney of record in a pending cause may accept service of papers and notices in the action[FN1] and may give any notice in the case that the client himself or herself might give.[FN2]

An attorney may be given the right to verify pleadings filed on behalf of his or her client, but only to the extent and under the conditions permitted in each jurisdiction.[FN3]

[FN1] Perkins v. Public Service Co. of N.H., 93 N.H. 459, 45 A.2d 210 (1945).
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[FN2] Bulldog Concrete Forms Sales Corp. v. Taylor, 195 F.2d 417, 49 A.L.R.2d 1 (7th Cir. 1952).
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[FN3] Am. Jur. 2d, Pleading § 892.
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Topic Summary Correlation Table References

§ 162. Authority to commence action; control of procedural matters

West's Key Number Digest

West's Key Number Digest, Attorney and Client 89, 90

A.L.R. Library

Attorney's submission of dispute to arbitration, or amendment of arbitration agreement, without client's knowledge or consent, 48 A.L.R.4th 127

Generally, the attorney-client relationship vests in the attorney the management, discretion, and control of all procedural matters connected with a proceeding, and by virtue of such delegation of authority, the client is bound by the actions of his or her attorney.[FN1] When a criminal defendant chooses to be represented by professional counsel, that counsel is "captain of the ship" and can make all but a few fundamental decisions for the defendant.[FN2] Certain decisions are ultimately for defense counsel, such as the decisions on what witnesses to call, whether and how to conduct cross-examination,[FN3] what jurors to accept or strike, and what trial motions should be made;[FN4] all other strategic and tactical decisions, such as preparation, scheduling, and the type of defense,[FN5] are the exclusive province of the lawyer after consultation with his or her client.[FN6] Counsel bears principal responsibility for the conduct of the defense; in particular, counsel has the responsibility for determining what arguments to pursue and what defenses to develop.[FN7] In the absence of testimony to the contrary, trial counsel's actions are presumed strategic.[FN8]

Observation: A defendant has no constitutional right to determine trial tactics and strategy of counsel.[FN9]

Caution: An attorney can waive his or her client's substantial rights only with specific authorization.[FN10] Thus, a criminal defendant, not his or her counsel, has authority over certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf,[FN11] or take an appeal.[FN12]

A trial court is entitled to rely on pleadings filed by an attorney on behalf of his or her client, and to presume that the client is aware of and consents to such pleadings.[FN13]

CUMULATIVE SUPPLEMENT

Cases:

Counsel's decisions regarding strategy and tactics must be rational and founded upon adequate investigation and preparation. People v. Doolin, 45 Cal. 4th 390, 87 Cal. Rptr. 3d 209, 198 P.3d 11 (2009), petition for cert. filed (U.S. June 15, 2009).

[END OF SUPPLEMENT]

[FN1] Brodeur v. Industrial Claim Appeals Office, 159 P.3d 810 (Colo. Ct. App. 2007).

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[FN2] People v. Alfaro, 41 Cal. 4th 1277, 63 Cal. Rptr. 3d 433, 163 P.3d 118 (2007).

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[FN3] McTaggart v. State, 285 Ga. App. 178, 645 S.E.2d 658 (2007).

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[FN4] Bledsoe v. State, 283 Kan. 81, 150 P.3d 868 (2007).
- Whether to request removal of a trial judge is not the type of decision that an attorney must allow his or her client to make. Schneider v. State, 725 N.W.2d 516 (Minn. 2007).
- The ultimate decision over whether to move for a mistrial is a strategic one made by the lawyer, not the client. Johnson v. State, 283 Ga. App. 524, 642 S.E.2d 170 (2007).
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[FN5] State v. McCormick, 159 P.3d 194 (Kan. Ct. App. 2007).
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[FN6] Bledsoe v. State, 283 Kan. 81, 150 P.3d 868 (2007).
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[FN7] In re Petition of State for Writ of Mandamus, 918 A.2d 1151 (Del. 2007).
- Decisions about viable defenses are the exclusive domain of defense counsel after consulting with the defendant. State v. Donkers, 170 Ohio App. 3d 509, 2007-Ohio-1557, 867 N.E.2d 903 (11th Dist. Portage County 2007).
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[FN8] McTaggart v. State, 285 Ga. App. 178, 645 S.E.2d 658 (2007).
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[FN9] State v. Donkers, 170 Ohio App. 3d 509, 2007-Ohio-1557, 867 N.E.2d 903 (11th Dist. Portage County 2007).
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[FN10] State v. Varnell, 137 Wash. App. 925, 155 P.3d 971 (Div. 2 2007).
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[FN11] People v. Phillips, 371 Ill. App. 3d 948, 309 Ill. Dec. 582, 864 N.E.2d 823 (1st Dist. 2007), appeal denied, 224 Ill. 2d 588, 312 Ill. Dec. 660, 871 N.E.2d 60 (2007); Bledsoe v. State, 283 Kan. 81, 150 P.3d 868 (2007).
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[FN12] In re Petition of State for Writ of Mandamus, 918 A.2d 1151 (Del. 2007).
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[FN13] Burdett v. State, 285 Ga. App. 571, 646 S.E.2d 748 (2007).
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Topic Summary Correlation Table References

§ 163. Stipulations

West's Key Number Digest

West's Key Number Digest, Attorney and Client 86

Trial Strategy

Client's Ratification of Stipulation Made by Counsel, 13 Am. Jur. Proof of Facts 2d 505

During the progress of a trial, an attorney of record has implied authority to enter into stipulations and agreements respecting matters of procedure,[FN1] even to the entering of judgment in favor of the opposite party.[FN2] However, it has been stated that the authority of plaintiffs' attorney to unilaterally concede the bona fides of the defendants' summary judgment motion and accede to the entry of judgment against the plaintiffs is not inherent in, nor implied from, the mere existence of an attorney-client relationship.[FN3]

In cases in which the substantive rule is that the attorney must be authorized by the client to act but in which the nature of the unauthorized agreement or stipulation is not substantial, the remedy for the attorney's breach of the rule is not the setting aside of the agreement; rather, the opposing party may continue to enforce the agreement, but the client has recourse against the lawyer for acting in excess of his or her authority, such as a malpractice action or a state bar disciplinary proceeding.[FN4]

[FN1] Halliday v. Stuart, 151 U.S. 229, 14 S. Ct. 302, 38 L. Ed. 141 (1894);
- State v. Varnell, 137 Wash. App. 925, 155 P.3d 971 (Div. 2 2007).
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[FN2] Stearns Bank N.A. v. Palmer, 182 S.W.3d 624 (Mo. Ct. App. E.D. 2005), reh'g and/or transfer denied, (Jan. 24, 2006) and transfer denied, (Feb. 28, 2006).
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[FN3] Tutson v. Upchurch, 203 S.W.3d 428 (Tex. App. Amarillo 2006), reh'g overruled, (Sept. 12, 2006) and review denied, (Feb. 2, 2007).
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[FN4] In re Marriage of Helsel, 198 Cal. App. 3d 332, 243 Cal. Rptr. 657 (4th Dist. 1988).
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Topic Summary Correlation Table References

§ 164. Statements or admissions by attorney during trial

West's Key Number Digest

West's Key Number Digest, Attorney and Client 86

A party is bound by a concession made during the trial by his or her attorney.[FN1] Thus, distinct and formal admissions of facts made by counsel during the progress of a civil[FN2] or a criminal trial are binding on the client when made for the express purpose of dispensing with formal proof.[FN3] In a civil proceeding, a client is bound by statements of his or her attorney made in open court when the statements are made in the client's presence and are not denied by the client.[FN4] Similarly, a statement by an attorney relating to the conduct of his or her client is to be considered as a statement by the client himself or herself.[FN5] A general admission made by an attorney during the progress of a trial is binding on the client in a subsequent trial of the same action.[FN6]

However, improvident or erroneous statements or admissions made by an attorney resulting from unguarded expressions or mistake should not be binding on the client.[FN7]

An admission by an attorney, to be binding on a client, must be one of fact and not a conclusion of law.[FN8]

[FN1] Terry v. Terry, 102 Conn. App. 215, 925 A.2d 375 (2007).
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[FN2] Turner v. Yates, 57 U.S. 14, 16 How. 14, 14 L. Ed. 824, 1853 WL 7700 (1853).
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[FN3] U. S. ex rel. Goldsby v. Harpole, 263 F.2d 71 (5th Cir. 1959).
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[FN4] Sweat v. Sweat, 281 Ga. 543, 641 S.E.2d 1 (2007).
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[FN5] Cox v. State, 279 Ga. 223, 610 S.E.2d 521 (2005).
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[FN6] Moynahan v. Perkins, 36 Colo. 481, 85 P. 1132 (1906).
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[FN7] Klinkerfuss v. Cronin, 199 S.W.3d 831 (Mo. Ct. App. E.D. 2006), reh'g and/or transfer denied, (Aug. 17, 2006) and transfer denied, (Sept. 26, 2006).
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[FN8] Metal Exchange Corp. v. J.W. Terrill, Inc., 173 S.W.3d 672 (Mo. Ct. App. E.D. 2005).
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§ 165. Extrajudicial statements or admissions by attorney

West's Key Number Digest

West's Key Number Digest, Attorney and Client 86

Generally, an attorney, merely by reason of his or her employment in connection with litigation, pending or prospective, has no power to affect his or her client by admissions of fact made out of court and not given for the specific purpose of dispensing with proof of the facts admitted.[FN1] An attorney employed to conduct or guard his or her client's interests with reference to a particular proceeding, whether judicial or not, or to enforce a cause of action by a judicial proceeding, or to make a defense in such a proceeding has, by mere reason of such employment, no authority to affect the client by extrajudicial admissions adverse to the interest, proceeding, or defense he or she is employed to sustain.[FN2]

[FN1] Graffam v. Burgess, 117 U.S. 180, 6 S. Ct. 686, 29 L. Ed. 839 (1886).
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[FN2] Solow v. Avon Products, Inc., 86 Misc. 2d 262, 380 N.Y.S.2d 515 (N.Y. City Civ. Ct. 1976).
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Topic Summary Correlation Table References

§ 166. Incurring expenses

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Attorney's personal liability for expenses incurred in relation to services for client, 66 A.L.R.4th 256

Forms

Am. Jur. Legal Forms 2d, Attorneys at Law § 30:139 (Contingent fee—General form—Reimbursement of costs)

In application of the general rule that an agent is not personally liable on contracts made for a disclosed principal, in the absence of his or her express agreement to be bound,[FN1] an attorney is generally not personally liable for expenses incurred in connection with litigation unless he or she expressly or impliedly assumed special liability therefor.[FN2]

A question of fact, rather than of law, is presented where there is a dispute as to whether the attorney in ordering a transcript undertook to be personally responsible or acted merely as an agent for his or her client, pledging the credit of the client rather than the credit of the attorney.[FN3] The expense of a reporter or stenographer employed to take and transcribe evidence, has been imposed upon an attorney.[FN4]

[FN1] Am. Jur. 2d, Agency §§ 291 to 297.

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[FN2] Petrando v. Barry, 4 Ill. App. 2d 319, 124 N.E.2d 85 (1st Dist. 1955).

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[FN3] Urban Court Reporting, Inc. v. Davis, 158 A.D.2d 401, 551 N.Y.S.2d 235 (1st Dep't 1990).

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[FN4] Arden Properties v. Anderson, 473 N.W.2d 924 (Minn. Ct. App. 1991).

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5. Release, Dismissal, or Compromise of Cause of Action; Confession of Judgment

Topic Summary Correlation Table References

§ 167. Release of cause of action

West's Key Number Digest

West's Key Number Digest, Attorney and Client 101 to 101(2)

An attorney, merely by virtue of his or her employment, has no implied authority to release his or her client's claim or cause of action.[FN1] However, an attorney may be found to have implied or actual authority to release a client's claim.[FN2]

[FN1] Nehleber v. Anzalone, 345 So. 2d 822 (Fla. Dist. Ct. App. 4th Dist. 1977).
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[FN2] Speed v. Muhanna, 274 Ga. App. 899, 619 S.E.2d 324 (2005), cert. denied, (Jan. 17, 2006).
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§ 168. Dismissal of action

West's Key Number Digest

West's Key Number Digest, Attorney and Client 101 to 101(2)

A.L.R. Library

Authority of attorney to dismiss or otherwise terminate action, 56 A.L.R.2d 1290

Unless otherwise provided by statute,[FN1] an attorney of record has no general or implied authority to dismiss a case with prejudice, or to do any other act that will have the effect of barring a subsequent suit on the same cause of action.[FN2] even though the attorney believes his or her client is not entitled to prevail in the action.[FN3]

An attorney of record generally has implied authority to enter or take a dismissal, discontinuance, or nonsuit that does not bar the bringing of another suit on the same cause of action.[FN4] The authority of an attorney to dismiss an action without prejudice is not affected by the fact that the statute of limitations may run before a new suit is instituted.[FN5]

[FN1] Wilson v. N. E. Isaacson of Georgia, Inc., 139 Ga. App. 582, 229 S.E.2d 29 (1976).
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[FN2] Romadka v. Hoge, 232 Cal. App. 3d 1231, 283 Cal. Rptr. 878 (6th Dist. 1991).
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[FN3] Duhe v. Jones, 186 So. 2d 419 (La. Ct. App. 4th Cir. 1966).
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[FN4] Duhe v. Jones, 186 So. 2d 419 (La. Ct. App. 4th Cir. 1966).
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[FN5] Duhe v. Jones, 186 So. 2d 419 (La. Ct. App. 4th Cir. 1966).
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§ 169. Compromise or settlement of cause

West's Key Number Digest

West's Key Number Digest, Attorney and Client 101 to 101(2)

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Authority of attorney to compromise action—modern cases, 90 A.L.R.4th 326

Forms

Am. Jur. Legal Forms 2d, Attorneys at Law § 30:87 (Authorization to accept settlement and disburse proceeds)

An attorney, merely by virtue of his or her general retainer, has no implied or apparent power to compromise and settle a client's claim or cause of action.[FN1] Without a grant of authority from a client, an attorney cannot compromise or settle a claim.[FN2] An exception to the general rule that mere employment of an attorney does not give the attorney authority to settle a claim is recognized when an attorney is confronted with an emergency which requires immediate action to protect the client's interests and consultation with the client is impossible.[FN3] A client may give his or her attorney special or express[FN4] authority to compromise his or her cause of action, but such authority must be clear and unequivocal.[FN5]

There is a rebuttable presumption in favor of the authority of an attorney of record to compromise and settle a pending action.[FN6]

It has been stated that an attorney's offer of settlement is generally within the scope of the attorney's litigation duties.[FN7] Thus, regardless of whether an action is pending in court, an attorney who has an attorney-client relationship with a party has apparent authority to enter into a settlement agreement on behalf of his or her client,[FN8] and the agreement is enforceable against the client by other settling parties.[FN9]

It will never do, in the absence of fraud, to allow the undoubted attorneys of record for a party to a suit to enter into a solemn agreement to settle and adjust the issues and subject-matter of a suit and then later, if it is done, because for any reason the party is dissatisfied, to allow him or her to repudiate this agreement and employ different counsel to upset and set aside what his or her first counsel has done.[FN10] Acts of an attorney are directly attributable to and binding upon the client, and absent fraud or mistake, where attorneys of record for a party agree to settle a case, the party cannot later repudiate the agreement.[FN11]

The party alleging authority of an attorney to settle a case has the burden of proving that fact.[FN12] Trial judges are in the best position to assess the content of an attorney's authority to settle in light of the individual facts and circumstances of the case and the customs of lawyers and clients in the locality.[FN13]

However, employment of an attorney does not give the attorney apparent authority to compromise the client's cause of action or settle the client's claim.[FN14]

Where special authority is coupled with an assignment of a portion of the claim to the attorney, the power cannot be revoked at will, at least not after a settlement is effected.[FN15]

On a motion to enforce a settlement agreement, an attorney's express authority to settle on behalf of the client is presumed, where the attorney asserts such authority.[FN16] However, it has also been stated that to grant a motion to enforce an out-of-court settlement, counsel must possess express consent or authorization to compromise or settle a case.[FN17]

Observation: Whether or not an attorney has agreed to a settlement on behalf of the client is a question of fact.[FN18]

CUMULATIVE SUPPLEMENT

Cases:

Under Illinois law, when settlement agreement is made out of court and out of client's presence, agreement is valid only if client expressly authorized attorney to enter into agreement. In re Hall-Walker, 445 B.R. 873 (Bankr. N.D. Ill. 2011).

An attorney may not consent to a final disposition of his client's case without express authority, and although an attorney of record is presumed to have his client's authority to compromise and settle litigation, a judgment entered upon an agreement by the attorney may be set aside on affirmative proof that the attorney had no right to consent to its entry. Alexander v. Burch, 968 So. 2d 992 (Ala. 2006).

The mere employment of an attorney does not of itself give the attorney the implied or apparent authority to compromise his client's cause of action, but exception exists if the attorney is confronted with an emergency which requires prompt action to protect his client's interest and consultation with the client is impossible. Ponce v. U-Haul Co. of Florida, 979 So. 2d 380 (Fla. Dist. Ct. App. 4th Dist. 2008).

Attorney for car passenger who was injured in collision with vehicle driven by alleged tortfeasor lacked apparent authority to enter into settlement agreement with tortfeasor's estate, in suit brought by passenger and her husband against estate, seeking damages for injuries and lost wages passenger sustained as result of collision, as mere act of passenger and her husband in retaining attorney to represent them in suit was not sufficient to confer apparent authority on attorney to enter into settlement agreement, and authority of attorney to negotiate with opposing counsel was not the same as authority to enter into a settlement agreement. Adkins v. Estate of Place, 180 Ohio App. 3d 747, 2009-Ohio-526, 907 N.E.2d 354 (2d Dist. Clark County 2009), appeal not allowed, 122 Ohio St. 3d 1412, 2009-Ohio-2751, 907 N.E.2d 1195 (2009).

A settlement is valid only if defendant was found to have granted express authority for his attorney to settle on those terms. Price v. Bowen, 2008 VT 10, 945 A.2d 367 (Vt. 2008).

[END OF SUPPLEMENT]

[FN1] U.S. v. Beebe, 180 U.S. 343, 21 S. Ct. 371, 45 L. Ed. 563 (1901); Collado v. Pavlow, 951 So. 2d 69 (Fla. Dist. Ct. App. 5th Dist. 2007); Luethke v. Suhr, 264 Neb. 505, 650 N.W.2d 220 (2002).

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[FN2] Allison v. Allison, 41 A.D.3d 519, 838 N.Y.S.2d 168 (2d Dep't 2007).

- While an attorney may negotiate for and advise settlement of controversy, the decision to settle belongs to the client. Melstad v. Kovac, 2006 SD 92, 723 N.W.2d 699 (S.D. 2006).

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[FN3] Collado v. Pavlow, 951 So. 2d 69 (Fla. Dist. Ct. App. 5th Dist. 2007).

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[FN4] Kulchawik v. Durabla Mfg. Co., 371 Ill. App. 3d 964, 309 Ill. Dec. 503, 864 N.E.2d 744 (1st Dist. 2007); Luethke v. Suhr, 264 Neb. 505, 650 N.W.2d 220 (2002).

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[FN5] Collado v. Pavlow, 951 So. 2d 69 (Fla. Dist. Ct. App. 5th Dist. 2007).

- Where a settlement is made out of court and not made part of the judgment, the client will not be bound by the agreement without proof of express authority of the attorney to make the settlement. Kulchawik v. Durabla Mfg. Co., 371 Ill. App. 3d 964, 309 Ill. Dec. 503, 864 N.E.2d 744 (1st Dist. 2007).

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[FN6] U.S. v. Beebe, 180 U.S. 343, 21 S. Ct. 371, 45 L. Ed. 563 (1901).

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[FN7] Gilbride v. Trunnelle, 620 N.W.2d 244 (Iowa 2000).

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[FN8] Kloian v. Domino's Pizza L.L.C., 273 Mich. App. 449, 733 N.W.2d 766 (2006).

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[FN9] Anaya v. Coello, 279 Ga. App. 578, 632 S.E.2d 425 (2006), cert. denied, (Sept. 8, 2006).
- Whether an attorney has authority to settle a client's case depends on a factual determination of the communications between them. Melstad v. Kovac, 2006 SD 92, 723 N.W.2d 699 (S.D. 2006).
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[FN10] Motley v. Williams, 374 S.C. 107, 647 S.E.2d 244 (Ct. App. 2007).
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[FN11] Motley v. Williams, 374 S.C. 107, 647 S.E.2d 244 (Ct. App. 2007).
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[FN12] Kulchawik v. Durabla Mfg. Co., 371 Ill. App. 3d 964, 309 Ill. Dec. 503, 864 N.E.2d 744 (1st Dist. 2007).
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[FN13] Parks v. MBNA America Bank, 204 S.W.3d 305 (Mo. Ct. App. W.D. 2006).
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[FN14] Collado v. Pavlow, 951 So. 2d 69 (Fla. Dist. Ct. App. 5th Dist. 2007).
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[FN15] Jeffries v. Mutual Life Ins. Co. of New York, 110 U.S. 305, 4 S. Ct. 8, 28 L. Ed. 156 (1884).
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[FN16] Eaton v. Mallinckrodt, Inc., 224 S.W.3d 596 (Mo. 2007).
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[FN17] Webster v. Hartman, 195 Ill. 2d 426, 255 Ill. Dec. 476, 749 N.E.2d 958 (2001).
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[FN18] Parmley v. 84 Lumber Co., 911 So. 2d 569 (Miss. Ct. App. 2005), cert. denied, 920 So. 2d 1008 (Miss. 2005).
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Attorneys at Law
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III. Attorney-Client Relationship
C. Authority of Attorney
5. Release, Dismissal, or Compromise of Cause of Action; Confession of Judgment

§ 170. Compromise or settlement of cause—Ratification or estoppel

West's Key Number Digest

West's Key Number Digest, Attorney and Client 101 to 101(2), 103

A.L.R. Library

Ratification of attorney's unauthorized compromise of action, 5 A.L.R.5th 56

An attorney's unauthorized compromise of a client's claim may be ratified by the client.[FN1] A client ratifies the actions of his or her attorney by not repudiating the acts once the client has knowledge of them, or by accepting the benefits of those acts.[FN2] The client, with knowledge of the facts, may also be estopped to repudiate an unauthorized compromise made by his or her attorney.[FN3]

Accepting proceeds of the settlement, without knowledge of it or its terms, or under the supposition that the proceeds constitute merely a payment on account, does not estop the client from pursuing the defendant for the balance of his or her claim.[FN4]

[FN1] Collado v. Pavlow, 951 So. 2d 69 (Fla. Dist. Ct. App. 5th Dist. 2007).

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[FN2] Kulchawik v. Durabla Mfg. Co., 371 Ill. App. 3d 964, 309 Ill. Dec. 503, 864 N.E.2d 744 (1st Dist. 2007).

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[FN3] Stowe v. U.S., 9 Ct. Cl. 98, 86 U.S. 13, 22 L. Ed. 144, 1873 WL 15963 (1873).

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[FN4] U.S. v. Beebe, 180 U.S. 343, 21 S. Ct. 371, 45 L. Ed. 563 (1901).

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III. Attorney-Client Relationship
C. Authority of Attorney
5. Release, Dismissal, or Compromise of Cause of Action; Confession of Judgment

Topic Summary Correlation Table References

§ 171. Confession of judgment

West's Key Number Digest

West's Key Number Digest, Attorney and Client 85

Forms

Am. Jur. Legal Forms 2d, Compromise and Settlement § 63:9 (Power of attorney—Provision—Authorization to submit consent decree)

Although some cases have held that the control an attorney has over the conduct of a case impliedly authorizes him or her to bind the client by a confession of or consent to a judgment,[FN1] other decisions maintain the view that an attorney has no authority to enter a consent decree, or confess judgment without the client's direction, knowledge, or consent,[FN2] and if a consent judgment or decree is entered against the protest of the client, or contrary to his or her instructions not to compromise, the judgment or decree will not be binding on the client.[FN3] If an attorney has apparent authority to confess, or consent to, judgment, it is ordinarily binding and conclusive on the client, notwithstanding an actual lack of authority unknown to the court or the opposing party, the sole remedy in such a case being against the attorney.[FN4]

An attorney's presumptive authority to consent to the entry of a judgment against his or her client can be rebutted by the client's presentation of evidence that the attorney had no such authority.[FN5]

Some decisions assert that a record showing that a defendant assented to a decree through its attorney is equivalent to a direct finding of fact by the court that the attorney had authority to do what he or she did and that it is binding as a fact on an appellate court.[FN6]

An order entered with the consent of counsel is binding on the client in the absence of fraud, accident, mistake or collusion of counsel.[FN7]

[FN1] Pacific R.R. v. Ketchum, 101 U.S. 289, 25 L. Ed. 932, 1879 WL 16618 (1879).
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[FN2] Senyshyn v. Karlak, 450 Pa. 535, 299 A.2d 294 (1973).
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[FN3] Senyshyn v. Karlak, 450 Pa. 535, 299 A.2d 294 (1973).
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[FN4] Motley v. Williams, 374 S.C. 107, 647 S.E.2d 244 (Ct. App. 2007).
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[FN5] Caudle v. Ray, 69 N.C. App. 543, 316 S.E.2d 909 (1984).
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[FN6] Pacific R.R. v. Ketchum, 101 U.S. 289, 25 L. Ed. 932, 1879 WL 16618 (1879).
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[FN7] Rieffel v. Rieffel, 281 Ga. 891, 644 S.E.2d 140 (2007).
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III. Attorney-Client Relationship
C. Authority of Attorney
6. Authority after Judgment

Topic Summary Correlation Table References

§ 172. Generally; issuance of execution

West's Key Number Digest

West's Key Number Digest, Attorney and Client 93 to 95

While the authority of an attorney to act for a client terminates on final judgment, at least with respect to the attorney for the losing party,[FN1] an attorney who secures a judgment has continuing authority to take any steps necessary to enforce collection of the judgment.[FN2] Thus, the attorney is deemed to have authority generally to control or superintend the execution of final process.[FN3]

General directions, deemed by the attorney best calculated to advance the interests of the client, exonerate the sheriff from liability and bind the client, depriving him or her of the right to go against the sheriff for any loss.[FN4]

[FN1] § 176.
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[FN2] Union Bank of Georgetown v. Geary, 30 U.S. 99, 8 L. Ed. 60, 1831 WL 3959 (1831).
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[FN3] Rogers v. The Marshal, 68 U.S. 644, 17 L. Ed. 714, 1863 WL 6648 (1863).
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[FN4] Rogers v. The Marshal, 68 U.S. 644, 17 L. Ed. 714, 1863 WL 6648 (1863).
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C. Authority of Attorney
6. Authority after Judgment

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§ 173. Collection and satisfaction of judgment

West's Key Number Digest

West's Key Number Digest, Attorney and Client 100

Forms

Satisfaction of judgment—By attorney of record. Am. Jur. Legal Forms 2d, Judgments § 157:24

An attorney who has recovered a judgment for his or her client has authority, after receiving payment, to give or enter satisfaction of the judgment.[FN1] The attorney has no implied authority, however, to accept anything in satisfaction of the judgment other than that which was sued for and for which the judgment was rendered.[FN2]

[FN1] Union Bank of Georgetown v. Geary, 30 U.S. 99, 8 L. Ed. 60, 1831 WL 3959 (1831).
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[FN2] Glenwood Lumber & Coal Co. v. Hammers, 226 Iowa 788, 285 N.W. 277 (1939).
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6. Authority after Judgment

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§ 174. Proceedings to vacate or modify judgment

West's Key Number Digest

West's Key Number Digest, Attorney and Client 96

A.L.R. Library

Service of notice to modify divorce decree or other judgment as to child's custody upon attorney who represented opposing party, 42 A.L.R.2d 1115

An attorney of record who obtains a judgment for his or her client has authority to accept service of motions to vacate or modify a judgment.[FN1]

Some courts deny the efficacy of service on an attorney of a motion to modify a decree in child custody cases.[FN2] Other courts hold that such service is valid and effective in those cases.[FN3]

[FN1] Keane v. Allen, 69 Idaho 53, 202 P.2d 411 (1949).

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[FN2] Moore v. Lee, 72 So. 2d 280, 42 A.L.R.2d 1112 (Fla. 1954); Smith v. Smith, 171 Kan. 619, 237 P.2d 213 (1951).

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[FN3] Reynolds v. Reynolds, 21 Cal. 2d 580, 134 P.2d 251 (1943); Sweeny v. Sweeny, 43 Wash. 2d 542, 262 P.2d 207 (1953).

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6. Authority after Judgment

Topic Summary Correlation Table References

§ 175. Prosecuting appeal from adverse judgment

West's Key Number Digest

West's Key Number Digest, Attorney and Client 96

A.L.R. Library

Adequacy of defense counsel's representation of criminal client regarding appellate and post-conviction remedies, 15 A.L.R.4th 582

Adequacy of defense counsel's representation of criminal client regarding post-plea remedies, 13 A.L.R.4th 533

The presumption that an attorney is authorized to represent his or her client extends to an attorney's authority to file a notice of appeal, and thus, in the absence of evidence affirmatively showing the attorney's lack of authorization, a notice of appeal signed by the client's attorney should raise no question about its validity.[FN1]

However, an attorney retained for the trial of an action has no implied authority to prosecute review proceedings from an adverse judgment and to bind his or her clients for costs and expenses on appeal.[FN2] Nor does the attorney have authority to execute an appeal bond in the name of his or her client.[FN3]

A criminal defendant, not his or her counsel, has authority over certain fundamental decisions regarding the case, such as whether to take an appeal.[FN4]

[FN1] In re Helen W., 150 Cal. App. 4th 71, 57 Cal. Rptr. 3d 914 (4th Dist. 2007).

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[FN2] Zorn v. Lowery, 236 Ala. 62, 181 So. 249 (1938).

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[FN3] Jones v. Banner Creamery, 214 S.W.2d 487 (Tex. Civ. App. Eastland 1948).

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[FN4] In re Petition of State for Writ of Mandamus, 918 A.2d 1151 (Del. 2007); People v. Smith, 32 A.D.3d 553, 820 N.Y.S.2d 162 (3d Dep't 2006).

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Research References

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West's Key Number Digest, Attorney and Client 76 to 76(4)

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A.L.R. Index, Attorney or Assistance of Attorney

West's A.L.R. Digest, Attorneys 76 to 76(4))

Trial Strategy

Dismissal of Attorney with Just Cause, 31 Am. Jur. Proof of Facts 2d 125

Forms

Am. Jur. Legal Forms 2d, Attorneys at Law §§ 30:180 to 30:182

Am. Jur. Legal Forms 2d, Judges § 156:13

Am. Jur. Pleading and Practice Forms, Attorneys at Law §§ 116 to 127

Federal Procedural Forms, L. Ed., Actions in District Court §§ 1:461, 1:465

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III. Attorney-Client Relationship
D. Termination of Relationship
1. In General

Topic Summary Correlation Table References

§ 176. Generally; right of client to discharge attorney

West's Key Number Digest

West's Key Number Digest, Attorney and Client 76, 76(.5)

Trial Strategy

Dismissal of Attorney With Just Cause, 31 Am. Jur. Proof of Facts 2d 125

Dismissal of Attorney with Just Cause, 31 Am. Jur. Proof of Facts 2d 125

Forms

Am. Jur. Legal Forms 2d, Attorneys at Law §§ 30:180, 30:181 (Notice terminating authority of attorney)

Am. Jur. Legal Forms 2d, Judges § 156:13 (Notice terminating attorney-client relationship—By attorney upon election or appointment to judgeship)

A client has an absolute right to discharge a attorney.[FN1] Generally, a client may, at any time, terminate the relation between himself or herself and the attorney, with or without cause,[FN2] and to substitute other counsel, for a client is entitled to be represented by an attorney in whose ability and fidelity he or she has confidence.[FN3] A lack of trust and confidence in counsel may, but will not necessarily always, lead to the termination of the attorney-client relationship; in any event, that lack of trust and confidence does not constitute the termination of the relationship.[FN4]

Fundamental to the attorney-client relationship is the power of the client to terminate that relationship without being held liable for breach of contract.[FN5] A contract between an attorney and a client is unenforceable where it requires the client to pay damages for terminating its attorney's employment contract, because such a contract eviscerates the client's absolute right to terminate its attorney's employment.[FN6]

An attorney who is employed under a contingent fee contract and discharged prior to the occurrence of the contingency is limited to quantum meruit recovery for the reasonable value of the services rendered to the client, and may not recover the full amount of the agreed contingent fee.[FN7]

CUMULATIVE SUPPLEMENT

Cases:

Attorney's motion to withdraw, which was filed more than 30 days before trial, was timely under local rule providing that a motion to withdraw shall not be presented within 30 days of the trial date. In re A.R., 236 S.W.3d 460 (Tex. App. Dallas 2007).

Restrictions placed on attorney and client's refusal to cooperate supported attorney's establishment of good cause for her withdrawal in conservatorship modification action; attorney and client entered into a written fee agreement that set forth client's obligation to pay a trial retainer, the retainer was not paid, requiring attorney to continue her representation of client in upcoming trial would have imposed an unreasonable financial hardship on attorney, who was sole practitioner, and attorney's representation of client had become unreasonably difficult in that client would not cooperate, return phone calls, or respond to e-mail messages. In re A.R., 236 S.W.3d 460 (Tex. App. Dallas 2007).

[END OF SUPPLEMENT]

[FN1] Wingate, Russotti & Shapiro, LLP v. Friedman, Khafif & Associates, 41 A.D.3d 367, 839 N.Y.S.2d 469 (1st Dep't 2007).

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[FN2] Baker v. Humphrey, 101 U.S. 494, 25 L. Ed. 1065, 1879 WL 16687 (1879); Sullivan v. Eichmann, 213 Ill. 2d 82, 289 Ill. Dec. 673, 820 N.E.2d 449 (2004).

- As to liability of a third party for wrongful interference with a contract between attorney and client, see Am. Jur. 2d, Interference § 43.

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[FN3] Sullivan v. Eichmann, 213 Ill. 2d 82, 289 Ill. Dec. 673, 820 N.E.2d 449 (2004).

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[FN4] R.E. Holland Excavating, Inc. v. Martin, Browne, Hull & Harper, P.L.L., 162 Ohio App. 3d 471, 2005-Ohio-3662, 833 N.E.2d 1273 (2d Dist. Clark County 2005), appeal not allowed, 107 Ohio St. 3d 1683, 2005-Ohio-6480, 839 N.E.2d 403 (2005).

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[FN5] McCullough v. Waterside Associates, 102 Conn. App. 23, 925 A.2d 352 (2007).

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[FN6] AFLAC, Inc. v. Williams, 264 Ga. 351, 444 S.E.2d 314 (1994).

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[FN7] Joseph E. Di Loreto, Inc. v. O'Neill, 1 Cal. App. 4th 149, 1 Cal. Rptr. 2d 636 (2d Dist. 1991).

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III. Attorney-Client Relationship
D. Termination of Relationship
1. In General

§ 177. Generally; right of client to discharge attorney—When attorney's power is coupled with an interest

West's Key Number Digest

West's Key Number Digest, Attorney and Client 76, 76(.5)

The right of a client to discharge his or her attorney at any time does not exist where the power of the attorney is coupled with an interest in the subject matter of the power[FN1] as distinguished from the proceeds to be derived from the exercise of the power.[FN2] The power of the attorney must be engrafted on an estate in the thing itself, and the power and interest must be united in the same person.[FN3]

[FN1] O'Connell v. Superior Court of City and County of San Francisco, 2 Cal. 2d 418, 41 P.2d 334, 97 A.L.R. 918 (1935).
- As to when power is coupled with an interest, see Am. Jur. 2d, Agency §§ 62 to 67.
-

[FN2] O'Connell v. Superior Court of City and County of San Francisco, 2 Cal. 2d 418, 41 P.2d 334, 97 A.L.R. 918 (1935).
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[FN3] O'Connell v. Superior Court of City and County of San Francisco, 2 Cal. 2d 418, 41 P.2d 334, 97 A.L.R. 918 (1935).
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D. Termination of Relationship
1. In General

§ 178. Attorney's right to notice of discharge

West's Key Number Digest

West's Key Number Digest, Attorney and Client 76(.5)

Forms

Am. Jur. Legal Forms 2d, Attorneys at Law §§ 30:180, 30:181 (Notice to attorney of termination of his employment and authority)

An attorney is entitled to notice of discharge,[FN1] although it need not be formal, since any act of the client indicating an unmistakable purpose to sever relations is sufficient.[FN2]

Where time is not of the essence in a retainer agreement between an attorney and client, the client is entitled to a reasonable period of time following the last day of the retainer agreement within which to notify the attorney that the retainer agreement will not be renewed for the subsequent period.[FN3]

[FN1] Feuer v. Feuer, 156 Fla. 117, 22 So. 2d 641 (1945).

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[FN2] Costello v. Bruskin, 58 A.D.2d 573, 395 N.Y.S.2d 116 (2d Dep't 1977).

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[FN3] Luxemburg v. Hotel and Restaurant Emp. and Bartenders Intern. Union Pension Fund, 91 Misc. 2d 930, 398 N.Y.S.2d 589 (Sup 1977).

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III. Attorney-Client Relationship

Topic Summary Correlation Table References

§ 179. Death of client

West's Key Number Digest

West's Key Number Digest, Attorney and Client 76(2)

Generally, when a client dies, the attorney-client relationship terminates, and thereafter, the attorney must obtain authorization from the decedent's personal representative in order to pursue the interests of the decedent; in the absence of this authorization, the attorney cannot proceed because he or she no longer represents a party to the litigation.[FN1] Thus, defense counsel will not have authority to pursue an appeal on behalf of a defendant who dies following a guilty verdict and prior to sentencing.[FN2] The death of a client terminates his or her attorney's authority to act and stays the client's personal injury action pending the substitution of a legal representative.[FN3] The personal representative may, however, be bound by ratification.[FN4]

[FN1] In re Estate of Horwitz, 371 Ill. App. 3d 625, 309 Ill. Dec. 210, 863 N.E.2d 842 (1st Dist. 2007).
- As to recovery by summary proceeding of fees advanced by decedent under contingent fee contract, see § 231.
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[FN2] Chmurny v. State, 392 Md. 159, 896 A.2d 354 (2006).
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[FN3] Giroux v. Dunlop Tire Corp., 16 A.D.3d 1068, 791 N.Y.S.2d 769 (4th Dep't 2005).
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[FN4] Bergum v. Palmborg, 239 Minn. 569, 58 N.W.2d 722 (1953).
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1. In General

Topic Summary Correlation Table References

§ 180. Death of attorney

West's Key Number Digest

West's Key Number Digest, Attorney and Client 76(2)

A contract of employment for legal services is personal in its nature and terminates upon the death of the attorney employed.[FN1]

No proceedings may be had against the unrepresented party and no judgment, order, or other step in the action taken, until the party appoints another attorney.[FN2]

[FN1] Bacon v. Hart, 66 U.S. 38, 17 L. Ed. 52, 1861 WL 7671 (1861).

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[FN2] Aldrich v. San Fernando Valley Lumber Co., 170 Cal. App. 3d 725, 216 Cal. Rptr. 300 (2d Dist. 1985).

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2. Abandonment or Withdrawal of Attorney

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§ 181. Generally

West's Key Number Digest

West's Key Number Digest, Attorney and Client 76(1)

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Legal Malpractice in Connection with Attorney's Withdrawal as Counsel—Criminal and Business-Related Cases, 41 A.L.R.6th 1

Ineffective assistance of counsel: right of attorney to withdraw, as appointed defense counsel, due to self-avowed incompetence, 16 A.L.R.5th 118

Legal malpractice in connection with attorney's withdrawal as counsel, 6 A.L.R.4th 342

Forms

Am. Jur. Legal Forms 2d § 30:179.30

Am. Jur. Pleading and Practice Forms, Attorneys at Law § 116 (Notice—By attorney—Of intent to file motion for leave to withdraw—To client)

Am. Jur. Pleading and Practice Forms, Attorneys at Law §§ 117 to 122 (Motion—By attorney—For order permitting withdrawal from representation)

Am. Jur. Pleading and Practice Forms, Attorneys at Law § 123 (Affidavit—In support of motion by attorney for permission to withdraw)

Am. Jur. Pleading and Practice Forms, Attorneys at Law §§ 124 to 126 (Order—Granting attorney permission to withdraw)

Am. Jur. Pleading and Practice Forms, Attorneys at Law § 127 (Order denying motion for leave to withdraw)

Motion and notice—By attorney—For permission to withdraw appearance—Attorney-client relationship terminated by agreement [Fed. R. Civ. P. 7(b)]. Federal Procedural Forms, L.Ed. § 1:461

Order—Permitting attorney to withdraw appearance [Fed. R. Civ. P. 5(a), 77(d)]. Federal Procedural Forms, L.Ed. § 1:465

An attorney not only is an employee of his or her client but also is an officer of the court, and this dual relation imposes a dual obligation: to the client who refuses to pay a fee, the attorney must give specific and reasonable notice so that the client may have adequate time to secure other counsel and so that the client may be heard if he or she disputes the charge of nonpayment, and to the court, which cannot cope with the ever-increasing volume of litigation unless lawyers are as concerned as is a conscientious judge to utilize completely the time of the term, the lawyer owes the duty to perfect his or her withdrawal in time to prevent the necessity of a continuance of the case.[FN1]

An attorney may withdraw as counsel of record upon a showing of good and sufficient cause,[FN2] and reasonable notice to the client.[FN3] Upon termination of representation, a lawyer must take steps to the extent

reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred.[FN4] The lawyer may retain papers relating to the client to the extent permitted by other law.[FN5]

A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation, and when ordered to do so by a tribunal, a lawyer must continue representation notwithstanding good cause for terminating the representation.[FN6]

The granting of leave to withdraw by the court is generally in the discretion of the court[FN7] and depends upon such considerations as proximity of the trial date, length of time an action has been pending, and possibility for the client to obtain other representation.[FN8] A court may order attorneys to continue representation despite good cause to withdraw, if other considerations take precedence, such as maintaining fairness to litigants and preserving a court's resources and efficiency, but such an order must be based on the specific circumstances presented.[FN9]

Under some circumstances it is required that counsel seeking to withdraw furnish the court with a brief in support of his or her request.[FN10] Ordinarily the trial court's decision will be reversed only for abuse of discretion,[FN11] or for an improvident exercise of discretion.[FN12]

An adverse party may continue to serve papers on the attorney of record until such time as the attorney secures permission of the court to withdraw.[FN13]

When an attorney resigns before judgment, no further proceedings may be taken in the action against the party for whom the attorney appeared without leave of court and until proper notice has been given.[FN14]

CUMULATIVE SUPPLEMENT

Cases:

Where a potential conflict arises from an attorney's successive representation of clients with potentially adverse interests, and the primary value at stake is therefore client confidentiality, the correct legal standard generally requires disqualification of the attorney if the former client demonstrates a substantial relationship between the subjects of the antecedent and current representations. In re Charlisse C., 45 Cal. 4th 145, 84 Cal. Rptr. 3d 597, 194 P.3d 330 (2008).

Conflicts of interest, warranting disqualification of an attorney, commonly arise in one of two factual contexts: (1) in cases of successive representation, where an attorney seeks to represent a client with interests that are potentially adverse to a former client of the attorney; and (2) in cases of simultaneous representation, where an attorney seeks to represent in a single action multiple parties with potentially adverse interests. In re Charlisse C., 45 Cal. 4th 145, 84 Cal. Rptr. 3d 597, 194 P.3d 330 (2008).

[END OF SUPPLEMENT]

[FN1] State v. Key, 643 S.E.2d 444 (N.C. Ct. App. 2007), writ denied, review denied (N.C. June 27, 2007).
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[FN2] Khan v. Dolly, 39 A.D.3d 649, 833 N.Y.S.2d 608 (2d Dep't 2007).
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[FN3] Mason v. MTA New York City Transit, 38 A.D.3d 258, 832 N.Y.S.2d 153 (1st Dep't 2007).
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[FN4] Rule 1.16(d), ABA Model Rules of Professional Conduct.
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[FN5] Rule 1.16(d), ABA Model Rules of Professional Conduct.
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[FN6] Rule 1.16(c), ABA Model Rules of Professional Conduct.
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[FN7] Khan v. Dolly, 39 A.D.3d 649, 833 N.Y.S.2d 608 (2d Dep't 2007); Porter v. Fieldcrest Cannon, Inc., 133 N.C. App. 23, 514 S.E.2d 517 (1999).
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[FN8] Haskell v. Haskell, 185 A.D.2d 333, 586 N.Y.S.2d 630 (2d Dep't 1992).
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[FN9] Parfi Holding AB v. Mirror Image Internet, Inc., 926 A.2d 1071 (Del. 2007).
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[FN10] Reed v. State, 378 So. 2d 899 (Fla. Dist. Ct. App. 1st Dist. 1980).
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[FN11] Porter v. Fieldcrest Cannon, Inc., 133 N.C. App. 23, 514 S.E.2d 517 (1999).
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[FN12] Khan v. Dolly, 39 A.D.3d 649, 833 N.Y.S.2d 608 (2d Dep't 2007).
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[FN13] Tripp v. Santa Rosa St. R. Co., 144 U.S. 126, 12 S. Ct. 655, 36 L. Ed. 371 (1892).
-

[FN14] Wisniewski v. Wisniewski, 149 A.D.2d 965, 540 N.Y.S.2d 101 (4th Dep't 1989).
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7 Am. Jur. 2d Attorneys at Law § 182

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Attorneys at Law
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III. Attorney-Client Relationship
D. Termination of Relationship
2. Abandonment or Withdrawal of Attorney

Topic Summary Correlation Table References

§ 182. When justified

West's Key Number Digest

West's Key Number Digest, Attorney and Client 76(1)

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Rights and duties of attorney in a criminal prosecution where client informs him of intention to present perjured testimony, 64 A.L.R.3d 385

A lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client; the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; the client has used the lawyer's services to perpetrate a crime or fraud; the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement; 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; the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or other good cause for withdrawal exists.[FN1]

The client's failure to pay or to secure the payment of proper fees upon reasonable demand will justify the attorney in refusing to proceed with the case; nevertheless, this does not mean that an attorney of record can walk out of the case by announcing to the court on the day of the trial that he or she has withdrawn because he or she has not been paid.[FN2]

Where a defense attorney is aware that a defendant intends to commit perjury, the attorney must first attempt to persuade the defendant not to pursue the unlawful course of conduct; if unsuccessful, withdrawal from representation may be an appropriate response, but when confronted with the problem during trial, an attorney's revelation of the perjury to the court is a professionally responsible and acceptable response.[FN3] Withdrawal under these conditions does not jeopardize the defendant's rights, because an attorney may not withdraw until he or she has obtained leave of court and further taken reasonable steps to avoid foreseeable prejudice to his or her client, including giving due notice to his or her client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.[FN4]

If appointed counsel determines that no meritorious appellate issues exist, counsel cannot simply withdraw without leave of the appellate court; appointed counsel must first advise the court of his or her opinion that the appeal is frivolous, thus placing counsel's duty to exercise candor toward the tribunal in conflict with the client's Sixth Amendment right to effective assistance of counsel.[FN5]

Observation: Neither the Sixth Amendment nor the attorney-client privilege give a person the right to carry out through counsel an unlawful course of conduct.[FN6]

Withdrawal on the morning of trial is appropriate where counsel has just been appointed to the bench and can no longer practice law.[FN7]

CUMULATIVE SUPPLEMENT

Cases:

The trial court's denial to attorney's motion to withdraw his appearance was not an abuse of discretion; the court remedied defendant's inability to pay by ordering the public defender to provide deposition services, defendant stated at the hearing that he did not want to discharge attorney, and the motion was filed one month before defendant's trial was scheduled to begin. Bronaugh v. State, 942 N.E.2d 826 (Ind. Ct. App. 2011).

[END OF SUPPLEMENT]

[FN1] Rule 1.16(b), ABA Model Rules of Professional Conduct.
- As to withdrawal of attorney who will be called as a witness, see § 71.
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[FN2] State v. Key, 643 S.E.2d 444 (N.C. Ct. App. 2007), writ denied, review denied (N.C. June 27, 2007).
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[FN3] People v. DePallo, 96 N.Y.2d 437, 729 N.Y.S.2d 649, 754 N.E.2d 751 (2001).
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[FN4] State v. Calhoun, 86 Ohio St. 3d 279, 1999-Ohio-102, 714 N.E.2d 905 (1999).
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[FN5] State v. Parent, 2006 WI 132, 298 Wis. 2d 63, 725 N.W.2d 915 (2006).
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[FN6] In re Sulfuric Acid Antitrust Litigation, 235 F.R.D. 407 (N.D. Ill. 2006), supplemented, 432 F. Supp. 2d 794 (N.D. Ill. 2006).
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[FN7] People v. Ward, 36 Cal. 4th 186, 30 Cal. Rptr. 3d 464, 114 P.3d 717 (2005), as modified, (Sept. 7, 2005) and cert. denied, 547 U.S. 1043, 126 S. Ct. 1625, 164 L. Ed. 2d 340 (2006).
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III. Attorney-Client Relationship
D. Termination of Relationship
2. Abandonment or Withdrawal of Attorney

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§ 183. Notice to client

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Forms

Am. Jur. Legal Forms 2d, Attorneys at Law § 30:182 (Notice terminating attorney-client relationship—By attorney)

Am. Jur. Pleading and Practice Forms, Attorneys at Law § 116 (Notice—By attorney—Of intent to file motion for leave to withdraw—To client)

An attorney should give his or her client reasonable notice before withdrawing[FN1] so the client may have adequate time to procure other counsel,[FN2] and so substitute counsel may adequately prepare for the trial, particularly in a complex case.[FN3]

[FN1] Hensgen v. Hensgen, 53 N.C. App. 331, 280 S.E.2d 766 (1981).
- An attorney did not comply with the requirement that he give a client reasonable warning that he was terminating representation when he told the probationer that he intended to withdraw at the courthouse, before the hearing. In re Key, 643 S.E.2d 452 (N.C. Ct. App. 2007), writ denied, review denied, 361 N.C. 428, 2007 WL 2156157 (2007).
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[FN2] Central Cab Co. v. Clarke, 259 Md. 542, 270 A.2d 662 (1970).
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[FN3] Finch v. Wallberg Dredging Co., 76 Idaho 246, 281 P.2d 136, 48 A.L.R.2d 1150 (1955).
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III. Attorney-Client Relationship
E. Substitution of Attorneys

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A.L.R. Index, Attorney or Assistance of Attorney

West's A.L.R. Digest, Attorney and Client 75(1) to 75(3))

Forms

Am. Jur. Pleading and Practice Forms, Attorneys at Law §§ 100 to 113

Federal Procedural Forms, L.Ed. § 1:455

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III. Attorney-Client Relationship
E. Substitution of Attorneys

Topic Summary Correlation Table References

§ 184. Generally

West's Key Number Digest

West's Key Number Digest, Attorney and Client 75(1) to 75(3)

Forms

Am. Jur. Pleading and Practice Forms, Attorneys at Law §§ 100 to 113 (Forms relating to substitution of counsel)

Stipulation—Between party and attorney of record—Substitution of attorneys. Federal Procedural Forms, L.Ed. § 1:455

When a client, for whatever reason, loses faith in his or her attorney, the client has the unqualified right to change lawyers.[FN1] A party has a right to discharge his or her attorney at any time with or without cause, and to substitute other counsel, for a client is entitled to be represented by an attorney in whose ability and fidelity he or she has confidence.[FN2] Although a defendant's loss of trust in assigned counsel should be considered when assessing whether good cause for substitution of counsel exists, a defendant must nevertheless afford the court with legitimate reasons for his or her lack of confidence.[FN3] Unless the attorney has an interest in the subject matter of the suit, a party has the right to change his or her attorney of record at any stage of the cause and substitute another attorney.[FN4]

A client has the right to choose any attorney who is in good standing with the bar and a court has no power to discipline such an attorney by refusing to allow him or her to participate in the client's case, even where the attorney's former firm accuses him or her of unethically obtaining the client's case.[FN5]

The right to substitute counsel is not absolute, and the trial court may deny substitution of counsel if the substitution would unduly prejudice the other party or interfere with the administration of justice.[FN6] Thus, the trial court is obligated to consider both the prejudice caused to the other party by grant of substitution of counsel and the detriment caused to the moving party by denial of substitution.[FN7]

Although, generally, the attorney of record has the exclusive right to appear for his or her client, when the actual authority of the new or different attorney appears, the absence of record of a formal substitution may be excused.[FN8]

It is a breach of duty for an attorney to retain a client's case files after discharge; an attorney's work product belongs absolutely to the client whether or not the attorney has been paid for his or her services.[FN9]

CUMULATIVE SUPPLEMENT

Cases:

Once a defendant expresses his dissatisfaction with appointed counsel, the district court is obliged to conduct an inquiry into the defendant's complaint to determine whether there is good cause for substitution of counsel. U.S. v. Henderson, 626 F.3d 326 (6th Cir. 2010).

District Court was within its discretion in denying defense counsel's motion to withdraw and in denying defendant's motions to substitute counsel and to continue trial, where motions to withdraw and substitute counsel were not timely made, the record did not evidence a total lack of communication between defendant and his counsel, and, as to the motion to continue trial, defendant had already received several continuances, counsel assured the court that he fully discussed everything with defendant, and government stated that it would suffer severe prejudice from further delays. U.S. v. Lopez, 406 Fed. Appx. 455 (11th Cir. 2010).

The trial court's duty to conduct an inquiry into a defendant's request for substitute appointed counsel arises only when the defendant makes a *Marsden* motion by asserting directly or by implication that his counsel's performance has been so inadequate as to deny him his constitutional right to effective counsel. U.S.C.A. Const.Amend. 6. People v. Carter, 182 Cal. App. 4th 522, 2010 WL 670127 (2d Dist. 2010).

Trial court acted within its discretion in refusing substitution of counsel for defendant who said he did not trust counsel and did not believe that counsel was working for his best interest, since defendant's reasons were

too vague to provide a basis for substituting counsel. People v. Clemons, 160 Cal. App. 4th 1243, 74 Cal. Rptr. 3d 248 (2d Dist. 2008).

If incompetency of counsel is assigned by the defendant as the reason for discharging his court-appointed counsel before trial, or a reason, the trial judge should make a sufficient inquiry of the defendant and his appointed counsel to determine whether there is reasonable cause to believe that the court-appointed counsel is not rendering effective assistance to the defendant, and if reasonable cause for such belief appears, the trial judge should make a finding to that effect on the record and appoint a substitute attorney who should be allowed adequate time to prepare the defense, but if no reasonable basis appears for a finding of ineffective representation, the trial judge should so state on the record and advise the defendant that if he discharges his original counsel the State may not thereafter be required to appoint a substitute. U.S.C.A. Const.Amend. 6. Nash v. State, 53 So. 3d 1208 (Fla. Dist. Ct. App. 2d Dist. 2011).

Trial court was required to conduct preliminary *Nelson* inquiry into effectiveness of counsel, where defendant's counsel, upon appearing with defendant before trial court to determine whether defendant was going to agree to pretrial intervention or proceed to trial, explained that "the last time I spoke to her outside of the court, she wanted to have me off of her case," he further explained that he did not know if that was still her request, and defendant never made oral motion to discharge counsel because trial court gave her no opportunity to do so. Penn v. State, 51 So. 3d 622 (Fla. Dist. Ct. App. 2d Dist. 2011).

Appointed counsel's failure to have the preliminary hearing transcript prepared for use at trial, which preparation had been requested by defendant, did not demonstrate an irreconcilable conflict between defendant and counsel, as basis for appointment of substitute counsel, as requested by defendant before voir dire. State v. Garza, 236 P.3d 501 (Kan. 2010).

To warrant substitute counsel, a defendant must show "justifiable dissatisfaction" with appointed counsel, which includes a showing of a conflict of interest, an irreconcilable conflict, or a complete breakdown in communications between counsel and the defendant. State v. Bryant, 285 Kan. 970, 179 P.3d 1122 (2008).

Whether appointed counsel is substituted upon indigent defendant's request is within the discretion and responsibility of the trial judge, and a court's duty to consider such a motion is invoked only where a defendant makes a seemingly serious request. U.S.C.A. Const.Amend. 6; McKinney's Const. Art. 1, § 6. People v. Porto, 16 N.Y.3d 93, 942 N.E.2d 283 (2010).

[END OF SUPPLEMENT]

[FN1] Malonis v. Harrington, 442 Mass. 692, 816 N.E.2d 115 (2004).
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[FN2] Sullivan v. Eichmann, 213 Ill. 2d 82, 289 Ill. Dec. 673, 820 N.E.2d 449 (2004).
- Where a defendant voices a seemingly substantial complaint about counsel, the court should inquire into the reasons for dissatisfaction. Viscomi v. Conway, 438 F. Supp. 2d 163 (W.D. N.Y. 2006).
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[FN3] Latterell v. Conway, 430 F. Supp. 2d 116 (W.D. N.Y. 2006).
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[FN4] Atlantic Commercial Development Corp. v. Nortek, Inc., 403 So. 2d 624 (Fla. Dist. Ct. App. 5th Dist. 1981).
-

[FN5] Larson v. Grossman, 604 So. 2d 1274 (Fla. Dist. Ct. App. 4th Dist. 1992).
-

[FN6] Sullivan v. Eichmann, 213 Ill. 2d 82, 289 Ill. Dec. 673, 820 N.E.2d 449 (2004).
-

[FN7] Sullivan v. Eichmann, 213 Ill. 2d 82, 289 Ill. Dec. 673, 820 N.E.2d 449 (2004).
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[FN8] Baker v. Boxx, 226 Cal. App. 3d 1303, 277 Cal. Rptr. 409 (2d Dist. 1991).

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[FN9] Kallen v. Delug, 157 Cal. App. 3d 940, 203 Cal. Rptr. 879 (2d Dist. 1984).

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7 Am. Jur. 2d Attorneys at Law III F Refs.

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III. Attorney-Client Relationship
F. Right of Client to Settle or Dismiss

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F. Right of Client to Settle or Dismiss

Topic Summary Correlation Table References

§ 185. Right to compromise or settle

West's Key Number Digest

West's Key Number Digest, Attorney and Client 62, 89, 101

Trial Strategy

Prohibition against settlement without approval. Setting the Fee, 1 Am. Jur. Trials 93 § 20

An attorney cannot compel his or her client to continue litigation; thus, the client may settle the cause of action without consulting the attorney.[FN1] The client may take such action despite an agreement with counsel not to do so.[FN2] The power of the client to make a settlement is not impaired because he or she has entered into a contingent fee agreement with the attorney or an agreement to pay the attorney part of the subject matter of litigation in case of success.[FN3]

[FN1] Milberg, Weiss, Bershad, Hynes, and Lerach, LLP v. State, 342 Ark. 303, 28 S.W.3d 842 (2000).
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[FN2] Kendall v. U.S., 74 U.S. 113, 19 L. Ed. 85, 1868 WL 11079 (1868).
-

[FN3] Knoll v. Klatt, 43 Wis. 2d 265, 168 N.W.2d 555 (1969) (abrogated on other grounds by, Herro, McAndrews and Porter, S. C. v. Gerhardt, 62 Wis. 2d 179, 214 N.W.2d 401 (1974)).
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III. Attorney-Client Relationship
F. Right of Client to Settle or Dismiss

Topic Summary Correlation Table References

§ 186. Right to dismiss

West's Key Number Digest

West's Key Number Digest, Attorney and Client 62, 89, 101

An attorney cannot compel his or her client to continue litigation; the client may dismiss the cause of action without consulting the attorney.[FN1] Sometimes authority to dismiss is expressly given to the client by statute.[FN2]

[FN1] Milberg, Weiss, Bershad, Hynes, and Lerach, LLP v. State, 342 Ark. 303, 28 S.W.3d 842 (2000).
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[FN2] Johnson v. Gerald, 216 Ala. 581, 113 So. 447, 59 A.L.R. 348 (1927).
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IV. Privileges and Disabilities of Attorney
A. In General

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IV. Privileges and Disabilities of Attorney
A. In General

Topic Summary Correlation Table References

§ 187. Privileges and exemptions

West's Key Number Digest

West's Key Number Digest, Attorney and Client 19 to 22

An attorney, as such, enjoys various privileges and exemptions not enjoyed by laypersons, that are granted for the purposes of protecting the courts from interruption and delay and of protecting the client's rights.[FN1] Thus, an attorney is to a large degree immune from liability for acts performed in the discharge of his or her professional duties.[FN2]

[FN1] Durst v. Tautges, Wilder & McDonald, 44 F.2d 507, 71 A.L.R. 1394 (C.C.A. 7th Cir. 1930).
- As to an attorney acting as witness and attorney as unethical conduct, see § 71.
- As to an attorney's exemption from jury service, see Am. Jur. 2d, Jury § 160.
- As to an attorney's exemption from service of process, see Am. Jur. 2d, Process § 35.
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[FN2] Kelly v. Clark, 192 Wis. 2d 633, 531 N.W.2d 455 (Ct. App. 1995).
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IV. Privileges and Disabilities of Attorney
B. Representation of Conflicting Interests

Topic Summary Correlation Table

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Forms

Am. Jur. Pleading and Practice Forms, Attorneys at Law §§ 87 to 98

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B. Representation of Conflicting Interests

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§ 188. General prohibition

West's Key Number Digest

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Propriety of Insurers' Use of Staff Attorneys to Represent Insureds, 2 A.L.R.6th 537

Admissibility and effect of evidence of professional ethics rules in legal malpractice action, 50 A.L.R.5th 301

Circumstances giving rise to prejudicial conflict of interests between criminal defendant and defense counsel—state cases, 18 A.L.R.4th 360

Propriety of attorney who has represented corporation acting for corporation in controversy with officer, director, or stockholder, 1 A.L.R.4th 1124

Attorney and client: Conflict of interest in real-estate closing situations, 68 A.L.R.3d 967

Representation of conflicting interests as disqualifying attorney from acting in a civil case, 31 A.L.R.3d 715

Propriety and effect of attorney representing interest adverse to that of former client, 52 A.L.R.2d 1243

Grounds for disqualification of criminal defendant's chosen and preferred attorney in federal prosecution, 127 A.L.R. Fed. 67

Disqualification of law firm from representing party in federal civil suit involving former client of that firm, 56 A.L.R. Fed. 189

Propriety of law firm's representation of client in federal court where lawyer affiliated with firm is disqualified from representing client, 51 A.L.R. Fed. 678

Forms

Am. Jur. Pleading and Practice Forms, Attorneys at Law §§ 88 to 98 (Forms relating to conflict of interest)

Law Reviews and Other Periodicals

Barker, Laying The Foundation for Staff Counsel Representation of Insureds, 39 Tort Trial & Ins. Prac. L.J. 897 (2004)

A conflict of interest exists when an attorney is in a position where the exercise of the attorney's independent professional judgment on behalf of one client would be adversely affected by the differing interests of the other clients.[FN1] Under the principles of loyalty and confidentiality set forth in the Code of Professional Responsibility, an attorney, after receiving the confidence of a client, may not enter the service of others whose interests are adverse to such client's interest in the same subject matter to which the confidence relates, or in matters so closely allied thereto as to be, in effect, a part thereof.[FN2] Thus, an attorney who seeks to simultaneously represent clients with directly adverse interests in the same litigation will be automatically disqualified.[FN3] Moreover, if a lawyer accepts dual representation and the client's interests thereafter come into actual conflict, the lawyer must withdraw.[FN4]
Observation: There is nothing wrong with a lawyer representing two clients in the same cause of action so long as the interests of the clients in that cause parallel each other; where the objectives of the clients are adverse to one another, however, the attorney will almost certainly be faced with a conflict of interest problem.[FN5]

An attorney's duty not to represent conflicting interests is an outgrowth of the attorney-client relationship itself, which is confidential, or fiduciary, in a broader sense; not only do clients at times disclose confidential information to their attorneys, they also repose confidence in them.[FN6]

Practice Tip: The conflict of interest provision of the Rules of Professional Conduct requires only the possibility that a client's interests may be materially limited by the lawyer's interests.[FN7] The rule applies to potential conflicts of interest, and thus, the rule applies even absent a direct conflict of interest.[FN8]

In a criminal case, while permitting a single attorney to represent co-defendants is not per se a violation of a defendant's right to effective assistance of counsel, a court alerted to possible conflicts of interest must take adequate steps to ascertain whether the conflict warrants separate counsel.[FN9]

Practice Tip: As a general rule, courts do not disqualify an attorney on the grounds of conflict of interest unless the former client moves for disqualification.[FN10] One seeking to disqualify an attorney must show that: (1) there was an actual attorney-client relationship between the movant and the attorney, and (2) there was a substantial relationship between the subject matter of the prior and current representation.[FN11] To demonstrate an actual conflict of interest, the defendant claiming ineffective assistance of counsel must identify specific evidence in the record that suggests that his or her interests were impaired or compromised for the benefit of the lawyer or another party.[FN12]

In the case of attorneys subject to discovery sanctions, unlike witnesses, whose interests may differ substantially from those of parties, attorneys assume an ethical obligation to serve their clients' interests, an obligation which remains even though the attorney might have a personal interest in seeking vindication from the sanctions order.[FN13] Thus, while attorneys who are the subject of discovery sanctions may well have a personal interest in pursuing an immediate appeal from a sanctions order, an interest which need not coincide with the interests of the client, the decision to appeal should turn, as a matter of professional ethics, entirely on the client's interest.[FN14]

CUMULATIVE SUPPLEMENT

Cases:

In order for a direct conflict to exist between an attorney's duties to a current client and to a former client, the same individual attorney must be involved in both cases simultaneously, or the allegedly conflicted attorney must have received confidential, material information from the former client. People v. Shari, 204 P.3d 453 (Colo. 2009).

Whenever an attorney-client relationship is formed, the court presumes that the client reposed confidences in the attorney; once the attorney-client relationship has ended, the attorney then has a duty not to use that confidential information in a manner that would be detrimental to the client. People v. Shari, 204 P.3d 453 (Colo. 2009).

Defendant failed to establish that trial counsel's prior representation of defendant's codefendant created an improper conflict of interest in murder prosecution; although counsel did not call codefendant as a witness or take a position adversarial to codefendant, there was no showing that codefendant's testimony would have been beneficial, counsel's reason for not calling codefendant to testify was not the alleged conflict of interest but a strategic decision, counsel did not remember previously representing codefendant, and counsel stated that if he had known that he represented codefendant and had learned something from that representation, he would have used that information to assist defendant. Stephens v. State, 975 So. 2d 405 (Fla. 2007).

Record did not support finding that attorney appointed as guardian litem for mentally disabled mother in termination of parental rights hearing violated attorney-client privilege or rules of professional responsibility by revealing confidential information he obtained during initial conversation with mother and her plenary guardian, or by operating under a conflict of interest; record showed that while attorney stated to court following initial conversation that there may be a conflict between what plenary guardian felt was in mother's best interest and what attorney felt was in mother's best interest, attorney simply described his role as a potential attorney and guardian ad litem to mother and plenary guardian, at no time during court proceeding did plenary guardian object to appointment of attorney as guardian ad litem, and attorney was never appointed mother's attorney. In re Mark W., 228 Ill. 2d 365, 320 Ill. Dec. 798, 888 N.E.2d 15 (2008).

Trial counsel's arrangement with television production company to wear a wireless microphone during trial, and thereby permit an intrusion into confidential attorney-client communications, created an actual conflict of

interest that would result in ineffective assistance absent voluntary, knowing, and intelligent consent by defendant; counsel's duty to give undivided loyalty to and zealous representation of his client competed with the obligation of wearing a wireless microphone and giving third parties seemingly unfettered access to his confidential relationship with defendant. Com. v. Perkins, 450 Mass. 834, 883 N.E.2d 230 (2008).

When a company and its employee or affiliate have common interests, a staff attorney can represent them both without the company engaging in unauthorized practice of law, because there is for all practical purposes only one client involved. Unauthorized Practice of Law Committee v. American Home Assur. Co., Inc., 261 S.W.3d 24 (Tex. 2008).

A liability insurer may use staff attorneys to defend a claim against an insured without engaging in unauthorized practice of law, if the insurer's interest and the insured's interest are congruent, but not otherwise; their interests are congruent when they are aligned in defeating the claim and there is no conflict of interest between the insurer and the insured. Unauthorized Practice of Law Committee v. American Home Assur. Co., Inc., 261 S.W.3d 24 (Tex. 2008).

[END OF SUPPLEMENT]

[FN1] In re Conduct of Wyllie, 331 Or. 606, 19 P.3d 338 (2001).

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[FN2] Detter v. Schreiber, 259 Neb. 381, 610 N.W.2d 13 (2000).

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[FN3] City and County of San Francisco v. Cobra Solutions, Inc., 38 Cal. 4th 839, 43 Cal. Rptr. 3d 771, 135 P.3d 20 (2006), opinion superseded, 63 Cal. Rptr. 3d 296, 163 P.3d 3 (Cal. 2007).

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[FN4] In re Disciplinary Proceeding Against Carpenter, 160 Wash. 2d 16, 155 P.3d 937 (2007).

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[FN5] Illinois Cent. R. Co. v. Gandy, 750 So. 2d 527 (Miss. 1999).

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[FN6] Knight v. Ferguson, 149 Cal. App. 4th 1207, 57 Cal. Rptr. 3d 823 (2d Dist. 2007), review denied, (July 11, 2007).

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[FN7] State v. Veale, 154 N.H. 730, 919 A.2d 794 (2007).

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[FN8] In re Disciplinary Proceeding Against Marshall, 160 Wash. 2d 317, 157 P.3d 859 (2007).

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[FN9] Wheat v. U.S., 486 U.S. 153, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988).

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[FN10] Hawkes v. Lewis, 255 Neb. 447, 586 N.W.2d 430 (1998).

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[FN11] Williams v. Bell, 793 So. 2d 609 (Miss. 2001).

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[FN12] Herring v. State, 730 So. 2d 1264 (Fla. 1998).

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[FN13] Cunningham v. Hamilton County, Ohio, 527 U.S. 198, 119 S. Ct. 1915, 144 L. Ed. 2d 184, 43 Fed. R. Serv. 3d 739 (1999).

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[FN14] Cunningham v. Hamilton County, Ohio, 527 U.S. 198, 119 S. Ct. 1915, 144 L. Ed. 2d 184, 43 Fed. R. Serv. 3d 739 (1999).

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IV. Privileges and Disabilities of Attorney
B. Representation of Conflicting Interests

Topic Summary Correlation Table References

§ 189. Where conflict of interest arises from former employment of attorney in firm

West's Key Number Digest

West's Key Number Digest, Attorney and Client 21

A.L.R. Library

Sufficiency of screening measures (Chinese Wall) designed to prevent disqualification of law firm, member of which is disqualified for conflict of interest, 68 A.L.R. Fed. 687

An attorney's conflict of interest is imputed to the law firm as a whole, warranting vicarious disqualification of the entire firm, on the rationale that attorneys, working together and practicing law in a professional association, share each other's and their clients' confidential information.[FN1] This presumption of shared confidences arises where a law firm employs an attorney who had previously represented a client in a matter substantially related to a matter in which the firm is representing another client, and the law firm will be disqualified from such representation if it fails to screen the attorney from the litigation after the firm should have been aware of the potential conflict of interest.[FN2] A very strict standard of proof is applied to rebuttal of this presumption of shared confidences, and any doubts as to the existence of an asserted conflict of interest must be resolved in favor of disqualification of the new firm in order to dispel any appearance of impropriety.[FN3] A “Chinese wall” is a procedure which permits an attorney involved in an earlier adverse

role to be screened from other attorneys in the firm, so as to prevent disqualification of the entire law firm simply because one member of the firm previously represented a client who is now an adversary of the client currently represented by the firm.[FN4] The burden is always on the party relying on this "Chinese wall" to demonstrate its existence and effectiveness.[FN5] Counsel may be disqualified where counsel has obtained the secrets of an adverse party in some manner other than previous representation of that party, such as where counsel's newly hired paralegal had access to the adversary's confidences while working for opposing counsel, or where counsel obtained confidential information from an expert with whom opposing counsel had consulted.[FN6]

Caution: In some cases, disqualification of a firm is ordered on the basis of the prior representation of a new member of the firm regardless of the screening done by the firm to shield the new member from the matter.[FN7]

For purposes of determining whether attorney disqualification is warranted, for attorneys, there is an irrebuttable presumption they gain confidential information on every case at the firm where they work, and an irrebuttable presumption they share that information with the members of a new firm.[FN8] For purposes of determining whether attorney disqualification is warranted, for legal assistants, there is an irrebuttable presumption they gain confidential information only on cases on which they work, and a rebuttable presumption they share that information with a new employer; the presumption is rebutted not by denials of disclosure, but by prophylactic measures assuring that legal assistants do not work on matters related to their prior employment.[FN9]

Even if departing attorneys have no connection with a former client of a former firm, they cannot take on a case against that client if it involves questioning the validity of the earlier representation.[FN10]

Observation: A law firm which is contemplating hiring counsel who had been directly involved on the opposing side has a duty to disclose to its own client that such a hiring may place the firm in conflict and could result in disqualification, and the firm may have to subordinate its desire to augment its staff against its duties to its client and avoid placing the firm's interests above the client's interests.[FN11]

CUMULATIVE SUPPLEMENT

Cases:

Confidentiality agreement signed by legal assistant when ending her employment with prior firm that defended hospital in medical malpractice action was not relevant to determining whether firm that subsequently hired assistant was required to be disqualified from representing plaintiff in same malpractice action, on basis of conflict of interest arising from assistant's work on malpractice action while employed at prior firm, since confidentiality agreement was not a step taken by hiring firm. V.T.C.A., Government Code Title 2, Subtitle G App. A–1, Disciplinary Procedure Rule 1.09(b). In re Columbia Valley Healthcare System, L.P., 320 S.W.3d 819 (Tex. 2010).

[END OF SUPPLEMENT]

[FN1] City and County of San Francisco v. Cobra Solutions, Inc., 38 Cal. 4th 839, 43 Cal. Rptr. 3d 771, 135 P.3d 20 (2006).

- Once it is proven that there is a substantial relationship between an attorney's representation of former and current clients, there is a presumption the attorney must be disqualified. Doe ex rel. Doe v. Perry Community School Dist., 650 N.W.2d 594 (Iowa 2002).

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[FN2] Nelson v. Green Builders, Inc., 823 F. Supp. 1439 (E.D. Wis. 1993).

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[FN3] Kala v. Aluminum Smelting & Refining Co., Inc., 81 Ohio St. 3d 1, 1998-Ohio-439, 688 N.E.2d 258 (1998).
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[FN4] Kala v. Aluminum Smelting & Refining Co., Inc., 81 Ohio St. 3d 1, 1998-Ohio-439, 688 N.E.2d 258 (1998).
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[FN5] Howitt v. Superior Court, 3 Cal. App. 4th 1575, 5 Cal. Rptr. 2d 196 (4th Dist. 1992).
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[FN6] Roush v. Seagate Technology, LLC, 150 Cal. App. 4th 210, 58 Cal. Rptr. 3d 275 (6th Dist. 2007), review denied, (July 25, 2007).
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[FN7] Henderson v. Floyd, 891 S.W.2d 252 (Tex. 1995).
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[FN8] In re Mitcham, 133 S.W.3d 274 (Tex. 2004).
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[FN9] In re Mitcham, 133 S.W.3d 274 (Tex. 2004).
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[FN10] In re Basco, 221 S.W.3d 637 (Tex. 2007).
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[FN11] Kala v. Aluminum Smelting & Refining Co., Inc., 81 Ohio St. 3d 1, 1998-Ohio-439, 688 N.E.2d 258 (1998).
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B. Representation of Conflicting Interests

Topic Summary Correlation Table References

§ 190. Where adverse parties knowingly consent

West's Key Number Digest

West's Key Number Digest, Attorney and Client 21.10

Forms

Am. Jur. Pleading and Practice Forms, Attorneys at Law § 89 (Consent of client to continued representation by attorney—In litigation—Potential conflict of interest)

Am. Jur. Pleading and Practice Forms, Attorneys at Law § 90 (Consent of client to continued representation by attorney—Litigation—Actual conflict of interest)

A law firm may satisfy the requirements of the Code of Professional Responsibility by fully informing a client of a potential conflict of interest in the firm's joint representation of parties and by the parties consenting to the continued representation.[FN1] However, although an attorney may simultaneously represent parties whose interests conflict, where the attorney acts with the full knowledge and consent of both parties,[FN2] this rule has been held inapplicable in an action of divorce or separation.[FN3]

[FN1] Hall Dickler Kent Goldstein & Wood, LLP v. McCormick, 36 A.D.3d 757, 828 N.Y.S.2d 528 (2d Dep't 2007).
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[FN2] Spivey v. Bender, 77 Ohio App. 3d 17, 601 N.E.2d 56 (6th Dist. Lucas County 1991).
- Rule 1.7(b), ABA Model Rules of Professional Conduct, provides that a lawyer may represent multiple clients if the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; the representation is not prohibited by law; the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and each affected client gives informed consent, confirmed in writing.
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[FN3] Holmes v. Holmes, 145 Ind. App. 52, 248 N.E.2d 564 (1969).
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Topic Summary Correlation Table References

§ 191. Representation of interest adverse to that of former client

West's Key Number Digest

West's Key Number Digest, Attorney and Client 21

A.L.R. Library

Propriety and effect of attorney representing interest adverse to that of former client, 52 A.L.R.2d 1243

A lawyer has a duty not to do anything which will injuriously affect his or her former client.[FN1] Thus, an attorney may not undertake or continue a representation adverse to a former client when the attorney has, because of his or her prior representation of the former client, obtained confidential information material to the new representation[FN2] or where a substantial relationship exists between the current and former representation.[FN3] In the context of an attorney's successive representation, the chief fiduciary value jeopardized is that of client confidentiality, not loyalty; the former client's expectation of confidentiality must be preserved to ensure the right of every person to freely and fully confer and confide in one having knowledge of law, and skilled in its practice, in order that the client may have adequate advice and a proper defense.[FN4] Accordingly, where the lawyer switches sides and represents the former client's adversary in the same matter, everything the lawyer does for the new client necessarily will injuriously affect the former client.[FN5] Disqualification is necessary to safeguard the attorney-client relationship in a case where counsel switches sides and represents a party adverse to the prior client.[FN6] A former client must be given the presumption that confidences were disclosed to his or her attorney, for purposes of determining whether the attorney is disqualified from representing a party against the former client.[FN7]

One purpose of disqualification of a former attorney is to prevent disclosure of confidential information that could be used to a former client's disadvantage.[FN8] Disqualification of counsel in cases in which an attorney is potentially or actually in a position to use privileged information obtained during prior representation of a client is rooted in notions of fundamental fairness; allowing an attorney to represent a client in a situation where he or she may use information obtained in the course of former representation of the client's adversary gives the client an unfair advantage.[FN9]

An attorney may not switch sides during pending litigation representing first one side and then the other, because the statutory duty to preserve client confidences survives the termination of the attorney's representation.[FN10]

Observation: The fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.[FN11]

An attorney is not prevented from representing a subsequent client against a former client, where the duties required of the attorney do not conflict with those required in the first employment.[FN12]

Courts have found no impropriety in an attorney's appearing specially on behalf of a railroad to oppose the appointment of a receiver, and later appearing generally for a trustee for bondholders of the railroad and moving to enter a default against the railroad.[FN13]

CUMULATIVE SUPPLEMENT

Cases:

Where an attorney's representation of a client is general in nature, he may be disqualified from representing an adverse party in later litigation, but only if the later litigation puts at issue the client's entire background, and if, on the other hand, the client's background is not at issue, an attorney's knowledge of the client's general business and financial background is not a proper basis for disqualification. Scantek Medical, Inc. v. Sabella, 693 F. Supp. 2d 235 (S.D. N.Y. 2008).

Two attorneys' representation of mother after having previously represented other parties in the same termination of parental rights proceeding was a per se conflict of interest, and also constituted ineffective assistance of counsel; prejudice was presumed based on attorneys' representation of mother and other parties during the course of the proceeding. In re Paul F., 408 Ill. App. 3d 862, 349 Ill. Dec. 791, 947 N.E.2d 805 (2d Dist. 2011).

Adopted standard for determining whether matters are substantially related, under rule of professional conduct governing a lawyer's duty to a former client, protects otherwise privileged communications, while also requiring a fact-sensitive analysis to ensure that the congruity of facts, and not merely similar legal theories, governs whether an attorney ethically may act adverse to a former client. RPC 1.9(a). City of Atlantic City v. Trupos, 201 N.J. 447, 992 A.2d 762 (2010).

An attorney is prohibited from engaging in a former-client conflict of interest even when the former client is deceased, as long as the former client's interests survive his or her death and are adverse to the current client during the subsequent representation. Rules of Prof.Conduct, Rule 1.9(a); Code of Prof.Resp., DR 5–105(C) (2004). In re Hostetter, 348 Or. 574, 238 P.3d 13 (2010).

[END OF SUPPLEMENT]

[FN1] Knight v. Ferguson, 149 Cal. App. 4th 1207, 57 Cal. Rptr. 3d 823 (2d Dist. 2007), review denied, (July 11, 2007).
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[FN2] Shandralina G. v. Homonchuk, 147 Cal. App. 4th 395, 54 Cal. Rptr. 3d 207 (4th Dist. 2007).
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[FN3] § 192.
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[FN4] People v. Baylis, 139 Cal. App. 4th 1054, 43 Cal. Rptr. 3d 559 (1st Dist. 2006), review denied, (Sept. 13, 2006).
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[FN5] Knight v. Ferguson, 149 Cal. App. 4th 1207, 57 Cal. Rptr. 3d 823 (2d Dist. 2007), review denied, (July 11, 2007).
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[FN6] Roush v. Seagate Technology, LLC, 150 Cal. App. 4th 210, 58 Cal. Rptr. 3d 275 (6th Dist. 2007), review denied, (July 25, 2007).
- Where confronted with an actual and substantial conflict of interest involving counsel's duty of confidentiality to a former client, a trial court may exercise its discretion to disqualify the conflicted attorney absent an informed waiver from the former client. People v. Baylis, 139 Cal. App. 4th 1054, 43 Cal. Rptr. 3d 559 (1st Dist. 2006), review denied, (Sept. 13, 2006).
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[FN7] Doe ex rel. Doe v. Perry Community School Dist., 650 N.W.2d 594 (Iowa 2002).
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[FN8] Nevada Yellow Cab Corp. v. Eighth Judicial Dist. Court ex rel. County of Clark, 152 P.3d 737 (Nev. 2007).
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[FN9] State v. Tensley, 955 So. 2d 227 (La. Ct. App. 2d Cir. 2007).
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[FN10] City and County of San Francisco v. Cobra Solutions, Inc., 38 Cal. 4th 839, 43 Cal. Rptr. 3d 771, 135 P.3d 20 (2006).
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[FN11] State v. Drach, 268 Kan. 636, 1 P.3d 864 (2000), as modified, (Apr. 18, 2000).
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[FN12] Shaw v. Bill, 95 U.S. 10, 24 L. Ed. 333, 1877 WL 18592 (1877).
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[FN13] Shaw v. Bill, 95 U.S. 10, 24 L. Ed. 333, 1877 WL 18592 (1877).
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IV. Privileges and Disabilities of Attorney
B. Representation of Conflicting Interests

Topic Summary Correlation Table References

§ 192. Representation of interest adverse to that of former client—Substantial relationship between current and former representation; presumption as to confidential information

West's Key Number Digest

West's Key Number Digest, Attorney and Client 21

A three-part test is utilized to determine whether the prior and present representations are substantially related for purposes of disqualifying an attorney: (1) the trial judge must make a factual reconstruction of the scope of the prior legal representation; (2) it must be determined whether it is reasonable to infer that the confidential information allegedly given would have been to a lawyer representing a client in those matters; and (3) it must be determined whether that information is relevant to the issues raised in the litigation pending against the former client.[FN1] Another variable is the nature and extent of the attorney's involvement with the case and whether he or she was in a position to learn of the client's policy or strategy.[FN2] A substantial relationship between successive legal representation of parties with adverse interests exists, requiring disqualification of the attorney, whenever the subjects of the prior and the current representations are linked in some rational manner.[FN3] Where a substantial relationship is shown between an attorney's prior representation and adverse representation in the present case, (1) it is presumed the attorney received confidential information, and (2) the attorney's disqualification is mandatory.[FN4]

Observation: The substantial relationship test is intended to protect the confidences of former clients when an attorney has been in a position to learn them.[FN5] Thus, where an attorney acquires knowledge about the former client's attitudes, practices, business customs, litigation philosophy, strengths, weaknesses, or strategy, disqualification in subsequent litigation adverse to the former client may be required for that reason alone.[FN6]

Practice Tip: A party seeking to disqualify an attorney on grounds that there is a real and substantial danger that the attorney would use confidential information obtained during the prior representation need not actually spell out the claimed secrets and confidences, but the party must, at a minimum, provide the motion court with information sufficient to determine whether there exists a reasonable probability that the attorney may use such confidential information.[FN7]

In determining whether an attorney who successively represents clients with adverse interests must be disqualified under the substantial relationship test, the court should focus on the similarities between the two factual situations, the legal questions posed, the nature and extent of the attorney's involvement with the cases, and the attorney's possible exposure to formulation of policy or strategy.[FN8] The legal theories and issues that an attorney discusses with a former client may be different from those involved in the subsequent lawsuit against that client, but the substantial relationship test for disqualification of the attorney is broad and not limited to the strict facts, claims, and issues involved in a particular action.[FN9] However, even where the issue of disclosure of privileged information is absent, an attorney representing a party adverse to a former client is properly disqualified for violating the separate and independent duty not to represent conflicting interests.[FN10]

CUMULATIVE SUPPLEMENT

Cases:

Under the substantial relationship test for conflict of interest, when an attorney successively represents clients with adverse interests, and where the subjects of the two representations are substantially related, the need to protect the first client's confidential information requires that the attorney be disqualified from the second representation. Med-Trans Corp., Inc. v. City of California City, 156 Cal. App. 4th 655, 68 Cal. Rptr. 3d 17 (5th Dist. 2007), as modified, (Nov. 19, 2007) and review denied, (Jan. 16, 2008).

An attorney may not do anything which will injuriously affect his former client in any matter in which he formerly represented him, nor at any time use against his former client knowledge or information acquired by virtue of the previous relationship. Med-Trans Corp., Inc. v. City of California City, 156 Cal. App. 4th 655, 68 Cal. Rptr. 3d 17 (5th Dist. 2007), as modified, (Nov. 19, 2007) and review denied, (Jan. 16, 2008).

In cases involving an attorney's successive representation of parties, a party may obtain the disqualification of an attorney by establishing that the targeted attorney (1) has actual knowledge of material confidential information or (2) is presumed to have acquired confidential information because of the relationship between the prior representation and the current representation. Med-Trans Corp., Inc. v. City of California City, 156 Cal. App. 4th 655, 68 Cal. Rptr. 3d 17 (5th Dist. 2007), as modified, (Nov. 19, 2007) and review denied, (Jan. 16, 2008).

Attorney, who had represented both decedent and her son and daughter-in-law in prior suit brought by creditors against decedent to collect debt, was disqualified from acting as attorney for decedent's estate in action brought by attorney, acting in representative capacity on behalf of estate both as special administrator and as estate's attorney, under rule against subsequent adverse representation, as scope of attorney's prior representation of son and daughter-in-law involved substantially the same issues that comprised estate's action, it was more than reasonable to infer that confidential information was given to attorney by son and daughter-in-law in other suit, which information was relevant, in that it related directly to defenses to be used in estate's suit, and attorney actually received confidential information that was usable in estate's suit. Estate of Markheim ex rel. Shumway v. Markheim, 2008 ME 138, 957 A.2d 56 (Me. 2008).

A three-part test is utilized to determine whether an attorney's prior and present representations are substantially related for purposes of disqualifying an attorney: (1) the trial judge must make a factual reconstruction of the scope of the prior legal representation, (2) it must be determined whether it is reasonable to infer that the confidential information allegedly given would have been to a lawyer representing a client in those matters, and (3) it must be determined whether that information is relevant to the issues raised in the litigation pending against the former client. Estate of Markheim ex rel. Shumway v. Markheim, 2008 ME 138, 957 A.2d 56 (Me. 2008).

Under the alternative confidential information prong of three-part test used to determine whether an attorney's prior and present representations are substantially related for purposes of disqualifying an attorney, if the attorney actually acquired confidential information in other representation that may be used in the present representation, the attorney is prohibited from representing the client in the present representation. Bar Rule 3.4(d)(1)(i). Estate of Markheim ex rel. Shumway v. Markheim, 2008 ME 138, 957 A.2d 56 (Me. 2008).

Bar rule governing conflicts of interest due to successive representation has two prongs, each of which provides an independent basis for disqualifying an attorney; under the first prong, if the two matters are substantially related, the attorney is disqualified, and, under the second prong, an attorney is disqualified if the current representation may involve the use of confidential information obtained in the former representation. Estate of Markheim ex rel. Shumway v. Markheim, 2008 ME 138, 957 A.2d 56 (Me. 2008).

Lawyer's representation of employer against former employee was not "substantially related" to lawyer's earlier representation of former employee against third party, even though both cases involved unfair competition, and thus disqualification of lawyer was not required, where prior case dealt with former employee's alleged breach of a noncompete agreement, while the case at hand contended that former employee engaged in the conversion of employer's client lists, the two cases did not involve the same type of evidence, the only witness in common appeared to be former employee himself, lawyer expressly denied that he was aware of any trade secrets, trial strategies, negotiation strategies, legal theories or business practices of former employee, and three years elapsed between the end of lawyer's representation of former employee and the commencement of the litigation in case at hand. Neb. Ct. R. of Prof. Cond. § 3–501.9(a). Jacob North Printing Co., Inc. v. Mosley, 279 Neb. 585, 779 N.W.2d 596 (2010).

Party is entitled to disqualification of opponent's lawyer on showing that there was prior attorney-client relationship, that matters involved in both representations are substantially related, and that present interests of attorney's past and present clients are materially adverse. Falk v. Chittenden, 11 N.Y.3d 73, 862 N.Y.S.2d 839, 893 N.E.2d 116 (2008).

Former wife's attorney violated former husband's rights to keep his psychological records confidential when she gave the records, which she obtained in divorce case, to the prosecutor in a criminal case against the former husband. Hageman v. Southwest Gen. Health Ctr., 119 Ohio St. 3d 185, 2008-Ohio-3343, 893 N.E.2d 153 (2008).

[END OF SUPPLEMENT]

[FN1] Hurley v. Hurley, 2007 ME 65, 923 A.2d 908 (Me. 2007).

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[FN2] Ochoa v. Fordel, Inc., 146 Cal. App. 4th 898, 53 Cal. Rptr. 3d 277 (5th Dist. 2007).
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[FN3] Knight v. Ferguson, 149 Cal. App. 4th 1207, 57 Cal. Rptr. 3d 823 (2d Dist. 2007), review denied, (July 11, 2007).
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[FN4] Knight v. Ferguson, 149 Cal. App. 4th 1207, 57 Cal. Rptr. 3d 823 (2d Dist. 2007), review denied, (July 11, 2007); State v. Tensley, 955 So. 2d 227 (La. Ct. App. 2d Cir. 2007).
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[FN5] Knight v. Ferguson, 149 Cal. App. 4th 1207, 57 Cal. Rptr. 3d 823 (2d Dist. 2007), review denied, (July 11, 2007).
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[FN6] Knight v. Ferguson, 149 Cal. App. 4th 1207, 57 Cal. Rptr. 3d 823 (2d Dist. 2007), review denied, (July 11, 2007).
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[FN7] Jamaica Public Service Co. Ltd. v. AIU Ins. Co., 92 N.Y.2d 631, 684 N.Y.S.2d 459, 707 N.E.2d 414 (1998).
- Because a request for disqualification of counsel implies a charge of unethical conduct, a challenged law firm must be given the opportunity to defend not only its relationship with the client, but also its good name, reputation, and ethical standards. Kala v. Aluminum Smelting & Refining Co., Inc., 81 Ohio St. 3d 1, 1998-Ohio-439, 688 N.E.2d 258 (1998).
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[FN8] Knight v. Ferguson, 149 Cal. App. 4th 1207, 57 Cal. Rptr. 3d 823 (2d Dist. 2007), review denied, (July 11, 2007).
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[FN9] Knight v. Ferguson, 149 Cal. App. 4th 1207, 57 Cal. Rptr. 3d 823 (2d Dist. 2007), review denied, (July 11, 2007).
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[FN10] Knight v. Ferguson, 149 Cal. App. 4th 1207, 57 Cal. Rptr. 3d 823 (2d Dist. 2007), review denied, (July 11, 2007).
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IV. Privileges and Disabilities of Attorney
B. Representation of Conflicting Interests

Topic Summary Correlation Table References

§ 193. Client's waiver of right to object

West's Key Number Digest

West's Key Number Digest, Attorney and Client 21.10

A.L.R. Library

Propriety and effect of attorney representing interest adverse to that of former client, 52 A.L.R.2d 1243

The right of a former client to object to his or her attorney's subsequent representation of an adverse interest may be expressly or tacitly waived.[FN1] The right of a former client to urge disqualification of counsel may be waived by the former client's failure to raise the issue early in the proceedings.[FN2]

In criminal cases where an attorney seeks to represent multiple co-defendants, a court must be allowed substantial latitude in refusing the defendants' waivers of their Sixth Amendment right to conflict-free representation, not only where an actual conflict may be demonstrated before trial, but also where there is a potential for conflict which may develop into an actual conflict as the trial progresses.[FN3]

Where the potential for abuse arising out of an attorney's conflict of interest is serious, the court may refuse to allow joint representation even where the parties sign a waiver of their rights to object.[FN4]

[FN1] City of Cleveland v. Cleveland Elec. Illuminating Co., 440 F. Supp. 193 (N.D. Ohio 1976), aff'd, 573 F.2d 1310 (6th Cir. 1977).
- A party who fails to file its motion to disqualify opposing counsel in a timely manner waives the complaint. In re EPIC Holdings, Inc., 985 S.W.2d 41 (Tex. 1998).
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[FN2] HECI Exploration Co. v. Clajon Gas Co., 843 S.W.2d 622 (Tex. App. Austin 1992), writ denied, (Mar. 31, 1993).
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[FN3] Fuller v. Diesslin, 868 F.2d 604 (3d Cir. 1989).
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[FN4] Shadid v. Jackson, 521 F. Supp. 87 (E.D. Tex. 1981).
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§ 194. Matters involving public interest

West's Key Number Digest

West's Key Number Digest, Attorney and Client 21.5(2)

A.L.R. Library

Disqualification of prosecuting attorney in state criminal case on account of relationship with accused, 42 A.L.R.5th 581

An attorney may not represent both a governmental body and a private client in the same matter even when full disclosure is made and they consent to the representation,[FN1] nor may a lawyer accept private employment in a matter in which he or she had personal and substantial responsibility while a public employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.[FN2]

A party seeking disqualification of his or her opponent's counsel on the ground that counsel had substantial responsibility for the same matter while he or she was a public employee must show that the matters embraced within the pending suit are substantially related to the matters or the cause of action involved in the previous representation.[FN3]

[FN1] In re A. and B., 44 N.J. 331, 209 A.2d 101, 17 A.L.R.3d 827 (1965).
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[FN2] Rule 1.11(a)(2), ABA Model Rules of Professional Conduct.
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[FN3] Outdoor Advertising Ass'n of Georgia, Inc. v. Garden Club of Georgia, Inc., 272 Ga. 146, 527 S.E.2d 856 (2000).
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Topic Summary Correlation Table References

§ 195. Judicial control

West's Key Number Digest

West's Key Number Digest, Attorney and Client 21.20

A.L.R. Library

Representation of conflicting interests as disqualifying attorney from acting in a civil case, 31 A.L.R.3d 715

Propriety and effect of attorney representing interest adverse to that of former client, 52 A.L.R.2d 1243

An attorney may be judicially restrained or disqualified from attempting to represent an interest adverse to that of a former client.[FN1] The test for determining whether there is an impairing conflict is one of probability, not certainty; thus, a court may restrain conduct which has the potential for evolving into a breach of ethics before such conduct becomes ripe for disciplinary action.[FN2]

Where an attorney accepts appointment as a guardian ad litem, thereby creating the appearance of a conflict of interest, and continues to serve after conflict should have been determined, the attorney may be denied compensation by the court for his or her services as guardian.[FN3]

Absent an abuse of discretion, the trial court's decision as to a motion to recuse an attorney is entitled to deference.[FN4] If an abuse of discretion is found, the appropriate remedy is by way of mandamus.[FN5]

The trial court's power to disqualify an attorney, derived from a statute authorizing the trial court to control the conduct of its ministerial officers and of all other persons in any manner connected with the judicial proceeding before it, applies in criminal cases, and the trial court's decision is reviewed for abuse of discretion.[FN6]

Observation: In the context of a certiorari proceeding involving the denial of a motion to disqualify an attorney, the disqualification of a party's lawyer in a civil case is an immensely unusual remedy, one that must be employed only in limited circumstances.[FN7]

Where there are no material disputed factual issues, the appellate court reviews the trial court's determination on a motion for disqualification of an attorney as a question of law.[FN8]

[FN1] Industrial Indem. Co. v. Great American Ins. Co., 73 Cal. App. 3d 529, 140 Cal. Rptr. 806 (2d Dist. 1977).
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[FN2] Pirillo v. Takiff, 462 Pa. 511, 341 A.2d 896 (1975), opinion reinstated, 466 Pa. 187, 352 A.2d 11 (1975).
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[FN3] Matter of Merrick's Will, 107 Misc. 2d 988, 436 N.Y.S.2d 125 (Sur. Ct. 1980).
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[FN4] Samuels v. Montgomery, 793 S.W.2d 337 (Tex. App. Houston 14th Dist. 1990).
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[FN5] J.K. and Susie L. Wadley Research Institute and Blood Bank v. Morris, 776 S.W.2d 271 (Tex. App. Dallas 1989).
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[FN6] People v. Baylis, 139 Cal. App. 4th 1054, 43 Cal. Rptr. 3d 559 (1st Dist. 2006), review denied, (Sept. 13, 2006).
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[FN7] Frank, Weinberg & Black, P.A. v. Effman, 916 So. 2d 971 (Fla. Dist. Ct. App. 4th Dist. 2005).
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[FN8] City and County of San Francisco v. Cobra Solutions, Inc., 38 Cal. 4th 839, 43 Cal. Rptr. 3d 771, 135 P.3d 20 (2006).
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West's Key Number Digest, Attorney and Client 125, 182

A.L.R. Library

A.L.R. Index, Attorney or Assistance of Attorney

West's A.L.R. Digest, Attorney and Client 125, 1822

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§ 196. Generally

West's Key Number Digest

West's Key Number Digest, Attorney and Client 125

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Am. Jur. Pleading and Practice Forms, Attorneys at Law § 93 (Motion or application—By attorney—Development of interests adverse to client subsequent to taking case—Consent of client to withdrawal)

An attorney cannot deal for himself or herself in the subject matter of the litigation to the prejudice of the client's interest.[FN1] With certain exceptions, a lawyer may not acquire a proprietary interest in the cause of action or subject matter of litigation he or she is conducting for a client.[FN2] Thus, an attorney selling property at public auction on another's account cannot become the buyer on his or her own account.[FN3]

It is contrary to the policy of the law and to the principles of equity to permit an attorney to occupy at the same time and in the same transaction the antagonistic and wholly incompatible position of adviser of a client concerning a pending litigation threatening the title to property, and that of the purchaser of that property in opposition to the title of the client.[FN4]

[FN1] Baker v. Humphrey, 101 U.S. 494, 25 L. Ed. 1065, 1879 WL 16687 (1879).

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[FN2] Rule 1.8(i), ABA Model Rules of Professional Conduct.

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[FN3] Marsh v. Whitmore, 88 U.S. 178, 22 L. Ed. 482, 1874 WL 17298 (1874).

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[FN4] Fisher v McInerney, 137 Cal 28, 69 P 622 (1902).

- An attorney's becoming a partner in a transaction to sell a client's property rather than advising her that delinquent taxes could have been deducted from the sale price at closing created an impermissible conflict of interest, absent evidence the attorney disclosed to the client that the proposed financial arrangement was more advantageous for him than for her. Iowa Supreme Court Bd. of Professional Ethics and Conduct v. Bisbee, 601 N.W.2d 88 (Iowa 1999).

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C. Acquiring Adverse Interest in Subject Matter of Litigation or Employment
1. In General

Topic Summary Correlation Table References

§ 197. Purchase by attorney at judicial or tax sale

West's Key Number Digest

West's Key Number Digest, Attorney and Client 125

A.L.R. Library

Duties, rights, and remedies between attorney and client where attorney purchases property of client at or through tax, execution, or judicial sale, 20 A.L.R.2d 1280

An attorney cannot buy and hold property sold at a judicial sale in which his or her client is interested, where the purchase would result in any injury or disadvantage to the client,[FN1] without the consent of the client, unless the attorney bids a sufficient amount to discharge the judgment debt.[FN2] The attorney for the judgment creditor, however, owes no allegiance to the judgment debtor and is under no obligation or duty to protect his or her interests; neither is there any confidential connection existing between the two.[FN3]

Counsel who is merely consulted as to the state of the title to land that is subsequently sold is not prohibited from becoming the purchaser provided he or she has given correct advice concerning liens on the property.[FN4]

[FN1] Stockton v. Ford, 52 U.S. 232, 11 How. 232, 13 L. Ed. 676, 1850 WL 6820 (1850).
-

[FN2] Douglass v. Blount, 95 Tex. 369, 67 S.W. 484 (1902).
-

[FN3] Douglass v. Blount, 95 Tex. 369, 67 S.W. 484 (1902).
-

[FN4] Kauder v. Lautman, 114 N.J. Eq. 197, 168 A. 660 (Ch. 1933), aff'd, 116 N.J. Eq. 145, 172 A. 565 (Ct. Err. & App. 1934).
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2. Remedies Available to Client

Topic Summary Correlation Table References

§ 198. Generally

West's Key Number Digest

West's Key Number Digest, Attorney and Client 125, 182

A.L.R. Library

Duties, rights, and remedies between attorney and client where attorney purchases property of client at or through tax, execution, or judicial sale, 20 A.L.R.2d 1280

Unless barred by laches,[FN1] a client may have a constructive trust impressed on property improperly purchased by his or her attorney.[FN2]

In some instances the attorney has been required to account to the former client for rents and profits derived while property was in the attorney's hands.[FN3] In the accounting, the attorney is allowed credits for the purchase money paid, as well as for taxes and other liens discharged, plus amounts expended for useful improvements.[FN4]

[FN1] § 200.

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[FN2] Gaffney v. Harmon, 405 Ill. 273, 90 N.E.2d 785, 20 A.L.R.2d 1273 (1950).

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[FN3] Gragg v. Pruitt, 1936 OK 842, 179 Okla. 369, 65 P.2d 994 (1936).

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[FN4] Gaffney v. Harmon, 405 Ill. 273, 90 N.E.2d 785, 20 A.L.R.2d 1273 (1950).
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2. Remedies Available to Client

Topic Summary Correlation Table References

§ 199. Good faith of attorney no defense

West's Key Number Digest

West's Key Number Digest, Attorney and Client 125, 182

The question of good faith on the part of an attorney in acquiring an interest adverse to that of a client, the fairness of the transaction, and the adequacy of consideration will not be inquired into where the client seeks to secure the benefit of a purchase made by the attorney for his or her own interest or benefit and without the knowledge or consent of the client.[FN1] However, where the client intended that the attorney should make the purchase and acquiesced in the purchase, and where the transaction was open, honest, and fair, the purchase by the attorney may be upheld.[FN2]

[FN1] Presbyterian Church of Flemington v. Plainfield Trust Co., 139 N.J. Eq. 501, 52 A.2d 400 (Ch. 1947).
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[FN2] Littleton v. Kincaid, 179 F.2d 848, 27 A.L.R.2d 572 (4th Cir. 1950).
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2. Remedies Available to Client

Topic Summary Correlation Table References

§ 200. Laches

West's Key Number Digest

West's Key Number Digest, Attorney and Client 125, 182

A client who, with full knowledge of the facts, acquiesces for a long time in a purchase made by his or her attorney will be denied relief in a proceeding to have the purchase declared to have been for the benefit of the client.[FN1] When the statutory period of limitations has not expired, laches may be invoked as a defense only where, under the circumstances, the granting of the requested relief will presumptively be inequitable and unjust because of the delay.[FN2]

CUMULATIVE SUPPLEMENT

Cases:

A lawyer who represents clients with adverse interests in same litigation automatically will be disqualified, as will a lawyer who switches sides during pending litigation, because both situations present an unacceptable risk that the lawyer's duties of loyalty and confidentiality will be compromised. In re Zamer G., 153 Cal. App. 4th 1253, 63 Cal. Rptr. 3d 769 (2d Dist. 2007), review denied, (Oct. 31, 2007).

[END OF SUPPLEMENT]

[FN1] Marsh v. Whitmore, 88 U.S. 178, 22 L. Ed. 482, 1874 WL 17298 (1874).
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[FN2] Gaffney v. Harmon, 405 Ill. 273, 90 N.E.2d 785, 20 A.L.R.2d 1273 (1950).

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Attorney Malpractice in Real Estate Transactions, 27 Am. Jur. Proof of Facts 3d 353

Legal Malpractice in a Securities Offering, 22 Am. Jur. Proof of Facts 3d 559

Medicolegal Malpractice: Attorney's Negligence in Selecting and Using Expert Medical Consultant, 48 Am. Jur. Proof of Facts 2d 635

Legal Malpractice in Domestic Relations, 44 Am. Jur. Proof of Facts 2d 377

Legal Malpractice—Attorney's Unreasonable Settlement or Failure to Settle Client's Case, 26 Am. Jur. Proof of Facts 2d 703

Legal Malpractice—Estate, Will, and Succession Matters, 24 Am. Jur. Proof of Facts 2d 577

Legal Malpractice—Inadequate Case Investigation, 16 Am. Jur. Proof of Facts 2d 549

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A. Liability to Client
1. In General

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§ 201. Generally

West's Key Number Digest

West's Key Number Digest, Attorney and Client 105 to 115

A.L.R. Library

Legal Malpractice in Connection with Attorney's Withdrawal as Counsel—Tort, Civil Rights, Family Law, Probate, and Unspecified Cases, 42 A.L.R.6th 463

Legal Malpractice in Connection with Attorney's Withdrawal as Counsel—Criminal and Business-Related Cases, 41 A.L.R.6th 1

Allowance of Punitive Damages in Action Against Attorney for Malpractice, 9 A.L.R.6th 285

Attorney malpractice in connection with services related to adoption of child, 18 A.L.R.5th 892

Legal malpractice: negligence or fault of client as defense, 10 A.L.R.5th 828

Legal malpractice in handling or defending medical malpractice claim, 78 A.L.R.4th 725

Liability of attorney for suicide of client based on attorney's professional act or omission, 41 A.L.R.4th 351

What constitutes professional services within meaning of statute preserving individual liability of professional employees of professional corporation, association, or partnership, 31 A.L.R.4th 898

Legal malpractice: defendant's right to contribution or indemnity from original tortfeasor, 20 A.L.R.4th 338

Legal malpractice in connection with attorney's withdrawal as counsel, 6 A.L.R.4th 342

Attorney's liability for negligence in cases involving domestic relations, 78 A.L.R.3d 255

Attorney's negligence in connection with estate, will, or succession matters, 55 A.L.R.3d 977

Attorney's liability for negligence in preparing or recording security document, 87 A.L.R.2d 991

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Attorney Malpractice in Real Estate Transactions, 27 Am. Jur. Proof of Facts 3d 353

Legal Malpractice in a Securities Offering, 22 Am. Jur. Proof of Facts 3d 559

Medicolegal Malpractice: Attorney's Negligence in Selecting and Using Expert Medical Consultant, 48 Am. Jur. Proof of Facts 2d 635

Legal Malpractice in Domestic Relations, 44 Am. Jur. Proof of Facts 2d 377

Legal Malpractice—Attorney's Unreasonable Settlement or Failure to Settle Client's Case, 26 Am. Jur. Proof of Facts 2d 703

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Maloy, Proximate Cause: The Final Defense in Legal Malpractice Cases, 36 U. Mem. L. Rev. 655 (2006)

Meredith & Brennan, Role of Expert Witnesses in Legal Malpractice Cases, 40-FEB Md. B.J. 42 (2007)

Thatcher, Recovery of "Lost Punitive Damages" as "Compensatory Damages" in Legal Malpractice Actions: Transference of Liability or Transformation of Character, 49 S.D. L. Rev. 1 (2003)

Weissblum, A Modest Proposal for Classifying Lost Punitive Damages in a Legal Malpractice Case: Look to the Deceased Tortfeasor for Guidance, 27 J. Legal Prof. 67 (2003)

An attorney who fails in his or her duty, causing actual loss to the client,[FN1] is liable for the damages sustained.[FN2] Violations of professional rules for attorneys do not constitute negligence per se, so a negligence complaint against an attorney for violation of professional rules must allege proximate cause in order to state a cause of action.[FN3] In order to succeed in a legal malpractice action, the plaintiff must not only establish that he or she would have succeeded in the underlying action and that any judgment would be collectible, but must also show that his or her former attorney was negligent and that plaintiff would have succeeded in the first action but for the attorney's malpractice.[FN4]

Observation: When determining questions of causation in a legal professional negligence action, the concern is cause in fact, that is, the "but for" consequences of an attorney's negligent act.[FN5]

The elements of a legal malpractice cause of action are (1) the duty of the attorney to use such skill, prudence, and diligence as members of the profession commonly possess and exercise, (2) a breach of that duty, (3) a proximate causal connection between the breach and the resulting injury, and (4) actual loss or damage resulting from the attorney's negligence.[FN6] Stated differently, to prevail on a legal malpractice claim, a plaintiff must show that (1) the attorney owed the plaintiff a duty, (2) the attorney breached that duty, (3) the breach proximately caused the plaintiff's injuries, and (4) damages occurred.[FN7] Negligence alone does not warrant a recovery for a plaintiff in a legal malpractice case; there must also be damage proximately resulting from an attorney's malpractice.[FN8] Thus, failure to demonstrate proximate cause mandates dismissal of a legal malpractice action regardless of whether the attorney was negligent.[FN9]

Generally, the attorney's liability for damages is only to the client, the liability flowing only from the dereliction of a duty owed to the client.[FN10]

An action for professional malpractice does not abate with the death of the client, and the action is considered "personal property" within the meaning of the survival statute.[FN11] However, because of the uniquely personal nature of legal services and the contract out of which the attorney-client relationship arises, a chose in action for legal malpractice is not assignable.[FN12]

A plaintiff may not maintain an action for malpractice against an attorney where the plaintiff and attorney are merely business partners, and no attorney-client relationship exists.[FN13]

A claim for legal malpractice is not subject to a consumer protection statute since the claim goes to the competency and strategy of the lawyer and not the entrepreneurial aspects of practice.[FN14]

The absence of an attorney-client or fiduciary relationship is not necessarily always a basis to deny a legal malpractice claim asserted against an attorney by a non-client.[FN15]

An attorney is liable for loss resulting from a disobedience of the client's proper instructions.[FN16]

CUMULATIVE SUPPLEMENT

Cases:

An attorney may be subject to a claim for breach of contract arising from an agreement to perform professional services, and in such a claim, the client usually has the option to sue for either breach of an implied contract, negligence or both. Connecticut Educ. Ass'n, Inc. v. Milliman USA, Inc., 105 Conn. App. 446, 938 A.2d 1249, 228 Ed. Law Rep. 810 (2008).

To establish a cause of action for legal malpractice based on negligent representation, a plaintiff must show (1) that the attorney owed a duty or obligation to the plaintiff, (2) that there was a breach of that duty or obligation and that the attorney failed to conform to the standard required by law, and (3) that there is a causal connection between the conduct complained of and the resulting damage or loss. Paterek v. Petersen & Ibold, 118 Ohio St. 3d 503, 2008-Ohio-2790, 890 N.E.2d 316 (2008).

To establish a cause of action for legal malpractice based on negligent representation, a plaintiff must show (1) that the attorney owed a duty or obligation to the plaintiff, (2) that there was a breach of that duty or obligation and that the attorney failed to conform to the standard required by law, and (3) that there is a causal connection between the conduct complained of and the resulting damage or loss. Paterek v. Petersen & Ibold, 118 Ohio St. 3d 503, 2008, 2008-Ohio-2790, 890 N.E.2d 316 (2008).

To establish a cause of action for legal malpractice based on negligence, the following elements must be proved: (1) an attorney-client relationship; (2) professional duty arising from that relationship; (3) breach of that duty; (4) proximate cause; and (5) damages. Shoemaker v. Gindlesberger, 118 Ohio St. 3d 226, 2008-Ohio-2012, 887 N.E.2d 1167 (2008).

To establish a cause of action for legal malpractice based on negligence, the following elements must be proved: (1) an attorney-client relationship; (2) professional duty arising from that relationship; (3) breach of that duty; (4) proximate cause; and (5) damages. Shoemaker v. Gindlesberger, 118 Ohio St. 3d 226, 2008, 2008-Ohio-2012, 887 N.E.2d 1167 (2008).

[END OF SUPPLEMENT]

[FN1] Brosie v. Stockton, 105 Ariz. 574, 468 P.2d 933 (1970).
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[FN2] National Sav. Bank of District of Columbia v. Ward, 100 U.S. 195, 25 L. Ed. 621, 1879 WL 16535 (1879).
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[FN3] Sipes v. Petry and Stewart, 812 S.W.2d 428 (Tex. App. San Antonio 1991).
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[FN4] Reich v. Price, 110 N.C. App. 255, 429 S.E.2d 372 (1993).
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[FN5] Geer v. Tonnon, 137 Wash. App. 838, 155 P.3d 163 (Div. 1 2007).
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[FN6] Ambriz v. Kelegian, 146 Cal. App. 4th 1519, 53 Cal. Rptr. 3d 700 (4th Dist. 2007), as modified on denial of reh'g, (Feb. 15, 2007) and review denied, (Apr. 18, 2007).
- The trier of fact must have some basis for understanding the causal link between the attorney's negligence and the client's harm. Alexander v. Turtur & Associates, Inc., 146 S.W.3d 113 (Tex. 2004).
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[FN7] Alexander v. Turtur & Associates, Inc., 146 S.W.3d 113 (Tex. 2004).
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[FN8] Day Advertising Inc. v. Devries And Associates, P.C., 217 S.W.3d 362 (Mo. Ct. App. W.D. 2007).
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[FN9] Bauza v. Livington, 40 A.D.3d 791, 836 N.Y.S.2d 645 (2d Dep't 2007).
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[FN10] § 234.
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[FN11] Beastall v. Madson, 235 Ill. App. 3d 95, 175 Ill. Dec. 865, 600 N.E.2d 1323 (3d Dist. 1992).
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[FN12] Jackson v. Rogers & Wells, 210 Cal. App. 3d 336, 258 Cal. Rptr. 454 (4th Dist. 1989).
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[FN13] In re Gertzman, 115 N.C. App. 634, 446 S.E.2d 130 (1994).
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[FN14] Eriks v. Denver, 118 Wash. 2d 451, 824 P.2d 1207 (1992).
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[FN15] DeAngelis v. Rose, 320 N.J. Super. 263, 727 A.2d 61 (App. Div. 1999).
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[FN16] Wilcox v. Plummer's Ex'rs, 29 U.S. 172, 7 L. Ed. 821, 1830 WL 3902 (1830).
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V. Liability of Attorney for Malpractice
A. Liability to Client
1. In General

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§ 202. Representation of adverse interest

West's Key Number Digest

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A.L.R. Library

Malpractice: Liability of attorney representing conflicting interests, 28 A.L.R.3d 389

In general, a conflict of interest, even if a violation of the code of professional responsibility, does not by itself support a legal malpractice cause of action.[FN1] However, an attorney's representation of two or more clients with adverse or conflicting interests constitutes such misconduct as to subject the attorney to liability for malpractice, unless the attorney has obtained the consent of the clients after full disclosure of all the facts concerning the dual representation.[FN2]

There is no conflict of interest when an attorney represents a party in an action against a former client where the matter in controversy was different from the matter involved in the prior representation and the former client cannot show that disclosures made in the prior representation were used prejudicially against it in the current matter.[FN3] The mere existence of an interrelationship between two clients does not necessarily create a conflict of interest.[FN4]

[FN1] Kimm v. Chang, 38 A.D.3d 481, 833 N.Y.S.2d 429 (1st Dep't 2007).
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[FN2] Hughes v. Consol-Pennsylvania Coal Co., 945 F.2d 594 (3d Cir. 1991).
- As to prohibition against representation of adverse interests, generally, see § 188.

- As to representation of adverse interests as a ground for discipline, see § 55.
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[FN3] Oar Lock Land & Cattle Co. v. Crowley, Haughey, Hanson, Toole & Dietrich, 253 Mont. 336, 833 P.2d 146 (1992).
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[FN4] Fitch v. Midland Bank & Trust Co., 737 S.W.2d 785 (Tenn. Ct. App. 1987).
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§ 203. Failure to exercise reasonable degree of care and skill

West's Key Number Digest

West's Key Number Digest, Attorney and Client 107

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Adequacy of Defense Counsel's Representation of Criminal Client Regarding Entrapment Defense—State Cases, 43 A.L.R.6th 475

Legal malpractice in defense of criminal prosecution, 4 A.L.R.5th 273

Measure and elements of damages recoverable for attorney's negligence in preparing or conducting litigation—Twentieth Century cases, 90 A.L.R.4th 1033

Adequacy of Defense Counsel's Representation of Criminal Client Regarding Entrapment Defense—Federal Cases, 42 A.L.R. Fed. 2d 145

Trial Strategy

Defending the Legal Malpractice Claim Arising From Representation of Small Business, 62 Am. Jur. Trials 395

An attorney's duty to a client requires him or her to exercise the knowledge, skill, and ability ordinarily possessed and exercised by members of the legal profession.[FN1] Thus, in an action to recover damages for legal malpractice, a plaintiff must demonstrate that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages.[FN2] The duty of care required of attorneys obligates them to use the reasonable knowledge and skill in the transaction of business which lawyers of ordinary ability and skill possess and exercise; on the one hand, an attorney is not to be held accountable for the consequences of every act which may be held to be an error by the court, but on the other hand, he or she is not immune from the responsibility, if he or she fails to employ in the work he or she undertakes that reasonable knowledge and skill exercised by lawyers of ordinary ability and skill.[FN3] Within this standard, the attorney will be protected so long as he or she acts honestly and in good faith.[FN4]

Failure to comply with the rules of professional conduct is not negligence per se, but merely one circumstance that may be considered along with other facts and circumstances in determining whether an attorney acted with reasonable care.[FN5]

For purposes of determining the local standard of care in a malpractice action, professionals in a community could not decide to adopt a local standard of care that is inferior to the bare minimum statewide standards.[FN6]

[FN1] Wilcox v. Plummer's Ex'rs, 29 U.S. 172, 7 L. Ed. 821, 1830 WL 3902 (1830); Bauza v. Livington, 40 A.D.3d 791, 836 N.Y.S.2d 645 (2d Dep't 2007).

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[FN2] Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer, 8 N.Y.3d 438, 835 N.Y.S.2d 534, 867 N.E.2d 385 (2007).

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[FN3] Estate of Albanese v. Lolio, 393 N.J. Super. 355, 923 A.2d 325 (App. Div. 2007).

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[FN4] National Sav. Bank of District of Columbia v. Ward, 100 U.S. 195, 25 L. Ed. 621, 1879 WL 16535 (1879).

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[FN5] Moore v. Weinberg, 373 S.C. 209, 644 S.E.2d 740 (Ct. App. 2007).

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[FN6] Grover v. Smith, 137 Idaho 247, 46 P.3d 1105 (2002).

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Topic Summary Correlation Table References

§ 204. Basic legal knowledge; nonobservance of local statutes, rules, and decisions

West's Key Number Digest

West's Key Number Digest, Attorney and Client 112.50

An attorney is expected to possess knowledge of those plain and elementary principles of law which are commonly known by well-informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques.[FN1] In addition, while a legal malpractice action is unlikely to succeed where an attorney erred because an issue of law was unsettled or debatable, an attorney may be liable for a failure to conduct adequate legal research.[FN2]

A law firm will be liable for failure to comply with requirements of a statute, even though the firm claims that compliance would be costly and that the client was preoccupied with costs.[FN3]

[FN1] Muse v. St. Paul Fire & Marine Ins. Co., 328 So. 2d 698 (La. Ct. App. 1st Cir. 1976).
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[FN2] Kempf v. Magida, 37 A.D.3d 763, 832 N.Y.S.2d 47 (2d Dep't 2007).
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[FN3] Doe v. Hughes, Thorsness, Gantz, Powell & Brundin, 838 P.2d 804, 18 A.L.R.5th 1098 (Alaska 1992).
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§ 205. Effect of advising client to commit crime or unlawful act

West's Key Number Digest

West's Key Number Digest, Attorney and Client 106, 107, 109

A.L.R. Library

Legal malpractice liability for advising client to commit crime or unlawful act, 51 A.L.R.4th 1227

A client may not recover against an attorney for malpractice on the grounds that the attorney advised the client to commit a crime or a wrongful act where the client is equally at fault, although recovery may still be had if the client's degree of guilt was substantially less than the attorney's or if some public policy would be advanced by recovery.[FN1] The general rule prohibiting the client's recovery is based on the belief that courts should not aid a person who bases a malpractice action on an immoral or illegal act.[FN2] However, restitution of attorney's fees paid is a proper remedy under such circumstances.[FN3] A client may not recover damages for emotional distress against an attorney in a malpractice action where the client's distress, if any, is attributable to his or her knowing misbehavior; society's interest in deterring attorneys from advising clients to lie under oath is subject to vindication through criminal sanctions or professional disciplinary proceedings.[FN4]

[FN1] Evans v. Cameron, 121 Wis. 2d 421, 360 N.W.2d 25, 51 A.L.R.4th 1213 (1985).
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[FN2] Feld and Sons, Inc. v. Pechner, Dorfman, Wolfee, Rounick, and Cabot, 312 Pa. Super. 125, 458 A.2d 545 (1983).
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[FN3] Evans v. Cameron, 121 Wis. 2d 421, 360 N.W.2d 25, 51 A.L.R.4th 1213 (1985).
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[FN4] Blain v. Doctor's Co., 222 Cal. App. 3d 1048, 272 Cal. Rptr. 250 (3d Dist. 1990).
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Topic Summary Correlation Table References

§ 206. Improper handling of funds collected for client

West's Key Number Digest

West's Key Number Digest, Attorney and Client 110

A.L.R. Library

Attorney's liability for negligence in preparing or conducting litigation, 45 A.L.R.2d 5 (sec. 18 superseded in part by Legal malpractice in connection with attorney's withdrawal as counsel, 6 A.L.R.4th 342, and sec. 4 superseded in part by Legal malpractice: negligence or fault of client as defense, 10 A.L.R.5th 828)

Liability of attorney for loss of client's money or personal property in his possession or entrusted to him, 26 A.L.R.2d 1340

Trial Strategy

Liability of Escrow Agent for Fee Attorney Absconding with Escrow Funds, 54 Am. Jur. Proof of Facts 3d 177

An attorney impliedly agrees promptly to pay over any money collected for a client.[FN1] Thus, the attorney should forthwith notify the client of the collection of such money, and remit it to the client, less proper

charges, or notify the client of his or her readiness to do so.[FN2] If the attorney fails to pay over the money after demand, or after directions are given for its remittance, the attorney is liable to an action.[FN3]

[FN1] Goodyear Metallic Rubber Shoe Co. v. Baker's Estate, 81 Vt. 39, 69 A. 160 (1908).
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[FN2] In re Paschal, 77 U.S. 483, 19 L. Ed. 992, 1870 WL 12746 (1870).
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[FN3] Glenn v. Haynes, 192 Va. 574, 66 S.E.2d 509, 26 A.L.R.2d 1334 (1951).
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§ 207. Fraudulent acts or misrepresentation affecting client

West's Key Number Digest

West's Key Number Digest, Attorney and Client 114

An attorney is liable for any loss sustained by a client in consequence of the attorney's fraud or unfair dealing.[FN1] Thus, an attorney who makes fraudulent misstatements of fact or law to a client,[FN2] or who fails to impart to a client information as to matters of fact,[FN3] is liable for any resulting damages which the client sustains.
Practice Tip: In a legal malpractice action alleging fraud, the client must plead fraud with specificity.[FN4]

[FN1] Robertson v. Chapman, 152 U.S. 673, 14 S. Ct. 741, 38 L. Ed. 592 (1894).
- As to liability to a client for fraudulent acts of a partner, see § 209.
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[FN2] Allen v. Frawley, 106 Wis. 638, 82 N.W. 593 (1900).
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[FN3] Baker v. Humphrey, 101 U.S. 494, 25 L. Ed. 1065, 1879 WL 16687 (1879).
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[FN4] Muhammad v. Strassburger, McKenna, Messer, Shilobod and Gutnick, 526 Pa. 541, 587 A.2d 1346 (1991).
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§ 208. Effect of errors of judgment

West's Key Number Digest

West's Key Number Digest, Attorney and Client 107, 109

A.L.R. Library

Legal malpractice: negligence or fault of client as defense, 10 A.L.R.5th 828

Attorney's liability for negligence in preparing or conducting litigation, 45 A.L.R.2d 5 (sec. 18 superseded in part by Legal malpractice in connection with attorney's withdrawal as counsel, 6 A.L.R.4th 342, and sec. 4 superseded in part by Legal malpractice: negligence or fault of client as defense, 10 A.L.R.5th 828)

If an attorney acts in good faith and in an honest belief that his or her acts and advice are well founded and in the best interest of the client, the attorney is not liable for a mere error of judgment.[FN1] Thus, an informed judgment on the part of counsel, even if subsequently proved erroneous, is not negligence.[FN2] A fortiori, an attorney is not liable for a mistaken opinion on a point of law that has not been settled by a court of last resort and on which reasonable doubt may well be entertained by informed lawyers.[FN3] Good faith tactical decisions or decisions made on a fairly debatable point of law are generally not actionable under the rule of judgmental immunity.[FN4] An attorney has no liability for following a decision of the highest court of his or her jurisdiction that is later reversed by the Supreme Court of the United States.[FN5]

[FN1] In re Watts, 190 U.S. 1, 23 S. Ct. 718, 47 L. Ed. 933 (1903).

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[FN2] Composition Roofers Local 30/30B v. Katz, 398 Pa. Super. 564, 581 A.2d 607 (1990).

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[FN3] Woodruff v. Tomlin, 616 F.2d 924 (6th Cir. 1980).

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[FN4] Crosby v. Jones, 705 So. 2d 1356 (Fla. 1998).

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[FN5] Marsh v. Whitmore, 88 U.S. 178, 22 L. Ed. 482, 1874 WL 17298 (1874).

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§ 209. Negligent or willful acts of partner or assistant

West's Key Number Digest

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Vicarious liability of attorneys for acts of associated counsel, 35 A.L.R.5th 717

Liability of professional corporation of lawyers, or individual members thereof, for malpractice or other tort of another member, 39 A.L.R.4th 556

Vicarious liability of attorney for tort of partner in law firm, 70 A.L.R.3d 1298

Liability of attorney for loss of client's money or personal property in his possession or entrusted to him, 26 A.L.R.2d 1340

Since part of a lawyer's obligation to his or her client is to ensure that delegated legal duties are completed properly,[FN1] a law partnership, or every member thereof, is responsible to a client for the negligent acts of the individual members of the firm acting within the scope of their authority,[FN2] particularly where the individual member is hindered or disabled as a result of illness.[FN3]

An attorney may also be liable for the negligence of an attorney to whom a client's cause is referred, if the referring attorney has failed to exercise due care in the selection of competent and trustworthy persons to conduct the affairs of the client,[FN4] or for the acts of a de facto partner.[FN5]

A fiduciary for an estate of a deceased law partner is not liable for any legal malpractice committed by the firm after the partner had withdrawn.[FN6]

CUMULATIVE SUPPLEMENT

Cases:

Attorney who contracted with county circuit court to provide indigent defense work was not considered to be associated in a firm with other attorney who contracted with county superior court to provide indigent defense work, and thus, circuit court attorney did not owe a duty to superior court attorney's client when he communicated information he had learned from superior court attorney about one of his clients to private attorney, even though the court attorneys shared office space, staff, letterhead, and a phone line; under the county's system for indigent defense, public defenders shared office space and support services provided by the courts, but they were not deemed to be members of a firm, at least for the purpose of rule that information acquired by one lawyer in a firm could be attributed to another. In re Recker, 902 N.E.2d 225 (Ind. 2009), as revised, (Apr. 22, 2009).

[END OF SUPPLEMENT]

[FN1] Disciplinary Counsel v. Young, 113 Ohio St. 3d 36, 2007-Ohio-975, 862 N.E.2d 504 (2007).
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[FN2] Priddy v. MacKenzie, 205 Mo. 181, 103 S.W. 968 (1907).
- As to liability in tort of partnership, generally, see Am. Jur. 2d, Partnership § 410.
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[FN3] Gautam v. De Luca, 215 N.J. Super. 388, 521 A.2d 1343 (App. Div. 1987).
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[FN4] Tormo v. Yormark, 398 F. Supp. 1159, 17 U.C.C. Rep. Serv. 166 (D.N.J. 1975).
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[FN5] Eisenberg v. Gagnon, 766 F.2d 770, 18 Fed. R. Evid. Serv. 783, 2 Fed. R. Serv. 3d 980 (3d Cir. 1985).
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[FN6] Wright v. Shapiro, 37 A.D.3d 1181, 830 N.Y.S.2d 627 (4th Dep't 2007).
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§ 210. Generally

West's Key Number Digest

West's Key Number Digest, Attorney and Client 112

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Legal malpractice in connection with attorney's withdrawal as counsel, 6 A.L.R.4th 342

Attorney's liability for negligence in preparing or conducting litigation, 45 A.L.R.2d 5 (sec. 18 superseded in part by Legal malpractice in connection with attorney's withdrawal as counsel, 6 A.L.R.4th 342, and sec. 4 superseded in part by Legal malpractice: negligence or fault of client as defense, 10 A.L.R.5th 828)

Trial Strategy

Inadequate Factual Investigation of Case by Attorney, 104 Am. Jur. Proof of Facts 3d 317

Attorney Malpractice in Real Estate Transactions, 27 Am. Jur. Proof of Facts 3d 353

Legal Malpractice in Domestic Relations, 44 Am. Jur. Proof of Facts 2d 377

Legal Malpractice—Estate, Will, and Succession Matters, 24 Am. Jur. Proof of Facts 2d 577

Managing Litigation, 51 Am. Jur. Trials 1

Forms

Am. Jur. Legal Forms 2d § 30:22.50

Am. Jur. Pleading and Practice Forms, Attorneys at Law §§ 154 to 186

Law Reviews and Other Periodicals

Lens, The (Overlooked) Consequence of Easing the Prohibition of Expert Legal Testimony in Professional Negligence Claims, 48 U. Louisville L. Rev. 53 (2009)

Legal malpractice may include an attorney's failure to exercise ordinary care in preparing, managing, and presenting litigation.[FN1] An attorney is liable for any loss or injury sustained by the client in consequence of a negligent failure to prepare, file, and serve pleadings essential to a proper presentation of the client's cause.[FN2] An attorney may be liable to a client for the negligent service of process, even though the task may have been "farmed out" to an independent contractor since the timely service of process is an integral part of the task the attorney undertakes on behalf of a client.[FN3] So, too, the attorney is liable for any loss suffered by the client due to failure to conduct a trial with the reasonable degree of care, skill, diligence, and learning expected of the average lawyer.[FN4] In addition, an attorney may properly withdraw from representation when he or she determines that the matter should not be brought to suit and there is sufficient time to engage new counsel and file suit.[FN5] An attorney is not liable in a legal malpractice action where the attorney followed the explicit directions of the client.[FN6]

To hold an attorney liable for neglecting to handle litigation, because he or she withdrew from a cause, the client must plead and prove that he or she suffered damages proximately caused by the attorney's conduct.[FN7]

The dismissal of criminal charges cannot be a basis of a legal malpractice action against the attorney who caused the charges to be filed if the charges were false and the client asserting both the charges and the malpractice action knew them to be false when made.[FN8]

Where a client establishes that his or her attorney, in advising on the settlement of an action, has failed to exercise the degree of skill and care of the average qualified lawyer, and that the failure has resulted in loss or damage to the client, the client is entitled to recover even if the settlement has received judicial approval.[FN9]

CUMULATIVE SUPPLEMENT

Cases:

Child's court-appointed family court counsel was immune from suit under quasi-judicial immunity in father's federal court action challenging state court custody proceedings; in advocating on behalf of best interests of young child, including investigating and interviewing parties and making recommendations to court, counsel provided crucial service to family court and gave family court neutral, unbiased and independent voice for child, who was too young to speak for herself. N.Y.McKinney's Family Court Act § 249. McKnight v. Middleton, 699 F. Supp. 2d 507 (E.D. N.Y. 2010).

Decision of attorney to notify federal court in Southern District of New York of status of forfeiture proceedings in federal court in Middle District of Florida and to request interim stay pending decision on "innocent owner" petition in Florida, which was granted, satisfied basic standards of legal practice under New York law, and thus, such decision was not ground for legal malpractice, where Florida and New York courts both had jurisdiction over issue of whether client was bona fide purchaser of property that was subject to forfeiture. 18 U.S.C.A. § 1963(*l*). Stonewell Corp. v. Conestoga Title Insurance Co., 678 F. Supp. 2d 203 (S.D. N.Y. 2010).

[END OF SUPPLEMENT]

[FN1] Alexander v. Turtur & Associates, Inc., 146 S.W.3d 113 (Tex. 2004).

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[FN2] Little v. Matthewson, 114 N.C. App. 562, 442 S.E.2d 567 (1994), aff'd, 340 N.C. 102, 455 S.E.2d 160 (1995).

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[FN3] Kleeman v. Rheingold, 81 N.Y.2d 270, 598 N.Y.S.2d 149, 614 N.E.2d 712 (1993).

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[FN4] Cotton v. Travaline, 179 N.J. Super. 362, 432 A.2d 122 (App. Div. 1981).

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[FN5] Riordan v. Jones, 793 F. Supp. 650 (D. Md. 1992), aff'd, 989 F.2d 494 (4th Cir. 1993).

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[FN6] Boyd v. Brett-Major, 449 So. 2d 952 (Fla. Dist. Ct. App. 3d Dist. 1984).

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[FN7] Byrd v. Arrowood, 118 N.C. App. 418, 455 S.E.2d 672 (1995).

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[FN8] Tushinsky v. Arnold, 195 Cal. App. 3d 666, 241 Cal. Rptr. 103 (2d Dist. 1987).

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[FN9] Meyer v. Wagner, 429 Mass. 410, 709 N.E.2d 784 (1999) (divorce action).

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§ 211. Permitting statutory time limitation to run against client's claim

West's Key Number Digest

West's Key Number Digest, Attorney and Client 109, 112

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Attorney Malpractice—Tolling or Other Exceptions to Running of Statute of Limitations, 87 A.L.R.5th 473

Legal malpractice by permitting statutory time limitation to run against client's claim, 90 A.L.R.3d 293

It is negligence on the part of an attorney to fail to commence action on a client's cause within the time prescribed by the applicable statute of limitations or notice-of-claim statute.[FN1] In order to support recovery[FN2] it must be shown that the statute of limitations did, in fact, bar the client's underlying claim.[FN3]

In order to prove causation of damages in a legal malpractice case involving a missed statute of limitations deadline, the plaintiff must establish that the statute of limitations expired during the attorney's employment as his or her counsel.[FN4] Thus, an attorney cannot be held liable for malpractice for failing to file an action prior to the expiration of the statute of limitations if he or she ceased to represent the client and was replaced by other counsel before the statute ran on the client's actions, but this defense is relevant only in situations where the later-retained attorney also failed to file suit on the client's behalf before the statute of limitations lapsed, since this subsequent failure can serve as an intervening cause that breaks the chain of causation arising from the prior attorney's negligence, absolving him or her of liability.[FN5]

Observation: Determining whether there was a suit that should be filed is a predicate step to determining whether the failure to file such a suit within the period provided for in the statute of limitations constituted a violation of an attorney's standard of conduct.[FN6]

[FN1] Wilcox v. Plummer's Ex'rs, 29 U.S. 172, 7 L. Ed. 821, 1830 WL 3902 (1830).
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[FN2] § 222.
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[FN3] Sample v. Freeman, 873 S.W.2d 470 (Tex. App. Beaumont 1994), writ denied, (Sept. 22, 1994).
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[FN4] United Petroleum Service, Inc. v. Piatchek, 218 S.W.3d 477 (Mo. Ct. App. E.D. 2007), reh'g and/or transfer denied, (Feb. 20, 2007) and transfer denied, (May 1, 2007).
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[FN5] Norton v. Sperling Law Office, P.C., 437 F. Supp. 2d 398 (D. Md. 2006).
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[FN6] Boyle v. Welsh, 256 Neb. 118, 589 N.W.2d 118 (1999).
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§ 212. Appellate matters

West's Key Number Digest

West's Key Number Digest, Attorney and Client 106, 107, 109

An attorney is under no obligation to pursue an appeal on behalf of a client unless there has been some agreement or indication from the client that the attorney is to represent him or her on appeal.[FN1] However, negligence of an attorney in failing to take proper steps to protect a client's right of appeal or review is actionable where, as a result, the right of appeal was lost.[FN2] Nevertheless, in a legal malpractice action alleging that an attorney failed to perfect an appeal, the plaintiff must prove that he or she would have been successful on appeal if the appeal had properly been perfected.[FN3]

Charges of negligence in failing to obtain appellate review or a new trial after an unfavorable judgment or verdict below do not support a verdict against the attorney in the absence of a showing that if the appeal or new trial had been obtained a judgment more favorable to the plaintiff would have resulted.[FN4]

Appellate counsel, whether retained or appointed, has an ethical duty not to advance frivolous arguments before the appellate tribunal.[FN5] If retained counsel, upon a thorough review of the record, determines that no meritorious appellate issues exist, counsel must advise his or her client that it would be a waste of money to appeal the conviction, and it would be unethical for the attorney to do so.[FN6]

[FN1] Young v. Bridwell, 20 Utah 2d 332, 437 P.2d 686 (1968).

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[FN2] Singleton v. Stegall, 580 So. 2d 1242 (Miss. 1991).

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[FN3] Universal Underwriters Ins. Co. v. Judge & James, Ltd., 372 Ill. App. 3d 372, 310 Ill. Dec. 207, 865 N.E.2d 531 (1st Dist. 2007).

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[FN4] Katsaris v. Scelsi, 115 Misc. 2d 115, 453 N.Y.S.2d 994 (Sup 1982).

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[FN5] State v. Parent, 2006 WI 132, 298 Wis. 2d 63, 725 N.W.2d 915 (2006).

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[FN6] State v. Parent, 2006 WI 132, 298 Wis. 2d 63, 725 N.W.2d 915 (2006).

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§ 213. Handling criminal defense matters

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Legal malpractice in defense of criminal prosecution, 4 A.L.R.5th 273

Public defender's immunity from liability for malpractice, 6 A.L.R.4th 774

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Inadequate Factual Investigation of Case by Attorney, 104 Am. Jur. Proof of Facts 3d 317

Legal Malpractice—Inadequate Case Investigation, 16 Am. Jur. Proof of Facts 2d 549

Actions Against Attorneys for Professional Negligence, 14 Am. Jur. Trials 265

An attorney may incur liability for malpractice through negligence in handling matters of criminal defense.[FN1] Failure of an attorney to take steps to reduce a sentence in excess of the maximum penalty,[FN2] failure to file a petition for certiorari,[FN3] failure to file a postconviction relief motion,[FN4] or failure to raise an appropriate defense may constitute negligence.[FN5]

In criminal cases, the legal standard of ineffective assistance of counsel and the standard for legal malpractice are equivalent, and where the issue of competent counsel is litigated, collateral estoppel will bar a malpractice action.[FN6] However, constitutional protections afforded a criminal defendant through the appellate process and post-conviction filings should not be used by an attorney as a liability shield.[FN7]

A public defender is not protected from liability for malpractice, because the public defender, as advocate, owes a duty to his or her client indistinguishable from that of privately retained counsel.[FN8]

An attorney may be liable to a prisoner for malpractice where the attorney accepts a fee from the prisoner but does not pursue post-conviction relief within the limitations period.[FN9]

While a criminal legal malpractice action requires all the proof essential to a civil malpractice claim, a criminal malpractice action will fail if the claimant does not allege and prove, by a preponderance of the evidence, actual innocence.[FN10] The statute of limitation for legal malpractice does not begin to run until the client has been exonerated of the criminal offense through reversal on direct appeal, post-conviction relief, or otherwise.[FN11]

CUMULATIVE SUPPLEMENT

Cases:

Where a plaintiff does not claim to be innocent of the crime for which he was convicted, he cannot bring a suit for legal malpractice arising out of the conviction. Herrera-Corral v. Hyman, 408 Ill. App. 3d 672, 350 Ill. Dec. 173, 948 N.E.2d 242 (1st Dist. 2011).

Criminal legal malpractice based on client's claim that his defense counsel failed to timely file state proceedings related to his convictions in order to toll one-year limitations period governing federal habeas corpus review required client to prove his actual innocence on charges of conviction. Gaylor v. Jeffco, 999 A.2d 290 (N.H. 2010).

Attorney appointed by federal court to represent criminal defendant, in a federal criminal prosecution, had absolute immunity from purely state law claims of legal malpractice that derived from attorney's conduct in underlying criminal proceedings; federal law provided immunity from legal malpractice for lawyers appointed by Federal Public Defender Office, Legislature provided immunity to appointed defense attorneys, and if appointed attorneys were subject to unbridled legal malpractice claims, it would have negative impact on quality and number of attorneys who would agree to accept appointment by federal courts to represent indigents. West's Ann.W.Va.Code, 29–21–20. Mooney v. Frazier, 693 S.E.2d 333 (W. Va. 2010).

[END OF SUPPLEMENT]

[FN1] Geddie v. St. Paul Fire & Marine Ins. Co., 354 So. 2d 718 (La. Ct. App. 4th Cir. 1978), writ denied, 356 So. 2d 1011 (La. 1978).
- A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Caston v. State, 823 So. 2d 473 (Miss. 2002).
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[FN2] Geddie v. St. Paul Fire & Marine Ins. Co., 354 So. 2d 718 (La. Ct. App. 4th Cir. 1978), writ denied, 356 So. 2d 1011 (La. 1978).
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[FN3] Moultrie v. State, 542 S.W.2d 835 (Tenn. Crim. App. 1976).
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[FN4] Baldayaque v. U.S., 338 F.3d 145 (2d Cir. 2003).
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[FN5] Martin v. Hall, 20 Cal. App. 3d 414, 97 Cal. Rptr. 730, 53 A.L.R.3d 719 (2d Dist. 1971).
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[FN6] McCord v. Bailey, 636 F.2d 606 (D.C. Cir. 1980).
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[FN7] Bailey v. Tucker, 533 Pa. 237, 621 A.2d 108 (1993).
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[FN8] Ferri v. Ackerman, 444 U.S. 193, 100 S. Ct. 402, 62 L. Ed. 2d 355 (1979); Sullivan v. Freeman, 944 F.2d 334 (7th Cir. 1991).
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[FN9] Singleton v. Stegall, 580 So. 2d 1242 (Miss. 1991).
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[FN10] Rodriguez v. Nielsen, 259 Neb. 264, 609 N.W.2d 368 (2000); Mahoney v. Shaheen, Cappiello, Stein & Gordon, P.A., 143 N.H. 491, 727 A.2d 996 (1999).
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[FN11] Stevens v. Bispham, 316 Or. 221, 851 P.2d 556 (1993).
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§ 214. Settling or failing to settle client's case

West's Key Number Digest

West's Key Number Digest, Attorney and Client 109, 112

A.L.R. Library

Legal malpractice in settling or failing to settle client's case, 87 A.L.R.3d 168

Trial Strategy

Legal Malpractice—Attorney's Unreasonable Settlement or Failure to Settle Client's Case, 26 Am. Jur. Proof of Facts 2d 703

Compromise or settlement of a client's case for an unreasonable amount or without the client's authority may constitute malpractice.[FN1] An attorney does not commit malpractice by settling within the insured's policy limits without the insured's consent, because an insured impliedly consents to the settlement of claims within policy limits.[FN2]

Failure to compromise or effect settlement of a client's cause may constitute negligence,[FN3] unless the proposed settlement offer from the opposing party bordered on unconscionable and was not likely to have been approved by the court.[FN4]

An attorney who exposes the client to an excess judgment when the attorney could have used insurance company money to settle the case breaches his or her duty of care owed to the client.[FN5]

The fact that an action has been settled does not, in and of itself, preclude one of the parties to that action from bringing a malpractice action against the attorneys who represented that party based upon a claim that the settlement was coerced and improvidently made.[FN6]

The doctrine of judgmental immunity does not apply to an attorney's failure to inform a client of unsettled legal issues relevant to a settlement; rather, whether an attorney is negligent for such a failure is determined by whether the attorney exercised the same skill, knowledge, and diligence as attorneys of ordinary skill and capacity commonly possess and exercise in the performance of all other legal tasks.[FN7]

[FN1] Grayson v. Wofsey, Rosen, Kweskin and Kuriansky, 231 Conn. 168, 646 A.2d 195 (1994).
- As to the authority of an attorney to compromise or settle a cause, generally, see § 169.
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[FN2] Mitchum v. Hudgens, 533 So. 2d 194 (Ala. 1988).
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[FN3] Smiley v. Manchester Ins. & Indem. Co. of St. Louis, 71 Ill. 2d 306, 16 Ill. Dec. 487, 375 N.E.2d 118 (1978).
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[FN4] Smith v. Ganz, 219 Neb. 432, 363 N.W.2d 526 (1985).
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[FN5] Bohna v. Hughes, Thorsness, Gantz, Powell & Brundin, 828 P.2d 745 (Alaska 1992).
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[FN6] Cohen v. Lipsig, 92 A.D.2d 536, 459 N.Y.S.2d 98 (2d Dep't 1983).
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[FN7] Wood v. McGrath, North, Mullin & Kratz, P.C., 256 Neb. 109, 589 N.W.2d 103 (1999).
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§ 215. Negligence incident to title search

West's Key Number Digest

West's Key Number Digest, Attorney and Client 106, 107, 109, 112.50

A.L.R. Library

Liability of attorney for negligence in connection with investigation or certification of title to real estate, 59 A.L.R.3d 1176

Trial Strategy

Attorney Malpractice in Real Estate Transactions, 27 Am. Jur. Proof of Facts 3d 353

An attorney employed to examine title to real or personal property must exercise reasonable care and skill in the matter, and the failure to do so is negligence for which the attorney will be liable to the client in damages if the client is injured.[FN1] This principle is applicable whether the examination is for a prospective purchaser or a prospective lender.[FN2]

The attorney must not overlook encumbrances, such as mortgages[FN3] or judgments.[FN4]

An attorney may be liable for malpractice for failing to discover an unrecorded judgment which places a servitude upon the property where the attorney had been retained to investigate the title and the clients expressed concern over a newspaper report of prior litigation between the seller and another party.[FN5]

[FN1] National Sav. Bank of District of Columbia v. Ward, 100 U.S. 195, 25 L. Ed. 621, 1879 WL 16535 (1879).
- An attorney's failure to disclose a subdivision violation discovered during a title search, which significantly decreased the value of the property, constituted legal malpractice. Estate of Fleming v. Nicholson, 168 Vt. 495, 724 A.2d 1026 (1998).
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[FN2] National Sav. Bank of District of Columbia v. Ward, 100 U.S. 195, 25 L. Ed. 621, 1879 WL 16535 (1879).
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[FN3] Gleason v. Title Guarantee Co., 300 F.2d 813 (5th Cir. 1962).
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[FN4] McClain v. Faraone, 369 A.2d 1090 (Del. Super. Ct. 1977).
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[FN5] Rajchandra Corp. v. Tom Sawyer Motor Inns, Inc., 106 A.D.2d 798, 484 N.Y.S.2d 257 (3d Dep't 1984).

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§ 216. Preparation of legal instruments

West's Key Number Digest

West's Key Number Digest, Attorney and Client 106, 107, 109, 112.50

A.L.R. Library

Liability of attorney for improper or ineffective incorporation of client, 40 A.L.R.4th 535

Attorney's liability for negligence in preparing or recording security document, 87 A.L.R.2d 991

Liability of one drawing an invalid will, 65 A.L.R.2d 1363

Trial Strategy

Legal Malpractice in a Securities Offering, 22 Am. Jur. Proof of Facts 3d 559

Legal Malpractice—Estate, Will, and Succession Matters, 24 Am. Jur. Proof of Facts 2d 577

An attorney employed to prepare a written instrument is responsible for any loss sustained by the client as the result of the attorney's negligence.[FN1] The attorney is not accountable, however, for the consequences of every act a court may hold to be error.[FN2] An attorney may breach his or her duty toward a client when, after undertaking to accomplish a specific result, such as to draft a will, he or she then fails to effectuate the intent of the parties.[FN3]

Practice Tip: Standing in a legal malpractice action is limited to those who can show that the testator's intent as expressed in the will is frustrated by the negligence of the testator's attorney.[FN4]

[FN1] McCullough v. Sullivan, 102 N.J.L. 381, 132 A. 102, 43 A.L.R. 928 (N.J. Ct. Err. & App. 1926).

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[FN2] McCullough v. Sullivan, 102 N.J.L. 381, 132 A. 102, 43 A.L.R. 928 (N.J. Ct. Err. & App. 1926).

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[FN3] Young v. Williams, 285 Ga. App. 208, 645 S.E.2d 624 (2007).

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[FN4] Espinosa v. Sparber, Shevin, Shapo, Rosen and Heilbronner, 612 So. 2d 1378 (Fla. 1993).

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§ 217. Failure to record papers

West's Key Number Digest

West's Key Number Digest, Attorney and Client 106, 107, 109

A.L.R. Library

Attorney's liability for negligence in preparing or recording security document, 87 A.L.R.2d 991

An attorney who agrees to have certain documents recorded and neglects to do so is responsible for any damage resulting from his or her negligence.[FN1] However, an attorney is not liable for failure properly to record a mortgage where the client suffers no loss as a result.[FN2]

CUMULATIVE SUPPLEMENT

Cases:

Closing attorney has a duty to effectuate a valid transfer of the interests being conveyed at the closing; this includes, not only the actual transfer of title on behalf of the attorney's client, but also the transfer of the consideration for the conveyance, typically mortgage loan proceeds in the case of the mortgage transactions. M.G.L.A. c. 183, § 63B; S.J.C.Rule 3:07, Rules of Prof.Conduct, Rule 1.15(a). Real Estate Bar Ass'n for Massachusetts, Inc. v. National Real Estate Information Services, 459 Mass. 512, 946 N.E.2d 665 (2011).

[END OF SUPPLEMENT]

[FN1] Campbell v. Elsass, 62 Ohio App. 3d 829, 577 N.E.2d 699 (10th Dist. Franklin County 1989).
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[FN2] Fisk v. Newsum, 9 Wash. App. 650, 513 P.2d 1035 (Div. 1 1973).
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§ 218. Preparation and recordation of security documents

West's Key Number Digest

West's Key Number Digest, Attorney and Client 106, 107, 109

A.L.R. Library

Attorney's liability for negligence in preparing or recording security document, 87 A.L.R.2d 991

The failure to observe statutory requirements in the preparation of a security document, the failure to record it in the proper county, the failure to record it at all, or the failure to inform the client of the necessity for recordation constitute acts of negligence sufficient to hold an attorney liable to a client, if the negligence can be proved and damages can be shown to be the result of such acts or omissions.[FN1] However, where there is no bad faith on the part of an attorney, the attorney will not be liable for malpractice where the problem with which the attorney was entrusted grew from an uncertain and unsettled area of the law.[FN2]

[FN1] Practical Offset, Inc. v. Davis, 83 Ill. App. 3d 566, 39 Ill. Dec. 132, 404 N.E.2d 516 (1st Dist. 1980).
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[FN2] Quality Inns Intern. Inc. v. Booth, Fish, Simpson, Harrison and Hall, 58 N.C. App. 1, 292 S.E.2d 755 (1982).
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Topic Summary Correlation Table References

§ 219. Handling collections

West's Key Number Digest

West's Key Number Digest, Attorney and Client 110

An attorney does not guarantee the collection of claims placed in his or her hands.[FN1] This includes loss resulting from neglect or delay in the institution of suit for collection of the claim,[FN2] as where there is a failure to bring suit within the time specified by the statute of limitations.[FN3]
Caution: One court has held that an attorney was not liable for malpractice for failure to serve a summons and complaint in a civil action, where, although the attorney was negligent, most of the amount involved in the lawsuit was barred by the statute of limitations at the time the attorney was retained to file the action, where the attorney had handled collection matters for the client for many years under an oral understanding by which the attorney sent letters to debtors designated by the client and did not file lawsuits until first instructed to do so, and where the collection in question was handled in accordance with that custom.[FN4]

[FN1] Marsh v. Whitmore, 88 U.S. 178, 22 L. Ed. 482, 1874 WL 17298 (1874).
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[FN2] Thompson v. Erving's Hatcheries, Inc., 186 So. 2d 756 (Miss. 1966).
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[FN3] § 210.
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[FN4] Kane, Kane & Kritzer, Inc v. Altagen, 107 Cal. App. 3d 36, 165 Cal. Rptr. 534 (2d Dist. 1980).
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§ 220. Form of remedy

West's Key Number Digest

West's Key Number Digest, Attorney and Client 129 to 129(4)

A.L.R. Library

Validity and construction of agreement between attorney and client to arbitrate disputes arising between them, 26 A.L.R.5th 107

Trial Strategy

Actions Against Attorneys for Professional Negligence, 14 Am. Jur. Trials 265

Distinctions between forms of action and legal theories are of relatively little importance today; by rule of court or statute, most jurisdictions provide for one form of civil action and the plaintiff may maintain the action if he or she pleads facts which entitle him or her to relief under any legal theory.[FN1] However, determination of the form of the action, as sounding in contract or in tort, may be significant in determination of what statute of limitations is applicable.[FN2]

An action for legal malpractice is not derivative; it does not owe its existence to another harm and is not dependent on another legal action, but is a wholly independent action which either stands or fails on the evidence presented at that time.[FN3]

Clients of an attorney may be "consumers" within the meaning of a state's deceptive trade act.[FN4]

Practice Tip: A legal malpractice plaintiff normally need not exhaust all possible remedies as a condition precedent to bringing the malpractice suit.[FN5]

[FN1] Am. Jur. 2d, Actions §§ 5 to 25.

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[FN2] § 228.

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[FN3] Liberty Bank v. Ruder, 402 Pa. Super. 561, 587 A.2d 761 (1991).

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[FN4] DeBakey v. Staggs, 612 S.W.2d 924 (Tex. 1981).

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[FN5] Carlson v. Sweeney, Dabagia, Donoghue, Thorne, Janes & Pagos, 868 N.E.2d 4 (Ind. Ct. App. 2007), opinion corrected on reh'g, 2007 WL 2258124 (Ind. Ct. App. 2007).
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§ 221. Pleading

West's Key Number Digest

West's Key Number Digest, Attorney and Client 129(2)

Forms

Am. Jur. Pleading and Practice Forms, Attorneys at Law §§ 133 to 140.3 (Complaint or petition—Legal malpractice)

Am. Jur. Pleading and Practice Forms, Attorneys at law §§ 164 to 172 (Complaint or petition—Negligence in conducting or initiating litigation)

Am. Jur. Pleading and Practice Forms, Attorneys at Law § 174 (Complaint or petition—Negligence in drafting written instrument)

Am. Jur. Pleading and Practice Forms, Attorneys at Law § 176 (Complaint or petition—Negligence in examining title)

Am. Jur. Pleading and Practice Forms, Attorneys at Law § 177 (Complaint or petition—Negligence in preparing tax return)

In an action for legal malpractice, a plaintiff must plead that the defendant attorney owed the plaintiff a duty of due care arising from the attorney-client relationship, the defendant breached that duty, and, as a proximate result, the plaintiff suffered actual damages.[FN1] A client fails to allege a cognizable cause of action to recover damages for legal malpractice, where the complaint fails to plead facts to the effect that, but for the attorney's alleged negligence with regard to matters within the scope of his or her retention, the client would not have suffered some actual, ascertainable damages.[FN2]

A client's counterclaim for legal malpractice is not barred as a compulsory counterclaim that was not raised in the attorney's prior fee arbitration proceeding, where the underlying legal action is still pending at the time of the arbitration.[FN3]

To state a cause of action for legal malpractice arising from negligent representation in a criminal proceeding, a plaintiff must allege his or her innocence or colorable claim of innocence of the underlying offense.[FN4]

CUMULATIVE SUPPLEMENT

Cases:

Under New York law, client, who failed to establish that his conviction following a guilty plea was overturned, failed to state a cause of action for legal malpractice arising from negligent representation in a criminal proceeding. Sash v. Schwartz, 356 Fed. Appx. 555 (2d Cir. 2009).

Client who pled guilty to driving under the influence of alcohol (DUI), following his DUI arrest at 12:40 a.m. on the date a new DUI law took effect, failed to establish that his attorney breached his duty of care in failing to raise claim that although the new DUI law became effective at 12:01 Alaska Standard Time, Alaska was still on Daylight Saving Time at the time of arrest; neither of two experienced criminal defense attorneys client consulted noticed an issue regarding Daylight Saving Time, client's postconviction counsel failed to notice the claim before filing a motion to withdraw for lack of colorable claims, and no existing authority suggested that time discrepancy would have an impact on the effective time of new legislation. Stewart v. Elliott, 239 P.3d 1236 (Alaska 2010).

Labor union representing public school teachers failed to establish the existence of a contract with law firm in which the firm promised to provide union with professional legal services necessary and appropriate to maintain union members' pension plan in good standing with federal law, as alleged in its breach of contract complaint against firm, thus precluding such claim, despite uncontradicted testimony from one firm attorney that she believed the firm's representation of union entailed advising union as to how to keep its pension plan in compliance with relevant federal law; the witness expressed uncertainty in her testimony, and none of the firm attorneys called as witnesses by the union participated in the formation of the contract. Connecticut Educ. Ass'n, Inc. v. Milliman USA, Inc., 105 Conn. App. 446, 938 A.2d 1249, 228 Ed. Law Rep. 810 (2008).

[END OF SUPPLEMENT]

[FN1] Universal Underwriters Ins. Co. v. Judge & James, Ltd., 372 Ill. App. 3d 372, 310 Ill. Dec. 207, 865 N.E.2d 531 (1st Dist. 2007).

- Clients' allegations that an attorney representing them in a forfeiture proceeding was negligent for failing to become familiar with the forfeiture law and agreeing to settlement terms without attempting to negotiate, and that his negligence was a proximate cause of their damages, stated a cause of action for legal malpractice. Kempf v. Magida, 37 A.D.3d 763, 832 N.Y.S.2d 47 (2d Dep't 2007).

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[FN2] Cummings v. Donovan, 36 A.D.3d 648, 828 N.Y.S.2d 475 (2d Dep't 2007).
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[FN3] Lansford v. Harris, 174 Ariz. 413, 850 P.2d 126 (Ct. App. Div. 1 1992).
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[FN4] Cummings v. Donovan, 36 A.D.3d 648, 828 N.Y.S.2d 475 (2d Dep't 2007).
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§ 222. Burden of proof

West's Key Number Digest

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To prevail on a malpractice claim, a client, by clear and convincing evidence,[FN1] must show: (1) employment of the defendant attorney; (2) failure of the attorney to exercise ordinary care, skill and diligence; (3) that such negligence was the proximate cause of damages to the client;[FN2] and (4) that but for defendant's conduct, the plaintiff would have obtained a more favorable result in the underlying transaction than the result that occurred.[FN3] Proof that better representation would have brought about a more favorable outcome is required.[FN4] It has also been stated that a plaintiff must prove that the defendant attorney owed the plaintiff a duty of due care arising from the attorney-client relationship; the defendant breached that duty; and, as a proximate result, the plaintiff suffered actual damages.[FN5] Similarly, to establish a prima facie case in a legal malpractice claim, the plaintiff must prove that negligence on the part of his or her former attorney caused the loss of opportunity resulting in the inference of causation and damages from that lost opportunity.[FN6]

If the plaintiff fails to prove even one of the elements of a legal malpractice claim, the claim fails.[FN7]

In an action for legal malpractice in the defense of a criminal case, the plaintiff must prove by a preponderance of the evidence that he or she did not commit any unlawful acts with which he or she was charged as well as any lesser included offenses.[FN8]

CUMULATIVE SUPPLEMENT

Cases:

When a plaintiff premises a legal-malpractice claim on the theory that he would have received a better outcome if his attorney had tried the underlying matter to conclusion rather than settled it, the plaintiff must establish that he would have prevailed in the underlying matter and that the outcome would have been better than the outcome provided by the settlement. Environmental Network Corp. v. Goodman Weiss Miller, L.L.P., 119 Ohio St. 3d 209, 2008-Ohio-3833, 893 N.E.2d 173 (2008).

Former clients failed to make required showing by preponderance of evidence in legal-malpractice action that they would have received better outcome if attorney had tried underlying matter to conclusion rather than entering settlement that erased clients' debt to opposing party and transferred $40,000 to clients to apply toward legal fees owed to attorney; while clients produced evidence demonstrating existence of a contract between clients and opposing party, the parties' obligations under that agreement, and clients' alleged losses as result of opposing party's alleged breach, uncontroverted testimony elicited by attorney was that settlement was very favorable to clients. Environmental Network Corp. v. Goodman Weiss Miller, L.L.P., 119 Ohio St. 3d 209, 2008, 2008-Ohio-3833, 893 N.E.2d 173 (2008).

When a plaintiff premises a legal-malpractice claim on the theory that he would have received a better outcome if his attorney had tried the underlying matter to conclusion rather than settled it, the plaintiff must establish that he would have prevailed in the underlying matter and that the outcome would have been better than the outcome provided by the settlement. Environmental Network Corp. v. Goodman Weiss Miller, L.L.P., 119 Ohio St. 3d 209, 2008, 2008-Ohio-3833, 893 N.E.2d 173 (2008).

Collectibility of the judgment lost through attorney's negligence is an element of the plaintiff's legal malpractice case that must be proved by the plaintiff. Paterek v. Petersen & Ibold, 118 Ohio St. 3d 503, 2008-Ohio-2790, 890 N.E.2d 316 (2008).

Collectibility of the judgment lost through attorney's negligence is an element of the plaintiff's legal malpractice case that must be proved by the plaintiff. Paterek v. Petersen & Ibold, 118 Ohio St. 3d 503, 2008, 2008-Ohio-2790, 890 N.E.2d 316 (2008).

A legal malpractice plaintiff's burden is to produce evidence explaining the legal significance of the attorney's failure and the impact this had on the underlying action; normally, plaintiff must offer expert testimony to discharge this burden. Kemp v. Jensen, 329 S.W.3d 866 (Tex. App. Eastland 2010), petition for review filed, (Jan. 19, 2011).

[END OF SUPPLEMENT]

[FN1] Pivnick v. Beck, 165 N.J. 670, 762 A.2d 653 (2000).

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[FN2] Paul v. Smith, Gambrell & Russell, 283 Ga. App. 584, 642 S.E.2d 217 (2007); McIntosh County Bank v. Dorsey & Whitney, LLP, 726 N.W.2d 108 (Minn. Ct. App. 2007), review granted, (Mar. 20, 2007).

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[FN3] McIntosh County Bank v. Dorsey & Whitney, LLP, 726 N.W.2d 108 (Minn. Ct. App. 2007), review granted, (Mar. 20, 2007).

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[FN4] Tri-Town Marine, Inc. v. J.C. Milliken Agency, Inc., 2007 ME 67, 924 A.2d 1066 (Me. 2007).
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[FN5] Universal Underwriters Ins. Co. v. Judge & James, Ltd., 372 Ill. App. 3d 372, 310 Ill. Dec. 207, 865 N.E.2d 531 (1st Dist. 2007).
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[FN6] Green v. Rice, 948 So. 2d 376 (La. Ct. App. 2d Cir. 2007).
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[FN7] McIntosh County Bank v. Dorsey & Whitney, LLP, 726 N.W.2d 108 (Minn. Ct. App. 2007), review granted, (Mar. 20, 2007).
- A client who prevailed at the negligence/liability phase of a bifurcated legal malpractice trial against an attorney, but who was awarded no damages at the damages phase, was not entitled to an award of prevailing party costs arising out of the negligence/liability phase, since damages were a necessary element of a legal malpractice claim, which the client failed to demonstrate. Massey v. David, 953 So. 2d 599 (Fla. Dist. Ct. App. 1st Dist. 2007).
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[FN8] Bailey v. Tucker, 533 Pa. 237, 621 A.2d 108 (1993).
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§ 223. Burden of proof—Causation; "case-within-a-case" litigation

West's Key Number Digest

West's Key Number Digest, Attorney and Client 129(2)

To establish causation in an action to recover damages for legal malpractice, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer's negligence.[FN1] Stated differently, a plaintiff's burden in a suit-within-a-suit legal malpractice action is to prove by a preponderance of the evidence that but for the malpractice or other misconduct, (1) he or she would have recovered a judgment in the action against the main defendant, (2) the amount of that judgment, and (3) the degree of collectibility of such judgment.[FN2] The burden of pleading and proving actual damages in a legal malpractice action requires establishing that "but for" the attorney's negligence, the plaintiff would have been successful in the underlying suit, and, thus, a legal malpractice plaintiff must litigate a case within a case.[FN3] The method for proving the element of causation has been likened to a "trial within a trial" or a "case within a case"; under either appellation, this is an objective approach to decide what should have been the result in the underlying proceeding or matter.[FN4] Thus, once negligence has been proven, the former attorney can overcome the prima facie case of legal malpractice if he or she can prove that the former client could not have succeeded on the original claim.[FN5]

In order to prove causation in a legal malpractice action, a convicted criminal must show that, but for his or her former attorney's conduct, he or she would have been successful in the criminal lawsuit.[FN6] Success in the underlying prosecution, which the convicted criminal must establish would have occurred but for the malpractice, is not merely to have a court grant a motion or even order a new trial, but means a "get out of jail free card" and proving to a jury that the convicted criminal is innocent of all counts for which he or she was convicted.[FN7] The "actual innocence" requirement for a criminal defendant to succeed in a malpractice action against a former attorney is not limited to only those criminal defendants who are suing their former trial attorneys; rather, the requirement is more general and dependent on public policy factors which apply equally to cases involving criminal defense attorneys hired to represented criminal defendants after conviction.[FN8]
Practice Tip: If a plaintiff obtains a favorable verdict in a suit-within-a-suit legal malpractice action, the defendants may move for a trial as to the collectibility of the judgment; in that proceeding, which generally should take place before the same jury, the burden of proof of non-collectibility is on defendants.[FN9]

The testimony of a witness whom a client and attorneys did not intend to call in the underlying personal injury action is inadmissible in a subsequent case-within-a-case legal malpractice action.[FN10]

[FN1] Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer, 8 N.Y.3d 438, 835 N.Y.S.2d 534, 867 N.E.2d 385 (2007).
- Since the ultimate settlement of underlying litigation was favorable, a client suffered no loss, as required to support a malpractice claim against his attorney. Nason v. Fisher, 36 A.D.3d 486, 828 N.Y.S.2d 51 (1st Dep't 2007).
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[FN2] Kranz v. Tiger, 390 N.J. Super. 135, 914 A.2d 854 (App. Div. 2007), certification denied, 192 N.J. 294, 927 A.2d 1293 (2007) and certification denied, 192 N.J. 294, 927 A.2d 1293 (2007) and certification denied, 192 N.J. 294, 927 A.2d 1293 (2007).
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[FN3] Universal Underwriters Ins. Co. v. Judge & James, Ltd., 372 Ill. App. 3d 372, 310 Ill. Dec. 207, 865 N.E.2d 531 (1st Dist. 2007); Day Advertising Inc. v. Devries And Associates, P.C., 217 S.W.3d 362 (Mo. Ct. App. W.D. 2007).
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[FN4] Ambriz v. Kelegian, 146 Cal. App. 4th 1519, 53 Cal. Rptr. 3d 700 (4th Dist. 2007), as modified on denial of reh'g, (Feb. 15, 2007) and review denied, (Apr. 18, 2007).
- The amount of a client's settlement in an underlying personal injury action was irrelevant and inadmissible in a subsequent case-within-a-case legal malpractice action to the issue of whether lawyers' and expert witness's alleged negligence was the proximate cause of damages to the client; the only relevance of the settlement was that the jury's verdict in the subsequent action would have been reduced by that amount. Kranz v. Tiger, 390 N.J. Super. 135, 914 A.2d 854 (App. Div. 2007), certification denied, 192 N.J. 294, 927 A.2d 1293 (2007) and

certification denied, 192 N.J. 294, 927 A.2d 1293 (2007) and certification denied, 192 N.J. 294, 927 A.2d 1293 (2007).
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[FN5] Green v. Rice, 948 So. 2d 376 (La. Ct. App. 2d Cir. 2007).
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[FN6] Tallmadge v. Boyle, 2007 WI App 47, 730 N.W.2d 173 (Wis. Ct. App. 2007), review denied, 2007 WI 114 (Wis. 2007) and review denied, (May 22, 2007).
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[FN7] Tallmadge v. Boyle, 2007 WI App 47, 730 N.W.2d 173 (Wis. Ct. App. 2007), review denied, 2007 WI 114 (Wis. 2007) and review denied, (May 22, 2007).
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[FN8] Tallmadge v. Boyle, 2007 WI App 47, 730 N.W.2d 173 (Wis. Ct. App. 2007), review denied, 2007 WI 114 (Wis. 2007) and review denied, (May 22, 2007).
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[FN9] Kranz v. Tiger, 390 N.J. Super. 135, 914 A.2d 854 (App. Div. 2007), certification denied, 192 N.J. 294, 927 A.2d 1293 (2007) and certification denied, 192 N.J. 294, 927 A.2d 1293 (2007) and certification denied, 192 N.J. 294, 927 A.2d 1293 (2007).
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[FN10] Kranz v. Tiger, 390 N.J. Super. 135, 914 A.2d 854 (App. Div. 2007), certification denied, 192 N.J. 294, 927 A.2d 1293 (2007) and certification denied, 192 N.J. 294, 927 A.2d 1293 (2007) and certification denied, 192 N.J. 294, 927 A.2d 1293 (2007).
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§ 224. Questions of law and fact

West's Key Number Digest

West's Key Number Digest, Attorney and Client 129(3)

Forms

Am. Jur. Pleading and Practice Forms, Attorneys at Law §§ 154 to 161 (Malpractice; jury instruction)

The degree of care required of an attorney is a question of law to be determined by the court, but the care actually exercised in a given situation[FN1] is a question of fact to be determined by the jury under proper instructions by the court.[FN2]

The determination of causation is a question of law.[FN3]

[FN1] Venable v. Block, 138 Ga. App. 215, 225 S.E.2d 755 (1976).
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[FN2] Venable v. Block, 138 Ga. App. 215, 225 S.E.2d 755 (1976).
- As to admissibility and necessity of expert testimony, see § 225.
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[FN3] Martin v. Hall, 20 Cal. App. 3d 414, 97 Cal. Rptr. 730, 53 A.L.R.3d 719 (2d Dist. 1971).
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§ 225. Expert testimony

West's Key Number Digest

West's Key Number Digest, Attorney and Client 129(3)

A.L.R. Library

Admissibility and Necessity of Expert Evidence as to Standards of Practice and Negligence in Malpractice Action Against Attorney—Conduct Related to Substantive Representation and Transactional Matters, 60 A.L.R.6th 1

Admissibility and Necessity of Expert Evidence as to Standards of Practice and Negligence in Malpractice Action Against Attorney—General Principles and Conduct Related to Interaction with Client, 58 A.L.R.6th 1

Admissibility and necessity of expert evidence as to standards of practice and negligence in malpractice action against attorney, 14 A.L.R.4th 170

In order to prove legal malpractice, expert testimony is normally required to demonstrate the standard of care by which an attorney's conduct is measured,[FN1] or to establish the actual standard adhered to by a reasonable, careful, and prudent lawyer,[FN2] because the law is admittedly a highly technical field beyond the knowledge of the ordinary person.[FN3] Thus, when the causal link is beyond the jury's common understanding, expert testimony is necessary in a legal malpractice action.[FN4] Some courts hold that the standards governing an attorney's ethical duties are conclusively established by the Rules of Professional Conduct, and cannot be changed by expert testimony.[FN5] Others hold that the applicable disciplinary rules in and of themselves do not create minimum standards such that a jury can determine liability merely by determining whether an attorney abided by the rules.[FN6]

The wisdom and consequences of an attorney's tactical choices about which witnesses to call, what testimony to obtain, or when to cross-examine are generally matters beyond the ken of most jurors and generally require expert testimony in a legal malpractice action.[FN7]

When the attorney's duty is so basic that it may be determined by the court as a matter of law, expert evidence is not required to establish the attorney's duty of care.[FN8] Thus, in many cases the trial court is competent to make the determination of the applicable standard of care,[FN9] and, in others, the attorney's failure to use due care under any reasonable standard may be so obvious as to make expert testimony unnecessary.[FN10]

Expert testimony is not required in legal malpractice cases where the issues are not beyond the knowledge of the average person, or are within the ordinary knowledge and experience of laypersons.[FN11] Thus, a legal malpractice claim does not require expert testimony to establish the negligence of an attorney who is ignorant of the applicable statute of limitations or who sits idly by and causes the client to lose the value of his or her claim for relief.[FN12] The most appropriate application of the common knowledge doctrine regarding the necessity of expert testimony in a legal malpractice action involves situations where the carelessness of the defendant attorney is readily apparent to anyone of average intelligence and ordinary experience.[FN13]

CUMULATIVE SUPPLEMENT

Cases:

In a legal malpractice action, the plaintiff must present expert testimony establishing the standard of care unless the attorney's lack of care and skill is so obvious that the trier of fact can find negligence as a matter of common knowledge; the kind of care and skill that can be found within the jury's common knowledge may include typical failures to act, for example, allowing the statute of limitations to run on the client's claim or permitting entry of a default against the client. Flax v. Schertler, 935 A.2d 1091 (D.C. 2007).

In a legal-malpractice case, expert testimony is generally required to establish an attorney's standard of conduct in a particular circumstance and that the attorney's conduct was not in conformity therewith; expert testimony is not required, however, where the evidence and circumstances are such that recognition of the alleged negligence may be presumed to be within the comprehension of laypersons. Wolski v. Wandel, 275 Neb. 266, 746 N.W.2d 143 (2008).

Expert testimony was required in legal malpractice claim to prove that law firm's failure to advise minor plaintiff in underlying medical malpractice action of presumptive 25% fee or of hourly-based fee caused plaintiff to receive reduced amount of settlement based on one-third contingency fee; determination as to whether trial court would have refused to approve fee greater than 25% or whether another attorney would have obtained similar result at lower cost was beyond the ken of the average layperson. Estate of Sicotte v. Lubin & Meyer, P.C., 157 N.H. 670, 959 A.2d 236 (2008).

In a legal malpractice case, expert testimony is required to establish the standard of care, show that defendant's conduct departed from that standard, and show that the conduct was the proximate cause of plaintiff's harm; the only exception to this requirement is where the lack of care is so apparent that only common knowledge and experience are needed to comprehend it. Clayton v. Unsworth, 2010 VT 84, 8 A.3d 1066 (Vt. 2010).

[END OF SUPPLEMENT]

[FN1] Carlson v. Sweeney, Dabagia, Donoghue, Thorne, Janes & Pagos, 868 N.E.2d 4 (Ind. Ct. App. 2007), opinion corrected on reh'g, 2007 WL 2258124 (Ind. Ct. App. 2007); Byrd v. Bowie, 933 So. 2d 899 (Miss. 2006); Kranz v. Tiger, 390 N.J. Super. 135, 914 A.2d 854 (App. Div. 2007), certification denied, 192 N.J. 294, 927 A.2d 1293 (2007) and certification denied, 192 N.J. 294, 927 A.2d 1293 (2007) and certification denied, 192 N.J. 294, 927 A.2d 1293 (2007).

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[FN2] Rino v. Mead, 2002 WY 144, 55 P.3d 13 (Wyo. 2002).

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[FN3] Geer v. Tonnon, 137 Wash. App. 838, 155 P.3d 163 (Div. 1 2007).

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[FN4] Alexander v. Turtur & Associates, Inc., 146 S.W.3d 113 (Tex. 2004).

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[FN5] Day v. Rosenthal, 170 Cal. App. 3d 1125, 217 Cal. Rptr. 89 (2d Dist. 1985).

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[FN6] Carlson v. Morton, 229 Mont. 234, 745 P.2d 1133 (1987).

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[FN7] Alexander v. Turtur & Associates, Inc., 146 S.W.3d 113 (Tex. 2004).

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[FN8] Kranz v. Tiger, 390 N.J. Super. 135, 914 A.2d 854 (App. Div. 2007), certification denied, 192 N.J. 294, 927 A.2d 1293 (2007) and certification denied, 192 N.J. 294, 927 A.2d 1293 (2007) and certification denied, 192 N.J. 294, 927 A.2d 1293 (2007).

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[FN9] Muse v. St. Paul Fire & Marine Ins. Co., 328 So. 2d 698 (La. Ct. App. 1st Cir. 1976).
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[FN10] Jim Mitchell and Jed Davis, P.A. v. Jackson, 627 A.2d 1014 (Me. 1993); DeLisle v. Avallone, 117 N.M. 602, 874 P.2d 1266 (Ct. App. 1994).
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[FN11] Kranz v. Tiger, 390 N.J. Super. 135, 914 A.2d 854 (App. Div. 2007), certification denied, 192 N.J. 294, 927 A.2d 1293 (2007) and certification denied, 192 N.J. 294, 927 A.2d 1293 (2007) and certification denied, 192 N.J. 294, 927 A.2d 1293 (2007).
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[FN12] Byrd v. Bowie, 933 So. 2d 899 (Miss. 2006).
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[FN13] Kranz v. Tiger, 390 N.J. Super. 135, 914 A.2d 854 (App. Div. 2007), certification denied, 192 N.J. 294, 927 A.2d 1293 (2007) and certification denied, 192 N.J. 294, 927 A.2d 1293 (2007) and certification denied, 192 N.J. 294, 927 A.2d 1293 (2007).
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§ 226. Calculation of damages

West's Key Number Digest

West's Key Number Digest, Attorney and Client 129(4)

A.L.R. Library

Allowance of Punitive Damages in Action Against Attorney for Malpractice, 9 A.L.R.6th 285

Attorney's obligation to share fee award with party representing public interest, 43 A.L.R.5th 793

Measure and elements of damages recoverable for attorney's negligence in preparing or conducting litigation—Twentieth Century cases, 90 A.L.R.4th 1033

Law Reviews and Other Periodicals

Thatcher, Recovery of "Lost Punitive Damages" as "Compensatory Damages" in Legal Malpractice Actions: Transference of Liability or Transformation of Character, 49 S.D. L. Rev. 1 (2003)

Weissblum, A Modest Proposal for Classifying Lost Punitive Damages in a Legal Malpractice Case: Look to the Deceased Tortfeasor for Guidance, 27 J. Legal Prof. 67 (2003)

In a malpractice action charging that an attorney's negligence in prosecuting a suit resulted in the loss of the client's claim, the value of the lost claim, that is, the amount that would have been recovered by the client except for the attorney's negligence, is a proper element of damages.[FN1] Such damages generally require proof of viability and worth of the claim that was irredeemably lost.[FN2] Accordingly, when the plaintiff's allegation is that some failure on the attorney's part caused an adverse result in prior litigation, the plaintiff must produce evidence from which a jury may reasonably infer that the attorney's conduct caused the damages alleged.[FN3]

Damages in a legal malpractice case are designed to make the injured client whole; a plaintiff's damages may include litigation expenses incurred in an attempt to avoid, minimize, or reduce the damage caused by the attorney's wrongful conduct.[FN4] Thus, a negligent attorney is responsible for the reasonable legal expenses and attorney fees incurred in prosecuting a legal malpractice action.[FN5] Legal malpractice damages are strictly limited to the amount the client actually lost due to the malpractice, which would exclude amounts received from insurance.[FN6]

A client may not recover lost punitive damages as compensatory damages.[FN7]

A trial court should not deduct from the sum found to have been lost by the client the amount the client would have normally paid the attorney as a fee if the matter had been competently handled.[FN8]

In order to recover punitive damages in an attorney malpractice action, something more than gross negligence must be shown, such as the element of intentional wrong or conscious indifference.[FN9]

Where the interest of the client in a malpractice action is economic, serious emotional distress is not an inevitable consequence of the loss of money; therefore, emotional distress damages are not recoverable.[FN10]

When bringing a legal malpractice action after settling the underlying action, the plaintiff's obligation is to prove that the settlement was necessary to mitigate damages, or that the plaintiff was driven to the necessity of settling because, if the case had not been settled, the plaintiff would have been worse off.[FN11]

Observation: A claim for legal malpractice is sui generis insofar as the plaintiff's proof of damages effectively requires proof that he or she would have prevailed in the original litigation but for the act of the attorney charged with malpractice.[FN12]

Public policy bars convicted criminals who file a legal malpractice claim from recovering money from their former defense counsel, unless they can prove that "but for" that defense counsel's actions, the convicted criminal would be free.[FN13]

A trial court's award of expert witness fees as costs to an attorney who prevails at the damages phase of a legal malpractice action is not an abuse of discretion.[FN14]

When the plaintiff in a suit-within-a-suit legal malpractice action has settled the underlying action, the measure of damages is the difference between the settlement and the amount of money that would have been obtained by judgment.[FN15]

CUMULATIVE SUPPLEMENT

Cases:

Both parties in appeal in legal malpractice action prevailed and lost in about equal proportions, and thus, neither party was entitled to attorney fees on appeal. Stephen v. Sallaz & Gatewood, Chtd., 248 P.3d 1256 (Idaho 2011).

Lawyer's breach of fiduciary duty and fraudulent conduct in misappropriating clients' funds, when he stole clients' money and then lied to them about the theft for years, demonstrated "bad motive" and "malice" as a matter of law, as required in order for clients to be entitled to an award of punitive damages in their breach of fiduciary duties, misrepresentation and misappropriation action, even if lawyer did not intend to harm clients and always intended to return the money, and thus the jury was not required to determine that the lawyer's motive in stealing the funds was to harm clients rather than to enrich himself in order to award clients punitive damages. DeYoung v. Ruggiero, 185 Vt. 267, 2009 VT 9, 971 A.2d 627 (2009).

[END OF SUPPLEMENT]

[FN1] Duvall, Blackburn, Hale & Downey v. Siddiqui, 243 Va. 494, 416 S.E.2d 448 (1992).
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[FN2] Albee Associates v. Orloff, Lowenbach, Stifelman and Siegel, P.A., 317 N.J. Super. 211, 721 A.2d 750 (App. Div. 1999).
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[FN3] Alexander v. Turtur & Associates, Inc., 146 S.W.3d 113 (Tex. 2004).
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[FN4] Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer, 8 N.Y.3d 438, 835 N.Y.S.2d 534, 867 N.E.2d 385 (2007).
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[FN5] Packard-Bamberger & Co., Inc. v. Collier, 167 N.J. 427, 771 A.2d 1194 (2001).
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[FN6] St. Pierre v. Koonmen, 371 Ill. App. 3d 466, 309 Ill. Dec. 49, 863 N.E.2d 279 (2d Dist. 2007).
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[FN7] Ferguson v. Lieff, Cabraser, Heimann & Bernstein, 30 Cal. 4th 1037, 135 Cal. Rptr. 2d 46, 69 P.3d 965, 9 A.L.R.6th 749 (2003).
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[FN8] Burton v. Kaplan, 184 A.D.2d 408, 585 N.Y.S.2d 359 (1st Dep't 1992).
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[FN9] Orsini v. Larry Moyer Trucking, Inc., 310 Ark. 179, 833 S.W.2d 366 (1992).
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[FN10] Merenda v. Superior Court, 3 Cal. App. 4th 1, 4 Cal. Rptr. 2d 87 (3d Dist. 1992).
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[FN11] Day Advertising Inc. v. Devries And Associates, P.C., 217 S.W.3d 362 (Mo. Ct. App. W.D. 2007).
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[FN12] Paul v. Smith, Gambrell & Russell, 283 Ga. App. 584, 642 S.E.2d 217 (2007).
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[FN13] Tallmadge v. Boyle, 2007 WI App 47, 730 N.W.2d 173 (Wis. Ct. App. 2007), review denied, 2007 WI 114 (Wis. 2007) and review denied, (May 22, 2007).
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[FN14] Massey v. David, 953 So. 2d 599 (Fla. Dist. Ct. App. 1st Dist. 2007).
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[FN15] Kranz v. Tiger, 390 N.J. Super. 135, 914 A.2d 854 (App. Div. 2007), certification denied, 192 N.J. 294, 927 A.2d 1293 (2007) and certification denied, 192 N.J. 294, 927 A.2d 1293 (2007) and certification denied, 192 N.J. 294, 927 A.2d 1293 (2007).
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§ 227. Generally

West's Key Number Digest

West's Key Number Digest, Attorney and Client 129(1)

The statute of limitations for a claim stemming from legal malpractice may be a specified time period.[FN1] A statute of limitations reflects the balance a legislature has struck between a plaintiff's interest in pursuing a meritorious claim and the public policy interests in prompt assertion of known claims.[FN2] The courts may not shift that balance by devising expedients that extend or toll the limitations period,[FN3] and a legislature may expressly disallow tolling under any circumstances not stated in the statute.[FN4]

In an action by a client charging an attorney with negligence in the performance of professional duties, the attorney may interpose the statute of limitations as a bar to the action.[FN5] The initial wrongdoing that forms

the basis for a client's legal malpractice claim cannot also serve as a ground to invoke equitable estoppel to preclude an attorney from raising the statute of limitations defense.[FN6]
Observation: Determining whether there was a suit that should be filed is a predicate step to determining whether the failure to file such a suit within the period provided for in the statute of limitations constituted a violation of an attorney's standard of conduct.[FN7]

CUMULATIVE SUPPLEMENT

Cases:

Failure of attorney who represented minor's guardianship estate in underlying medical malpractice action relating to minor's injuries at birth, to inform guardian of $1 million pretrial settlement offer in medical malpractice case before attorney rejected the offer, was proximate cause of injury to estate, as element of legal malpractice, because in underlying action, the trial court would have approved of pretrial settlement on minor's behalf; settlement amount was adequate, in light of weaknesses in the medical malpractice case, adverse evidentiary rulings, risk that jury would find no medical malpractice, and the motivation of minor's mother, which was "[n]ot the money" but rather to "go after the doctor so he couldn't do it to another baby". First Nat. Bank of LaGrange v. Lowrey, 375 Ill. App. 3d 181, 313 Ill. Dec. 464, 872 N.E.2d 447 (1st Dist. 2007), appeal pending, (Nov. 1, 2007).

A two-year limitations period applies to a legal malpractice negligence claim, and a four-year limitations period applies to a legal malpractice breach of contract claim. Wachovia Bank, N.A. v. Ferretti, 2007 PA Super 320, 935 A.2d 565 (2007).

Clients' purported breach of fiduciary duty claims against attorneys, alleging that attorneys failed to properly advise, inform, and communicate with them in their underlying action, were actually claims of professional negligence and to which the two-year limitations period for tort actions applied; although clients alleged that attorneys engaged in self-dealing when they continued to represent clients and another client with allegedly adverse interests, clients did not allege that attorneys pursued their own pecuniary interests over the clients' interests or obtained any improper benefit by continuing to represent the allegedly adverse client. Murphy v. Gruber, 241 S.W.3d 689 (Tex. App. Dallas 2007), petition for review filed, (Jan. 29, 2008).

[END OF SUPPLEMENT]

[FN1] Preblich v. Zorea, 996 P.2d 730 (Alaska 2000) (six years); Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison, 18 Cal. 4th 739, 76 Cal. Rptr. 2d 749, 958 P.2d 1062 (1998) (one year); Carlson v. Sweeney, Dabagia, Donoghue, Thorne, Janes & Pagos, 868 N.E.2d 4 (Ind. Ct. App. 2007), opinion corrected on reh'g, 2007 WL 2258124 (Ind. Ct. App. 2007) (two years); Iser v. Kerrigan, 37 A.D.3d 662, 830 N.Y.S.2d 343 (2d Dep't 2007) (three years).
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[FN2] Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison, 18 Cal. 4th 739, 76 Cal. Rptr. 2d 749, 958 P.2d 1062 (1998).
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[FN3] Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison, 18 Cal. 4th 739, 76 Cal. Rptr. 2d 749, 958 P.2d 1062 (1998).
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[FN4] Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison, 18 Cal. 4th 739, 76 Cal. Rptr. 2d 749, 958 P.2d 1062 (1998).
- As to tolling of a statute of limitations, see § 230.
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[FN5] Wilcox v. Plummer's Ex'rs, 29 U.S. 172, 7 L. Ed. 821, 1830 WL 3902 (1830).
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[FN6] Tenamee v. Schmukler, 438 F. Supp. 2d 438 (S.D. N.Y. 2006).
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[FN7] Boyle v. Welsh, 256 Neb. 118, 589 N.W.2d 118 (1999).
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§ 228. What statute applies

West's Key Number Digest

West's Key Number Digest, Attorney and Client 129(1)

A.L.R. Library

What statute of limitations governs damage action against attorney for malpractice, 2 A.L.R.4th 284

An action against an attorney for malfeasance or nonfeasance must be brought within the term specified in a statute of limitations governing malpractice actions.[FN1]

In the absence of a statute explicitly covering malpractice actions, some courts hold that a complaint for malpractice sounds in tort rather than in contract and is governed by the statute of limitations applicable to tort actions.[FN2] Other courts have held that an action against an attorney for negligence in the performance of professional services is based on a breach of contract and falls within the purview of the statute of limitations

applicable to contract actions.[FN3] There is also support for the position that an action against an attorney for malpractice is governed by the statute of limitations specifying the time within which an action on a contract, obligation, or liability not founded on an instrument in writing must be instituted.[FN4] Where an attorney is bankrupt, the federal bankruptcy extension statute[FN5] controls over a state statute of limitations on malpractice actions, because the federal statute expressly extends nonbankruptcy limitations statutes to protect creditors.[FN6]

When a plaintiff's fraud claim amounts to nothing but a thinly disguised claim for legal malpractice, the client cannot benefit from the longer statute of limitations for fraud claims.[FN7]

[FN1] Hargett v. Holland, 337 N.C. 651, 447 S.E.2d 784 (1994).

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[FN2] B. Swirsky & Co., Inc. v. Bott, 598 So. 2d 1281 (La. Ct. App. 4th Cir. 1992), writ denied, 605 So. 2d 1149 (La. 1992); McGrogan v. Till, 167 N.J. 414, 771 A.2d 1187 (2001).

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[FN3] Jampole v. Matthews, 857 S.W.2d 57 (Tex. App. Houston 1st Dist. 1993), writ denied, (Oct. 27, 1993).

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[FN4] Towns v. Frey, 149 Ariz. 599, 721 P.2d 147 (Ct. App. Div. 1 1986).

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[FN5] 11 U.S.C.A. § 108(a).

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[FN6] California Aviation, Inc. v. Leeds, 233 Cal. App. 3d 724, 284 Cal. Rptr. 687 (2d Dist. 1991), opinion modified, (Sept. 20, 1991).

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[FN7] Tenamee v. Schmukler, 438 F. Supp. 2d 438 (S.D. N.Y. 2006).

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Topic Summary Correlation Table References

§ 229. When statute of limitations begins to run; negligent acts and omissions

West's Key Number Digest

West's Key Number Digest, Attorney and Client 129(1)

A.L.R. Library

When Statute of Limitations Begins to Run on Action Against Attorney for Malpractice Based Upon Negligence—View that Statute Begins to Run from Time Client Discovers, or Should Have Discovered, Negligent Act or Omission—Application of Rule to Negligent Misrepresentation, Failure to Supervise Junior Counsel, Conflict of Interest, Billing Disputes, and Unspecified Acts of Negligence, 16 A.L.R.6th 653

When Statute of Limitations Begins to Run on Action Against Attorney for Malpractice Based Upon Negligence—View that Statute Begins to Run from Time Client Discovers, or Should Have Discovered, Negligent Act or Omission—Application of Rule to Property, Estate, Corporate, and Document Cases, 15 A.L.R.6th 427

When Statute of Limitations Begins to Run on Action Against Attorney for Malpractice Based upon Negligence—View That Statute Begins to Run from Time Client Discovers, or Should Have Discovered, Negligent Act or Omission—Application of Rule to Conduct of Litigation and Delay or Inaction in Conducting Client's Affairs, 14 A.L.R.6th 1

When Statute of Limitations Begins to Run on Action Against Attorney for Malpractice Based upon Negligence—View that Statute Begins to Run from Time of Occurrence of Sustaining Damage or Injury and Other Theories, 12 A.L.R.6th 1

When Statute of Limitations Begins to Run on Action Against Attorney for Malpractice Based upon Negligence—View that Statute Begins to Run from Time of Occurrence of Negligent Act or Omission, 11 A.L.R.6th 1

The general rule that the statute of limitations begins to run against a cause of action only after the right to prosecute such cause of action to a successful conclusion has accrued[FN1] applies to an action against an attorney for malpractice.[FN2] With respect to malpractice allegedly arising from some negligent act or omission of an attorney, a number of courts hold that the cause of action accrues at the time of the negligent act, and that the statute of limitations begins to run at that time.[FN3] Under this view, a cause of action based on an attorney's negligence or want of skill in the prosecution or management of an action or its defense accrues at the time the attorney fails to exercise the proper degree of professional skill, not when the consequent damages result or become liquidated, and the statute of limitations begins to run at the time the cause of action accrues.[FN4] This “occurrence rule” provides that the statute of limitations applicable to a malpractice action begins to run, in the absence of a concealment or wrong, when the negligence occurs, and not when it is discovered.[FN5]

Some cases hold that a cause of action against an attorney for malpractice accrues from the time the client has sustained damages.[FN6] Some courts hold that a statute of limitations on an attorney malpractice action will not begin to run until the final judgment becomes final, rather than when the verdict is rendered, where various postverdict motions are filed and final judgment is not entered until almost two years after the jury verdict, since the trial court retains inherent authority to reconsider any of its nonfinal rulings prior to entry of

final judgment.[FN7] Thus, a statute of limitations on a criminal defendant's malpractice action against defense counsel does not commence until the defendant has obtained final appellate or postconviction relief.[FN8] Accordingly, an inmate's cause of action for legal malpractice accrues when the inmate is sentenced for conviction of a crime.[FN9]

A number of courts hold that a cause of action for legal malpractice does not accrue until the client discovers, or should discover, the facts establishing his or her cause of action.[FN10] This rule has been applied where a client does not discover the wrongful conduct of an attorney until after a cause of action has been settled.[FN11]

In some cases, the statute of limitations does not begin to run until the plaintiff knows or should know of the attorney's negligence and the plaintiff suffers actual and appreciable harm.[FN12]

In an action to recover for neglect or misconduct in the collection of a note, the statute of limitations does not begin to run from the date of the receipt for the note given by the attorney, but from a reasonable time thereafter for beginning proceedings to collect the amount owing.[FN13]

In a criminal case, the statute of limitations begins to run when the defendant obtains post-conviction relief or reversal on appeal,[FN14] or from the date of sentencing where the malpractice claim is based on the attorney's failure to withdraw a guilty plea.[FN15]

CUMULATIVE SUPPLEMENT

Cases:

The statute of limitations period for legal malpractice negligence actions is three years, and absent concealment, it begins to run upon the occurrence of the wrong. Delanno, Inc. v. Peace, 366 Ark. 542, 237 S.W.3d 81 (2006).

A professional malpractice action only accrues for limitations purposes once there has been "some damage." West's I.C.A. § 5–219(4). Stuard v. Jorgenson, 249 P.3d 1156 (Idaho 2011).

Legal malpractice action stemming from ineffective assistance in public defender's failure to apprise client of immigration consequences to pleading guilty to criminal charge accrued, and the two-year limitations period began to run, on date on which client received postconviction relief in postconviction court's setting aside of guilty plea. McKnight v. Office of Public Defender, 197 N.J. 180, 962 A.2d 482 (2008).

The statutory limitations period on a legal malpractice claim begins to run not when the plaintiff has actual knowledge of alleged acts of malpractice, but rather when he becomes aware of facts or by exercising reasonable diligence could discover facts that would place a reasonable person on notice that a potential claim exists. Gen.Laws 1956, § 9–1–14.3(2). Zanni v. Voccola, 13 A.3d 1068 (R.I. 2011).

"Injury," for purposes of commencing the limitations period for a legal malpractice claim, is defined as the loss or impairment of a right, remedy, or interest that otherwise would have been available but for the attorney's negligence. West's U.C.A. § 78B–2–307(3). Jensen v. Young, 2010 UT 67, 245 P.3d 731 (Utah 2010).

Cause of action against attorney for legal malpractice accrued, and five year limitations period began to run, from the date the final divorce decree was entered, even though former client allegedly suffered no injury until 30 years later when former husband died and client was unable to receive survivor benefits. West's V.C.A. §§ 8.01–230, 8.01–246. Van Dam v. Gay, 699 S.E.2d 480 (Va. 2010).

[END OF SUPPLEMENT]

[FN1] Am. Jur. 2d, Limitation of Actions § 147, 148.

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[FN2] Wilcox v. Plummer's Ex'rs, 29 U.S. 172, 7 L. Ed. 821, 1830 WL 3902 (1830).

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[FN3] Wilcox v. Plummer's Ex'rs, 29 U.S. 172, 7 L. Ed. 821, 1830 WL 3902 (1830); Ladner v. Inge, 603 So. 2d 1012 (Ala. 1992).

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[FN4] Wilcox v. Plummer's Ex'rs, 29 U.S. 172, 7 L. Ed. 821, 1830 WL 3902 (1830).

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[FN5] Moix-McNutt v. Brown, 348 Ark. 518, 74 S.W.3d 612, 11 A.L.R.6th 795 (2002).

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[FN6] Kopicko v. Young, 114 Nev. 1333, 971 P.2d 789 (1998); Mahorney v. Waren, 2002 OK CIV APP 111, 60 P.3d 38 (Div. 1 2002).

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[FN7] Silvestrone v. Edell, 721 So. 2d 1173 (Fla. 1998).

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[FN8] Steele v. Kehoe, 747 So. 2d 931 (Fla. 1999).

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[FN9] Mahorney v. Waren, 2002 OK CIV APP 111, 60 P.3d 38 (Div. 1 2002).

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[FN10] Jacobson v. Shine, 859 P.2d 911 (Colo. Ct. App. 1993); Channel v. Loyacono, 954 So. 2d 415 (Miss. 2007); Murphy v. Campbell, 964 S.W.2d 265 (Tex. 1997).

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[FN11] Channel v. Loyacono, 954 So. 2d 415 (Miss. 2007).

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[FN12] Hampton v. Payne, 600 So. 2d 1144 (Fla. Dist. Ct. App. 3d Dist. 1992); Grunwald v. Bronkesh, 131 N.J. 483, 621 A.2d 459 (1993).

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[FN13] Wilcox v. Plummer's Ex'rs, 29 U.S. 172, 7 L. Ed. 821, 1830 WL 3902 (1830).

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[FN14] Stevens v. Bispham, 316 Or. 221, 851 P.2d 556 (1993).

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[FN15] Shuster v. Buckley, 5 Conn. App. 473, 500 A.2d 240 (1985).

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7 Am. Jur. 2d Attorneys at Law § 230

Topic Summary Correlation Table References

§ 230. When statute of limitations is tolled

West's Key Number Digest

West's Key Number Digest, Attorney and Client 129(1)

Law Reviews and Other Periodicals

Floyd, South Carolina Tort Law: For Whom the Statute of Limitations Tolls—The Epstein Court's Rejection of the Continuous Representation Rule, 57 S.C. L. Rev. 643 (2006)

The statute of limitations on an action for legal malpractice is tolled until the date the attorney ceases to represent the client on the specific matter in which the malpractice allegedly occurred, despite the client's awareness of the attorney's negligence.[FN1] However, this continuous representation doctrine applies only where there is an ongoing, continuous, developing and dependent relationship between client and attorney.[FN2] It will only be applied where the professional's involvement after the alleged malpractice is for the performance of the same or related services and is not merely the continuation of a general professional relationship.[FN3] Thus, the doctrine has no application where the attorney was discharged several years before the client brings the malpractice action.[FN4]
Caution: At least one jurisdiction does not apply the rule that the statute of limitations for legal malpractice is tolled under the theory of continuous representation.[FN5]

For purposes of determining when tolling of the limitations period for a legal malpractice action ceases under the continuous representation exception, in the event of an attorney's unilateral withdrawal or abandonment of the client, the representation ends when the client actually has or reasonably should have no expectation that the attorney will provide further legal services.[FN6]

The statute of limitations for malpractice for failure to sue a tortfeasor is tolled until the litigation has concluded against the other tortfeasors who are liable for the same indivisible injury.[FN7] The filing of a legal malpractice claim with a local bar association does not toll the statute of limitations for filing a malpractice claim in court.[FN8]

Under the view that the statute of limitations on a legal malpractice action does not begin to run until the plaintiff knows or should know of the attorney's negligence and the plaintiff suffers actual and appreciable harm,[FN9] the statute is tolled during the time the plaintiff has not sustained actual injury.[FN10]

CUMULATIVE SUPPLEMENT

Cases:

One-year statute of limitations on client's malpractice and breach of contract claims against attorneys, for failing to preserve client's defamation claims against law firm that had represented corporation founded by client, was not tolled by the continuous representation rule, though client alleged that complaint that attorneys

filed for client in a related federal action preserved client's right to sue law firm by alleging law firm engaged in various acts of wrongdoing without formally naming law firm as a party, where attorneys told client that they would not name law firm as a party in the federal action and that he should retain new counsel to pursue claims against law firm, and client retained new counsel to sue law firm in state court. West's Ann.Cal.C.C.P. § 340.6. Lockton v. O'Rourke, 184 Cal. App. 4th 1051, 109 Cal. Rptr. 3d 392 (2d Dist. 2010).

The existence of a fiduciary relationship, such as that of attorney and client, may excuse the discovery of an attorney's alleged negligent act and toll the statute of limitations in the context of a legal malpractice action. Ehrman v. Kaufman, Vidal, Hileman & Ramlow, PC, 2010 MT 284, 358 Mont. 519, 246 P.3d 1048 (2010).

Client knew or had reason to know of its legal malpractice claim against law firm, with regard to representation of client in underlying dispute concerning dock rights agreement, triggering applicable limitations period, at time that summary judgment was entered against client in underlying action, rather than opposing parties' previous countervailing interpretation of contract and challenges to contract; client wholly relied on attorney's advice throughout representation. MCA 27–2–206. Ehrman v. Kaufman, Vidal, Hileman & Ramlow, PC, 2010 MT 284, 358 Mont. 519, 246 P.3d 1048 (2010).

[END OF SUPPLEMENT]

[FN1] O'Neill v. Tichy, 19 Cal. App. 4th 114, 25 Cal. Rptr. 2d 162 (1st Dist. 1993).

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[FN2] Schoenrock v. Tappe, 419 N.W.2d 197 (S.D. 1988).

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[FN3] Schoenrock v. Tappe, 419 N.W.2d 197 (S.D. 1988).

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[FN4] Wettanen v. Cowper, 749 P.2d 362 (Alaska 1988).

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[FN5] Edwards v. Andrews, Davis, Legg, Bixler, Milsten & Murrah, Inc., 1982 OK 72, 650 P.2d 857 (Okla. 1982).

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[FN6] Gonzalez v. Kalu, 140 Cal. App. 4th 21, 43 Cal. Rptr. 3d 866 (2d Dist. 2006).

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[FN7] Davis v. Shanks, 898 S.W.2d 285 (Tex. 1995).

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[FN8] Lewis v. Roselle, 63 Ohio App. 3d 254, 578 N.E.2d 546 (1st Dist. Hamilton County 1990), dismissed, 54 Ohio St. 3d 707, 561 N.E.2d 941 (1990).

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[FN9] § 229.

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[FN10] Sirott v. Latts, 6 Cal. App. 4th 923, 8 Cal. Rptr. 2d 206 (2d Dist. 1992); Grunwald v. Bronkesh, 131 N.J. 483, 621 A.2d 459 (1993).

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7 Am. Jur. 2d Attorneys at Law § 231

American Jurisprudence, Second Edition
Database updated August 2011

Attorneys at Law
Rachel M. Kane, M.A., J.D.

V. Liability of Attorney for Malpractice
A. Liability to Client
4. Recovery by Summary Proceeding

Topic Summary Correlation Table References

§ 231. Generally

West's Key Number Digest

West's Key Number Digest, Attorney and Client 126 to 126(2)

By virtue of the authority it has over its own officers, a court will enforce honorable conduct on the part of its attorneys, and compel them to act honestly toward their clients,[FN1] by means of fine, imprisonment, disbarment[FN2] or contempt proceedings.[FN3] To this end, an attorney is amenable to a summary proceeding initiated by a client for professional misconduct of the attorney affecting the client.[FN4] In the exercise of its summary jurisdiction, a court may compel an attorney to pay over or account for money or property belonging to the client,[FN5] as, for instance, where the attorney improperly retains money collected for the client.[FN6] A client, however, has no absolute right to invoke a summary remedy against an attorney; use of the remedy is subject to the discretion of the court to determine the circumstances under which it will entertain the proceeding.[FN7] Thus, if, on the record, it appears that the attorney is not guilty of any professional misconduct, the court will not exercise its summary jurisdiction.[FN8]

[FN1] In re Paschal, 77 U.S. 483, 19 L. Ed. 992, 1870 WL 12746 (1870).
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[FN2] Ex parte Wall, 107 U.S. 265, 2 S. Ct. 569, 27 L. Ed. 552 (1883).
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[FN3] People's Sav. Bank v. Chesley, 138 Me. 353, 26 A.2d 632 (1942).
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[FN4] People's Sav. Bank v. Chesley, 138 Me. 353, 26 A.2d 632 (1942).
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[FN5] In re Ferrell, 172 A.2d 555 (Mun. Ct. App. D.C. 1961).
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[FN6] In re Paschal, 77 U.S. 483, 19 L. Ed. 992, 1870 WL 12746 (1870).
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[FN7] Leibowitz v. Szoverffy, 97 Misc. 2d 854, 412 N.Y.S.2d 569 (Sup 1979).
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[FN8] In re Paschal, 77 U.S. 483, 19 L. Ed. 992, 1870 WL 12746 (1870).
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Topic Summary Correlation Table References

§ 232. Limitations on available relief

West's Key Number Digest

West's Key Number Digest, Attorney and Client 126 to 126(2)

Summary relief will not be granted against an attorney on behalf of anyone except a client.[FN1]
Caution: One court qualified this statement by limiting it to situations where there is an absence of fraud, collusion, malicious acts, or some other special circumstance.[FN2]

[FN1] Brown v. Superior Court of Pima County, 78 Ariz. 120, 276 P.2d 540 (1954).
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[FN2] Associated Factors Corp. v. Paul M. O'Neill Detective Agency, Inc., 146 A.D.2d 728, 537 N.Y.S.2d 212 (2d Dep't 1989).
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4. Recovery by Summary Proceeding

Topic Summary Correlation Table References

§ 233. Procedure

West's Key Number Digest

West's Key Number Digest, Attorney and Client 126(2)

The procedural steps incident to the initiation of a summary proceeding against an attorney are regulated by statutes[FN1] or rules of court that are peculiar to each jurisdiction, although the procedure rests largely in the discretion of the court, and this discretion is untrammeled by statutory rules.[FN2]

Immunity granted by rule of court in an attorney disciplinary proceeding is absolute and precludes a civil action by the attorney against the complainant.[FN3]

[FN1] People's Sav. Bank v. Chesley, 138 Me. 353, 26 A.2d 632 (1942).
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[FN2] In re Long, 287 N.Y. 449, 40 N.E.2d 247, 141 A.L.R. 651 (1942).
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[FN3] Jarvis v. Drake, 250 Kan. 645, 830 P.2d 23 (1992).
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V. Liability of Attorney for Malpractice
B. Liability to Third Persons

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A.L.R. Library

A.L.R. Index, Attorney or Assistance of Attorney

A.L.R. Index, Malpractice by Attorney

West's A.L.R. Digest, Attorney and Client §§26

Trial Strategy

Legal Malpractice—Estate, Will, and Succession Matters, 24 Am. Jur. Proof of Facts 2d 577

Forms

Am. Jur. Pleading and Practice Forms, Attorneys at Law §§ 196 to 201

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7 Am. Jur. 2d Attorneys at Law § 234

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V. Liability of Attorney for Malpractice
B. Liability to Third Persons

Topic Summary Correlation Table References

§ 234. Generally

West's Key Number Digest

West's Key Number Digest, Attorney and Client 26

A.L.R. Library

Attorney's liability, to one other than immediate client, for negligence in connection with legal duties, 61 A.L.R.4th 615

What constitutes negligence sufficient to render attorney liable to person other than immediate client, 61 A.L.R.4th 464

Forms

Am. Jur. Pleading and Practice Forms, Attorneys at Law § 198 (Complaint or petition—Negligence in real estate transaction—Third-party beneficiary theory)

In general, existence of an attorney-client relationship between the plaintiff and the defendant attorney is a required element in any legal malpractice case,[FN1] and, with limited exceptions, an attorney owes no actionable duty to strangers or non-parties to the attorney-client relationship in the way legal responsibilities are performed.[FN2] The rule that a plaintiff must show an attorney-client or analogous professional relationship in

order to maintain a legal malpractice claim applies to allegations of legal malpractice in any context, including disputes involving the drafting, execution, or administration of a will.[FN3] An attorney's representation, which could incidentally benefit a third party other than the client, does not alone establish a duty of care to the third party, even if the attorney knows that third parties will be affected by his or her representation of his or her client.[FN4] Under certain circumstances, however, an attorney may owe a duty to a party who is not his or her client, but who is a third-party beneficiary to an agreement between the attorney and his or her client.[FN5] Accordingly, third-party liability of an attorney arising from representation of a client may be found to exist where the attorney is responsible for damage caused by his or her negligence to a person intended to be benefited by his or her performance irrespective of any lack of privity.[FN6] Privity between an attorney and a non-client is not necessary for a duty to attach where the attorney had reason to foresee the specific harm which occurred.[FN7] In addition, attorneys may owe a duty of care to non-clients when the attorneys know, or should know, that non-clients will rely on the attorney's representations and the non-clients are not too remote from the attorneys to be entitled to protection.[FN8]

An essential predicate for establishing an attorney's duty of care under an "intended beneficiary" theory is that both the attorney and the client must have intended the third party to be the beneficiary of legal services that the attorney was to render.[FN9] It must clearly appear from the contract that it was intended for the third party's benefit; the mere fact that the third party would benefit from performance of the agreement is not alone sufficient.[FN10]

To determine if an attorney's duty of care exists to a non-client, a court conducts an inquiry that involves a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution; the primary question in this inquiry is one of fairness.[FN11] If the material facts are not in dispute, a district court determines as a matter of law whether the plaintiff in a legal malpractice claim was a third-party beneficiary of a law firm's representation of its client by applying specific factors, which include (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the attorney's conduct and the injury, (5) the policy of preventing future harm, and (6) whether recognition of liability under the circumstances would impose an undue burden on the profession.[FN12] Whether an attorney's duty of care extends to non-clients is necessarily fact-dependent, and determining if an attorney has a duty to a third party in a specific situation is a question of law, where the court must balance the attorney's duty to represent clients vigorously with the duty not to provide misleading information on which third parties foreseeably will rely.[FN13]

According to some courts, an attorney may be held liable to third parties only if he or she has been guilty of fraud or collusion or of a malicious or tortious act.[FN14] Thus, although a legal malpractice claim may accrue only to the attorney's client, an attorney may be liable for damages to a third party because of events arising out of his or her representation of a client if the attorney's acts are fraudulent or tortious and result in injury to that third person.[FN15]

An attorney for a trustee is liable for breach of fiduciary duty to the third-party beneficiaries of the trust when the attorney has placed his or her self-interest above that of the trustee.[FN16]

If an attorney so fraudulently manipulates an execution, levy, and sale in the enforcement of a judgment procured for a client as to enable himself or herself, as purchaser at the judicial sale, to procure title to the property for a grossly inadequate consideration, the attorney is liable to the judgment debtor to set the sale aside.[FN17]

CUMULATIVE SUPPLEMENT

Cases:

The recipient of the information provided by an attorney, for the purposes of a claim against the attorney for negligent misrepresentation, could fall into two classes of people: first, the recipient could be a third party, to whom the attorney provides guidance at the request of his or her client, or second, the recipient could be a non-client to whom the attorney provides information directly. Restatement (Second) of Torts § 552. Allen v. Steele, 252 P.3d 476 (Colo. 2011).

Loan assignee's attorney-client relationship with attorney, which was formed during the appeal of the underlying foreclosure action, did not give assignee standing to bring a legal malpractice action based upon acts in foreclosing mortgage that occurred during attorney's representation of a prior holder of the note and mortgage. Law Office of David J. Stern, P.A. v. Security Nat. Servicing Corp., 969 So. 2d 962 (Fla. 2007).

Residual beneficiaries of revocable trust were not entitled, under attorney fee provision of earnest money agreement for the purchase of real property owned by the trust, to recover attorney fees for their action against settlor-trustee's attorney, alleging negligence and professional negligence with respect to sale of the property; the earnest money agreement was between the purchaser and the trust, and thus, the residual beneficiaries were not parties to the agreement. Taylor v. Maile, 146 Idaho 705, 201 P.3d 1282 (2009).

Legal malpractice claim brought by decedent's son against law firm that drafted decedent's estate plan, in which son alleged that he was an intended third-party beneficiary of the attorney-client relationship between decedent and law firm and that law firm failed to carry out decedent's testamentary intent that he receive a family farm, did not arise until decedent's death, and thus son was required to assert the claim within the time for filing claims against the estate or contesting the validity of the will; decedent could have revoked or amended her will to give son the farm up until her death. 735 ILCS 5/13–214.3(d) (1994 Bar Ed.) Fitch v. McDermott, Will and Emery, LLP, 341 Ill. Dec. 88, 929 N.E.2d 1167 (App. Ct. 2d Dist. 2010).

Client's excess insurer was not represented by client's attorneys in products liability action, as was required for insurer to bring legal malpractice claim against attorneys, even though there was communication between client and insurer regarding the litigation, where there was no evidence that attorneys consented to represent both their client and the excess insurer. Querrey & Harrow, Ltd. v. Transcontinental Ins. Co., 885 N.E.2d 1235 (Ind. 2008).

Banks that participated in two loans to finance a casino project were not direct and intended beneficiaries of attorney-client relationship between loan originator and law firm retained by originator, and thus, law firm did not owe duty of care to the banks; central purpose of attorney-client relationship was to close the loans rather than to benefit the banks, the banks had no direct communication with law firm, the banks acknowledged in their participation agreements with originator that they purchased participations in reliance not on originator but on their own independent evaluation of the loans, and even assuming originator had intended to benefit the banks, law firm was not aware of such intent. McIntosh County Bank v. Dorsey & Whitney, LLP, 745 N.W.2d 538 (Minn. 2008).

Waiver of medical confidentiality for litigation purposes is limited to the specific case for which the records are sought, and an attorney who violates this limited waiver by disclosing the records to a third party unconnected to the litigation may be held liable for these actions. Hageman v. Southwest Gen. Health Ctr., 119 Ohio St. 3d 185, 2008-Ohio-3343, 893 N.E.2d 153 (2008).

Based on the strict rule of privity, a beneficiary of a decedent's will may not maintain an action for legal malpractice based on negligence, against an attorney who had been retained by the decedent for preparation of the will and for preparation of a deed, as to the preparation of a deed that results in increased tax liability for the decedent's estate. Shoemaker v. Gindlesberger, 118 Ohio St. 3d 226, 2008-Ohio-2012, 887 N.E.2d 1167 (2008).

The rule in Ohio is that attorneys are not liable to a third party, for legal malpractice based on negligence, for the good faith representation of a client, unless the third party is in privity with the client for whom the legal services were performed, which rule is rooted in the attorney's obligation to direct attention to the needs of the client, not to the needs of a third party not in privity with the client. Shoemaker v. Gindlesberger, 118 Ohio St. 3d 226, 2008-Ohio-2012, 887 N.E.2d 1167 (2008).

"Privity," for purposes of rule that an attorney is not liable to a third party, for legal malpractice based on negligence, for the good faith representation of a client unless the third party is in privity with the client for whom the legal services were performed, is the connection or relationship between two parties, each having a legally recognized interest in the same subject matter. Shoemaker v. Gindlesberger, 118 Ohio St. 3d 226, 2008-Ohio-2012, 887 N.E.2d 1167 (2008).

Two of testator's children were not in privity with testator, and thus, they lacked standing to sue testator's attorney for legal malpractice based on negligence, relating to attorney's preparation of deed during testator's lifetime conveying a joint life estate in real property from testator to a third child and his wife, after attorney had drafted testator's will, resulting in increased tax liability for testator's estate; the two children were merely potential beneficiaries of testator's will, whose rights did not vest until testator's death, since testator retained the

right to revoke or amend her will during her lifetime. Shoemaker v. Gindlesberger, 118 Ohio St. 3d 226, 2008-Ohio-2012, 887 N.E.2d 1167 (2008).

"Privity," for purposes of rule that an attorney is not liable to a third party, for legal malpractice based on negligence, for the good faith representation of a client unless the third party is in privity with the client for whom the legal services were performed, is the connection or relationship between two parties, each having a legally recognized interest in the same subject matter. Shoemaker v. Gindlesberger, 118 Ohio St. 3d 226, 2008, 2008-Ohio-2012, 887 N.E.2d 1167 (2008).

An attorney is immune from liability to any third person arising from his performance as an attorney in good faith on behalf of and with the knowledge of his client, unless the third person was in privity with the client or unless the attorney acted maliciously. Ireton v. JTD Realty Invests., L.L.C., 162 Ohio Misc. 2d 1, 2010-Ohio-6692, 944 N.E.2d 1238 (C.P. 2010).

[END OF SUPPLEMENT]

[FN1] Young v. Williams, 285 Ga. App. 208, 645 S.E.2d 624 (2007); McIntosh County Bank v. Dorsey & Whitney, LLP, 726 N.W.2d 108 (Minn. Ct. App. 2007), review granted, (Mar. 20, 2007); Fox v. White, 215 S.W.3d 257 (Mo. Ct. App. W.D. 2007), reh'g and/or transfer denied, (Feb. 27, 2007).
- Generally, an attorney owes a duty only to his or her client, and the client is identified in the retainer agreement. Estate of Albanese v. Lolio, 393 N.J. Super. 355, 923 A.2d 325 (App. Div. 2007).
- A contract between an attorney and a criminal defendant's stepfather, whereby the attorney agreed to represent the defendant in criminal proceedings in exchange for the stepfather's agreement to pay, did not establish an attorney-client relationship between the attorney and the stepfather as required to support a legal malpractice action by the stepfather against the attorney. Fox v. White, 215 S.W.3d 257 (Mo. Ct. App. W.D. 2007), reh'g and/or transfer denied, (Feb. 27, 2007).
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[FN2] Fox v. White, 215 S.W.3d 257 (Mo. Ct. App. W.D. 2007), reh'g and/or transfer denied, (Feb. 27, 2007).
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[FN3] Hess v. Fox Rothschild, LLP, 2007 PA Super 133, 925 A.2d 798 (2007).
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[FN4] Zenith Ins. Co. v. Cozen O'Connor, 148 Cal. App. 4th 998, 55 Cal. Rptr. 3d 911 (2d Dist. 2007).
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[FN5] Young v. Williams, 285 Ga. App. 208, 645 S.E.2d 624 (2007).
- As to the general rule that no action for breach of contract can be brought by one not in privity of contract, see Am. Jur. 2d, Contracts § 416.
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[FN6] Baker v. Coombs, 219 S.W.3d 204 (Ky. Ct. App. 2007).
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[FN7] Estate of Albanese v. Lolio, 393 N.J. Super. 355, 923 A.2d 325 (App. Div. 2007).
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[FN8] Estate of Albanese v. Lolio, 393 N.J. Super. 355, 923 A.2d 325 (App. Div. 2007).
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[FN9] Zenith Ins. Co. v. Cozen O'Connor, 148 Cal. App. 4th 998, 55 Cal. Rptr. 3d 911 (2d Dist. 2007).
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[FN10] Young v. Williams, 285 Ga. App. 208, 645 S.E.2d 624 (2007).
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[FN11] Estate of Albanese v. Lolio, 393 N.J. Super. 355, 923 A.2d 325 (App. Div. 2007).
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[FN12] McIntosh County Bank v. Dorsey & Whitney, LLP, 726 N.W.2d 108 (Minn. Ct. App. 2007), review granted, (Mar. 20, 2007).
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[FN13] Estate of Albanese v. Lolio, 393 N.J. Super. 355, 923 A.2d 325 (App. Div. 2007).
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[FN14] Newhouse by Skow v. Citizens Sec. Mut. Ins. Co., 176 Wis. 2d 824, 501 N.W.2d 1 (1993).
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[FN15] Baker v. Coombs, 219 S.W.3d 204 (Ky. Ct. App. 2007).
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[FN16] Heaven v. McGowan, 40 A.D.3d 583, 835 N.Y.S.2d 641 (2d Dep't 2007).
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[FN17] Byers v. Surget, 60 U.S. 303, 19 How. 303, 15 L. Ed. 670, 1856 WL 8719 (1856).
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V. Liability of Attorney for Malpractice
B. Liability to Third Persons

Topic Summary Correlation Table References

§ 235. Duty to client's adversary

West's Key Number Digest

West's Key Number Digest, Attorney and Client 26

An attorney does not owe a legal duty to his or her client's adversary when acting on his or her client's behalf,[FN1] since the public policy of maintaining a vigorous adversary system outweighs the asserted

advantages of finding a duty of due care to an attorney's legal opponent.[FN2] However, an attorney can be held liable for fraudulent misrepresentation to an adversary of the attorney's client.[FN3] Nevertheless, the creation of a duty owed by an attorney in favor of an adversary of the attorney's client would create an unacceptable conflict of interest; not only would the adversary's interests interfere with the client's interests, the attorney's justifiable concern with being sued for negligence would detrimentally interfere with the attorney-client relationship.[FN4]

CUMULATIVE SUPPLEMENT

Cases:

Mother in child custody suit with father had no common law negligence per se claim for violation of Health Insurance Portability and Accountability Act (HIPAA) by father's former counsel in disclosing her medical and psychiatric records; HIPAA and its corresponding regulations did not impose a duty of care on counsel. Young v. Carran, 2008 WL 4683236 (Ky. Ct. App. 2008).

[END OF SUPPLEMENT]

[FN1] Scheffler v. Adams and Reese, LLP, 950 So. 2d 641 (La. 2007).
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[FN2] Casey v. Auto Owners Ins. Co., 273 Mich. App. 388, 729 N.W.2d 277 (2006), appeal denied, 478 Mich. 866, 731 N.W.2d 746 (2007).
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[FN3] Buscher v. Boning, 114 Haw. 202, 159 P.3d 814 (2007).
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[FN4] Buscher v. Boning, 114 Haw. 202, 159 P.3d 814 (2007).
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Topic Summary Correlation Table References

§ 236. Acts maliciously or otherwise improperly motivated

West's Key Number Digest

West's Key Number Digest, Attorney and Client 26

A.L.R. Library

Liability of attorney, acting for client, for malicious prosecution, 46 A.L.R.4th 249

Forms

Am. Jur. Pleading and Practice Forms, Attorneys at Law § 199 (Complaint or petition—For false representation by attorney—Fraud theory)

Am. Jur. Pleading and Practice Forms, Attorneys at Law § 200 (Complaint or petition—For negligence and malicious prosecution in filing legal action—Against attorney and client)

While generally an attorney's professional duty of care extends only to dealings with his or her own client and to intended beneficiaries of the legal work performed, these limitations upon liability for negligence based upon the scope of the attorney's duty do not apply to liability for fraud.[FN1] In addition, an attorney may be held liable for conspiracy where, in addition to representing his or her client, the attorney breaches some independent duty to a third person.[FN2]

Absent an attorney-client relationship, liability for negligent misrepresentation arises only if the attorney committed fraud, acted with malice, or otherwise committed an intentional tort.[FN3] If an attorney is actuated by malicious motives or shares the illegal motives of his or her client, the attorney may be personally liable with the client for damage suffered by a third person as a result of the attorney's actions.[FN4] For the tort theory of representation to apply in a legal malpractice action, the non-client plaintiff's reliance on the attorney's advice must have been reasonable.[FN5]

[FN1] Jackson v. Rogers & Wells, 210 Cal. App. 3d 336, 258 Cal. Rptr. 454 (4th Dist. 1989).
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[FN2] Moore v. Weinberg, 373 S.C. 209, 644 S.E.2d 740 (Ct. App. 2007).
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[FN3] McIntosh County Bank v. Dorsey & Whitney, LLP, 726 N.W.2d 108 (Minn. Ct. App. 2007), review granted, (Mar. 20, 2007).
-

[FN4] Stern v. Thompson & Coates, Ltd., 185 Wis. 2d 220, 517 N.W.2d 658 (1994).
- As to liability for assisting client in procuring the arrest of third person, see Am. Jur. 2d, False Imprisonment § 103.
- As to liability for assisting a client in the malicious prosecution of another, see Am. Jur. 2d, Malicious

Prosecution §§ 92, 94.
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[FN5] McIntosh County Bank v. Dorsey & Whitney, LLP, 726 N.W.2d 108 (Minn. Ct. App. 2007), review granted, (Mar. 20, 2007).
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Topic Summary Correlation Table References

§ 237. Money collected on judgment later reversed

West's Key Number Digest

West's Key Number Digest, Attorney and Client 26

An attorney will not be required to make restitution of money collected on a judgment and paid over to his or her client prior to appellate reversal, where no fraud is shown in the procurement of the erroneous judgment.[FN1] Where money has been paid on a judgment that is subsequently reversed, the attorney may be required to make restitution if he or she still retains the money in his or her possession.[FN2]

[FN1] Wall v. Johnson, 80 So. 2d 362 (Fla. 1955).
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[FN2] Waggoner v. Glacier Colony of Hutterites, 131 Mont. 525, 312 P.2d 117 (1957).
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B. Liability to Third Persons

Topic Summary Correlation Table References

§ 238. Negligence in drafting or execution of will

West's Key Number Digest

West's Key Number Digest, Attorney and Client 26

A.L.R. Library

What constitutes negligence sufficient to render attorney liable to person other than immediate client, 61 A.L.R.4th 464

Liability of one drawing an invalid will, 65 A.L.R.2d 1363

Trial Strategy

Legal Malpractice—Estate, Will, and Succession Matters, 24 Am. Jur. Proof of Facts 2d 577

Forms

Am. Jur. Pleading and Practice Forms, Attorneys at Law § 196 (Complaint or petition—By third party—Negligence in drafting will—Third-party beneficiary theory)

Am. Jur. Pleading and Practice Forms, Attorneys at Law § 197 (Complaint or petition—Against attorney and law firm—Negligence in drafting will)

Law Reviews and Other Periodicals

Fogel, Estate Planning Malpractice, Special Issues in Need of Special Care, 17-AUG Prob. & Prop. 20 (2003)

A legatee has standing to bring suit against a testator's attorney under a third-party beneficiary theory if the legatee's right to performance is appropriate to effectuate the intentions of the parties to the contract, that is, the testator and his or her attorney.[FN1] For purposes of determining whether a legatee has a cause of action against the testator's attorney as a third-party beneficiary, the circumstances which clearly indicate the testator's intent to benefit a named legatee are his or her arrangements with the attorney and the text of his or her will.[FN2] In an analysis for determining whether a legatee has a potential cause of action against a testator's attorney as an intended third-party beneficiary of a testator's will, the attorney is the promisor, who promised to draft a will to effectuate the testator's intent to benefit the legatee, and the testator is the promisee, who intended that the legatee receive the benefit as a third-party beneficiary of the drafted will.[FN3]
Practice Tip: The class of legatees that may bring suit against a testator's attorney under the third-party beneficiary theory is limited to those legatees who would otherwise have no means by which to obtain their expectancies under the testamentary instruments naming them.[FN4]

However, an attorney has no duty to an heir to be alert to indications that the client was incompetent or subject to undue influence; to hold otherwise would imposed conflicting duties on the attorney.[FN5] Absent privity of contract, the malpractice of an attorney in preparing a will does not render the attorney liable to the disappointed beneficiaries,[FN6] except in the presence of fraud, collusion, malicious acts, or other special circumstances.[FN7]

CUMULATIVE SUPPLEMENT

Cases:

Two of testator's children were not in privity with testator, and thus, they lacked standing to sue testator's attorney for legal malpractice based on negligence, relating to attorney's preparation of deed during testator's lifetime conveying a joint life estate in real property from testator to a third child and his wife, after attorney had drafted testator's will, resulting in increased tax liability for testator's estate; the two children were merely potential beneficiaries of testator's will, whose rights did not vest until testator's death, since testator retained the right to revoke or amend her will during her lifetime. Shoemaker v. Gindlesberger, 118 Ohio St. 3d 226, 2008-Ohio-2012, 887 N.E.2d 1167 (2008).

Two of testator's children were not in privity with testator, and thus, they lacked standing to sue testator's attorney for legal malpractice based on negligence, relating to attorney's preparation of deed during testator's lifetime conveying a joint life estate in real property from testator to a third child and his wife, after attorney had drafted testator's will, resulting in increased tax liability for testator's estate; the two children were merely potential beneficiaries of testator's will, whose rights did not vest until testator's death, since testator retained the right to revoke or amend her will during her lifetime. Shoemaker v. Gindlesberger, 118 Ohio St. 3d 226, 2008, 2008-Ohio-2012, 887 N.E.2d 1167 (2008).

Based on the strict rule of privity, a beneficiary of a decedent's will may not maintain an action for legal malpractice based on negligence, against an attorney who had been retained by the decedent for preparation of the will and for preparation of a deed, as to the preparation of a deed that results in increased tax liability for the decedent's estate. Shoemaker v. Gindlesberger, 118 Ohio St. 3d 226, 2008, 2008-Ohio-2012, 887 N.E.2d 1167 (2008).

[END OF SUPPLEMENT]

[FN1] Hess v. Fox Rothschild, LLP, 2007 PA Super 133, 925 A.2d 798 (2007).
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[FN2] Hess v. Fox Rothschild, LLP, 2007 PA Super 133, 925 A.2d 798 (2007).
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[FN3] Hess v. Fox Rothschild, LLP, 2007 PA Super 133, 925 A.2d 798 (2007).
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[FN4] Hess v. Fox Rothschild, LLP, 2007 PA Super 133, 925 A.2d 798 (2007).
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[FN5] Logotheti v. Gordon, 414 Mass. 308, 607 N.E.2d 1015 (1993).
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[FN6] Guy v. Liederbach, 501 Pa. 47, 459 A.2d 744 (1983).
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[FN7] Deeb v. Johnson, 145 Misc. 2d 942, 548 N.Y.S.2d 622 (Sup 1989), order aff'd, 170 A.D.2d 865, 566 N.Y.S.2d 688 (3d Dep't 1991).
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Primary Authority

18 U.S.C.A. § 3006A

20 U.S.C.A. §§ 1681 to 1688

42 U.S.C.A. §§ 1981, 1981a, 1982, 1983, 1985, 1986, 1988, 2000bb et seq., 2000cc, 2000d et seq., 7604, 13981

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§ 239. Generally

West's Key Number Digest

West's Key Number Digest, Attorney and Client 130, 131, 133

Trial Strategy

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Lawyers are entitled to compensation for services rendered to their clients, and, in the absence of an express agreement as to the amount of the compensation, they are entitled to reasonable remuneration.[FN1] If the attorney is not compensated for the work performed on the client's case that resulted in a recovery for the client, the client is unjustly enriched.[FN2]

Courts possess traditional authority to supervise the charging of fees for legal services pursuant to their inherent and statutory power to regulate the practice of law.[FN3] A court may inquire into the reasonableness of attorney fees as part of its inherent authority to regulate the practice of law.[FN4] Although summaries of an attorney's hours worked and customary fees can be used in assessing the fee award, underlying material must be made available where it is not clear what was charged, whether the time devoted to particular tasks was reasonable, and whether there was improper overlapping of hours.[FN5] In a proceeding to fix a fair and reasonable attorney's fee, the court has authority to review the entire fee arrangement between the attorney and client and, if necessary, order a refund of fees already paid.[FN6]

In an action to enforce various federal civil rights statutes, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.[FN7] Similar provisions apply to citizen suits brought under the Clean Air Act.[FN8]

CUMULATIVE SUPPLEMENT

Cases:

Prevailing plaintiffs in § 1983 political discrimination case against Puerto Rico's insurance commissioner were not entitled to include in their attorney fee award travel expenses, outside-hotel meals, long distance telephone charges, or mail, fax, and courier expenses, where expenses were necessitated by plaintiffs' decision to employ out-of-state attorneys, even though local counsel with required degree of experience and specialization were available. Guillemard-Ginorio v. Contreras, 575 F. Supp. 2d 346 (D.P.R. 2008), opinion amended and superseded, 603 F. Supp. 2d 301 (D.P.R. 2009).

[END OF SUPPLEMENT]

[FN1] Sutherland v. O'Malley, 882 F.2d 1196 (7th Cir. 1989); In re Marriage of O'Brien, 759 P.2d 826 (Colo. Ct. App. 1988); Calderon v. Navarette, 111 N.M. 1, 800 P.2d 1058 (1990).
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[FN2] Carr v. Pearman, 860 N.E.2d 863 (Ind. Ct. App. 2007), transfer denied, 869 N.E.2d 462 (Ind. 2007).
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[FN3] Campion v. Campion, 32 A.D.3d 814, 821 N.Y.S.2d 232 (2d Dep't 2006).
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[FN4] Smith v. State, Dept. of Transp. & Development, 899 So. 2d 516 (La. 2005).
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[FN5] Intel Corp. v. Terabyte Intern., Inc., 6 F.3d 614, 39 Fed. R. Evid. Serv. 790, 26 Fed. R. Serv. 3d 1201 (9th Cir. 1993).
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[FN6] Cass & Sons, Inc. v. Stag's Fuel Oil Co., Inc., 148 Misc. 2d 640, 561 N.Y.S.2d 519 (Sup 1990), order aff'd as modified, 194 A.D.2d 707, 601 N.Y.S.2d 803 (2d Dep't 1993).
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[FN7] 42 U.S.C.A. § 1988(b), referring to 20 U.S.C.A. §§ 1681 to 1688, 42 U.S.C.A. §§ 1981, 1981a, 1982, 1983, 1985, 1986, 2000bb et seq., 2000cc, 2000d et seq., 13981.
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[FN8] 42 U.S.C.A. § 7604(d), referring to 42 U.S.C.A. § 7604(a).
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VI. Compensation of Attorneys
A. Right to Compensation

Topic Summary Correlation Table References

§ 240. Necessity for attorney-client relationship

West's Key Number Digest

West's Key Number Digest, Attorney and Client 130, 131, 133

Trial Strategy

Existence of Attorney-Client Relationship, 48 Am. Jur. Proof of Facts 2d 525

The creation of the relation of attorney and client by contract, express or implied, is essential to the right of an attorney to recover compensation for services.[FN1] In order for a person to be liable for attorney's fees, that person must have either hired the attorney personally,[FN2] or authorized someone to hire the attorney on their behalf.[FN3]

Unless the circumstances show that services were intended to be gratuitous,[FN4] a party's acceptance of, or acquiescence in, the services rendered by an attorney will raise an implied promise to pay for the services.[FN5] However, the party sought to be charged must be free to take or reject the benefit of the services.[FN6]

[FN1] Dickie v. City of Tomah, 190 Wis. 2d 455, 527 N.W.2d 697 (Ct. App. 1994).

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[FN2] Gibson v. Gibson, 122 Ind. App. 559, 106 N.E.2d 102 (1952); Breeden v. Lybrand, 927 So. 2d 451 (La. Ct. App. 4th Cir. 2006), writ denied, 930 So. 2d 28 (La. 2006); Cooper v. Cranin, 104 A.D.2d 550, 479 N.Y.S.2d 254 (2d Dep't 1984).

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[FN3] Breeden v. Lybrand, 927 So. 2d 451 (La. Ct. App. 4th Cir. 2006), writ denied, 930 So. 2d 28 (La. 2006).

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[FN4] Hightower v. Trinity Church of Covington, 313 S.W.2d 858 (Ky. 1958).

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[FN5] Bogorad v. Schwarz, 208 F.2d 704 (4th Cir. 1953); Geier v. Laughlin, 129 A.2d 401 (Mun. Ct. App. D.C. 1957).

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[FN6] Bogorad v. Schwarz, 208 F.2d 704 (4th Cir. 1953).

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VI. Compensation of Attorneys
A. Right to Compensation

Topic Summary Correlation Table References

§ 241. Necessity for attorney-client relationship—Private attorney general doctrine

West's Key Number Digest

West's Key Number Digest, Attorney and Client 130, 131, 133

A.L.R. Library

Private attorney general doctrine—state cases, 106 A.L.R.5th 523

An exception to the rule that an attorney cannot recover fees from one who did not employ him or her or authorize his or her employment, is the private attorney general doctrine, under which a plaintiff's attorneys are entitled to reasonable attorney's fees where, as a result of their efforts, constitutional rights of societal importance are protected to the benefit of a large number of people.[FN1] Thus, in a class action by jail inmates brought under 42 U.S.C.A. § 1983, seeking relief against the sheriff responsible for allegedly intolerable living conditions, an award of attorney's fees to a civil rights organization was proper under the private attorney general doctrine, since the litigation served the public interest by vindicating strong public policies favoring the protection of constitutional rights.[FN2]

Such allowance may be made even where the attorneys are public-interest law firms.[FN3] However, attorney's fees will not be awarded under the private attorney general doctrine where the interests of the general public are only incidental to the primary objectives of the parties of protecting their interests.[FN4] A statute authorizing awards of attorney's fees under a private attorney general theory applies to all cases pending on appeal on the effective date of the statute.[FN5] Congress has supplied specific statutory authorization for the allowance of attorney's fees under the private attorney general rationale in civil rights cases.[FN6]

CUMULATIVE SUPPLEMENT

Cases:

A litigant's personal nonpecuniary motives may not be used to disqualify that litigant from obtaining fees under private attorney general fee statute; disapproving *Williams v. San Francisco Bd. of Permit Appeals*,74 Cal.App.4th 961, 88 Cal.Rptr.2d 565, *Families Unafraid to Uphold Rural El Dorado County v. Bd. of Supervisors*,79 Cal.App.4th 505, 94 Cal.Rptr.2d 205, *Hammond v. Agran*,99 Cal.App.4th 115, 120 Cal.Rptr.2d 646, and *Punsly v. Ho*,105 Cal.App.4th 102, 129 Cal.Rptr.2d 89. West's Ann.Cal.C.C.P. § 1021.5. In re Conservatorship of Whitley, 50 Cal. 4th 1206, 117 Cal. Rptr. 3d 342, 241 P.3d 840 (2010).

Eligibility for fees under private attorney general fee statute is established when (1) plaintiffs' action or defendants' defense of that action has resulted in the enforcement of an important right affecting the public interest, (2) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons and (3) the necessity and financial burden of private enforcement are such as to make the award appropriate. West's Ann.Cal.C.C.P. § 1021.5. Wilson v. San Luis Obispo County Democratic Cent. Com., 192 Cal. App. 4th 918, 2011 WL 489930 (2d Dist. 2011).

In determining whether to award attorney fees under statute codifying the private attorney general attorney fee doctrine, a trial court must consider whether: (1) plaintiffs' action has resulted in the enforcement of an important right affecting the public interest, (2) a significant benefit, whether pecuniary or nonpecuniary has been conferred on the general public or a large class of persons and (3) the necessity and financial burden of private enforcement are such as to make the award appropriate. West's Ann.Cal.C.C.P. § 1021.5. Burke v. Ipsen, 189 Cal. App. 4th 801, 117 Cal. Rptr. 3d 91 (2d Dist. 2010).

A plaintiff may be considered a "successful party," so as to be entitled to attorney fees under private attorney general doctrine, if the plaintiff succeeds on any significant issue in the litigation that achieves some of the benefit sought in bringing suit. West's Ann.Cal.C.C.P. § 1021.5. Ebbetts Pass Forest Watch v. California Dept. of Forestry and Fire Protection, 187 Cal. App. 4th 376, 2010 WL 3123286 (5th Dist. 2010).

[END OF SUPPLEMENT]

[FN1] Serrano v. Priest, 20 Cal. 3d 25, 141 Cal. Rptr. 315, 569 P.2d 1303 (1977).

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[FN2] Incarcerated Men of Allen County Jail v. Fair, 507 F.2d 281 (6th Cir. 1974).

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[FN3] Serrano v. Priest, 20 Cal. 3d 25, 141 Cal. Rptr. 315, 569 P.2d 1303 (1977).

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[FN4] California Licensed Foresters Assn. v. State Bd. of Forestry, 30 Cal. App. 4th 562, 35 Cal. Rptr. 2d 396 (3d Dist. 1994), as modified on denial of reh'g, (Dec. 20, 1994).

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[FN5] Woodland Hills Residents Assn., Inc. v. City Council, 23 Cal. 3d 917, 154 Cal. Rptr. 503, 593 P.2d 200 (1979).

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[FN6] Stanford Daily v. Zurcher, 550 F.2d 464 (9th Cir. 1977), judgment rev'd on other grounds, 436 U.S. 547, 98 S. Ct. 1970, 56 L. Ed. 2d 525 (1978).

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§ 242. Liability of third party benefited by services

West's Key Number Digest

West's Key Number Digest, Attorney and Client 130, 131, 133

Generally, an attorney may not recover legal fees from persons other than his or her client merely because such other persons might have benefited from his or her services.[FN1]

[FN1] Wyoming Farm Bureau Mut. Ins. Co. v. Mondale, 160 Mont. 239, 502 P.2d 39 (1972); Kantrowitz, Goldhamer & Graifman, P.C. v. New York State Elec. & Gas Corp., 27 A.D.3d 872, 810 N.Y.S.2d 550 (3d Dep't 2006), leave to appeal denied, 7 N.Y.3d 704, 819 N.Y.S.2d 871, 853 N.E.2d 242 (2006); Bashara v. Baptist Memorial Hosp. System, 685 S.W.2d 307 (Tex. 1985); Security Nat. Bank & Trust Co. v. Willim, 155 W. Va. 1, 180 S.E.2d 46 (1971).
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Topic Summary Correlation Table References

§ 243. Liability of third party benefited by services—Common fund doctrine

West's Key Number Digest

West's Key Number Digest, Attorney and Client 130, 131, 133

The "common fund doctrine" is an equitable exception to the general rule that each party bears his or her own attorney's fees.[FN1] The basis for the common fund doctrine for allocating attorney's fees among attorneys whose efforts produced benefits for a class is the equitable consideration that parties who benefit from the efforts of counsel in creating, preserving, protecting or recovering a common fund should pay for their fair share of the work required to bring about that benefit;[FN2] the doctrine is primarily employed to realize the broadly defined purpose of recapturing unjust enrichment.[FN3]

CUMULATIVE SUPPLEMENT

Cases:

A district court's duty to ensure that attorney fees are reasonable and divided up fairly among plaintiffs' counsel in a class action suit is no less compelling in common fund cases where a separate fund to pay attorney fees is created as part of the class action settlement. In re High Sulfur Content Gasoline Products Liability Litigation, 517 F.3d 220, 69 Fed. R. Serv. 3d 1516 (5th Cir. 2008).

District court used flawed procedures, and thus abused its discretion, in applying class action principles to allocation of $6.875 million attorney fee award among plaintiffs' attorneys in common fund case, when court was persuaded at ex parte hearing, apparently without benefit of supporting data, to accept allocation proposal of fees committee made up of some of the plaintiffs' attorneys, and court sealed individual awards, prevented all counsel from communicating about awards, required releases from counsel who accepted payment, and limited its own scope of review of objections to allocation. In re High Sulfur Content Gasoline Products Liability Litigation, 517 F.3d 220, 69 Fed. R. Serv. 3d 1516 (5th Cir. 2008).

Under the "common fund" doctrine generally, a litigant or lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole. O'Donnell v. Johnson, 209 P.3d 128 (Alaska 2009).

An attorney fee award of 25 percent is the "benchmark" award that should be given in common fund class action cases. In re Consumer Privacy Cases, 175 Cal. App. 4th 545, 96 Cal. Rptr. 3d 127 (1st Dist. 2009), review denied, (Sept. 30, 2009).

Automobile insurer was not obligated under common fund doctrine to pay proportionate share of costs and attorney fees incurred in settling insurer's subrogation claim, in context of insureds' action against other driver, where insurer specifically notified insureds' attorney in writing that attorney was not authorized to pursue their subrogation claim and that any settlement should not include insurer's subrogation claim, and therefore, insurer did not accept benefits of insureds' settlement. Lopez v. Farm Bureau Mut. Ins. Co. of Idaho, 148 Idaho 515, 224 P.3d 1104 (2010).

"Common–fund exception" to the American rule for attorneys' fees is an equitable, common–law exception, which is only applicable when a prevailing party creates or protects a common fund that benefits himself and others, that is premised on the principle that it is unfair to allow others to benefit at the expense of the prevailing party without contribution to the costs incurred in securing the common fund. Miller v. Citizens Ins. Co., 288 Mich. App. 424, 794 N.W.2d 622 (2010), appeal denied, 488 Mich. 1034, 793 N.W.2d 234 (2011).

The "common fund doctrine" allows a court in its equitable jurisdiction to award reasonable attorney fees to a party who, at his own expense, successfully maintains a suit for the creation, recovery, preservation, or increase of a common fund or common property; attorney fees awarded pursuant to the common fund doctrine come directly out of the common fund created or preserved. Layman v. State, 376 S.C. 434, 658 S.E.2d 320 (2008).

The "common fund doctrine," as exception to American rule, provides that attorney fees may be awarded when the efforts of a litigant succeed in securing, augmenting, or preserving property or a fund of money in which other people are entitled to share in common; in that event, the beneficiaries of the fund or property may be required to contribute to the litigant's attorney fees by having those fees assessed against the fund or property itself. House v. Estate of Edmondson, 245 S.W.3d 372 (Tenn. 2008).

[END OF SUPPLEMENT]

[FN1] Charles I. Friedman, P.C. v. Microsoft Corp., 213 Ariz. 344, 141 P.3d 824 (Ct. App. Div. 1 2006), review denied, (Dec. 6, 2006).

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[FN2] Valder Law Offices v. Keenan Law Firm, 212 Ariz. 244, 129 P.3d 966 (Ct. App. Div. 1 2006), review denied, (Sept. 26, 2006); Parnell v. Adventist Health System/West, 35 Cal. 4th 595, 26 Cal. Rptr. 3d 569, 109 P.3d 69 (2005); Barnes v. City of Atlanta, 281 Ga. 256, 637 S.E.2d 4 (2006); Stavenjord v. Montana State Fund, 2006 MT 257, 334 Mont. 117, 146 P.3d 724 (2006); In re Wachovia Shareholders Litigation, 168 N.C. App. 135, 607 S.E.2d 48 (2005), review denied, 359 N.C. 411, 613 S.E.2d 25 (2005); Strunk v. Public Employees Retirement Bd., 341 Or. 175, 139 P.3d 956 (2006); Allstate Ins. Co. v. Edminster, 224 S.W.3d 456 (Tex. App. Dallas 2007).

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[FN3] Strunk v. Public Employees Retirement Bd., 341 Or. 175, 139 P.3d 956 (2006).

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Topic Summary Correlation Table References

§ 244. Liability of third party benefited by services—Subrogated insurer

West's Key Number Digest

West's Key Number Digest, Attorney and Client 130, 131, 133

A.L.R. Library

Right of attorney for holder of property insurance to fee out of insurer's share of recovery from tortfeasor, 2 A.L.R.3d 1441

In the special situation wherein the attorney for an insured has recovered or settled for the entire loss suffered by the insured, including a portion of such recovery or settlement to which the insurer is entitled by way of subrogation, some courts recognize an exception to the general rule that an attorney cannot recover a fee against a third party benefited by services rendered to the client and hold that the attorney is entitled to fees on the entire recovery or settlement, and not merely on that portion which may be retained by the insured client.[FN1] The common fund doctrine applies in the context of insurance subrogation actions; thus, an insurer that does not assist in the insured's collection of damages from a third party must pay its share of the costs and expenses incurred in obtaining the recovery from the third party, including attorney's fees.[FN2] However, if the insurer employed its own counsel and actively participated in the action against the third party, it cannot be compelled to contribute to the insured's attorney's fee.[FN3]

[FN1] Washington Fire & Marine Ins. Co. v. Hammett, 237 Ark. 954, 377 S.W.2d 811 (1964); United Services Auto. Ass'n v. Hills, 172 Neb. 128, 109 N.W.2d 174, 2 A.L.R.3d 1422 (1961); Klacik v. Kovacs, 111 N.J. Super. 307, 268 A.2d 305 (App. Div. 1970).

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[FN2] State Farm Mut. Auto. Ins. Co. v. Perkins, 216 S.W.3d 396 (Tex. App. Eastland 2006).

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[FN3] Washington Fire & Marine Ins. Co. v. Hammett, 237 Ark. 954, 377 S.W.2d 811 (1964).

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§ 245. Recovery by nonresident for local services

West's Key Number Digest

West's Key Number Digest, Attorney and Client 130, 131

A.L.R. Library

Right of attorney admitted in one state to recover compensation for services rendered in another state where he was not admitted to the bar, 11 A.L.R.3d 907

Generally, even though duly admitted in another state, an attorney may not recover compensation for legal services unless he or she has been admitted to practice in the jurisdiction where the services were rendered.[FN1] However, some courts have allowed an out-of-state attorney to recover fees for services rendered in the local jurisdiction that did not involve courtroom appearances or other actual litigation before the courts,[FN2] although other courts have refused to permit recovery of fees under these circumstances.[FN3]

An attorney may be allowed to recover fees, even though he or she was not admitted to practice in the state in which the services were rendered, where such services involved practice before the federal rather than the state courts.[FN4] And in cases involving practice of an essentially interstate nature, an attorney may be allowed to recover fees, even though some of the services rendered were in a state where he or she was not admitted to practice.[FN5]

[FN1] Lozoff v. Shore Heights, Ltd., 35 Ill. App. 3d 697, 342 N.E.2d 475 (2d Dist. 1976), judgment aff'd, 66 Ill. 2d 398, 6 Ill. Dec. 225, 362 N.E.2d 1047 (1977); Spivak v. Sachs, 16 N.Y.2d 163, 263 N.Y.S.2d 953, 211 N.E.2d 329 (1965).

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[FN2] Taft v. Amsel, 23 Conn. Supp. 225, 180 A.2d 756 (Super. Ct. 1962); Lamb v. Jones, 202 So. 2d 810 (Fla. Dist. Ct. App. 3d Dist. 1967); Ginsburg v. Fahrney, 45 Misc. 2d 777, 258 N.Y.S.2d 43 (Sup 1965).

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[FN3] Lozoff v. Shore Heights, Ltd., 35 Ill. App. 3d 697, 342 N.E.2d 475 (2d Dist. 1976), judgment aff'd, 66 Ill. 2d 398, 6 Ill. Dec. 225, 362 N.E.2d 1047 (1977); Spivak v. Sachs, 16 N.Y.2d 163, 263 N.Y.S.2d 953, 211 N.E.2d 329 (1965).

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[FN4] Spanos v. Skouras Theatres Corp., 235 F. Supp. 1 (S.D. N.Y. 1964), judgment aff'd in part, rev'd in part on other grounds, 364 F.2d 161, 10 Fed. R. Serv. 2d 1601, 10 Fed. R. Serv. 2d 1606 (2d Cir. 1966); Cowen v. Calabrese, 230 Cal. App. 2d 870, 41 Cal. Rptr. 441, 11 A.L.R.3d 903 (5th Dist. 1964).

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[FN5] Western Life Ins. Co. v. Nanney, 296 F. Supp. 432 (E.D. Tenn. 1969); Appell v. Reiner, 43 N.J. 313, 204 A.2d 146 (1964).

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§ 246. Court-appointed attorney

West's Key Number Digest

West's Key Number Digest, Attorney and Client 132

A.L.R. Library

Court appointment of attorney to represent, without compensation, indigent in civil action, 52 A.L.R.4th 1063

Right of court-appointed attorney to contract with his indigent client for fee, 43 A.L.R.3d 1426

Right of attorney appointed by court for indigent accused to, and court's power to award, compensation by public, in absence of statute or court rule, 21 A.L.R.3d 819

In some jurisdictions, an attorney appointed by the court to defend an indigent, in the absence of statute, cannot recover compensation from the public for his or her services.[FN1] This rule is because an attorney, being an officer of the court, like other officers takes his or her office cum onere, and one of the burdens of office which custom has recognized is the gratuitous service rendered to a poor person at the suggestion of the court.[FN2] Some courts adopt the view that, in accepting a license to practice law, the attorney consents to render uncompensated service for indigent defendants when appointed by the courts to do so.[FN3] The constitutional guaranty of the right of an accused to be heard by counsel does not impose any liability on the part of the government to pay an attorney assigned to represent the indigent.[FN4]

In other jurisdictions, an attorney appointed to represent an indigent defendant is entitled to compensation, even though no statute or court rule specifically provides for compensation.[FN5]

Some courts have stated that requiring an attorney to defend, without compensation, an accused who cannot pay does not involve an unconstitutional taking of property without compensation or without due process of law,[FN6] whereas other courts have taken the opposite view.[FN7] At least one court had held that the forced appointment of an attorney without compensation unfairly singles out attorneys as a class to donate their services to the poor.[FN8]

Although an attorney may be constitutionally compelled to represent an indigent defendant without compensation, the attorney cannot be compelled to pay the expenses of criminal defense work without reimbursement, since this would constitute taking the attorney's property without just compensation.[FN9] An appointed attorney, however, is not entitled to compensation for the services of a law partner, associate, or law clerk where no application for the appointment of a second attorney was made and the appointed counsel, thus, obtains legal assistance from other persons without court authority to do so.[FN10]

Where an attorney is employed by a legal services organization during the course of a case, an award of attorney's fees in that case should be awarded to the organization, not to the individual attorney personally.[FN11]

An attorney and an indigent defendant whom he or she represents may validly enter into a contract for compensation,[FN12] but an attorney who has received compensation from a public authority for representing an indigent under appointment by a court has no right to contract for a fee with the indigent client or with the client's relatives.[FN13]

An attorney who represents a criminal defendant is not entitled to payment, by the state, of his or her attorney's fees, where the attorney had been privately hired, rather than having been appointed by the court.[FN14]

CUMULATIVE SUPPLEMENT

Cases:

A lawyer may mount a successful challenge to the provision of fees for his or her representation through court-appointment of an indigent criminal defendant by showing that the restrictions to the provided fees, if enforced, would have a substantial chilling effect on the constitutional rights of criminal defendants to effective assistance of counsel; there is no requirement of showing actual prejudice. U.S.C.A. Const.Amend. 6; Const. Art. 1, § 10. Simmons v. State Public Defender, 791 N.W.2d 69 (Iowa 2010).

[END OF SUPPLEMENT]

[FN1] Dade County v. McCrary, 260 So. 2d 543 (Fla. Dist. Ct. App. 3d Dist. 1972); Warner v. Com., 400 S.W.2d 209 (Ky. 1966); Young v. State, 255 So. 2d 318 (Miss. 1971).

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[FN2] People ex rel. Conn v. Randolph, 35 Ill. 2d 24, 219 N.E.2d 337, 18 A.L.R.3d 1065 (1966); Warner v. Com., 400 S.W.2d 209 (Ky. 1966).

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[FN3] U.S. v. Dillon, 346 F.2d 633 (9th Cir. 1965); In re Amendments to Rules Regulating The Florida Bar- 1-3.1(a) and Rules of Judicial Admin.- 2.065 (Legal Aid), 573 So. 2d 800 (Fla. 1990).

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[FN4] Young v. State, 255 So. 2d 318 (Miss. 1971).

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[FN5] State v. Green, 470 S.W.2d 571 (Mo. 1971); Kovarik v. Banner County, 192 Neb. 816, 224 N.W.2d 761 (1975); State v. Rush, 46 N.J. 399, 217 A.2d 441, 21 A.L.R.3d 804 (1966).

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[FN6] U.S. v. Dillon, 346 F.2d 633 (9th Cir. 1965); Warner v. Com., 400 S.W.2d 209 (Ky. 1966); In re Meizlish, 387 Mich. 228, 196 N.W.2d 129 (1972).

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[FN7] DeLisio v. Alaska Superior Court, 740 P.2d 437 (Alaska 1987); Bradshaw v. Ball, 487 S.W.2d 294 (Ky. 1972); State ex rel. Partain v. Oakley, 159 W. Va. 805, 227 S.E.2d 314 (1976).
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[FN8] Cunningham v. Superior Court, 177 Cal. App. 3d 336, 222 Cal. Rptr. 854 (2d Dist. 1986).
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[FN9] Williamson v. Vardeman, 674 F.2d 1211 (8th Cir. 1982).
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[FN10] Hulse v. Wilfvat, 306 N.W.2d 707 (Iowa 1981).
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[FN11] Jordan v. City of Greenwood, Miss., 808 F.2d 1114 (5th Cir. 1987).
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[FN12] Oliver v. Mitchell, 14 Utah 2d 9, 376 P.2d 390 (1962).
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[FN13] Hale v. Brewster, 81 N.M. 342, 467 P.2d 8, 43 A.L.R.3d 1420 (1970); In re L.E.C., 171 W. Va. 670, 301 S.E.2d 627 (1983).
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[FN14] Coleman v. State, 930 So. 2d 580 (Fla. 2006).
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§ 247. Court-appointed attorney—Statute providing for payment

West's Key Number Digest

West's Key Number Digest, Attorney and Client 132

A.L.R. Library

Validity and construction of state statute or court rule fixing maximum fees for attorney appointed to represent indigent, 3 A.L.R.4th 576

Construction of state statutes providing for compensation of attorney for services under appointment by court in defending indigent accused, 18 A.L.R.3d 1074

Propriety of order under subsection (f) of Criminal Justice Act of 1964 (18 U.S.C.A. sec. 3006(A)(f)) directing payment by or on behalf of party for services of court-appointed counsel, 51 A.L.R. Fed. 561

Compensation, under subsection (d) of Criminal Justice Act of 1964 (18 USC sec. 3006A(d)), of counsel appointed for accused, 9 A.L.R. Fed. 569

Many jurisdictions have enacted legislation to provide an appointed attorney with some measure of compensation and reimbursement for necessary out-of-pocket expenses for services performed on behalf of an indigent defendant,[FN1] although in general that compensation is much less than the fee that would be charged to a paying client for comparable service.[FN2]

Under the Federal Criminal Justice Act of 1964, the United States has undertaken to provide compensation for court-appointed attorneys who defend indigent defendants or prisoners in the federal courts.[FN3] An attorney may be awarded a fee in excess of the maximum level of compensation under this statute under certain circumstances, such as where several of the indigent defendants neither spoke nor understood English and were involved in an extended and complex trial.[FN4]

A statute providing that appointed attorneys are “entitled to” reasonable attorney's fees is not discretionary.[FN5] Additionally, in some cases, statutes that do not specifically provide for compensation of appointed attorneys are construed to permit such payment.[FN6]

Under a statute providing for compensation to a court-appointed attorney, an allowance may be made only in those types of prosecutions contemplated by the applicable legislation.[FN7] A state statute providing payment for legal services for indigents does not extend to representation of indigents in the federal courts[FN8] such as the United States Supreme Court.[FN9]

The statutes differ on the question as to which court or official is to make the award of an allowance; sometimes that duty is delegated to the trial court.[FN10] Many cases recognize that the court in which the services of the attorney were performed has a large measure of discretion in fixing or recommending the amount of the allowable fee.[FN11]

A number of cases dealing with the claim of an attorney for compensation for services rendered on appeal in representing an indigent under court appointment have held that the allowance was properly made by the trial court,[FN12] while others hold that the amount of compensation is to be determined by the court hearing the appeal.[FN13]

In various circumstances, under the terms of the applicable statutes, compensation has been allowed to an attorney appointed to defend an indigent for services rendered or terminated before trial,[FN14] for post-conviction motions,[FN15] and for services rendered on appeal.[FN16]

Practice Tip: An order for the payment of fees for representing an indigent defendant may be enforced by contempt proceedings.[FN17]

Where an indigent defendant enjoys a constitutional right to counsel at the expense of the state, the legislature cannot infringe upon the prerogative of the judiciary to determine what is a reasonable fee to be allowed an attorney by a statute setting a maximum fee for most felony cases and a low hourly rate of compensation.[FN18] A statute that forbids the allowance of an attorney's fee for the defense of an indigent in a criminal case unless there was an existing appropriation for the payment of the fee is unconstitutional in that it

deprives the court of its inherent power to give full effect to the constitutional right of an accused to be represented by counsel.[FN19]

A court may depart from statutory fee guidelines in order to grant greater compensation to a court-appointed attorney who spends an unusually large amount of time defending a defendant in a criminal case,[FN20] or where other extraordinary circumstances are present that would make an award of the statutory maximum grossly unjust.[FN21] The attorney has the burden of establishing facts in support of such an award.[FN22]

Under a statute authorizing compensation to attorneys appointed to represent indigent defendants, the requirement of reasonable compensation does not mean "what is charged for the defense of indigent defendants" in the community, but rather means the prevailing community rate for nonindigent criminal defense services.[FN23] In setting the amount of compensation, a court must make a reasonableness judgment and afford counsel an opportunity to rebut or reply.[FN24]

A rule allowing an attorney appointed to represent indigent appellants in criminal cases to recover fees applies only to attorneys not otherwise compensated for their representation, not to salaried, full-time public defenders.[FN25]

CUMULATIVE SUPPLEMENT

Cases:

District court lacked authority to award fees to attorney in excess of his contract with state public defender for representation of defendant in allegedly complex appeal, since attorney failed to exhaust his administrative remedies by asking the public defender to increase the fees provided by his contract, as provided by administrative rule governing appellate fees for attorneys contracting with public defender. State Public Defender v. Iowa Dist. Court for Clarke County, 745 N.W.2d 738 (Iowa 2008).

[END OF SUPPLEMENT]

[FN1] State v. Davis, 270 N.C. 1, 153 S.E.2d 749 (1967).
- A statute on fees and expenses for attorneys who represent indigent defendants provides for the payment of office-overhead expenses reasonably incurred in the defense of an indigent defendant. Wright v. Childree, 2006 WL 3759345 (Ala. 2006).
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[FN2] State v. Sidney, 66 Wis. 2d 602, 225 N.W.2d 438 (1975).
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[FN3] 18 U.S.C.A. § 3006A.
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[FN4] U.S. v. Quintero-Medina, 489 F. Supp. 82 (N.D. Ill. 1980), referring to 18 U.S.C.A. § 3006A(d).
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[FN5] Goodson v. Castellanos, 214 S.W.3d 741 (Tex. App. Austin 2007), reh'g overruled, (Mar. 1, 2007) and petition for review filed, (Apr. 16, 2007).
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[FN6] People ex rel. Conn v. Randolph, 35 Ill. 2d 24, 219 N.E.2d 337, 18 A.L.R.3d 1065 (1966); Abodeely v. Worcester County, 352 Mass. 719, 227 N.E.2d 486 (1967); State v. Rush, 46 N.J. 399, 217 A.2d 441, 21 A.L.R.3d 804 (1966).
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[FN7] In re State in Interest of Steenback, 34 N.J. 89, 167 A.2d 397 (1961); Bedford v. Salt Lake County, 22 Utah 2d 12, 447 P.2d 193 (1968).
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[FN8] State v. Davis, 270 N.C. 1, 153 S.E.2d 749 (1967).
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[FN9] State v. Harrison, 95 Haw. 28, 18 P.3d 890 (2001).
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[FN10] Lindh v. O'Hara, 325 A.2d 84 (Del. 1974); Jones v. Com., 411 S.W.2d 37 (Ky. 1967); In re Hayes, 55 Mich. App. 30, 222 N.W.2d 20 (1974); State v. Perala, 132 Wash. App. 98, 130 P.3d 852 (Div. 3 2006), review denied, 158 Wash. 2d 1018, 149 P.3d 378 (2006).
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[FN11] Johnson & Douglas v. Superior Court, 101 Ariz. 373, 419 P.2d 730 (1966); State v. Driver, 38 N.J. 294, 183 A.2d 676 (1962).
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[FN12] Corbett v. People, 154 Colo. 238, 389 P.2d 853 (1964); State v. McDaniel, 204 N.W.2d 627 (Iowa 1973); Brackenbrough v. State, 92 Nev. 460, 553 P.2d 419 (1976).
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[FN13] Honore v. Washington State Bd. of Prison Terms and Paroles, 77 Wash. 2d 660, 466 P.2d 485 (1970).
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[FN14] Johnson & Douglas v. Superior Court, 101 Ariz. 373, 419 P.2d 730 (1966); People v. Perry, 27 A.D.2d 154, 278 N.Y.S.2d 323 (Sup 1967).
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[FN15] Stahl v. Board of County Com'rs of Geary County, 198 Kan. 623, 426 P.2d 134 (1967).
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[FN16] Marks v. Superior Court for Los Angeles County, 245 Cal. App. 2d 779, 54 Cal. Rptr. 169 (2d Dist. 1966); Matter of Burgess, 69 Mich. App. 689, 245 N.W.2d 348 (1976); Carter v. State, 79 Nev. 89, 378 P.2d 876 (1963).
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[FN17] State ex rel. Colgrove v. Supanick, 41 Ohio St. 2d 141, 70 Ohio Op. 2d 261, 324 N.E.2d 183 (1975).
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[FN18] Smith v. State, 118 N.H. 764, 394 A.2d 834, 3 A.L.R.4th 568 (1978).
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[FN19] People ex rel. Conn v. Randolph, 35 Ill. 2d 24, 219 N.E.2d 337, 18 A.L.R.3d 1065 (1966).
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[FN20] Makemson v. Martin County, 491 So. 2d 1109 (Fla. 1986).
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[FN21] Application of Armani, 83 Misc. 2d 252, 371 N.Y.S.2d 563 (County Ct. 1975).
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[FN22] Florida Dept. of Financial Services v. Freeman, 921 So. 2d 598 (Fla. 2006) (death penalty case).
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[FN23] Hulse v. Wilfvat, 306 N.W.2d 707 (Iowa 1981).
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[FN24] State v. Longjaw, 307 Or. 47, 761 P.2d 1331 (1988).
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[FN25] Rushing v. State, 340 Ark. 84, 8 S.W.3d 489 (2000).
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28 U.S.C.A. § 2412

42 U.S.C.A. § 1988

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Construction and Operation of Attorney's General or Classic Retainer Fee or Salary Contract Under State Law, 102 A.L.R.5th 253

Construction and Operation of Attorney's General or Classic Retainer Fee or Salary Contract in Bankruptcy Context, 181 A.L.R. Fed. 1

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Express contracts. Am. Jur. Pleading & Practice Forms, Attorneys at Law §§ 204 to 221

An attorney and client are free to contract for reasonable attorney's fees rather than statutory attorney's fees.[FN1]

Observation: Because of the unique and special relationship between an attorney and a client, ordinary contract principles governing agreements between the parties must give way to the higher ethical and professional standards enunciated by the supreme court, and thus a contract for legal services is not like other contracts.[FN2]

Lawyers have a duty, at the outset of the representation, to inform a client of the basis or rate of the fee and the fee contract's implications for the client.[FN3] Under the Model Rules of Professional Conduct the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible must be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate.[FN4] Any changes in the basis or rate of the fee or expenses must also be communicated to the client.[FN5] Some jurisdictions require that an attorney is required in every case to either provide his or her client with a written letter of engagement or to enter into a signed written retainer agreement with the client.[FN6]

If an attorney charges separately for a legal assistant, the legal assistant's hourly charges should be stated and agreed to in writing.[FN7] An attorney is not entitled to charge a client for work performed by his or her assistant, where the fee agreement between the attorney and the client is silent as to whether the attorney may charge a client for work that the attorney's assistant performed on the client's behalf.[FN8]

[FN1] R. W. King Const. Co. v. City of Melbourne, 384 So. 2d 654 (Fla. Dist. Ct. App. 5th Dist. 1980).

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[FN2] Pellettieri, Rabstein and Altman v. Protopapas, 383 N.J. Super. 142, 890 A.2d 1022 (App. Div. 2006).

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[FN3] Tax Authority, Inc. v. Jackson Hewitt, Inc., 187 N.J. 4, 898 A.2d 512 (2006); Hoover Slovacek LLP v. Walton, 206 S.W.3d 557 (Tex. 2006).

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[FN4] ABA Model Rules of Professional Conduct Rule 1.5(b).

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[FN5] ABA Model Rules of Professional Conduct Rule 1.5(b).

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[FN6] Lewin v. Law Offices of Godfrey G. Brown, 8 Misc. 3d 622, 798 N.Y.S.2d 884 (N.Y. City Civ. Ct. 2005).

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[FN7] Columbus Bar Assn. v. Brooks, 87 Ohio St. 3d 344, 1999-Ohio-137, 721 N.E.2d 23 (1999).

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[FN8] In re Complaint as to Conduct of Skagen, 342 Or. 183, 149 P.3d 1171 (2006).

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§ 249. Retainer

West's Key Number Digest

West's Key Number Digest, Attorney and Client 137

Forms

Am. Jur. Legal Forms 2d §§ 30:121 to 30:126.3 (Retainer agreement)

A “true retainer,” also known as a “general retainer” or “classic retainer,” is paid by a client to the lawyer to secure the lawyer's availability during a specified period of time or for a specified matter.[FN1]

A breach of contract action against an attorney based on a retainer agreement may be sustained only where the attorney makes a specific promise in the agreement to obtain a specific result and fails to do so.[FN2]

An agreement of general retainer for a fixed period is like any other contract and, on its breach, the attorney is not limited to quantum meruit but may sue for the contract sum.[FN3]

An “advance payment retainer” consists of a present payment to the lawyer in exchange for the commitment to provide legal services in the future.[FN4] Advance payment retainers, ownership of which passes to the lawyer immediately upon payment by the client, should be used only sparingly, when necessary to accomplish some purpose for the client that cannot be accomplished by using a security retainer.[FN5] However, it has been held that a nonrefundable minimum retainer fee agreement is void as against public policy.[FN6]

CUMULATIVE SUPPLEMENT

Cases:

Attorney who accepted retainer agreements and payment from automobile passenger had obligation to act with reasonable diligence or promptness in representing passenger and to keep him reasonably informed, even though attorney entered appearance on behalf of driver and arranged for another attorney to file notice of appearance on passenger's behalf; passenger reasonably believed he had hired attorney as his lawyer when he signed the retainer agreement and began paying her fee, and from that point on, attorney never did anything to unequivocally inform passenger that she did not represent him or that another attorney did. The Florida Bar v. Brown, 978 So. 2d 107 (Fla. 2008).

A true retainer, also known as a general retainer or classic retainer, is earned when paid by the client and immediately becomes property of the lawyer, regardless of whether the lawyer ever actually performs any services for the client. Dowling v. Chicago Options Associates, Inc., 226 Ill. 2d 277, 314 Ill. Dec. 725, 875 N.E.2d 1012 (2007).

Advance payment retainer arrangements and security retainer arrangements are subject to a lawyer's duty to refund to a client any unearned fees upon termination of representation. Dowling v. Chicago Options Associates, Inc., 226 Ill. 2d 277, 314 Ill. Dec. 725, 875 N.E.2d 1012 (2007).

Where a retainer is paid to an attorney to secure the client's payment of legal fees, the client only retains an interest in the funds if the retainer has not been earned by the attorney. State ex rel. Nixon v. Bass, 282 S.W.3d 343 (Mo. 2009).

Legal work done by attorney and law firm to transfer all of testator's stock in closely held corporation to her grandson did not implicate a fiduciary duty to corporation's minority shareholders, for purposes of the privity exception to the *Simon v. Zipperstein* rule, which provided than an attorney was immune from liability to third parties arising from his performance as an attorney in good faith unless such third party was in privity with the client or the attorney acts maliciously; transfer of stock was a purely private matter, personal to testator, and was not done on behalf of corporation. LeRoy v. Allen, Yurasek & Merklin, 114 Ohio St. 3d 323, 2007-Ohio-3608, 872 N.E.2d 254 (2007).

Allegations of testator's children against attorney and law firm that executed testator's will and assisted in the transfer of all of testator's stock in closely held corporation to her grandson that there was a conflict of interest in attorney's representation of testator, as well as testator's son and grandson, and that attorney and law firm committed acts in collusion with testator's son and grandson were sufficient to state a claim under the maliciousness exception to the *Simon v. Zipperstein* rule, which provided than an attorney was immune from liability to third parties arising from his performance as an attorney in good faith unless such third party was in privity with the client or the attorney acted maliciously. LeRoy v. Allen, Yurasek & Merklin, 114 Ohio St. 3d 323, 2007-Ohio-3608, 872 N.E.2d 254 (2007).

A "hybrid retainer" contains both provisions which are general in nature, in that they allow for the availability of the attorney, combined with a provision for future legal services. McQueen, Rains & Tresch, LLP v. Citgo Petroleum Corp., 2008 OK 66, 195 P.3d 35 (Okla. 2008).

Under a general retainer, the client is paying the attorney for availability and the retainer fees are often deemed to be earned when paid. McQueen, Rains & Tresch, LLP v. Citgo Petroleum Corp., 2008 OK 66, 195 P.3d 35 (Okla. 2008).

A "general retainer agreement" is a contract pursuant to which the client agrees to pay the attorney a fixed sum in exchange for an agreed price to cover all legal services arising during a specified period. McQueen, Rains & Tresch, LLP v. Citgo Petroleum Corp., 2008 OK 66, 195 P.3d 35 (Okla. 2008).

A "special retainer" is an agreement between an attorney and the client pursuant to which the client contracts to pay a specified fee in exchange for a specified service. McQueen, Rains & Tresch, LLP v. Citgo Petroleum Corp., 2008 OK 66, 195 P.3d 35 (Okla. 2008).

[END OF SUPPLEMENT]

[FN1] Dowling v. Chicago Options Associates, Inc., 2007 WL 1288279 (Ill. 2007).

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[FN2] Pacesetter Communications Corp. v. Solin & Breindel, P.C., 150 A.D.2d 232, 541 N.Y.S.2d 404 (1st Dep't 1989).

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[FN3] Luxemburg v. Hotel and Restaurant Emp. and Bartenders Intern. Union Pension Fund, 91 Misc. 2d 930, 398 N.Y.S.2d 589 (Sup 1977).

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[FN4] Dowling v. Chicago Options Associates, Inc., 2007 WL 1288279 (Ill. 2007).

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[FN5] Dowling v. Chicago Options Associates, Inc., 2007 WL 1288279 (Ill. 2007).

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[FN6] Rimberg & Associates, P.C. v. Jamaica Chamber of Commerce, Inc., 40 A.D.3d 1066, 837 N.Y.S.2d 259 (2d Dep't 2007).

- Entitlement to advance payment retainer upon discharge of attorney, see § 265.

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7 Am. Jur. 2d Attorneys at Law § 250

Topic Summary Correlation Table References

§ 250. Construction of fee contract

West's Key Number Digest

West's Key Number Digest, Attorney and Client 144

The matter of a fee agreement between a lawyer and his or her client is a question of contract[FN1] and is construed using the same rules as apply to any other contract;[FN2] any ambiguity is construed against the attorney who drew the agreement,[FN3] or, stated conversely, must be construed most favorably to the client.[FN4]
Observation: When interpreting attorney-client fee agreements, it is not enough to simply say that a contract is a contract, because there are ethical considerations overlaying the contractual relationship.[FN5]

A legal services contract, which is silent on whether the clients agree to pay costs independent of the outcome at trial, will be construed against the law firm, as the drafting party.[FN6]
Practice Tip: Whether a contract between client and attorney is overreaching and unconscionable is generally a question of fact for the trial court.[FN7]

CUMULATIVE SUPPLEMENT

Cases:

Nothing in contingent fee agreement between attorney and client overcame the presumption that the attorney's contingent fee was to be based on the amount client received after any set offs, and thus, attorney's 35% contingent fee should have been based upon the net recovery by client in its action against bank, not the total jury award plus interest. Bar Rule 8(e)(4). Camden Nat. Bank v. Steamship Navigation Co., 2010 ME 29, 991 A.2d 800 (Me. 2010).

[END OF SUPPLEMENT]

[FN1] Universal Beverages Holdings, Inc. v. Merkin, 902 So. 2d 288 (Fla. Dist. Ct. App. 3d Dist. 2005).
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[FN2] Moore v. State Farm Mut. Auto. Ins. Co., 916 So. 2d 871 (Fla. Dist. Ct. App. 2d Dist. 2005); Mello v. Davis, 182 S.W.3d 622 (Mo. Ct. App. E.D. 2005), reh'g and/or transfer denied, (84795)(Jan. 19, 2006) and transfer denied, (Feb. 28, 2006).
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[FN3] Mello v. Davis, 182 S.W.3d 622 (Mo. Ct. App. E.D. 2005), reh'g and/or transfer denied, (84795)(Jan. 19, 2006) and transfer denied, (Feb. 28, 2006).
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[FN4] In re Kunicki, 35 A.D.3d 742, 827 N.Y.S.2d 244 (2d Dep't 2006), leave to appeal denied, 8 N.Y.3d 816, 2007 WL 1673313 (2007).
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[FN5] Hoover Slovacek LLP v. Walton, 206 S.W.3d 557 (Tex. 2006).
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[FN6] Pritchett & Burch, PLLC v. Boyd, 169 N.C. App. 118, 609 S.E.2d 439 (2005), review dismissed, 359 N.C. 635, 616 S.E.2d 543 (2005).
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[FN7] Continental Cas. Co. v. Knowlton, 305 Minn. 201, 232 N.W.2d 789 (1975).
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Topic Summary Correlation Table References

§ 251. Contract prior to inception of relationship

West's Key Number Digest

West's Key Number Digest, Attorney and Client 143

Prior to the establishment of an attorney-client relationship, the parties may deal with each other at arm's length, and the attorney may then contract with reference to compensation for his or her services.[FN1] It is not presumed that such contracts are the result of overreaching or improper influence on the part of the attorney.[FN2] A contract prior to the establishment of an attorney-client relationship is as valid and unobjectionable as if made between persons who do not occupy a fiduciary relation to each other and who are competent to contract with each other.[FN3] If, however, the contract was induced by fraud or misrepresentation, or if the compensation is so excessive as to evince a purpose on the part of the attorney to

obtain an improper or undue influence over the client, the contract will not be enforced.[FN4] The public policy of preventing exorbitant or excessive fees does not tolerate the premise that, if there is no explicit written statute, rule, or canon expressly forbidding it or imposing discipline therefor, any fee agreement that a lawyer can effect is valid and enforceable without regard to considerations of good conscience, fair dealing, and irrespective of the eventual effect on the cost to the client.[FN5]

CUMULATIVE SUPPLEMENT

Cases:

Under California law, promissory note given to attorney by client to pay attorney fees created valid lien against shares in restaurant held by client where attorney went through terms of note with client, including requirement that client have opportunity to consult with outside counsel, two days before client's date of signature, terms of note, when narrowly construed, were fair and reasonable to client, and terms of note should have been reasonably clear to client, given his sophistication and familiarity with similar security instruments. Cal.Prof.Conduct Rule 3–300. Kaisha v. Dodson, 423 B.R. 888 (N.D. Cal. 2010).

[END OF SUPPLEMENT]

[FN1] Holt v. Swenson, 252 Minn. 510, 90 N.W.2d 724 (1958); Higgins v. Beaty, 242 N.C. 479, 88 S.E.2d 80, 54 A.L.R.2d 600 (1955).

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[FN2] Higgins v. Beaty, 242 N.C. 479, 88 S.E.2d 80, 54 A.L.R.2d 600 (1955); Archer v. Griffith, 390 S.W.2d 735 (Tex. 1964).

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[FN3] Higgins v. Beaty, 242 N.C. 479, 88 S.E.2d 80, 54 A.L.R.2d 600 (1955).

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[FN4] Reid v. Johnson, 106 So. 2d 624 (Fla. Dist. Ct. App. 3d Dist. 1958).

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[FN5] Altschul v. Sayble, 83 Cal. App. 3d 153, 147 Cal. Rptr. 716 (2d Dist. 1978).

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Topic Summary Correlation Table References

§ 252. Contract made during existence of relationship

West's Key Number Digest

West's Key Number Digest, Attorney and Client 143

A.L.R. Library

Validity and effect of contract for attorney's compensation made after inception of attorney-client relationship, 13 A.L.R.3d 701

Forms

Am. Jur. Legal Forms 2d §§ 30:112 to 30:115 (Agreements during existence of attorney-client relationship)

The rule that all transactions between an attorney and a client during their confidential relationship are closely scrutinized by the courts applies to a contract for an attorney's compensation made during the existence of the attorney-client relationship.[FN1] Thus, courts regard such contracts with suspicion[FN2] and construe them most strongly against the attorney.[FN3]

Failure to allow the client time to consider the agreement before executing it,[FN4] or threatening to withdraw from the case, or conditioning the performance of some necessary act on the client's agreement to the contract, especially if this takes place at a crucial stage in the proceedings may result in a finding of undue influence.[FN5] Actual fraud is not necessary to support a finding of undue influence, and the fact that the attorney acted in good faith does not necessarily overcome the presumption of invalidity of a fee contract.[FN6]

Ratification of an attorney's fee agreement may occur at any time, so long as a client has full knowledge of the relevant facts (including the terms of the agreement and the choice to disavow it) and has acquiesced.[FN7]

[FN1] Spilker v. Hankin, 188 F.2d 35 (D.C. Cir. 1951); Bounougias v. Peters, 49 Ill. App. 2d 138, 198 N.E.2d 142, 13 A.L.R.3d 688 (1st Dist. 1964); Archer v. Griffith, 390 S.W.2d 735 (Tex. 1964).
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[FN2] Lawrence v. Tschirgi, 244 Iowa 386, 57 N.W.2d 46 (1953).
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[FN3] Hitchcock v. Skelly Oil Co., 201 Kan. 260, 440 P.2d 552 (1968).
- Burden of proof of fairness as to contracts made between an attorney and his or her client subsequent to employment, see § 305.
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[FN4] Bounougias v. Peters, 49 Ill. App. 2d 138, 198 N.E.2d 142, 13 A.L.R.3d 688 (1st Dist. 1964).
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[FN5] Griffin v. Rainer, 212 Va. 627, 186 S.E.2d 10 (1972).
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[FN6] Archer v. Griffith, 390 S.W.2d 735 (Tex. 1964).
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[FN7] King v. Fox, 7 N.Y.3d 181, 818 N.Y.S.2d 833, 851 N.E.2d 1184 (2006).
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§ 253. Contract made after completion of services

West's Key Number Digest

West's Key Number Digest, Attorney and Client 143

A.L.R. Library

Validity and effect of contract for attorney's compensation made after inception of attorney-client relationship, 13 A.L.R.3d 701

Some cases hold that the rules governing the validity of contracts for an attorney's compensation made during the existence of an attorney-client relationship are applicable to contracts made after completion of all services by the attorney for the client if the influence arising from the attorney-client relationship still

exists.[FN1] Other cases take the view that a fee contract between attorney and client, entered into after complete performance of all services, is, assuming that the client was fully informed as to the business transacted, valid and enforceable, because under such circumstances, the parties deal at arm's length, and they may fix the compensation at whatever figure they think proper.[FN2]

[FN1] In re Vaupel's Estate, 266 A.D. 723, 40 N.Y.S.2d 956 (1st Dep't 1943).
- Where an attorney receives fees pursuant to purported agreements between the attorney and client entered into well after the attorney-client relationship has been established, the attorney bears the burden in a subsequent suit by the client to recover alleged overpayments of establishing the fairness of the purposed agreement by clear and convincing proof. Mercy Hospital, Inc. v. Johnson, 390 So. 2d 103 (Fla. Dist. Ct. App. 3d Dist. 1980).
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[FN2] Potter v. Daily, 220 Ind. 43, 40 N.E.2d 339 (1942); Burleson v. Morse, 172 S.W.2d 361 (Tex. Civ. App. Galveston 1943), writ refused w.o.m., (Oct. 6, 1943).
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§ 254. Validity of agreement to increase compensation

West's Key Number Digest

West's Key Number Digest, Attorney and Client 143

A fee agreement between a lawyer and a client, revised after the relationship has been established on terms more favorable to the lawyer than originally agreed upon, may be void or voidable unless the attorney shows that the contract was fair and reasonable, free from undue influence, and made after a fair and full disclosure of

the facts on which it is predicated.[FN1] Such agreement may also be refused enforcement if the increase in compensation is not supported by new consideration.[FN2]

CUMULATIVE SUPPLEMENT

Cases:

Proposed reimbursement of lead plaintiff in securities fraud class action for his time and expenses in amount of $40,000 was reasonable, where amount represented his lost wages for 200 hours at hourly rate of $200, which represented his compensation as chief executive officer (CEO), and lead plaintiff engaged in periodic conferences, participated in litigation, provided input into case, kept fully informed of case, reviewed pleadings and motions, and participated in settlement negotiations. In re Immune Response Securities Litigation, 497 F. Supp. 2d 1166 (S.D. Cal. 2007).

[END OF SUPPLEMENT]

[FN1] Valley/50th Ave., L.L.C. v. Stewart, 159 Wash. 2d 736, 153 P.3d 186 (2007), as amended, (May 30, 2007).

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[FN2] Denton v. Smith, 101 Cal. App. 2d 841, 226 P.2d 723 (4th Dist. 1951); Bounougias v. Peters, 49 Ill. App. 2d 138, 198 N.E.2d 142, 13 A.L.R.3d 688 (1st Dist. 1964).

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§ 255. Fee set by client or third party after completion of services

West's Key Number Digest

West's Key Number Digest, Attorney and Client 144

Where the attorney agreed to accept whatever fee the client or some third person should decide to pay, some courts find that in the absence of a provision calling for a reasonable fee, the court is limited to reviewing the good faith of the person setting the fee, and that the unreasonableness of the compensation is not in itself sufficient to justify an inference of bad faith,[FN1] especially if the contract leaves the amount to the sole discretion of the person fixing the fee or makes his or her decision final.[FN2]

[FN1] Hogan v. Wright, 356 F.2d 595 (6th Cir. 1966); Causeway Loan Co. v. Bucklew, 81 So. 2d 212 (Fla. 1955).

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[FN2] Causeway Loan Co. v. Bucklew, 81 So. 2d 212 (Fla. 1955).

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§ 256. Account stated

West's Key Number Digest

West's Key Number Digest, Attorney and Client 142.1

A.L.R. Library

Validity and effect of contract for attorney's compensation made after inception of attorney-client relationship, 13 A.L.R.3d 701

Forms

Am. Jur. Legal Forms 2d §§ 30:155 to 30:158 (Bill for services)

An account stated between an attorney and client during the existence of their relationship is analogous to an ordinary fee contract and governed by the same rules.[FN1] Where a statement of account is balanced and rendered to the client by an attorney and is assented to either expressly or impliedly, an account stated is established.[FN2]

Practice Tip: A law firm seeking recovery of unpaid legal fees from a client must, in order to be entitled to summary judgment on the theory of account stated, provide the client with billing statements that show not only the balance due but also the nature of the services rendered or the hours expended.[FN3]

[FN1] Rupp v. Cool, 147 Colo. 18, 362 P.2d 396 (1961); Bounougias v. Peters, 49 Ill. App. 2d 138, 198 N.E.2d 142, 13 A.L.R.3d 688 (1st Dist. 1964).

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[FN2] Parker, Chapin, Flattau and Klimpl v. Daelen Corp., 59 A.D.2d 375, 399 N.Y.S.2d 222 (1st Dep't 1977).

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[FN3] Scheichet & Davis, P.C. v. Steinger, 183 A.D.2d 479, 583 N.Y.S.2d 407 (1st Dep't 1992).

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§ 257. Fee-sharing agreements

West's Key Number Digest

West's Key Number Digest, Attorney and Client 151

A.L.R. Library

Validity and Enforceability of Express Fee-Splitting Agreements Between Attorneys, 11 A.L.R.6th 587

Forms

Am. Jur. Legal Forms 2d, §§ 30:116 to 30:119 (Division of compensation between attorneys)

Fee sharing is prohibited, in the rules of professional conduct, in order to protect a lawyer's professional independence of judgment in rendering services to another,[FN1] however, a referral agreement dividing fees between attorneys has been held enforceable where the agreement provides for a percentage split of fees between the referring and receiving attorneys, the client signs the referral agreement, and the agreement fully discloses that a division of fees will be made.[FN2] Under the Model Rules of Professional Conduct, a division of a fee between lawyers who are not in the same firm may be made only if:
(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;[FN3]

(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing;[FN4] and

(3) the total fee is reasonable.[FN5]

A professional rule governing the division of fees between lawyers who are not affiliated with the same law firm requires only that there be "a writing" to the client, and does not require that the attorneys involved in the representation either write to the client individually or subscribe jointly to a single writing.[FN6]
Practice Tip: The rule governing attorney's fee-sharing agreements requires the referring attorney to disclose the agreement to the client and obtain the client's consent in writing before the referral is made, and attorneys being retained by referred clients should confirm compliance with the rule before undertaking the representation.[FN7]

An agreement to share attorney's fees that does not comply with the Rules of Professional Responsibility is unenforceable.[FN8]
Distinction: A pure referral contract, which provides that an attorney will receive a fee for merely forwarding a client to another attorney while doing nothing towards handling the case, must be distinguished from a co-counsel agreement, under which one attorney performs services for the client and refers the client to another attorney who also performs services on the case; under the latter agreement, fee splitting is permitted.[FN9]

In one jurisdiction, the supreme court's approval of an amendment to a rule of professional conduct which effectively sanctioned forwarding fee agreements under certain circumstances, was interpreted as an indication that referral fee agreements are no longer contrary to public policy.[FN10]

An attorney will be subject to disciplinary action for having what amounts to a fee-splitting arrangement with a collection agency whereby the attorney turns over to the agency all fees collected and agrees with the agency as to the subsequent distribution of the fees.[FN11] Also, an attorney will be subject to disciplinary action where he or she requests fees from a client as a retainer for another attorney but fails to give the fees to the other attorney, commingles the fees with his or her own funds, and resists the client's request for a return of the fees.[FN12]

An agreement entitling an attorney to share in the net earnings of a law partnership for a specified period after his or her withdrawal as a partner does not constitute an improper fee splitting arrangement.[FN13] Similarly, an employment agreement between a law firm and a lawyer is not subject to the prohibition against fee-splitting among unaffiliated attorneys.[FN14]

An agreement by an attorney who has been retained to prosecute claims on a contingent fee, to share the fee with another attorney who is employed to act as counsel in the litigation, establishes between the attorneys the relationship of joint adventurers.[FN15]

CUMULATIVE SUPPLEMENT

Cases:

Attorney and law firm which violated New York disciplinary rule governing the division of fees among lawyers by failing to obtain informed consent from client and to give client a writing in which each lawyer assumed joint responsibility for the representation could not cure the violation by providing the client with a joint responsibility letter after a settlement had been reached and an infant compromise hearing had been scheduled; undertaking of joint responsibility was difficult to accomplish, other than as a charade, after settlement had been reached. N.Y.Code of Prof.Resp., DR 2–107 (Repealed). Wagner & Wagner, LLP v. Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile, P.C., 596 F.3d 84 (2d Cir. 2010).

Letter that attorney sent to accident victim regarding fee-splitting agreement between attorney and law firm to which attorney was referring victim was not sufficient to constitute "written agreement" for purposes of Missouri rule of professional conduct that required agreement to share attorney fees to be in writing, even if victim's actions clearly demonstrated that he knew of and accepted fee-splitting agreement. V.A.M.R. 4, Rules of Prof.Conduct, Rule 4–1.5(e) (2007). Eng v. Cummings, McClorey, Davis & Acho, PLC, 611 F.3d 428 (8th Cir. 2010).

Rule of Professional Conduct requiring consent of a client to a division of fees among attorneys does not require that the client consent be prior to the commencement of work by the associated in attorney or law firm; consent may be given after the work is done. Cohen v. Brown, 173 Cal. App. 4th 302, 93 Cal. Rptr. 3d 24 (2d Dist. 2009), as modified on denial of reh'g, (May 22, 2009) and review denied, (July 8, 2009).

Even assuming that allocation of referral fee within law firm was governed by the state's Uniform Partnership Act rather than law firm's partnership agreement, partner who received 55% of the fee could not be liable for alleged misallocation of funds under the Act, where the law firm rather than the individual partner received and allocated the fee, and the plaintiff settled with the law firm and signed a release. Phelps v. Frampton, 2007 MT 263, 339 Mont. 330, 170 P.3d 474 (2007).

Referring attorney retained to represent client in medical malpractice case complied with professional responsibility rule governing division of legal fees when he entered into a fee-sharing arrangement with another attorney who agreed to act as trial counsel; client consented to retention of the other attorney and was apprised that his involvement would not result in an increase in fees, and referring attorney's correspondence conveyed that both his and trial attorney's law firms had assumed responsibility for the representation, noting that he would be regularly "assisting and consulting with" trial counsel. Samuel v. Druckman & Sinel, LLP, 12 N.Y.3d 205, 879 N.Y.S.2d 10, 906 N.E.2d 1042 (2009).

Attorney's conduct in paying another lawyer, who was not in attorney's law firm, on an hourly basis for appearing in attorney's place at client's deposition and at mediation conference in client's federal employment

discrimination case, without attorney charging client for the other lawyer's work and without attorney sharing with that lawyer part of the attorney's contingent fee, did not violate professional responsibility rule addressing division of fees between lawyers unaffiliated in practice. Cleveland Bar Assn. v. Mishler, 118 Ohio St. 3d 109, 2008-Ohio-1810, 886 N.E.2d 818 (2008).

[END OF SUPPLEMENT]

[FN1] In re Disciplinary Proceeding Against Marshall, 160 Wash. 2d 317, 157 P.3d 859 (2007).
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[FN2] Halberg v. W.M. Chanfrau, P.A., 613 So. 2d 600 (Fla. Dist. Ct. App. 5th Dist. 1993).
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[FN3] ABA Model Rules of Professional Conduct Rule 1.5(e)(1).
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[FN4] ABA Model Rules of Professional Conduct Rule 1.5(e)(2).
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[FN5] ABA Model Rules of Professional Conduct (ABA) Rule 1.5(e)(3).
- Measure of compensation where fees are shared between attorneys, see §§ 284, 285.
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[FN6] Robert P. Lynn, Jr., LLC v. Purcell, 40 A.D.3d 729, 835 N.Y.S.2d 664 (2d Dep't 2007).
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[FN7] Saggese v. Kelley, 445 Mass. 434, 837 N.E.2d 699 (2005).
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[FN8] Neilson v. McCloskey, 186 S.W.3d 285 (Mo. Ct. App. E.D. 2005), reh'g and/or transfer denied, (Jan. 19, 2006) and transfer denied, (Apr. 11, 2006).
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[FN9] Waterman v. Kitrick, 60 Ohio App. 3d 7, 572 N.E.2d 250 (10th Dist. Franklin County 1990).
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[FN10] Moran v. Harris, 131 Cal. App. 3d 913, 182 Cal. Rptr. 519, 28 A.L.R.4th 655 (4th Dist. 1982).
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[FN11] Matter of Struthers, 179 Ariz. 216, 877 P.2d 789 (1994).
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[FN12] Matter of Gallo, 619 N.E.2d 921 (Ind. 1993).
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[FN13] Anderson, McPharlin & Connors v. Yee, 135 Cal. App. 4th 129, 37 Cal. Rptr. 3d 627 (2d Dist. 2005); Hendler & Murray v. Lambert, 147 A.D.2d 444, 537 N.Y.S.2d 560 (2d Dep't 1989).
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[FN14] Cooper, Bamundo, Hecht & Longworth, LLP v. Kuczinski, 14 A.D.3d 644, 789 N.Y.S.2d 508 (2d Dep't 2005).
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[FN15] Scheffler v. Adams and Reese, LLP, 950 So. 2d 641 (La. 2007).
- A joint venture may be found to exist where attorneys have agreed to share fees. Sholer v. State ex rel. Dept. of Public Safety, 2006 OK CIV APP 145, 149 P.3d 1040 (Div. 4 2006), as corrected, (Mar. 8, 2006) and cert. denied, (Nov. 20, 2006).
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§ 258. Generally

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A.L.R. Library

Court Rules and Rules of Professional Conduct Limiting Amount of Contingent Fees or Otherwise Imposing Conditions on Contingent Fee Contracts, 49 A.L.R.6th 505

Validity of statute establishing contingent fee scale for attorneys representing parties in medical malpractice actions, 12 A.L.R.4th 23

Validity, construction, and effect of contract providing for contingent fee to defendant's attorney, 9 A.L.R.4th 191

Effect of contingent fee contract on fee award authorized by federal statute, 76 A.L.R. Fed. 347

Forms

Am. Jur. Legal Forms 2d §§ 30:130 to 30:145 (Contingent fee)

Contingent fee contracts between an attorney and client are generally recognized as valid[FN1] and a true "contingent fee" has two components: (1) payment is contingent on the outcome, and (2) the fee is a percentage deducted from the client's recovery.[FN2] The happening of the contingency is a condition precedent to the right of the attorney to recover for his or her services, and the precise event which was contemplated must happen.[FN3] More specifically, an attorney's right to a contingency fee is not acquired until the claim in the underlying case is reduced to judgment or settlement.[FN4] In other words, absent a contrary agreement between the lawyer and the client, attorney's fees pursuant to a contingency fee agreement should be taken only when the client receives payment.[FN5]

Observation: The primary purpose of contingent-fee contracts is to allow plaintiffs who cannot afford an attorney to obtain legal services by compensating the attorney from the proceeds of any recovery.[FN6]

An agreement between attorney and client for a contingency fee cannot be implied,[FN7] but must be a matter expressly contracted for by the attorney and the client.[FN8] Under the Model Rules of Professional Conduct, a contingent fee agreement must be in a writing signed by the client and must state the method by which the fee is to be determined, including the percentage or percentages that will accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated.[FN9]

Where an express contingent-fee agreement exists between attorney and client, the attorney's recovery of fees must lie on the contract.[FN10] Generally, courts should enforce contingency fee contracts between attorneys and clients as made[FN11] and even flawed contingency fee agreements can be enforceable.[FN12]

The attorney's fee statute applicable to federal civil rights actions does not prevent a plaintiff from promising an attorney a percentage of any money judgment that may be recovered.[FN13] However, a Title VII class action plaintiffs' attorneys' deliberate failure to disclose to the federal district court their intent to enforce contingent fee agreements against the named plaintiffs' recovery from the settlement fund, on top of a portion of the fund set aside in the settlement agreement to cover "all" attorney fees, circumvented the court's fiduciary role and resulted in a conflict of interest between the attorneys and the named plaintiffs, rendering the contingent agreements unenforceable regardless of the reasonableness of the total fees that would have been collected.[FN14]

Contingent fee agreements are proscribed as unethical in criminal cases.[FN15]

CUMULATIVE SUPPLEMENT

Cases:

District Court had authority to adjudicate propriety of contingent fee agreements between whistleblowers and their counsel in connection with global plea agreement and fee award, following indictment of corporate owner of various vessels under Act to Prevent Pollution from Ships (APPS) in connection with illegal dumping of oil, notwithstanding that whistleblowers did not object to agreements; court had inherent authority to supervise conduct of attorneys that appeared before it, which included assessment of fairness of attorney fee agreements. 33 U.S.C.A. § 1908(a). U.S. v. Overseas Shipholding Group, Inc., 625 F.3d 1 (1st Cir. 2010).

[END OF SUPPLEMENT]

[FN1] Gelfand, Greer, Popko & Miller v. Shivener, 30 Cal. App. 3d 364, 105 Cal. Rptr. 445 (4th Dist. 1973); Snow v. Mikenas, 373 Mass. 809, 370 N.E.2d 1001 (1977); Mancino v. City of Lakewood, 36 Ohio App. 3d 219, 523 N.E.2d 332 (8th Dist. Cuyahoga County 1987).

- A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by rule or other law. Model Rules of Professional Conduct (ABA) Rule 1.5(c), referring to Model Rules of Professional Conduct (ABA) Rule 1.5(d).

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[FN2] Boonville Convalescent Center, Inc. v. Cloverleaf Healthcare Services, Inc., 834 N.E.2d 1116 (Ind. Ct. App. 2005), transfer denied, 855 N.E.2d 1002 (Ind. 2006).
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[FN3] Lewis v. Smith, 274 Ga. App. 528, 618 S.E.2d 32 (2005), cert. denied, (Dec. 1, 2005).
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[FN4] Cox v. Boggs, 899 So. 2d 770 (La. Ct. App. 2d Cir. 2005).
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[FN5] Four Winds, LLC v. Smith & DeBonis, LLC, 854 N.E.2d 70 (Ind. Ct. App. 2006), transfer denied, 869 N.E.2d 453 (Ind. 2007); Hoover Slovacek LLP v. Walton, 206 S.W.3d 557 (Tex. 2006).
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[FN6] Hoover Slovacek LLP v. Walton, 206 S.W.3d 557 (Tex. 2006).
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[FN7] Sullivan v. Fawver, 58 Ill. App. 2d 37, 206 N.E.2d 492 (2d Dist. 1965); Carr v. Pearman, 860 N.E.2d 863 (Ind. Ct. App. 2007), transfer denied, 869 N.E.2d 462 (Ind. 2007).
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[FN8] Sullivan v. Fawver, 58 Ill. App. 2d 37, 206 N.E.2d 492 (2d Dist. 1965).
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[FN9] ABA Model Rules of Professional Conduct Rule 1.5(c).
- Services rendered after judgment or appeal, see § 261.
- A purported oral agreement between an attorney and client amending a written contingent fee agreement to include attorney's fees awarded by a court was unenforceable, and thus the attorney fee award to a client as a prevailing party in litigation was capped by the fee called for in a contingent fee agreement. Harbaugh v. Greslin, 365 F. Supp. 2d 1274 (S.D. Fla. 2005).
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[FN10] Mello v. Davis, 182 S.W.3d 622 (Mo. Ct. App. E.D. 2005), reh'g and/or transfer denied, (84795)(Jan. 19, 2006) and transfer denied, (Feb. 28, 2006).
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[FN11] Rangel v. Save Mart, Inc., 140 N.M. 395, 2006-NMCA-120, 142 P.3d 983 (Ct. App. 2006), as revised, (Sept. 25, 2006).
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[FN12] Freedman v. Fraser Engineering & Testing, Inc., 927 So. 2d 949 (Fla. Dist. Ct. App. 4th Dist. 2006).
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[FN13] Venegas v. Mitchell, 495 U.S. 82, 110 S. Ct. 1679, 109 L. Ed. 2d 74 (1990), referring to 42 U.S.C.A. § 1988.
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[FN14] Warnell v. Ford Motor Co., 205 F. Supp. 2d 956 (N.D. Ill. 2002).
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[FN15] Lewin v. Law Offices of Godfrey G. Brown, 8 Misc. 3d 622, 798 N.Y.S.2d 884 (N.Y. City Civ. Ct. 2005).
- A lawyer may not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case. ABA Model Rules of Professional Conduct Rule 1.5(d)(2).
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7 Am. Jur. 2d Attorneys at Law § 259

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Attorneys at Law
Rachel M. Kane, M.A., J.D.

VI. Compensation of Attorneys
B. Compensation Agreements
2. Contingent Fee Contracts

Topic Summary Correlation Table References

§ 259. Validity as dependent on fairness to client

West's Key Number Digest

West's Key Number Digest, Attorney and Client 147

Trial Strategy

Reasonableness of Contingent Fee in Personal Injury Action, 46 Am. Jur. Proof of Facts 2d 1

If a contingent fee contract is obtained by fraud, mistake, or undue influence, the contract will be held invalid.[FN1] Even if a contingent fee contract is found to have been entered into fairly and in good faith and without suppression of fact, it is subject to the scrutiny of the court as to its reasonableness.[FN2]

A contingent fee may be disallowed as between attorney and client in spite of a contingent fee retainer agreement, where the amount becomes large enough to be out of all proportion to the value of the professional services rendered.[FN3] A reasonable client does not expect that a lawyer engaged on a contingent-fee basis will charge a fee equaling or exceeding one hundred percent of the recovery.[FN4] Additionally, a contingent fee agreement that allows attorneys to receive the entire net recovery in an action up to a certain amount, and splits the excess between the attorney and the client, where the agreement is intended to compensate the attorneys for unpaid fees earned in another matter, is invalid because it allows the attorneys to acquire too much proprietary interest in the client's action.[FN5]

Besides the sheer amount of the fee, another factor to consider, and perhaps the most important, in determining the unconscionability of a contingent fee agreement, is whether the client was fully informed upon entering into the agreement with the attorney.[FN6] It is not necessarily the agreed-upon percentage of the recovery due the attorney or the duration of the recovery that makes a contingent fee agreement unconscionable, but rather the facts and circumstances surrounding the agreement, including the parties' intent and the value of the attorney's services in proportion to the fees charged, in hindsight.[FN7]

The mere fact that the case involved less difficulty and work than was believed necessary at the outset will not render the fee unconscionable and unfair.[FN8]

A fee agreement is unenforceable where it provides that the hourly rate would be agreed on at a later date and that a new agreement on rates would be reached if new litigation were commenced.[FN9]

[FN1] Archer v. Griffith, 390 S.W.2d 735 (Tex. 1964).
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[FN2] Harmon v. Pugh, 38 N.C. App. 438, 248 S.E.2d 421 (1978).
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[FN3] King v. Fox, 7 N.Y.3d 181, 818 N.Y.S.2d 833, 851 N.E.2d 1184 (2006).
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[FN4] Hoover Slovacek LLP v. Walton, 206 S.W.3d 557 (Tex. 2006).
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[FN5] Landsman v. Moss, 180 A.D.2d 718, 579 N.Y.S.2d 450 (2d Dep't 1992).
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[FN6] King v. Fox, 7 N.Y.3d 181, 818 N.Y.S.2d 833, 851 N.E.2d 1184 (2006).
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[FN7] King v. Fox, 7 N.Y.3d 181, 818 N.Y.S.2d 833, 851 N.E.2d 1184 (2006).
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[FN8] Dombey, Tyler, Richards and Grieser v. Detroit, T. & I. R. Co., 351 F.2d 121, 6 Ohio Misc. 185, 34 Ohio Op. 2d 99 (6th Cir. 1965).
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[FN9] Mar Oil, S.A. v. Morrissey, 982 F.2d 830 (2d Cir. 1993).
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Topic Summary Correlation Table References

§ 260. Validity in divorce or alimony proceedings

West's Key Number Digest

West's Key Number Digest, Attorney and Client 147

A.L.R. Library

Excessiveness or adequacy of attorneys' fees in domestic relations cases, 17 A.L.R.5th 366

A fee contract contingent on procuring a divorce, or contingent in amount on the amount of alimony, support, or property settlement to be obtained, is against public policy and void.[FN1] Under the Model Rules of Professional Conduct, a lawyer may not enter into an arrangement for, charge, or collect any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof.[FN2] An attorney may not, in the context of a suit which includes both matrimonial and nonmatrimonial causes of action, enter into a contingency fee agreement whereby he or she becomes entitled to a percentage of so much of the proceeds of the litigation as are derived from the nonmatrimonial causes of action; allowing contingency fees for nonmatrimonial claims interposed with matrimonial claims contravenes the important policy concerns that inform the general prohibition against contingent fees in matrimonial actions.[FN3]

However, contingent fee arrangements in domestic relations litigation are enforceable when they relate to the return of a wife's separate property,[FN4] or where the contingent fee contract calls for legal proceedings between husband and wife to settle property rights, but no divorce action is contemplated.[FN5] A contingency fee between an attorney and client is also allowed in a domestic relations matter to modify a property settlement agreement that is independent of support issues.[FN6]

Observation: As a general rule, contingent fee agreements are begrudgingly permitted in domestic relations cases, but they are subjected to enhanced scrutiny and rarely are found to be justified.[FN7]

[FN1] Succession of Butler, 294 So. 2d 512 (La. 1974); Miller v. Miller, 83 S.D. 227, 157 N.W.2d 537 (1968); Morfeld v. Andrews, 579 P.2d 426 (Wyo. 1978).

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[FN2] ABA Model Rules of Professional Conduct Rule 1.5(d)(1).

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[FN3] Ross v. DeLorenzo, 28 A.D.3d 631, 813 N.Y.S.2d 756 (2d Dep't 2006).

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[FN4] Salter v. St. Jean, 170 So. 2d 94 (Fla. Dist. Ct. App. 3d Dist. 1964).

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[FN5] In re Smith, 42 Wash. 2d 188, 254 P.2d 464 (1953).

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[FN6] Marquis & Aurbach v. Eighth Judicial Dist. Court, 146 P.3d 1130 (Nev. 2006).

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[FN7] Alexander v. Inman, 974 S.W.2d 689 (Tenn. 1998).

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§ 261. Services rendered after judgment or on appeal

West's Key Number Digest

West's Key Number Digest, Attorney and Client 146.1

A.L.R. Library

Construction of contingent fee contract as regards compensation for services after judgment or on appeal, 13 A.L.R.3d 673

In the absence of an express provision to the contrary, services rendered by the attorney in prosecuting or defending an appeal from a judgment in the case for which he or she was employed are covered by a contingent fee contract, and the attorney is not entitled to any additional compensation for such services.[FN1] If a contingent fee contract contains an express provision for additional compensation for services to be rendered on appeal, the attorney will be allowed to recover such compensation if the particular appellate services in question are those intended to be covered by such provision.[FN2]

In a contingency fee contract, providing for an enhanced fee if an appeal is filed, the enhanced-fee language of the contract could not plausibly be read to exclude its application to interlocutory appeals.[FN3]

Services rendered by attorneys in administering the estate after a successful representation of their client in a will contest are covered by the language in a contingent fee agreement providing that the attorneys were to represent their client "in connection with said Estate and to contest said Will."[FN4] However, an attorney employed to prosecute a claim seeking title to certain property is entitled to the reasonable value of his or her services in defending a forcible entry and detainer action brought against the client by the opposing party after

the entry of a judgment adverse to the client, on the ground that such services had not been contemplated as part of prosecuting the original action.[FN5]

A litigant is entitled to attorney's fees under the Equal Access to Justice Act, not only for the successful prosecution of the suit under the Act but also for the time spent preparing and litigating the fee issue itself, including the time and effort expended by counsel on appeal.[FN6]

[FN1] Pocius v. Halvorsen, 30 Ill. 2d 73, 195 N.E.2d 137, 13 A.L.R.3d 662 (1963).

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[FN2] Lane v. Wilkins, 229 Cal. App. 2d 315, 40 Cal. Rptr. 309 (2d Dist. 1964).

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[FN3] Wihtol v. Lynn, 209 Or. App. 56, 146 P.3d 365 (2006), review denied, 342 Or. 299, 152 P.3d 902 (2007) (further holding that an enhanced fee clause in a contingent fee agreement, based on the filing of an interlocutory appeal, is not void as against public policy).

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[FN4] Hoffman v. Burkhammer, 373 Mich. 187, 128 N.W.2d 503 (1964).

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[FN5] Pocius v. Halvorsen, 30 Ill. 2d 73, 195 N.E.2d 137, 13 A.L.R.3d 662 (1963).

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[FN6] Trichilo v. Secretary of Health and Human Services, 832 F.2d 743 (2d Cir. 1987), referring to 28 U.S.C.A. § 2412.

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C. Factors Affecting Right to Compensation

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Research References

West's Key Number Digest

West's Key Number Digest, Attorney and Client 134(1) to 135, 140, 141, 162

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A.L.R. Index, Attorneys' Fees

A.L.R. Index, Contingent Fees

West's A.L.R. Digest, Attorney and Client 134(1) to 1355, 1400, 1411, 1622

Trial Strategy

Dismissal of Attorney with Just Cause, 31 Am. Jur. Proof of Facts 2d 125

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Topic Summary Correlation Table References

§ 262. Fidelity and professional competence

West's Key Number Digest

West's Key Number Digest, Attorney and Client 135, 140, 141

As a matter of policy, a lawyer should be regarded as "earning" his or her fee only when he or she provides legal services to his or her client in a manner consistent with his or her professional duties; consequently, a lawyer's improper conduct can reduce or eliminate the fee that the lawyer may reasonably charge.[FN1] Fee forfeiture or disgorgement by an attorney is appropriate where there is a breach of fiduciary duty.[FN2]
Practice Tip: A client need not prove actual damages in order to obtain forfeiture of an attorney's fee for the attorney's breach of fiduciary duty to the client.[FN3] The ultimate decision on the amount of any fee forfeiture must be made by the court, in the case of attorneys who breach their duty to a client.[FN4]

[FN1] Lawyer Disciplinary Bd. v. Ball, 219 W. Va. 296, 633 S.E.2d 241 (2006).
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[FN2] Bilodeau v. Webb, 170 S.W.3d 904 (Tex. App. Corpus Christi 2005), review denied, (Mar. 3, 2006).
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[FN3] Burrow v. Arce, 997 S.W.2d 229 (Tex. 1999).
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[FN4] Burrow v. Arce, 997 S.W.2d 229 (Tex. 1999).
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Topic Summary Correlation Table References

§ 263. Representing adverse interests

West's Key Number Digest

West's Key Number Digest, Attorney and Client 135, 140, 141

A.L.R. Library

Propriety and effect of attorney representing interest adverse to that of former client, 52 A.L.R.2d 1243

Propriety and effect of representation of heir or other beneficiary of decedent's estate by attorney for executor or administrator in controversy with other heirs or beneficiaries, 47 A.L.R.2d 1104

Unless the attorney acted with the consent of both parties, he or she may not recover for services rendered to parties having opposing or adverse interests growing out of the same transaction.[FN1] However, an attorney is entitled to recover fees earned up until the date the conflict of interest arose.[FN2]

Where an attorney has accepted employment to represent an interest adverse to that of a former client, the attorney's conduct may not free the former client from the obligation to pay the attorney the fees called for by the contract,[FN3] but sometimes the attorney is precluded from recovering fees from the party wronged.[FN4]

CUMULATIVE SUPPLEMENT

Cases:

An attorney supervising a loan closing may represent both the lender and the borrower after full disclosure and with each party's consent. Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 698 S.E.2d 244 (Ct. App. 2010).

[END OF SUPPLEMENT]

[FN1] In re Rorem's Estate, 245 Iowa 1125, 66 N.W.2d 292, 47 A.L.R.2d 1089 (1954).
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[FN2] James T. Butler, P.A. v. Walker, 932 So. 2d 1218 (Fla. Dist. Ct. App. 5th Dist. 2006).
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[FN3] Deupree v. Garnett, 1954 OK 110, 277 P.2d 168 (Okla. 1954).
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[FN4] King v. King, 52 Ill. App. 3d 749, 10 Ill. Dec. 592, 367 N.E.2d 1358 (4th Dist. 1977).
- An attorney's representation, in a personal injury action, of both the driver of the automobile involved in the collision and the passenger in that vehicle violated a disciplinary rule proscribing multiple representation of parties with a conflicting interest, and precluded any award of attorney fees for services rendered before he was replaced by another attorney. Quinn v. Walsh, 18 A.D.3d 638, 795 N.Y.S.2d 647 (2d Dep't 2005).
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§ 264. Abandonment of cause

West's Key Number Digest

West's Key Number Digest, Attorney and Client 134(1), 134(2), 140, 141

A.L.R. Library

Circumstances under which attorney retains right to compensation notwithstanding voluntary withdrawal from case, 53 A.L.R.5th 287

An attorney who, without justifiable cause and without the client's consent, voluntarily abandons or withdraws from a case before its termination and before the attorney has fully performed the services required of him or her loses all right to compensation for services rendered.[FN1] However, if the attorney has justifiable cause for withdrawing from a case before it is finished or for abandoning his or her employment, he or she may recover compensation for services already rendered.[FN2]

Practice Tip: The attorney has the burden of proving that the withdrawal was mandatory under a statute or state bar rules, that the primary motivation for the withdrawal was the obligation to adhere to these ethical imperatives, that counsel commenced the action in good faith, that subsequent to counsel's withdrawal the client obtained recovery, and that counsel's work contributed in some measurable degree toward the client's recovery.[FN3]

The attorney may also recover the reasonable value of services rendered notwithstanding his or her withdrawal or abandonment where he or she does so with the client's consent.[FN4]

In a proceeding to fix a fair and reasonable attorney's fee, an attorney is not entitled to recover fees for two motions to withdraw as counsel since such motions were not made for the benefit of the client.[FN5]

[FN1] Henican, James and Cleveland v. Strate, 348 So. 2d 689 (La. Ct. App. 4th Cir. 1977), writ denied, 350 So. 2d 1213 (La. 1977); Staples v. McKnight, 763 S.W.2d 914 (Tex. App. Dallas 1988), writ denied, (Sept. 6, 1989).

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[FN2] Empire State Ins. Co. v. Chafetz, 302 F.2d 828 (5th Cir. 1962); Ambrose v. Detroit Edison Co., 65 Mich. App. 484, 237 N.W.2d 520, 88 A.L.R.3d 239 (1975); Fairchild v. General Motors Acceptance Corp., 254 Miss. 261, 179 So. 2d 185 (1965).

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[FN3] Estate of Falco, 188 Cal. App. 3d 1004, 233 Cal. Rptr. 807 (2d Dist. 1987).
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[FN4] State of Iowa v. Union Asphalt & Roadoils, Inc., 281 F. Supp. 391, 12 Fed. R. Serv. 2d 493 (S.D. Iowa 1968), judgment aff'd, 409 F.2d 1239 (8th Cir. 1969) and order aff'd, 408 F.2d 1171 (8th Cir. 1969).
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[FN5] Cass & Sons, Inc. v. Stag's Fuel Oil Co., Inc., 148 Misc. 2d 640, 561 N.Y.S.2d 519 (Sup 1990), order aff'd as modified, 194 A.D.2d 707, 601 N.Y.S.2d 803 (2d Dep't 1993).
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Topic Summary Correlation Table References

§ 265. Discharge; prevention of performance by client

West's Key Number Digest

West's Key Number Digest, Attorney and Client 134(1), 134(2), 140, 141

A.L.R. Library

Construction and Operation of Attorney's General or Classic Retainer Fee or Salary Contract Under State Law, 102 A.L.R.5th 253

Construction and Operation of Attorney's General or Classic Retainer Fee or Salary Contract in Bankruptcy Context, 181 A.L.R. Fed. 1

Trial Strategy

Where the client's discharge of an attorney is for cause, the outgoing attorney is not entitled to any fee.[FN1]

However, where an attorney is, without fault on his or her part, discharged, or is otherwise wrongfully prevented from performing the professional duties for which he or she was employed, the attorney is entitled to compensation.[FN2]

An attorney discharged by his or her client is not entitled to collect a contingency fee, if the attorney is discharged before the occurrence of the contingency specified in the contingency fee contract.[FN3] Attorneys, who are employed under a contingency fee contract and are discharged without cause before completion of the contract, are entitled to only recover reasonable attorney fees on a quantum meruit basis;[FN4] a substituted attorney is entitled to the full contingent fee provided for in the contract.[FN5]

A client has an unqualified right to discharge a lawyer, and if discharged, the lawyer may keep, from the advance payment retainer or security retainer, only a sum that is reasonable in light of the services the lawyer performed prior to being discharged.[FN6] Advance payment retainer arrangements and security retainer arrangements are subject to a lawyer's duty to refund to a client any unearned fees upon termination of representation.[FN7]

[FN1] Byrne v. Leblond, 25 A.D.3d 640, 811 N.Y.S.2d 681 (2d Dep't 2006).
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[FN2] Thompson v. Hiter, 356 Ill. App. 3d 574, 292 Ill. Dec. 362, 826 N.E.2d 503 (1st Dist. 2005), appeal denied, 216 Ill. 2d 736, 298 Ill. Dec. 391, 839 N.E.2d 1038 (2005); Stageberg v. Stageberg, 695 N.W.2d 609 (Minn. Ct. App. 2005), as amended, (May 6, 2005) and review denied, (July 19, 2005); Byrne v. Leblond, 25 A.D.3d 640, 811 N.Y.S.2d 681 (2d Dep't 2006).
- Measure of compensation on discharge under noncontingent fee contract, see § 280.
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[FN3] Amstead v. McFarland, 279 Ga. App. 765, 632 S.E.2d 707 (2006), cert. denied, (Sept. 8, 2006).
- Contingency fees generally, see §§ 258 to 261.
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[FN4] Lubell v. Martinez, 901 So. 2d 951 (Fla. Dist. Ct. App. 3d Dist. 2005); Amstead v. McFarland, 279 Ga. App. 765, 632 S.E.2d 707 (2006), cert. denied, (Sept. 8, 2006); Baker v. Shapero, 203 S.W.3d 697 (Ky. 2006); Pritchett & Burch, PLLC v. Boyd, 169 N.C. App. 118, 609 S.E.2d 439 (2005), review dismissed, 359 N.C. 635, 616 S.E.2d 543 (2005); Hoover Slovacek LLP v. Walton, 206 S.W.3d 557 (Tex. 2006).
- Measure of compensation on discharge under under contingent fee contract, see § 281.
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[FN5] Lubell v. Martinez, 901 So. 2d 951 (Fla. Dist. Ct. App. 3d Dist. 2005).
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[FN6] Dowling v. Chicago Options Associates, Inc., 2007 WL 1288279 (Ill. 2007).
- Retainer agreements generally, see § 249.
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[FN7] Dowling v. Chicago Options Associates, Inc., 2007 WL 1288279 (Ill. 2007).
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Topic Summary Correlation Table References

§ 266. Compromise, settlement, or dismissal of cause by client

West's Key Number Digest

West's Key Number Digest, Attorney and Client 134(1), 134(2), 140, 141

The client cannot, by settling, compromising, or dismissing a pending suit or action, without the consent or over the objection of his or her attorney, deprive the attorney of compensation which the client agreed to pay.[FN1] This rule applies even in the case of reconciliation in a divorce suit.[FN2]

The contract between the attorney and client may fix the compensation of the attorney in the event of settlement.[FN3]

Where a contingent fee agreement provides that an attorney was to receive one-third of the total amount recovered, an attorney is entitled to receive one-third of each payment received by the client under a structured settlement as and when the client receives it.[FN4]

[FN1] Katopodis v. Liberian S/T Olympic Sun, 282 F. Supp. 369 (E.D. Va. 1968); Wunnicke Finance Co. v. Tupper, 373 P.2d 142 (Wyo. 1962).
- Measure of compensation of where client settles without attorney's consent, see § 283.
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[FN2] Fiasconaro and Fiasconaro v. Orlando, 342 So. 2d 1261 (La. Ct. App. 4th Cir. 1977); Aadal v. Sunchris Realty, Inc., 89 A.D.2d 898, 454 N.Y.S.2d 11 (2d Dep't 1982).
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[FN3] Harnetiaux' Estate v. Hartzell, 91 Ill. App. 2d 222, 234 N.E.2d 81 (3d Dist. 1968).
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[FN4] Cardenas v. Ramsey County, 322 N.W.2d 191, 31 A.L.R.4th 89 (Minn. 1982).
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§ 267. Death, incapacity, disqualification, or disbarment of attorney

West's Key Number Digest

West's Key Number Digest, Attorney and Client 134(1), 134(2), 140, 141

A.L.R. Library

Attorney's right to compensation as affected by disbarment or suspension before complete performance, 59 A.L.R.5th 693

Attorney's death, prior to final adjudication or settlement of case, as affecting compensation under contingent fee contract, 33 A.L.R.3d 1375

An attorney who becomes physically or mentally incapacitated and is unable to complete a professional engagement is entitled to compensation for services rendered.[FN1] The estate of an attorney who dies after part performance, but before final adjudication or settlement, of a case in which he or she had been employed, is likewise entitled to compensation for the services rendered.[FN2] The same is true where the deceased or disabled attorney was employed on a contingent basis.[FN3]

Some courts, taking the view that an attorney who is disbarred or suspended from practice before completion of a contract of employment is in the position of having voluntarily and willfully abandoned the contract, hold that such attorneys are not entitled to recover from their clients for legal services rendered prior to disbarment or suspension.[FN4] However, it has also been held that a disbarred attorney may recover legal fees for services rendered prior to disbarment.[FN5]

A law firm may not charge a former client for contesting its disqualification where the law firm is disqualified after it hired a lawyer who had worked on behalf of the opposing party in the same matter, because the law firm caused the conflict by hiring a disqualified lawyer.[FN6]

An attorney who refers a case to another attorney prior to resigning his or her license to practice law is entitled to receive the contracted referral fee because the attorney was an attorney at the time the contract was entered into and was still an attorney when his or her obligation to the client ended.[FN7]

[FN1] In re Montgomery's Estate, 272 N.Y. 323, 6 N.E.2d 40, 109 A.L.R. 669 (1936).
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[FN2] Sullivan v. Fawver, 58 Ill. App. 2d 37, 206 N.E.2d 492 (2d Dist. 1965); In re Montgomery's Estate, 272 N.Y. 323, 6 N.E.2d 40, 109 A.L.R. 669 (1936) (limited to contract price).
- Measure of compensation on death of attorney, see § 279.
-

[FN3] Estate of Linnick, 171 Cal. App. 3d 752, 217 Cal. Rptr. 552 (2d Dist. 1985).
- Contingency fees generally, see §§ 258 to 261.
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[FN4] Royden v. Ardoin, 160 Tex. 338, 331 S.W.2d 206 (1960).
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[FN5] Padilla v. Sansivieri, 31 A.D.3d 64, 815 N.Y.S.2d 173 (2d Dep't 2006).
- A lawyer, suspended for misconduct not associated with a case, is owed at least the value of the services he rendered from the date of engagement until the date he was suspended from the practice of law. Collins v. Hertenstein, 181 S.W.3d 204 (Mo. Ct. App. W.D. 2005), reh'g and/or transfer denied, (63898)(Dec. 20, 2005) and transfer denied, (Jan. 31, 2006).
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[FN6] Spinelli v. Rodes-Roper-Love Ins. Agency, Inc., 613 So. 2d 504 (Fla. Dist. Ct. App. 5th Dist. 1993).
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[FN7] Dover Elevator Co. v. Servellon, 812 S.W.2d 366 (Tex. App. Dallas 1991).
- Fee-sharing agreements generally, see § 257.
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§ 268. Contract against public policy

West's Key Number Digest

West's Key Number Digest, Attorney and Client 135, 140, 141

A.L.R. Library

Attorney's recovery in quantum meruit for legal services rendered under a contract which is illegal or void as against public policy, 100 A.L.R.2d 1378

An attorney may not collect a fee barred by a public policy expressed in a code of professional conduct.[FN1]

[FN1] Larrison v. Scarola Reavis & Parent LLP, 11 Misc. 3d 572, 812 N.Y.S.2d 243 (Sup 2005).

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§ 269. Contract void because of illegality

West's Key Number Digest

West's Key Number Digest, Attorney and Client 135, 140, 141

A.L.R. Library

Attorney's recovery in quantum meruit for legal services rendered under a contract which is illegal or void as against public policy, 100 A.L.R.2d 1378

Although incidental acts of illegality, with respect to an otherwise lawful contract, will not prevent a recovery of compensation by the attorney,[FN1] when the contract for legal services is void because it is illegal, there can be no recovery by the attorney of his or her stipulated compensation even though nothing illegal was done under the condemned contract.[FN2] Thus, even though legitimate services may have been rendered under the contract, no recovery may be had if the contract between the attorney and client calls for the performance of illegal services that prevent or obstruct the proper administration of justice.[FN3]

[FN1] Old Dominion Transp. Co. v. Hamilton, 146 Va. 594, 131 S.E. 850, 46 A.L.R. 186 (1926).
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[FN2] Provisor v. Haas Realty, Inc., 256 Cal. App. 2d 850, 64 Cal. Rptr. 509 (2d Dist. 1967); Hollister v. Ulvi, 199 Minn. 269, 271 N.W. 493 (1937).
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[FN3] Gray v. Atkins, 331 So. 2d 157 (La. Ct. App. 3d Cir. 1976), writ denied, 334 So. 2d 433 (La. 1976).
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§ 270. Contract void because of illegality—Compensation on quantum meruit basis

West's Key Number Digest

West's Key Number Digest, Attorney and Client 135, 140, 141

The invalidity of a retainer agreement does not preclude an attorney from seeking recovery against a client in equity for the reasonable value of any legal services rendered after the agreement was entered into.[FN1] Attorneys may recover on a quantum meruit basis even where the parties have entered an unenforceable fee contract, such as one contingent on procuring a divorce,[FN2] or for a contingent interest in a property settlement.[FN3] However, an attorney has been denied recovery on the contract or a quantum meruit in the case of a contingent fee agreement calling for a percentage of an alimony award.[FN4] Also, an attorney will be denied an award of attorney's fees under a quantum meruit theory where the attorney does not allege that theory in the complaint and where the fee agreement is void due to coercion, duress, and threats at the time it was signed by the client.[FN5]

[FN1] Rimberg & Associates, P.C. v. Jamaica Chamber of Commerce, Inc., 40 A.D.3d 1066, 837 N.Y.S.2d 259 (2d Dep't 2007).
- Retainer agreements generally, see § 249.
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[FN2] Hay v. Erwin, 244 Or. 488, 419 P.2d 32 (1966).
- Validity of contingency fee agreement in divorce or alimony proceedings, see § 260.
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[FN3] Salter v. St. Jean, 170 So. 2d 94 (Fla. Dist. Ct. App. 3d Dist. 1964); Ownby v. Prisock, 243 Miss. 203, 138 So. 2d 279, 100 A.L.R.2d 1375 (1962); Archer v. Griffith, 390 S.W.2d 735 (Tex. 1964).
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[FN4] McCarthy v. Santangelo, 137 Conn. 410, 78 A.2d 240 (1951).
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[FN5] Jackson v. Griffith, 421 So. 2d 677 (Fla. Dist. Ct. App. 4th Dist. 1982).
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§ 271. Statute of limitations

West's Key Number Digest

West's Key Number Digest, Attorney and Client 162

A.L.R. Library

When statute of limitations begins to run against action by attorney, not employed on contingent fee basis, for compensation for services, 60 A.L.R.2d 1008

If an attorney is retained to perform a particular service or to carry on or defend a suit, the contract is an entire one and the attorney's right to recover compensation does not accrue until the completion of the service contemplated, the entry of final judgment, or the final determination of the matter, as respects the limitations period.[FN1]

The cause of action of an attorney to recover fees allowed for representing an indigent under court appointment does not accrue until the appointing court makes the determination of the fee.[FN2]

Where an attorney's services are severable and distinct, with no identifying continuity, the statute begins to run on each service at the time it is rendered.[FN3]

[FN1] Axelrod, Goodman, Steiner & Bazelon v. Chicago Messenger Service, Inc., 73 Ill. App. 3d 415, 29 Ill. Dec. 639, 392 N.E.2d 196 (1st Dist. 1979).

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[FN2] Magnus v. Jackson, 31 Cal. App. 3d 399, 107 Cal. Rptr. 287 (5th Dist. 1973).

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[FN3] Axelrod, Goodman, Steiner & Bazelon v. Chicago Messenger Service, Inc., 73 Ill. App. 3d 415, 29 Ill. Dec. 639, 392 N.E.2d 196 (1st Dist. 1979); Shaad v. Hutchinson's Boat Works, Inc., 84 Misc. 2d 631, 376 N.Y.S.2d 861 (Sup 1975).

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Topic Summary Correlation Table References

§ 272. Statute of limitations—Withdrawal or discharge of attorney

West's Key Number Digest

West's Key Number Digest, Attorney and Client 162

Where an attorney not contingently employed withdraws from a case for good cause, the statute of limitations commences to run on his or her claim for past services from the time of withdrawal.[FN1]

There is a lack of agreement as to when the statute commences to run against an action by an attorney employed on a contingent fee, who is discharged or withdraws before the determination of the litigation or other event on which his or her compensation is contingent; some decisions hold that the right of action does not accrue at the time of the attorney's discharge or withdrawal, but at the time when the litigation under which the claim arose is finally determined.[FN2]

[FN1] Succession of Buvens, 373 So. 2d 750 (La. Ct. App. 3d Cir. 1979).
- Withdrawal by attorney generally, see § 264.
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[FN2] Fracasse v. Brent, 6 Cal. 3d 784, 100 Cal. Rptr. 385, 494 P.2d 9 (1972).
- Discharge of attorney generally, see § 265.
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West's Key Number Digest

West's Key Number Digest, Attorney and Client 137 to 152

Primary Authority

42 U.S.C.A. §§ 1988, 7604

A.L.R. Library

A.L.R. Index, Attorneys' Fees

A.L.R. Index, Contingent Fees

West's A.L.R. Digest, Attorney and Client 137 to 1533

Trial Strategy

Dismissal of Attorney with Just Cause, 31 Am. Jur. Proof of Facts 2d 125

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ABA Model Rules of Professional Conduct Rule 1.5

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§ 273. Under contract specifying amount or percentage

West's Key Number Digest

West's Key Number Digest, Attorney and Client 137, 142 to 150

What attorneys charge for their services is generally a matter of agreement between the lawyer and the client[FN1] and when a fee contract exists between attorney and client, the contract will govern the attorney's fee.[FN2]

Where the amount of fees is determined by a contingent agreement, there can be no recovery on quantum meruit[FN3] to obtain a second bite of the apple.[FN4]

Interest accruing during an appeal will be shared between the attorney and the client in proportion to their respective interests in the judgment where the attorney's fee contract provides for a fee of a certain percentage of the net recovery and states that the fee becomes due and payable when the amount of judgment becomes payable to the client.[FN5]

[FN1] In re Disciplinary Action Against Hellerud, 2006 ND 105, 714 N.W.2d 38 (N.D. 2006).
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[FN2] Lewis v. Smith, 274 Ga. App. 528, 618 S.E.2d 32 (2005), cert. denied, (Dec. 1, 2005).
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[FN3] Carmichael v. Iowa State Highway Commission, 219 N.W.2d 658 (Iowa 1974).
- Contingency fees generally, see §§ 258 to 261.
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[FN4] Mello v. Davis, 182 S.W.3d 622 (Mo. Ct. App. E.D. 2005), reh'g and/or transfer denied, (84795)(Jan. 19, 2006) and transfer denied, (Feb. 28, 2006).
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[FN5] Matter of Innkeepers of New Castle, Inc., 671 F.2d 221 (7th Cir. 1982).
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§ 274. Under contract allowing client to set fee

West's Key Number Digest

West's Key Number Digest, Attorney and Client 137, 142.1

Where the promisor has determined the amount to be paid, no more can be recovered, at least where the promisor has acted in good faith, even though the compensation is considerably less than the reasonable value of the services.[FN1] The fact that the client fixed the compensation at an amount considerably less than the amount deemed reasonable by the trial court is not in itself sufficient to justify an inference of fraud or bad faith.[FN2] However, a former clients' refusal to engage in a discussion about the fair value for a law firm's services breached a contingency fee contract requiring the parties to agree on the fair value in the event of a non-cash resolution.[FN3]

[FN1] Hogan v. Wright, 356 F.2d 595 (6th Cir. 1966).
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[FN2] Carmichael v. Iowa State Highway Commission, 219 N.W.2d 658 (Iowa 1974).
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[FN3] Dykema Gossett PLLC v. Ajluni, 273 Mich. App. 1, 730 N.W.2d 29 (2006).
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Topic Summary Correlation Table References

§ 275. For services not specified in contract

West's Key Number Digest

West's Key Number Digest, Attorney and Client 144

Whether work or services for which additional compensation is claimed were within the reasonable contemplation of the parties at the time the contract was entered into is of importance in determining whether extra compensation is in order.[FN1] The fact that the attorney makes no claim for extra compensation for particular services at the time of rendering them has also been considered in determining whether the attorney is entitled to extra compensation.[FN2] At least one court has held that a retainer agreement under which an attorney is to be paid a specific monthly sum for "professional services" generally covers the attorney's compensation for both ordinary services and "extraordinary" services.[FN3]

The phrase "court appearances," as used in a provision that an attorney under a general retainer is to receive extra compensation therefor, is not necessarily limited to the physical appearance of the attorney in court and may include work done in his or her office in connection with pending litigation.[FN4]

[FN1] Roberts v. Veterans Co-op. Housing Ass'n, 88 A.2d 324 (Mun. Ct. App. D.C. 1952); Pocius v. Halvorsen, 30 Ill. 2d 73, 195 N.E.2d 137, 13 A.L.R.3d 662 (1963); Hoffman v. Burkhammer, 373 Mich. 187, 128 N.W.2d 503 (1964).

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[FN2] Roberts v. Veterans Co-op. Housing Ass'n, 88 A.2d 324 (Mun. Ct. App. D.C. 1952).

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[FN3] Cannon v. First Nat. Bank of East Islip, 98 A.D.2d 704, 469 N.Y.S.2d 101 (2d Dep't 1983), order aff'd, 62 N.Y.2d 1003, 479 N.Y.S.2d 517, 468 N.E.2d 699 (1984).

- Retainer agreements generally, see § 249.

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[FN4] Froedtert Grain & Malting Co. v. Peter P. Woboril, Inc., 265 Wis. 456, 61 N.W.2d 855, 43 A.L.R.2d 671 (1953).

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§ 276. Interest on unpaid fees

West's Key Number Digest

West's Key Number Digest, Attorney and Client 138, 144

A.L.R. Library

Time from which interest begins to run on fee or disbursements owed by client to attorney, 29 A.L.R.3d 824

Date on which postjudgment interest, under 28 U.S.C.A. sec. 1961(a), begins to accrue on federal court's award of attorneys' fees, 111 A.L.R. Fed. 615

Many cases hold that interest is recoverable from the time when demand for payment is made, or not until demand is made.[FN1] The commencement of an action constitutes a sufficient demand to begin the running of interest in actions to recover the reasonable value of legal services.[FN2] Interest runs from the date of demand where the action is to recover legal fees based on account stated or quantum meruit.[FN3] Interest on fees to an attorney appointed to represent an indigent defendant does not begin to accrue until there is a final judgment upon which the fee award could be based.[FN4] Where the attorney-client relationship has been terminated by discharge or withdrawal of the attorney, some courts hold that interest on the claim for the attorney's services

runs from the date of such termination of employment.[FN5] Where the amount owing is in dispute, interest does not commence to run on an attorney's claim for services until the date of verdict or decision, or of judgment.[FN6] Where employment has been on a retainer basis providing for a fixed compensation, interest on the attorney's claim for fees will run from the completion of the services contemplated or the termination of the attorney-client relationship, as the case may be.[FN7]

Interest on the unpaid portion of an award of attorney's fees may be denied entirely where there is no agreement requiring interest to be paid on fees, an appeal of the fee award was not a wrongful delay of payment, and counsel delayed payment of the balance with another appeal, because to award interest under such circumstances would encourage unnecessary litigation and stalling tactics.[FN8]

Where a fee agreement states that if fees and costs are not paid within 30 days of the billing date, the client agrees to pay one-and-one-half percent interest, the client may not raise the defense of usury, because a usurious transaction must contain a loan express or implied, and a fee agreement is not a loan.[FN9]

[FN1] Haas v. Ledoux's Estate, 427 So. 2d 12 (La. Ct. App. 3d Cir. 1983); Giffen v. Tigerton Lumber Co., 26 Wis. 2d 327, 132 N.W.2d 572 (1965) (holding interest allowable 30 days from the date of demand).

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[FN2] James, Robinson, Felts and Starnes v. Powell, 303 So. 2d 229 (La. Ct. App. 2d Cir. 1974); Brent v. Keesler, 32 A.D.2d 804, 302 N.Y.S.2d 349 (2d Dep't 1969).

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[FN3] Kramer, Levin, Nessen, Kamin & Frankel v. Aronoff, 638 F. Supp. 714 (S.D. N.Y. 1986).

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[FN4] People v. Johnson, 87 Ill. 2d 98, 57 Ill. Dec. 599, 429 N.E.2d 497 (1981).

- Compensation of court-appointed attorney generally, see §§ 246, 247.

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[FN5] In re Straitz' Estate, 147 So. 2d 172 (Fla. Dist. Ct. App. 2d Dist. 1962).

- Discharge of attorney, see § 265.
- Withdrawal of attorney, see § 264.

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[FN6] Pittman and Matheny v. Davidge, 189 So. 2d 706, 29 A.L.R.3d 815 (La. Ct. App. 1st Cir. 1966), writ refused, 249 La. 768, 191 So. 2d 143 (1966) and writ refused, 249 La. 771, 191 So. 2d 144 (1966); Johnson v. Tindall, 195 Mont. 165, 635 P.2d 266 (1981); Kennedy v. Clausing, 74 Wash. 2d 483, 445 P.2d 637 (1968).

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[FN7] Western Oil Fields, Inc. v. Coit, 29 Colo. App. 567, 487 P.2d 562 (1971); Hargrove, Guyton, Van Hook and Ramey v. Blanchard, 216 So. 2d 127 (La. Ct. App. 2d Cir. 1968), writ refused, 253 La. 321, 217 So. 2d 413 (1969).

- Retainer agreements generally, see § 249.

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[FN8] In re Meade Land and Development Co., Inc., 5 B.R. 464 (Bankr. E.D. Pa. 1980).

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[FN9] Earle Lee Butler, P.A. v. Target, Inc., 601 So. 2d 1276 (Fla. Dist. Ct. App. 4th Dist. 1992).

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§ 277. Statutory limit on fees

West's Key Number Digest

West's Key Number Digest, Attorney and Client 138

A.L.R. Library

Court Rules and Rules of Professional Conduct Limiting Amount of Contingent Fees or Otherwise Imposing Conditions on Contingent Fee Contracts, 49 A.L.R.6th 505

Limitation to quatum meruit recovery, where attorney employed under contingent-fee contract is discharged without cause, 56 A.L.R.5th 1

Validity of statute establishing contingent fee scale for attorneys representing parties in medical malpractice actions, 12 A.L.R.4th 23

A statute may validly limit the fee an attorney may charge or receive for prosecuting a claim[FN1] and typical of the statutes under consideration are those that limit a fee for prosecuting a claim under unemployment compensation acts,[FN2] or medical malpractice provisions,[FN3] although extraordinary circumstances may permit a contingency fee award in excess of a statutory mandatory maximum contingency fee for medical malpractice actions.[FN4]

The federal government may constitutionally prohibit the acceptance of an attorney's fee for the representation of claimants under the Black Lung Benefits Act of 1972, except such fees as are approved by the Department of Labor.[FN5]

[FN1] Blair v. Village of Coleraine, 180 Minn. 388, 231 N.W. 193, 69 A.L.R. 1315 (1930); In re Reed's Estate, 37 Wyo. 107, 259 P. 815, 55 A.L.R. 941 (1927).

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[FN2] Mississippi Employment Sec. Commission v. Wilks, 247 Miss. 737, 156 So. 2d 583 (1963).
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[FN3] Herrera v. St. Martin, 34 A.D.3d 529, 825 N.Y.S.2d 88 (2d Dep't 2006), leave to appeal denied, 8 N.Y.3d 815, 2007 WL 1630300 (2007) and leave to appeal denied, 8 N.Y.3d 1003, 2007 WL 1630288 (2007) (compensation based on a statute's sliding scale).
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[FN4] O'Connell v. Shivaram, 37 A.D.3d 435, 830 N.Y.S.2d 720 (2d Dep't 2007).
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[FN5] U.S. Dept. of Labor v. Triplett, 494 U.S. 715, 110 S. Ct. 1428, 108 L. Ed. 2d 701 (1990).
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§ 278. Court rule limiting contingent fees in negligence cases

West's Key Number Digest

West's Key Number Digest, Attorney and Client 138

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Court Rules and Rules of Professional Conduct Limiting Amount of Contingent Fees or Otherwise Imposing Conditions on Contingent Fee Contracts, 49 A.L.R.6th 505

Court rules limiting amount of contingent fees or otherwise imposing conditions on contingent fee contracts, 77 A.L.R.2d 411

Trial Strategy

Reasonableness of Contingent Fee In Personal Injury Action, 46 Am. Jur. Proof of Facts 2d 1

In contingent fee cases in personal injury and wrongful death actions, a court rule may validly prescribe a graduated scale of fees, and unless authorized by the court on a showing of extraordinary circumstances, a fee in excess of the prescribed schedule is unreasonable and unconscionable.[FN1]
Observation: The rationale of this view is that the setting of a scale of fees is a procedural matter.[FN2]

Out-of-state law firms that, although not formally admitted to state courts, appear therein are subject to rules governing contingent fees and may not circumvent those rules by hiring local counsel on an hourly basis and then charging a contingent fee above that allowable under state rules.[FN3]

CUMULATIVE SUPPLEMENT

Cases:

Only public nuisance actions, and perhaps other actions requiring delicate balancing and weighing of interests and values, fall within the class of civil actions wherein the duty of absolute neutrality bars governments from using contingency fees to compensate lawyers with sole litigation discretion. Priceline.com Inc. v. City of Anaheim, 180 Cal. App. 4th 1130, 2010 WL 16022 (4th Dist. 2010).

[END OF SUPPLEMENT]

[FN1] American Trial Lawyers Ass'n, New Jersey Branch v. New Jersey Supreme Court, 66 N.J. 258, 330 A.2d 350 (1974); Gair v. Peck, 6 N.Y.2d 97, 188 N.Y.S.2d 491, 160 N.E.2d 43, 77 A.L.R.2d 390 (1959), reargument denied, remittitur amended, 6 N.Y.2d 983, 191 N.Y.S.2d 951, 161 N.E.2d 736 (1959); In re Guardianship of Schott, 23 Wis. 2d 213, 127 N.W.2d 19 (1964).
- In a complex medical malpractice case, resolved by a structured settlement providing $500,000 in cash and $50,000 per year for the rest of the plaintiff's life, the actual cost of plaintiff's annuity was the value to be used for the calculation of the attorney's contingent fee, and the attorney's uncontested increased counsel fee application was granted on the grounds of the difficulty of the case, skill, results, and ability of counsel, and the inadequacy of the counsel fee permitted under the applicable rule. Keller v. Dougherty, 197 N.J. Super. 406, 484 A.2d 1327 (Law Div. 1984).
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[FN2] Gair v. Peck, 6 N.Y.2d 97, 188 N.Y.S.2d 491, 160 N.E.2d 43, 77 A.L.R.2d 390 (1959), reargument denied, remittitur amended, 6 N.Y.2d 983, 191 N.Y.S.2d 951, 161 N.E.2d 736 (1959).
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[FN3] Anderson v. Conley, 206 N.J. Super. 132, 501 A.2d 1057 (Law Div. 1985).
- Recovery by nonresident for local services, see § 245.
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§ 279. When death of attorney terminates services

West's Key Number Digest

West's Key Number Digest, Attorney and Client 145, 149, 150

A.L.R. Library

Attorney's death, prior to final adjudication or settlement of case, as affecting compensation under contingent fee contract, 33 A.L.R.3d 1375

Where a contract between an attorney and a client is terminated by the attorney's death before completion of the contemplated services, the general contract rule applies, and the personal representative of the attorney may recover against the client the full reasonable value of the services rendered prior to the death, not exceeding, however, the sum or rate fixed by the contract.[FN1]

In determining what amount constitutes the value for services rendered under a contingent fee contract by a deceased attorney prior to his or her death, the recovery may not exceed the sum or rate fixed by the contract.[FN2] This rule has been applied in cases where the attorney was employed on a contingent basis and was the only attorney employed.[FN3] Where a partnership or attorneys in a joint venture are retained under a contingent fee contract, some courts have held that the death of one of the attorneys prior to completion of the contemplated services will not relieve the client's responsibility to pay according to the terms of the contract where the required performance is accomplished by the survivors of the partnership or joint venture with the consent or acquiescence of the client.[FN4]

[FN1] Roe v. Sears, Roebuck & Co., 132 F.2d 829 (C.C.A. 7th Cir. 1943).
- Entitlement to fees on death of attorney, see § 267.
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[FN2] Pittman Const. Co. v. Housing Authority of New Orleans, 183 So. 2d 343 (La. Ct. App. 4th Cir. 1966).
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[FN3] Roe v. Sears, Roebuck & Co., 132 F.2d 829 (C.C.A. 7th Cir. 1943); Pittman Const. Co. v. Housing Authority of New Orleans, 183 So. 2d 343 (La. Ct. App. 4th Cir. 1966).
- Contingent fee agreements generally, see §§ 258 to 261.
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[FN4] Kespohl v. Northern Trust Co., 93 Ill. App. 2d 211, 236 N.E.2d 268, 33 A.L.R.3d 1368 (1st Dist. 1968).
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Topic Summary Correlation Table References

§ 280. Where attorney is discharged without his or her fault; under noncontingent fee contract

West's Key Number Digest

West's Key Number Digest, Attorney and Client 145

A.L.R. Library

Measure or basis of attorney's recovery on express contract fixing noncontingent fees, where he is discharged without cause or fault on his part, 54 A.L.R.2d 604

Regardless of other rights, an attorney may recover the reasonable value of services rendered on a noncontingent contract when he or she is discharged without fault on his or her part prior to full performance.[FN1]

Observation: It is the skill, diligence, ability, experience, judicial knowledge, and judgment of the attorney that is rewarded under a theory of quantum meruit, following premature termination of the attorney-client relationship.[FN2]

Some jurisdictions hold that when an attorney is discharged without cause, he or she may collect his or her fee either on the basis of quantum meruit or based on contract, whichever is greater.[FN3] Also, an agreement calling for a reasonable method of compensating a discharged lawyer may be enforceable according to its terms.[FN4] Finally, quantum meruit does not serve to permit a client who has agreed to pay an hourly attorney fee, and on whose behalf services have been performed pursuant to that agreement, to ignore statements for those services, discharge the attorney, and avoid contractual fee obligations theretofore incurred; for services rendered in accordance with the parties' agreement, the contractual provision is enforceable unless the fee is excessive, unearned, or incommensurate.[FN5]

CUMULATIVE SUPPLEMENT

Cases:

The modern rule, whereby the discharged attorney's recovery is limited to the reasonable value of his services on a quantum meruit theory, is optimal because it evidences a greater sensitivity to the desired public policy of allowing a client to discharge his attorney at any time, without undue burden, in a manner that is not cost prohibitive. Welman v. Parker, 328 S.W.3d 451 (Mo. Ct. App. S.D. 2010), reh'g and/or transfer denied, (Dec. 10, 2010) and transfer denied, (Jan. 25, 2011).

[END OF SUPPLEMENT]

[FN1] Oliver v. Campbell, 43 Cal. 2d 298, 273 P.2d 15 (1954); Rosenberg v. Levin, 409 So. 2d 1016 (Fla. 1982); Thompson v. Hiter, 356 Ill. App. 3d 574, 292 Ill. Dec. 362, 826 N.E.2d 503 (1st Dist. 2005), appeal denied, 216 Ill. 2d 736, 298 Ill. Dec. 391, 839 N.E.2d 1038 (2005); Kennedy v. Point Dedicated Services, LLC, 31 A.D.3d 1117, 821 N.Y.S.2d 311 (4th Dep't 2006); Columbus Bar Assn. v. Farmer, 111 Ohio St. 3d 137, 2006-Ohio-5342, 855 N.E.2d 462, 25 A.L.R.6th 619 (2006).
- Entitlement to compensation on discharge generally, see § 265.
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[FN2] Pritchett & Burch, PLLC v. Boyd, 169 N.C. App. 118, 609 S.E.2d 439 (2005), review dismissed, 359 N.C. 635, 616 S.E.2d 543 (2005).
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[FN3] In re Estate of Weisberger, 224 S.W.3d 154 (Tenn. Ct. App. 2006), appeal denied, (Apr. 16, 2007).
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[FN4] Carr v. Pearman, 860 N.E.2d 863 (Ind. Ct. App. 2007), transfer denied, 869 N.E.2d 462 (Ind. 2007).
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[FN5] Gold, Weems, Bruser, Sues & Rundell v. Granger, 947 So. 2d 835 (La. Ct. App. 3d Cir. 2006), writ denied, 955 So. 2d 687 (La. 2007).
- Measure of compensation under contract specifying amount, see § 273.
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§ 281. Where attorney is discharged without his or her fault; under contingent fee contract

West's Key Number Digest

West's Key Number Digest, Attorney and Client 149, 150

A.L.R. Library

Limitation to quatum meruit recovery, where attorney employed under contingent-fee contract is discharged without cause, 56 A.L.R.5th 1

Where an attorney is employed on a contingent contract to perform legal services, the discharge of the attorney without fault on his or her part, before he or she has performed the work, constitutes a breach of the contract and renders the client liable to respond in damages.[FN1] The measure of damages in that situation is the agreed percentage of the amount the client is subsequently able to secure by settlement or judgment,[FN2] less a fair allowance for services and expenses not expended by the discharged attorney in performing the balance of the contract.[FN3] It would be inherently unfair to permit a client to dismiss an attorney without cause after the attorney had spent time preparing the case, and then to deny the attorney any compensation at all on the ground that the attorney had not settled or successfully tried the case, where the lack of the benefit to the client was due to the fact that the client discharged the attorney.[FN4]

An attorney is not limited to recovery in quantum meruit where the clients terminate the attorney without cause after the attorney had fully performed the services for which the parties had contracted.[FN5] Additionally, an attorney is entitled to the entire contigency fee where an attorney is discharged after substantially performing the duties owed to a client, where minor and relatively unimportant deviations remain to accomplish full contractual performance.[FN6]

Some cases hold that an attorney discharged under a contingent fee contract without fault on his or her part may at his or her election recover the reasonable value of the services rendered up to the time of discharge,[FN7] and others give the attorney the option of enforcing the contingent fee contract and claiming an equitable lien against the final judgment or settlement.[FN8] In other jurisdictions the discharged attorney has no election and may not recover on the contract, but is restricted to a quantum meruit recovery.[FN9]

Practice Tip: Where an attorney does not elect, at the time of his or her discharge without cause, to receive compensation immediately based on quantum meruit or based on the contingent percentage fee as a proportionate share of the work performed on the whole case, the presumption arises that the contingent fee was chosen.[FN10]

CUMULATIVE SUPPLEMENT

Cases:

Where an attorney has been discharged, without fault on his part, from further services in a suit just begun by him under a contract for payment contingent upon successful prosecution of the suit, his measure of damages is not the contingent fee agreed upon, but the value of his services rendered, and, in the absence of evidence of the reasonable value of such services, no recovery can be had. Trickett v. Laurita, 223 W. Va. 357, 674 S.E.2d 218 (2009).

[END OF SUPPLEMENT]

[FN1] Tonn v. Reuter, 6 Wis. 2d 498, 95 N.W.2d 261 (1959).
- Entitlement to compensation on discharge generally, see § 265.
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[FN2] Milton Kelner, P. A. v. 610 Lincoln Road, Inc., 328 So. 2d 193, 92 A.L.R.3d 684 (Fla. 1976); Chambliss, Bahner and Crawford v. Luther, 531 S.W.2d 108 (Tenn. Ct. App. 1975); Tonn v. Reuter, 6 Wis. 2d 498, 95 N.W.2d 261 (1959).
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[FN3] Knoll v. Klatt, 43 Wis. 2d 265, 168 N.W.2d 555 (1969) (abrogated on other grounds by, Herro, McAndrews and Porter, S. C. v. Gerhardt, 62 Wis. 2d 179, 214 N.W.2d 401 (1974)); Tonn v. Reuter, 6 Wis. 2d 498, 95 N.W.2d 261 (1959).
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[FN4] Ashby v. Price, 112 Ill. App. 3d 114, 67 Ill. Dec. 958, 445 N.E.2d 438 (3d Dist. 1983).
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[FN5] Franklin v. Appel, 8 Cal. App. 4th 875, 10 Cal. Rptr. 2d 759 (2d Dist. 1992).
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[FN6] Farrar v. Kelly, 440 So. 2d 939 (La. Ct. App. 2d Cir. 1983) (wherein the attorney performed all the services except for having a final judgment signed); Goncharuk v. Barrong, 132 Wash. App. 745, 133 P.3d 510 (Div. 3 2006), review denied, 153 P.3d 195 (Wash. 2007).
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[FN7] Chambliss, Bahner and Crawford v. Luther, 531 S.W.2d 108 (Tenn. Ct. App. 1975).
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[FN8] In re Willis, 143 B.R. 428 (Bankr. E.D. Tex. 1992).
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[FN9] Lubell v. Martinez, 901 So. 2d 951 (Fla. Dist. Ct. App. 3d Dist. 2005); Hofreiter v. Leigh, 124 Ill. App. 3d 1052, 80 Ill. Dec. 319, 465 N.E.2d 110 (3d Dist. 1984); Phil Watson, P.C. v. Peterson, 650 N.W.2d 562 (Iowa 2002); International Materials Corp. v. Sun Corp., Inc., 824 S.W.2d 890 (Mo. 1992).
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[FN10] Cohen v. Grainger, Tesoriero & Bell, 81 N.Y.2d 655, 602 N.Y.S.2d 788, 622 N.E.2d 288 (1993).
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Topic Summary Correlation Table References

§ 282. Where attorney terminates employment or is discharged for cause

West's Key Number Digest

West's Key Number Digest, Attorney and Client 145, 149, 150

Trial Strategy

Dismissal of Attorney with Just Cause, 31 Am. Jur. Proof of Facts 2d 125

Where the client's discharge of an attorney is for cause, the outgoing attorney is not entitled to any fee.[FN1]

An attorney who, without justifiable cause and without the client's consent, voluntarily abandons or withdraws from a case before its termination and before the attorney has fully performed the services required of him or her loses all right to compensation for services rendered.[FN2] However, an attorney retained on a contingent fee arrangement who withdraws from a case for good cause is entitled to compensation for the reasonable value of his or her services based upon quantum meruit, and not the contingent fee contract.[FN3] There is a sufficient basis for an award of attorney fees in quantum meruit to an attorney which failed to fulfill its obligations under a retainer agreement, where there had apparently been an honest disagreement as to the viability of a damages cause of action.[FN4]

[FN1] § 265.

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[FN2] § 264.
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[FN3] Dykema Gossett PLLC v. Ajluni, 273 Mich. App. 1, 730 N.W.2d 29 (2006).
- A lawyer may retain only the reasonable value of legal services actually rendered prior to the lawyer's withdrawal from representation during an ongoing legal dispute. Columbus Bar Assn. v. Farmer, 111 Ohio St. 3d 137, 2006-Ohio-5342, 855 N.E.2d 462, 25 A.L.R.6th 619 (2006).
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[FN4] Ruthman, Mercadante & Hadjis, P.C. v. Nardiello, 16 A.D.3d 815, 791 N.Y.S.2d 665 (3d Dep't 2005).
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Topic Summary Correlation Table References

§ 283. Amount of contingent fee payable where client settles without attorney's consent

West's Key Number Digest

West's Key Number Digest, Attorney and Client 145, 149, 150

If a contractual provision prohibiting a settlement without the consent of the attorney is against public policy and void, and is so connected with the clause prescribing the percentage of the recovery the attorney is to receive as compensation that the latter clause falls with it, the attorney may recover the value of the services rendered on the basis of actual worth.[FN1]

[FN1] Cummings v. Patterson, 59 Tenn. App. 536, 442 S.W.2d 640 (1968).
- Entitlement to fees after settlement by client, see § 266.
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Topic Summary Correlation Table References

§ 284. Sharing of fees with other attorneys

West's Key Number Digest

West's Key Number Digest, Attorney and Client 151

A.L.R. Library

Validity and Enforceability of Express Fee-Splitting Agreements Between Attorneys, 11 A.L.R.6th 587

Attorney's obligation to share fee award with party representing public interest, 43 A.L.R.5th 793

Legal fees may not be shared in the absence of a sharing of services or responsibilities.[FN1] In fee-sharing disputes between attorneys, the courts will not inquire into the precise worth of the services performed by the parties as long as each party actually contributed to the legal work and there is no claim that either refused to contribute more substantially.[FN2] However, where it can be shown in a proceeding to allocate attorney's fees that one attorney played a greater role in securing a total award, a larger fee is appropriate for that attorney.[FN3] In this regard, it has been held that the service and responsibility must relate to an actual participation in or handling of the case.[FN4]

CUMULATIVE SUPPLEMENT

Cases:

Referring attorney retained to represent client in medical malpractice case complied with professional responsibility rule governing division of legal fees when he entered into a fee-sharing arrangement with another attorney who agreed to act as trial counsel; client consented to retention of the other attorney and was apprised that his involvement would not result in an increase in fees, and referring attorney's correspondence conveyed that both his and trial attorney's law firms had assumed responsibility for the representation, noting that he would be regularly "assisting and consulting with" trial counsel. Samuel v. Druckman & Sinel, LLP, 12 N.Y.3d 205, 879 N.Y.S.2d 10, 906 N.E.2d 1042 (2009).

[END OF SUPPLEMENT]

[FN1] Altschul v. Sayble, 83 Cal. App. 3d 153, 147 Cal. Rptr. 716 (2d Dist. 1978); Palmer v. Breyfogle, 217 Kan. 128, 535 P.2d 955 (1975); Fitzgibbon v. Carey, 70 Or. App. 127, 688 P.2d 1367 (1984).
- Fee-sharing agreements, see § 257.
- A fee splitting contract between three law firms involved in class actions, which provided one firm with 70% of fees and gave the other two firms 30%, did not violate a former rule of professional conduct regarding such agreements so as to make the contract unenforceable as against public policy, where the contract stated that the fee splitting provision was fair in relation to the division of work, the contract stated in regard to the two firms receiving 30% fees that one would act as a co-lead class counsel and the the other would continue to provide legal services and act in a consulting capacity, and there was no evidence that the clients objected to the firms' involvement. Dardas v. Fleming, Hovenkamp & Grayson, P.C., 194 S.W.3d 603 (Tex. App. Houston 14th Dist. 2006), review denied, (Sept. 1, 2006).
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[FN2] Reich v. Wolf & Fuhrman, P.C., 36 A.D.3d 885, 828 N.Y.S.2d 562 (2d Dep't 2007).
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[FN3] Garces v. Montano, 947 So. 2d 499 (Fla. Dist. Ct. App. 3d Dist. 2006).
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[FN4] Palmer v. Breyfogle, 217 Kan. 128, 535 P.2d 955 (1975).
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Topic Summary Correlation Table References

§ 285. Where several attorneys perform services without agreement on division of fees

West's Key Number Digest

West's Key Number Digest, Attorney and Client 151

A.L.R. Library

Division of fees or compensation between cooperating attorneys, 73 A.L.R.2d 991

In the absence of any agreement or custom to the contrary, attorneys engaged in a joint venture share equally in the profits, while attorneys employed severally receive the reasonable value of their services.[FN1]

The same rule applies where one attorney engages another to assist in the prosecution of litigation for a contingent fee under an agreement to share the fee if successful.[FN2]

Where a contingent fee client retains two law firms pursuant to one contract, the contingent fee is divided between the firms rather than among the attorneys involved.[FN3]

Observation: If an attorney wants a share of the fee awarded another attorney in a case, he or she must perform an appropriate share of the legal services in the case, which requires actual participation in the handling of the case, or the assumption of a financial and ethical responsibility for the case; this fundamental requirement applies to attorneys seeking fees for legal services performed and to those claiming fees for assuming joint responsibility for representation in the case.[FN4]

[FN1] Whalen v. Murphy, 943 So. 2d 504 (La. Ct. App. 1st Cir. 2006), writ denied, 952 So. 2d 696 (La. 2007). - The evidence was sufficient in an attorney fee dispute to support a trial court's finding that co-counsel assumed joint responsibility for an estate's wrongful death claim and that the attorney fees were to be divided equally between co-counsel, even though one co-counsel withdrew representation before the estate received the proceeds from the judgment, where counsel had orally agreed to split the fee equally, and the co-counsel who withdrew had accompanied and assisted the other co-counsel at every deposition and initiated and conducted a lot of the investigatory work on the case. In re Estate of Johnson, 855 N.E.2d 686 (Ind. Ct. App. 2006), transfer denied, (July 19, 2007).

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[FN2] Glover v. Maddox, 98 Ga. App. 548, 106 S.E.2d 288 (1958).

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[FN3] Fontenot & Mitchell v. Rozas, Manuel, Fontenot & McGee, 425 So. 2d 259 (La. Ct. App. 3d Cir. 1982), writ denied, 432 So. 2d 268 (La. 1983).

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[FN4] Neilson v. McCloskey, 186 S.W.3d 285 (Mo. Ct. App. E.D. 2005), reh'g and/or transfer denied, (Jan. 19, 2006) and transfer denied, (Apr. 11, 2006).
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2. Factors Considered in Determining Reasonable Value of Services

Topic Summary Correlation Table References

§ 286. Generally

West's Key Number Digest

West's Key Number Digest, Attorney and Client 140, 141

A.L.R. Library

Excessiveness or inadequacy of attorney's fees in matters involving commercial and general business activities, 23 A.L.R.5th 241

Excessiveness or adequacy of attorneys' fees in domestic relations cases, 17 A.L.R.5th 366

Excessiveness or adequacy of attorneys' fees in matters involving real estate—modern cases, 10 A.L.R.5th 448

Amount of attorneys' compensation in proceedings involving wills and administration of decedents' estates, 58 A.L.R.3d 317

Amount of attorneys' fees in tort actions, 57 A.L.R.3d 584 (sec. 5 superseded in part by Calculations of attorneys' fees under Federal Tort Claims Act—28 U.S.C.A. sec. 2678, 86 A.L.R. Fed. 866)

Amount of attorneys' compensation in matters involving guardianship and trusts, 57 A.L.R.3d 550

Comment Note.—Amount of attorneys' compensation in absence of contract or statute fixing amount, 57 A.L.R.3d 475

In the absence of a controlling contract, statute, or rule of court fixing the amount of compensation, an attorney is entitled to the reasonable value of services performed for the client; such reasonable value is a question of fact to be determined in the light of the particular circumstances of each individual case, and the trial court, where the services were performed in that court, has a large measure of discretion in fixing the reasonable value of legal services.[FN1] The factors, in the rules of professional conduct, for determining the reasonableness of an attorney fee are not of equal weight, and all of the factors need not be considered.[FN2]

The most useful starting point for determining the amount of a reasonable attorney's fee is a lodestar figure.[FN3] The "lodestar method" of calculating attorney's fees involves determining the number of hours reasonably spent on a case multiplied by a reasonable hourly rate.[FN4] The lodestar is usually increased by a weighted multiplier to arrive at a final award.[FN5] While the lodestar method is generally preferred when calculating statutory attorney's fees, the "percentage of recovery" approach is used in calculating fees under the common fund doctrine.[FN6] The choice of whether to use the lodestar method or a percentage-of-recovery method, when determining an attorney's fee award under the common fund doctrine, is within the district court's discretion.[FN7]

Practice Tip: An attorney will not be awarded attorney's fees where he or she fails to meet the burden of establishing the necessity for and the value of the services rendered.[FN8]

Where a law firm takes over a long-running claim from a firm that filed suit on the claim, an award of fees to the successor firm will be reduced to reflect the time spent by the successor firm in learning the history of the case.[FN9]

After a court has eliminated those hours from a fee request that relate to claims on which the prevailing party either had no right to receive attorney's fees or failed to prove its case and had established the appropriate hourly rate, it must determine whether the remaining hours were reasonably expended.[FN10]

A trial court's award of attorney's fees is reviewed on appeal for abuse of discretion.[FN11]

A lawyer is not entitled to remuneration of disbursements expended upon duties which the lawyer has the primary duty of performing himself or herself.[FN12]

An attorney's fee allowed under the Civil Rights Attorney's Fees Awards Act is not limited to the amount provided in a contingent fee agreement entered into by the plaintiff and his or her counsel; such an agreement is only one of several factors to be considered in assessing a reasonable fee.[FN13] Should a fee agreement provide less than a reasonable fee for the time and effort by counsel for the prevailing plaintiff, the defendant should be required to pay the higher amount, and the defendant is not required to pay the amount called for in a contingent fee contact if it is more than a reasonable fee calculated in the usual way.[FN14] In calculating compensation for the work of paralegals and law clerks as part of an attorney's fee award under this statute, the relevant market rates for the work of paralegals and law clerks, rather than their actual cost to the attorney, may properly be applied.[FN15]

Attorney's fee awards under the Clean Air Act follow principles and case law governing fee awards under 42 U.S.C.A. § 1988; thus, fees are calculated under the lodestar approach (number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate for attorneys and paraprofessionals).[FN16]

Under the Model Rules of Professional Conduct, the factors to be considered in determining the reasonableness of a fee include the nature and length of the professional relationship with the client.[FN17]

CUMULATIVE SUPPLEMENT

Cases:

In class civil rights action that successfully challenged adequacy of foster care provided by counties as allegedly violative of children's First, Ninth and Fourteenth Amendment rights, delay in payment of fees of

claimants' counsel did not constitute permissible basis for enhancing "lodestar" figure, for purpose of determining reasonable fee award for claimants, given that such delay was to be expected in virtually every class action, and that acceptance of this factor as basis for enhancement was inconsistent with strong presumption as to reasonableness of "lodestar" figure. Kenny A. ex rel. Winn v. Perdue, 532 F.3d 1209 (11th Cir. 2008), petition for cert. filed, 77 U.S.L.W. 3442 (U.S. Jan. 29, 2009).

Attorneys' representation of interests of foster children, in successfully pursuing to favorable settlement class civil rights litigation challenging adequacy of foster care provided by counties as allegedly violative of children's First, Ninth and Fourteenth Amendment rights, was not type of representation, such as representation of pedophile or of atheist in Bible Belt, that might expose attorneys to social, political or professional ostracism, as possible basis for enhancement of attorneys' "lodestar" fee under fee-shifting provision of civil rights statutes. Kenny A. ex rel. Winn v. Perdue, 532 F.3d 1209 (11th Cir. 2008), petition for cert. filed, 77 U.S.L.W. 3442 (U.S. Jan. 29, 2009).

In class civil rights action that successfully challenged adequacy of foster care provided by counties as allegedly violative of children's First, Ninth and Fourteenth Amendment rights, possibility that, whether as result of high quality of representation provided by claimants' attorneys, poor quality of representation provided by attorneys who represented state officials, or sheer dumb luck, claimants may have obtained greater relief pursuant to settlement than that to which they were legally entitled was not permissible basis for enhancing "lodestar" figure, in determining reasonable fee award for claimants. Kenny A. ex rel. Winn v. Perdue, 532 F.3d 1209 (11th Cir. 2008), petition for cert. filed, 77 U.S.L.W. 3442 (U.S. Jan. 29, 2009).

Regardless of whether attorneys' fees in connection with a class action settlement are determined using the lodestar method or awarded based on a "percentage-of-the-benefit" analysis under the common fund doctrine, the ultimate goal is the award of a reasonable fee to compensate counsel for their efforts, irrespective of the method of calculation. In re Consumer Privacy Cases, 175 Cal. App. 4th 545, 96 Cal. Rptr. 3d 127 (1st Dist. 2009), review denied, (Sept. 30, 2009).

The party requesting attorney fees has the burden of providing the court with the necessary information to determine the reasonableness of its request. Nova Research, Inc. v. Penske Truck Leasing Co., 405 Md. 435, 952 A.2d 275 (2008).

When determining the appropriateness of attorney's fees in a class action lawsuit, the lodestar method works well outside the statutory fee cases where the nature of the settlement evades the precise evaluation needed for the percentage of recovery method. Sutter v. Horizon Blue Cross Blue Shield of New Jersey, 406 N.J. Super. 86, 966 A.2d 508 (App. Div. 2009).

Regardless of any theoretical preference for one method of fee calculation over another, the overriding benchmark for awards of attorney fees under both the state action statute and the general premise of the common fund doctrine is that attorney fees must be "reasonable". Layman v. State, 376 S.C. 434, 658 S.E.2d 320 (2008).

Whether the common fund doctrine applies in a given case is a question of law for the court to decide. House v. Estate of Edmondson, 245 S.W.3d 372 (Tenn. 2008).

[END OF SUPPLEMENT]

[FN1] Curran v. Security Ins. Co., 195 F. Supp. 562 (W.D. Ark. 1961); Wolf v. Mutual Ben. Health and Acc. Ass'n, 188 Kan. 694, 366 P.2d 219 (1961); Hudson v. Smith, 391 S.W.2d 441 (Tex. Civ. App. Houston 1965), writ refused n.r.e., (Dec. 31, 1965).

- A reasonable attorney's fee for the provider of a satellite television (TV) programming who obtained a default judgment against the defendant for theft of satellite transmissions was $1,500 rather than the requested amount of $11,245.12; the plaintiff failed to provide information as to the specific hourly rates charged or the justification therefor, and the court's experience indicated the case was routine and straightforward, and did not require extensive research. DIRECTV, Inc. v. Hamilton, 215 F.R.D. 460 (S.D. N.Y. 2003), subsequent determination, 2003 WL 21664817 (S.D. N.Y. 2003).

- Under the Model Rules of Professional Conduct, a lawyer must not make an agreement for, charge, or collect

an unreasonable fee or an unreasonable amount for expenses. ABA Model Rules of Professional Conduct Rule 1.5(a).
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[FN2] In re N.M. Indirect Purchasers Microsoft Corp., 140 N.M. 879, 2007-NMCA-007, 149 P.3d 976 (Ct. App. 2006), cert. denied, 141 N.M. 163, 2007-NMCERT-001, 152 P.3d 150 (2007).
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[FN3] Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 106 S. Ct. 3088, 92 L. Ed. 2d 439 (1986), opinion supplemented, 483 U.S. 711, 107 S. Ct. 3078, 97 L. Ed. 2d 585 (1987).
- A fee agreement which states that the attorney will seek an award of reasonable attorney fees from the court implicitly incorporates the lodestar approach for computing reasonable attorney's fees. Moore v. State Farm Mut. Auto. Ins. Co., 916 So. 2d 871 (Fla. Dist. Ct. App. 2d Dist. 2005).
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[FN4] Chun v. Board of Trustees of Employees' Retirement System of State of Hawai'i, 106 Haw. 416, 106 P.3d 339 (2005), cert. denied, 106 Haw. 477, 106 P.3d 1120 (2005) (class action litigation where the recovery has resulted in the creation of a common fund).
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[FN5] Charles I. Friedman, P.C. v. Microsoft Corp., 213 Ariz. 344, 141 P.3d 824 (Ct. App. Div. 1 2006), review denied, (Dec. 6, 2006); Chun v. Board of Trustees of Employees' Retirement System of State of Hawai'i, 106 Haw. 416, 106 P.3d 339 (2005), cert. denied, 106 Haw. 477, 106 P.3d 1120 (2005).
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[FN6] Okeson v. City of Seattle, 130 Wash. App. 814, 125 P.3d 172 (Div. 1 2005), as amended, (Dec. 22, 2005).
- Common fund doctrine, see § 243.
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[FN7] In re N.M. Indirect Purchasers Microsoft Corp., 140 N.M. 879, 2007-NMCA-007, 149 P.3d 976 (Ct. App. 2006), cert. denied, 141 N.M. 163, 2007-NMCERT-001, 152 P.3d 150 (2007).
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[FN8] Sand v. Lammers, 150 A.D.2d 355, 540 N.Y.S.2d 876 (2d Dep't 1989).
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[FN9] Malarkey v. Texaco, Inc., 794 F. Supp. 1248 (S.D. N.Y. 1992).
- An attorney for the beneficiary of an accidental loss policy, who prevailed on the insurer's appeal of a decision awarding her benefits under the policy, could not recover fees for the time he spent traveling to and attending oral arguments on appeal, as such fees were for unnecessary and duplicative work; oral arguments were presented entirely by the senior partner at the attorney's firm, not by the attorney. Cox v. Reliance Standard Life Ins. Co., 235 F. Supp. 2d 481 (E.D. Va. 2002).
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[FN10] Wright v. U-Let-Us Skycap Services, Inc., 648 F. Supp. 1216 (D. Colo. 1986).
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[FN11] Purcell v. Seguin State Bank and Trust Co., 999 F.2d 950 (5th Cir. 1993); In re LaRocca's Trust Estate, 431 Pa. 542, 246 A.2d 337 (1968).
- A trial court's award to the plaintiff wife of $2,000 as prospective attorney's fees, to be incurred in defending an appeal of a divorce decree, constitutes an abuse of discretion where the briefs were short, oral argument was waived, and no novel issues were presented. In re Marriage of Metcalf, 183 Mont. 266, 598 P.2d 1140 (1979).
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[FN12] Levy v. State, 100 Misc. 2d 781, 420 N.Y.S.2d 154 (Ct. Cl. 1979).
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[FN13] Blanchard v. Bergeron, 489 U.S. 87, 109 S. Ct. 939, 103 L. Ed. 2d 67 (1989), referring to 42 U.S.C.A. § 1988.
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[FN14] Blanchard v. Bergeron, 489 U.S. 87, 109 S. Ct. 939, 103 L. Ed. 2d 67 (1989).
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[FN15] Missouri v. Jenkins by Agyei, 491 U.S. 274, 109 S. Ct. 2463, 105 L. Ed. 2d 229, 54 Ed. Law Rep. 16 (1989).
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[FN16] American Lung Ass'n v. Reilly, 144 F.R.D. 622 (E.D. N.Y. 1992), referring to 42 U.S.C.A. § 7604(d).
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[FN17] ABA Model Rules of Professional Conduct Rule 1.5(a)(6).
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§ 287. Novelty or difficulty of issues

West's Key Number Digest

West's Key Number Digest, Attorney and Client 140, 141

Among the factors to be considered in determining the reasonable value of legal services are the nature, extent, complexity, novelty and difficulty of the services rendered.[FN1]

Conversely, the fact that an action involves no novel or difficult questions, and thus a low risk is assumed by counsel, may be a reason for limiting attorney's fees.[FN2] Although a case involves difficult legal issues, a

fee award does not have to be enhanced where the case is relatively uncomplicated, involves only a few witnesses, a few court appearances, a few days of trial, and very little discovery.[FN3]

[FN1] Bowe v. Colgate-Palmolive Co., 443 F. Supp. 696 (S.D. Ind. 1977); Ullman, Perlmutter and Sklaver v. Byers, 96 Conn. App. 501, 900 A.2d 602 (2006); Succession of D'Antoni, 342 So. 2d 1281 (La. Ct. App. 4th Cir. 1977); Padilla v. Sansivieri, 31 A.D.3d 64, 815 N.Y.S.2d 173 (2d Dep't 2006); In re Estate of Weisberger, 224 S.W.3d 154 (Tenn. Ct. App. 2006), appeal denied, (Apr. 16, 2007) (skill requisite to perform the legal service properly).
- Under the Model Rules of Professional Conduct, the factors to be considered in determining the reasonableness of a fee include the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly. ABA Model Rules of Professional Conduct Rule 1.5(a)(1).
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[FN2] Lucerne Inv. Co. v. Estate Belvedere, Inc., 411 F.2d 1205 (3d Cir. 1969); Pete v. United Mine Workers of America Welfare and Retirement Fund of 1950, 517 F.2d 1275, 19 Fed. R. Serv. 2d 1012 (D.C. Cir. 1975); Kiser v. Huge, 517 F.2d 1237 (D.C. Cir. 1974), opinion reinstated in part on reh'g, 517 F.2d 1275, 19 Fed. R. Serv. 2d 1012 (D.C. Cir. 1975).
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[FN3] Hamilton v. Bradford, 502 F. Supp. 822, 31 Fed. R. Serv. 2d 1030 (S.D. Miss. 1980).
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§ 288. Time required; time limitations

West's Key Number Digest

West's Key Number Digest, Attorney and Client 140, 141

One of the more important elements to be considered in determining the reasonable value of an attorney's services is the time and labor spent by him or her in the performance of those services.[FN1] However, the time element must be considered in conjunction with other factors.[FN2]

The factors for determining whether attorney fees are reasonable also includes time limitations imposed by the circumstances.[FN3]

[FN1] Beecher v. Able, 435 F. Supp. 397 (S.D. N.Y. 1975); Ullman, Perlmutter and Sklaver v. Byers, 96 Conn. App. 501, 900 A.2d 602 (2006); Grayson v. Fishlove, 266 So. 2d 38 (Fla. Dist. Ct. App. 3d Dist. 1972); Lewis v. Smith, 274 Ga. App. 528, 618 S.E.2d 32 (2005), cert. denied, (Dec. 1, 2005) (an attorney is entitled to have his fees valued in light of the amount of work he has done); Padilla v. Sansivieri, 31 A.D.3d 64, 815 N.Y.S.2d 173 (2d Dep't 2006); In re Estate of Weisberger, 224 S.W.3d 154 (Tenn. Ct. App. 2006), appeal denied, (Apr. 16, 2007).
- Under the Model Rules of Professional Conduct, the factors to be considered in determining the reasonableness of a fee include the the time and labor required. ABA Model Rules of Professional Conduct Rule 1.5(a)(1).
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[FN2] Rubenstein v. Republic Nat. Life Ins. Co., 74 F.R.D. 337 (N.D. Tex. 1976); In re Marks' Estate, 74 Ill. App. 3d 599, 30 Ill. Dec. 502, 393 N.E.2d 538 (1st Dist. 1979); In re Wood's Estate, 55 Ohio App. 2d 67, 9 Ohio Op. 3d 225, 379 N.E.2d 256 (10th Dist. Franklin County 1977).
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[FN3] In re Estate of Weisberger, 224 S.W.3d 154 (Tenn. Ct. App. 2006), appeal denied, (Apr. 16, 2007).
- Under the Model Rules of Professional Conduct, the factors to be considered in determining the reasonableness of a fee include the the time limitations imposed by the client or by the circumstances. ABA Model Rules of Professional Conduct Rule 1.5(a)(5).
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§ 289. Loss of opportunity for other employment

West's Key Number Digest

West's Key Number Digest, Attorney and Client 140, 141

The fact that an attorney, in accepting employment, necessarily lost the opportunity to accept other employment has been considered a significant factor in connection with other matters in determining the reasonableness of a fee.[FN1]

[FN1] State of Iowa v. Union Asphalt & Roadoils, Inc., 281 F. Supp. 391, 12 Fed. R. Serv. 2d 493 (S.D. Iowa 1968), judgment aff'd, 409 F.2d 1239 (8th Cir. 1969) and order aff'd, 408 F.2d 1171 (8th Cir. 1969); Confederated Bands of Ute Indians v. U.S., 120 Ct. Cl. 609, 1951 WL 5396 (1951).
- Under the Model Rules of Professional Conduct, the factors to be considered in determining the reasonableness of a fee include the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer. ABA Model Rules of Professional Conduct Rule 1.5(a)(2).
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§ 290. Skill and standing of counsel

West's Key Number Digest

West's Key Number Digest, Attorney and Client 140, 141

In assessing the reasonable value of an attorney's services, his or her standing in the profession for knowledge, experience, reputation, ability, skill, and integrity should be considered.[FN1]

An attorney's unique skill or experience, however, is not an important factor where the case involved is not such as to call for such specialized ability.[FN2]

[FN1] State of Iowa v. Union Asphalt & Roadoils, Inc., 281 F. Supp. 391, 12 Fed. R. Serv. 2d 493 (S.D. Iowa 1968), judgment aff'd, 409 F.2d 1239 (8th Cir. 1969) and order aff'd, 408 F.2d 1171 (8th Cir. 1969); Roccaforte v. Nintendo of America, Inc., 917 So. 2d 1143 (La. Ct. App. 5th Cir. 2005); Padilla v. Sansivieri, 31 A.D.3d 64, 815 N.Y.S.2d 173 (2d Dep't 2006); Widdicombe v. Tucker-Cales, 366 S.C. 75, 620 S.E.2d 333 (Ct. App. 2005); In re Estate of Weisberger, 224 S.W.3d 154 (Tenn. Ct. App. 2006), appeal denied, (Apr. 16, 2007).
- Under the Model Rules of Professional Conduct, the factors to be considered in determining the reasonableness of a fee include the experience, reputation, and ability of the lawyer or lawyers performing the services. ABA Model Rules of Professional Conduct Rule 1.5(a)(7).
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[FN2] Milwaukee Towne Corp. v. Loew's, Inc., 190 F.2d 561 (7th Cir. 1951).
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§ 291. Value of interests involved

West's Key Number Digest

West's Key Number Digest, Attorney and Client 140, 141

In determining the reasonable value of professional services, a significant factor is the amount of money, or the value of the property or interests, involved.[FN1]

The responsibility assumed by an attorney, where the interests are great, should be given substantial weight in determining the compensation to which the attorney is entitled.[FN2] However, the amount involved is not controlling, but must be considered in relation to other factors in arriving at a reasonable fee.[FN3]

CUMULATIVE SUPPLEMENT

Cases:

No single factor in rule of professional conduct governing reasonable attorney fees merits special emphasis over the other factors in determining a reasonable fee in cases involving a minor; instead, the trial court may conclude that certain factors merit greater weight under the unique circumstances of a particular case. West's T.C.A. § 34–1–121(b); Sup.Ct.Rules, Rule 8, Rules of Prof.Conduct, Rule 1.5(a)(1–10). Wright ex rel. Wright v. Wright, 337 S.W.3d 166 (Tenn. 2011).

[END OF SUPPLEMENT]

[FN1] Fergus v. Songer, 150 Cal. App. 4th 552, 59 Cal. Rptr. 3d 273 (2d Dist. 2007), as modified on denial of reh'g, (June 1, 2007) and review denied, (July 25, 2007); Beard v. Westmoreland, 90 Ga. App. 632, 84 S.E.2d 93 (1954); In re LaRocca's Trust Estate, 431 Pa. 542, 246 A.2d 337 (1968).
- Under the Model Rules of Professional Conduct, the factors to be considered in determining the reasonableness of a fee include the amount involved. ABA Model Rules of Professional Conduct Rule 1.5(a)(4).
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[FN2] Roccaforte v. Nintendo of America, Inc., 917 So. 2d 1143 (La. Ct. App. 5th Cir. 2005); In re Atwood's Trust, 227 Minn. 495, 35 N.W.2d 736, 9 A.L.R.2d 1126 (1949); Vaughn v. Gunter, 458 S.W.2d 523, 57 A.L.R.3d 541 (Tex. Civ. App. Dallas 1970), writ refused n.r.e., 461 S.W.2d 599 (Tex. 1970).
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[FN3] Lucerne Inv. Co. v. Estate Belvedere, Inc., 411 F.2d 1205 (3d Cir. 1969).
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§ 292. Results secured

West's Key Number Digest

West's Key Number Digest, Attorney and Client 140, 141

The results obtained for the benefit of the client are important in determining the reasonable value of the attorney's services.[FN1]

[FN1] Fergus v. Songer, 150 Cal. App. 4th 552, 59 Cal. Rptr. 3d 273 (2d Dist. 2007), as modified on denial of reh'g, (June 1, 2007) and review denied, (July 25, 2007); Lewis v. Smith, 274 Ga. App. 528, 618 S.E.2d 32 (2005), cert. denied, (Dec. 1, 2005); Trask v. Kam, 44 Haw. 10, 44 Haw. 56, 352 P.2d 320, 88 A.L.R.2d 1 (1959); In re Estate of Johnson, 855 N.E.2d 686 (Ind. Ct. App. 2006), transfer denied, (July 19, 2007) (value conferred on the client); Roccaforte v. Nintendo of America, Inc., 917 So. 2d 1143 (La. Ct. App. 5th Cir. 2005).
- Under the Model Rules of Professional Conduct, the factors to be considered in determining the reasonableness of a fee include the results obtained. ABA Model Rules of Professional Conduct Rule 1.5(a)(4).
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Topic Summary Correlation Table References

§ 293. Ability of client to pay

West's Key Number Digest

West's Key Number Digest, Attorney and Client 140, 141

Some courts hold that an award of attorney's fees must be based on both parties' respective abilities to pay and that an award of attorney's fees on appeal must be based on consideration of the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal.[FN1] An attorney for an indigent appellant in an involuntary commitment proceeding may be awarded attorney fees and reimbursement for actual out-of-pocket expenses incurred in pursuit of the appellant's interests.[FN2]

[FN1] In re Marriage of Hunt, 476 N.W.2d 99 (Iowa Ct. App. 1991).
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[FN2] Ritterbusch v. Speaks, 602 S.W.2d 937 (Mo. Ct. App. W.D. 1980).
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§ 294. Customary charges for similar services in same locality

West's Key Number Digest

West's Key Number Digest, Attorney and Client 140, 141

In determining the reasonable value of legal services, some courts have deemed it proper to consider the amounts customarily charged or allowed for similar services in the same locality.[FN1]
Practice Tip: Some states have statutes declaring that the usual and customary fee in cases similar to the one before the court are presumed to be reasonable.[FN2]

CUMULATIVE SUPPLEMENT

Cases:

Court would use prevailing hourly rates in Puerto Rico, rather than Boston, in calculating attorney fee award for prevailing plaintiffs in § 1983 action challenging Puerto Rico insurance commissioner's politically motivated investigation and revocation of their agency's license, even though plaintiffs' attorneys practiced in Boston, where litigation involved mainly civil rights issues, that, although complex, required no specialized ability in order to provide plaintiffs with adequate legal representation, and there were available lawyers with required degree of experience and specialization in Puerto Rico who would have charged significantly lower fees. Guillemard-Ginorio v. Contreras, 575 F. Supp. 2d 346 (D.P.R. 2008), opinion amended and superseded, 603 F. Supp. 2d 301 (D.P.R. 2009).

[END OF SUPPLEMENT]

[FN1] State of Iowa v. Union Asphalt & Roadoils, Inc., 281 F. Supp. 391, 12 Fed. R. Serv. 2d 493 (S.D. Iowa 1968), judgment aff'd, 409 F.2d 1239 (8th Cir. 1969) and order aff'd, 408 F.2d 1171 (8th Cir. 1969); Ullman, Perlmutter and Sklaver v. Byers, 96 Conn. App. 501, 900 A.2d 602 (2006); Padilla v. Sansivieri, 31 A.D.3d 64, 815 N.Y.S.2d 173 (2d Dep't 2006); In re Estate of Weisberger, 224 S.W.3d 154 (Tenn. Ct. App. 2006), appeal denied, (Apr. 16, 2007); In re Wheeler's Estate, 71 Wash. 2d 789, 431 P.2d 608 (1967).
- Under the Model Rules of Professional Conduct, the factors to be considered in determining the reasonableness of a fee include the fee customarily charged in the locality for similar legal services. ABA Model Rules of Professional Conduct Rule 1.5(a)(3).
- An award of $20,000 in attorney's fees in connection with a post-partition sale of property for $200,000 was reasonable where the evidence reflected that the plaintiffs got the result they wanted, the attorney spent 200 hours on the case over a three-year period, and other attorneys in the same county testified that $20,000 would be the fee customarily charged in the locality for similar legal services. Anderson v. Lee, 621 So. 2d 1305 (Ala. 1993).
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[FN2] Gifford v. Old Republic Ins. Co., 613 S.W.2d 43 (Tex. Civ. App. Houston 14th Dist. 1981).
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§ 295. Compensation of public officials for similar services

West's Key Number Digest

West's Key Number Digest, Attorney and Client 140, 141

Some courts have limited an attorney's fee to the compensation paid to public officers for similar services.[FN1] On the other hand, this basis of computation has been rejected by other courts.[FN2]

[FN1] Hill v. Superior Court In and For Humboldt County, 46 Cal. 2d 169, 293 P.2d 10 (1956).
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[FN2] Cape Cod Food Products v. National Cranberry Ass'n, 119 F. Supp. 242 (D. Mass. 1954).
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§ 296. Minimum fee schedules of bar association

West's Key Number Digest

West's Key Number Digest, Attorney and Client 140, 141

Courts in older cases have examined minimum fee schedules adopted by bar associations as at least persuasive evidence of what constitutes a reasonable fee for legal services.[FN1] However, since minimum fee schedules for the performance of legal services may constitute illegal price-fixing within the antitrust proscription of the Sherman Act,[FN2] their evidentiary value may have been vitiated.[FN3]

An attorney may not attempt to treat a claim as a collection matter, within the purview of a bar association's minimum fee schedule allowing a certain percentage of the amount collected as a fee, as a subterfuge for reaching an unconscionable result.[FN4]

[FN1] Krieger v. Colby, 106 F. Supp. 124 (S.D. Cal. 1952); In re Freeman's Estate, 34 N.Y.2d 1, 355 N.Y.S.2d 336, 311 N.E.2d 480 (1974) (but noting that the surrogate made an independent determination of the reasonableness of the fee allowed).

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[FN2] Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975); U.S. v. Oregon State Bar, 385 F. Supp. 507 (D. Or. 1974).

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[FN3] Colonial Plumbing & Heating Supply Co. v. Contemporary Const. Co., Inc., 464 A.2d 741 (R.I. 1983).

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[FN4] Westchester County Bar Ass'n v. St. John (State Report Title: Matter of St. John), 43 A.D.2d 218, 350 N.Y.S.2d 737 (2d Dep't 1974).

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§ 297. Cost of living; office overhead

West's Key Number Digest

West's Key Number Digest, Attorney and Client 140, 141, 152

What is a reasonable fee for legal services depends in part on the cost of living[FN1] and the attorney's overhead expense in maintaining his or her office.[FN2]

[FN1] Henriques v. Vaccaro, 218 La. 1020, 51 So. 2d 611 (1951); Egress v. Egress, 202 Md. 510, 97 A.2d 335 (1953).
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[FN2] In re Bloomer's Estate, 37 N.J. Super. 85, 117 A.2d 17 (App. Div. 1955).
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§ 298. Services duplicating work done by others

West's Key Number Digest

West's Key Number Digest, Attorney and Client 140, 141

It is proper, in determining the reasonable fee for legal services, to consider whether the work done by the attorney duplicates work done by other attorneys who have also received, or are entitled to, pay.[FN1] However, there is no duplication of efforts where the work of an associate is reviewed by a senior attorney where the litigation is complex.[FN2]

[FN1] Cirimele v. Shinazy, 134 Cal. App. 2d 50, 285 P.2d 311, 52 A.L.R.2d 860 (1st Dist. 1955).
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[FN2] Donahue v. Watson, 413 N.E.2d 974 (Ind. Ct. App. 1980).
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§ 299. Compensation contingent on success

West's Key Number Digest

West's Key Number Digest, Attorney and Client 140, 141, 146.1

The fact that an attorney's employment is undertaken on a contingent basis is a proper factor to be considered in assessing a reasonable compensation for his or her services; a larger fee will be authorized when its payment depends on the attorney's success than where the attorney is to be paid regardless of success.[FN1] If, however, there is little hazard involved in the litigation, the fact that a retainer is on a contingent fee basis may be entitled to little weight.[FN2]

Attorney's fees awarded under certain provisions of the Solid Waste Disposal Act and the Clean Water Act may not be enhanced beyond the lodestar amount on the basis of the attorney's having taken the case on a contingent fee basis.[FN3] The rule of that decision has been regarded by at least one court as applicable to all federal fee-shifting statutes whose relevant language is similar to the statutes at issue in that decision.[FN4] However, other courts have regarded the rule as not extending to cases in which attorneys' fees are awarded under the "common fund" doctrine,[FN5] even if the case began as a "fee-shifting" case and only later developed into a "common fund" case.[FN6]

CUMULATIVE SUPPLEMENT

Cases:

In class civil rights action that successfully challenged adequacy of foster care provided by counties as allegedly violative of children's First, Ninth and Fourteenth Amendment rights, contingent nature of fees charged by claimants' attorneys did not constitute permissible basis for enhancing "lodestar" figure, for purpose of determining reasonable fee award for claimants. Kenny A. ex rel. Winn v. Perdue, 532 F.3d 1209 (11th Cir. 2008), petition for cert. filed, 77 U.S.L.W. 3442 (U.S. Jan. 29, 2009).

A key distinction between the award of fees authorized by statute and the award of fees from a common fund is that the equitable principles underlying the common fund doctrine create a mechanism in which attorneys' fees are not assessed against the losing party by fee-shifting, but rather are taken directly from the common fund or recovery and borne by the prevailing party through fee-spreading. Layman v. State, 376 S.C. 434, 658 S.E.2d 320 (2008).

[END OF SUPPLEMENT]

[FN1] Prucka v. Papio Natural Resources Dist., 206 Neb. 234, 292 N.W.2d 293 (1980).
- Contingency fee agreements generally, see §§ 258 to 261.
- Under the Model Rules of Professional Conduct, the factors to be considered in determining the reasonableness of a fee include whether the fee is fixed or contingent. ABA Model Rules of Professional Conduct Rule 1.5(a)(8).
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[FN2] Bordonaro Bros Theatres v. Paramount Pictures, 113 F. Supp. 196 (W.D. N.Y. 1953).
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[FN3] City of Burlington v. Dague, 505 U.S. 557, 112 S. Ct. 2638, 120 L. Ed. 2d 449 (1992).
- Lodestar method of collecting fees, see § 286.
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[FN4] Lipsett v. Blanco, 975 F.2d 934, 77 Ed. Law Rep. 711 (1st Cir. 1992) (applying rule to fee awards under 42 U.S.C.A. § 1988).
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[FN5] In re Washington Public Power Supply System Securities Litigation, 19 F.3d 1291 (9th Cir. 1994).
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[FN6] McLendon v. Continental Group, Inc., 872 F. Supp. 142 (D.N.J. 1994).
- Common fund doctrine generally, see § 243.
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§ 300. Generally

West's Key Number Digest

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In the absence of statutory authority or consent of the attorney's client, the court cannot adjudge and decree the attorney a portion of the proceeds of a judgment at law recovered by the attorney in favor of the client.[FN1]

Where an attorney commits professional negligence to the damage of his or her client, the loss to the client is properly set off against the attorney's pre-petition action for fees in the client's subsequent bankruptcy.[FN2]

[FN1] Grigsby v. Hopkins, 218 S.W.2d 275 (Tex. Civ. App. Fort Worth 1949), writ refused; In re Pingree's Estate, 82 Utah 437, 25 P.2d 937, 90 A.L.R. 96 (1933).
- The trial court's subject matter jurisdiction in a matrimonial action does not normally encompass the power to adjudicate financial disputes that may crop up between a litigant and the litigant's attorney. Fischer v. Fischer, 375 N.J. Super. 278, 867 A.2d 1190 (App. Div. 2005), certification denied, 183 N.J. 590, 874 A.2d 1107 (2005).
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[FN2] In re Danelson, 142 B.R. 932 (Bankr. D. Mont. 1992).
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§ 301. Right to sue

West's Key Number Digest

West's Key Number Digest, Attorney and Client 136, 163

The right of an attorney to recover by suit the compensation to which he or she is entitled for services, either under express contract or on a quantum meruit, is well established.[FN1]

A judgment in divorce proceedings obligating a husband to pay a wife's legal fees does not preclude the wife's attorney from seeking to recover payment of fees in a separate action based on his retainer agreement with the wife.[FN2]

Once an attorney's client has been dismissed from a case, the attorney may no longer prosecute the cause on his or her own behalf to secure a contingent fee.[FN3] Thus, an attorney who represented plaintiff in a divorce action has no right, independent of the client who died prior to trial, to enforce an award of attorney's fees.[FN4]

[FN1] Wall v. Bruckner, Greene and Manas, P.A., 344 So. 2d 947 (Fla. Dist. Ct. App. 3d Dist. 1977); Lyons v. Hall, 90 So. 2d 519, 60 A.L.R.2d 1003 (La. Ct. App. 2d Cir. 1956).
- Law firm partners who had worked on the law firm's defense of a client in an underlying real estate litigation had a justiciable interest in receiving attorney fees from the client, and thus, they had standing to sue the client. Spurgeon v. Coan & Elliott, 180 S.W.3d 593 (Tex. App. Eastland 2005).
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[FN2] In re Thompson, 30 A.D.3d 154, 816 N.Y.S.2d 441 (1st Dep't 2006).
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[FN3] Dow Chemical Co. v. Benton, 163 Tex. 477, 357 S.W.2d 565 (1962).
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[FN4] Adamson v. Adamson, 21 Utah 2d 39, 439 P.2d 854 (1968).
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§ 302. Right to sue—Adverse party or attorney after compromise by client

West's Key Number Digest

West's Key Number Digest, Attorney and Client 136, 163

If the defendant is instrumental in bringing about the settlement of the plaintiff's action, the plaintiff's attorney may, where he or she was not notified, sue not only the client, but the adverse party, for his or her compensation.[FN1]

A plaintiff attorney, whose client had executed a contingent fee contract for collection of a claim, is entitled to recover his or her contingent fee from another attorney who, in representing the adverse party, settled the claim with the first attorney's client after he or she had been advised of the latter's contingent fee status.[FN2] On the other hand, a plaintiff attorney's recovery of his or her contingent fee has been denied under similar circumstances where the other attorney was not advised of the contingent fee contract and was told by the claimant that he or she was no longer represented by the attorney.[FN3]

[FN1] Skelly v. Richman, 10 Cal. App. 3d 844, 89 Cal. Rptr. 556 (2d Dist. 1970).
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[FN2] Skelly v. Richman, 10 Cal. App. 3d 844, 89 Cal. Rptr. 556 (2d Dist. 1970).
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[FN3] Bryan & Amidei v. Law, 435 S.W.2d 587 (Tex. Civ. App. Fort Worth 1968).
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VI. Compensation of Attorneys
E. Recovery by Action

Topic Summary Correlation Table References

§ 303. Pleading

West's Key Number Digest

West's Key Number Digest, Attorney and Client 165

To state a cause of action for the violation of a fee splitting agreement, a plaintiff must plead facts in its petition showing that the agreement complies with the rule of professional conduct governing the division of fees.[FN1]

An attorney's complaint alleged that his investigative work on behalf of a client in a personal injury action was significant and that the case against a car manufacturer, which was subsequently brought by different attorneys, could not have been successfully maintained without it, and thus, the attorney's complaint was sufficient to allege at least an implied agreement with the client for the purposes of a quantum meruit action brought against the attorneys who represented the client at trial and obtained a settlement.[FN2]

In an action to recover an attorney's fee, an amendment to the complaint to assert that the plaintiff attorney was entitled to recovery of the fee individually and as assignee of the law firm in which he or she had been a partner when the defendant allegedly breached the employment contract at issue does not constitute a new cause of action and thus relates back.[FN3] Similarly, a law firm's amended complaint against a client to recover the balance due for legal services rendered related back to its original complaint for the purposes of determining the application of an exemption from a requirement that the firm provide the client with written notice of her right to arbitrate a dispute if the firm had not rendered legal services to the client for more than two years.[FN4]

An attorney is not entitled to the benefits of the rule relating to suits on a sworn account where the attorney's petition to recover fees is insufficient in its itemization, and the defendant's general denial will be sufficient to allow all issues in the case to be decided.[FN5]

[FN1] Law Offices of Gary Green, P.C. v. Morrissey, 210 S.W.3d 421 (Mo. Ct. App. S.D. 2006).
- Fee-sharing agreements, see § 257.
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[FN2] Carr v. Pearman, 860 N.E.2d 863 (Ind. Ct. App. 2007), transfer denied, 869 N.E.2d 462 (Ind. 2007).
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[FN3] Foss v. Mansell, 378 So. 2d 802 (Fla. Dist. Ct. App. 3d Dist. 1979).
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[FN4] Borah, Goldstein, Altschuler, Schwartz, & Nahins, PC v. Lubnitzki, 13 Misc. 3d 823, 822 N.Y.S.2d 425 (N.Y. City Civ. Ct. 2006).
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[FN5] Fagin v. Craig, 611 S.W.2d 488 (Tex. Civ. App. Waco 1981), writ refused n.r.e., (Apr. 29, 1981).
- Account stated generally, see § 256.
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Topic Summary Correlation Table References

§ 304. Burden of proof

West's Key Number Digest

West's Key Number Digest, Attorney and Client 167(1) to 167(4)

The attorney has the burden of proving his or her right to fees for services rendered.[FN1] The attorney must show that a contract, express or implied, was entered into[FN2] with full knowledge of all material circumstances known to the attorney,[FN3] that there was performance on his or her part,[FN4] and that he or she has not been paid.[FN5]

[FN1] Hightower v. Detroit Edison Co., 262 Mich. 1, 247 N.W. 97, 86 A.L.R. 509 (1933); Dailey v. Testone, 72 Wash. 2d 662, 435 P.2d 24 (1967) (holding that an attorney must prove by a preponderance of the evidence both the services rendered and the reasonable value thereof).
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[FN2] Ferris v. Snively, 172 Wash. 167, 19 P.2d 942, 90 A.L.R. 278 (1933).
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[FN3] Kiser v. Bailey, 92 Misc. 2d 435, 400 N.Y.S.2d 312 (N.Y. City Civ. Ct. 1977).
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[FN4] Carmichael v. Iowa State Highway Commission, 219 N.W.2d 658 (Iowa 1974).
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[FN5] Ferris v. Snively, 172 Wash. 167, 19 P.2d 942, 90 A.L.R. 278 (1933).
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Topic Summary Correlation Table References

§ 305. Burden of proof—As to fairness of contract

West's Key Number Digest

West's Key Number Digest, Attorney and Client 167(1) to 167(4)

Lawyers almost always possess the more sophisticated understanding of fee arrangements,[FN1] and therefore the burden is on attorneys who have drafted the retainer agreements to show that the contracts are fair, reasonable, and fully known and understood by their clients.[FN2]

As to contracts made between an attorney and his or her client subsequent to employment which are beneficial to the attorney, there is a presumption of unfairness or invalidity attaching to a contract for compensation made after the relationship has been established and the burden is on the attorney to show it was fairly and openly made,[FN3] and that the client was fully informed concerning it and understood its effect.[FN4] Other cases hold that such a presumption does not arise, or the burden of proving validity is not imposed upon the attorney, until the client presents some evidence of undue influence or other inequitable conduct on the part of the attorney.[FN5]

In an action by an attorney to recover payments due under a promissory note executed by the client, under which the client promised to pay attorney's fees, the action was an action on account to the extent that the attorney sought to recover fees accumulated after the date that the promissory note was executed, and thus, as to fees accumulated after the promissory note was executed, the attorney had the burden of establishing the fairness and reasonableness of the fees incurred, of providing information with respect to the results obtained, and establishing that the hours were necessary given the issues raised.[FN6]

CUMULATIVE SUPPLEMENT

Cases:

Evidence in attorney's action against former client for unpaid attorney fees was sufficient to support trial court's award of $63,214.48 for attorney's work on client's underlying personal injury case, and further award of $5,000 for attorney's partial handling of subsequent fee dispute with client, where client executed agreement that provided attorney would represent client and be paid at a rate of $335 per hour for time spent handling client's case if client terminated attorney's services and transferred case to another attorney, client terminated attorney and transferred case, and attorney provided billing records describing his efforts in both matters, and offered expert testimony that his efforts and fees were reasonable. Abrams v. Putney, 304 Ga. App. 626, 697 S.E.2d 269 (2010).

[END OF SUPPLEMENT]

[FN1] Hoover Slovacek LLP v. Walton, 206 S.W.3d 557 (Tex. 2006).
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[FN2] King v. Fox, 7 N.Y.3d 181, 818 N.Y.S.2d 833, 851 N.E.2d 1184 (2006).
- The burden of proving the reasonableness of the fees charged is on the attorney claiming fees are owed. Gold, Weems, Bruser, Sues & Rundell v. Granger, 947 So. 2d 835 (La. Ct. App. 3d Cir. 2006), writ denied, 955 So. 2d 687 (La. 2007).
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[FN3] Behrens v. Wedmore, 2005 SD 79, 698 N.W.2d 555 (S.D. 2005); Kennedy v. Clausing, 74 Wash. 2d 483, 445 P.2d 637 (1968) (fair and full disclosure of the facts upon which it was predicated).
- Contract made during existence of relationship, see § 252.
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[FN4] Fein v. Schwartz, 404 S.W.2d 210 (Mo. Ct. App. 1966); Behrens v. Wedmore, 2005 SD 79, 698 N.W.2d 555 (S.D. 2005).
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[FN5] O'Kelley v. Evans, 119 Ga. App. 167, 166 S.E.2d 392 (1969); Renegar v. Staples, 1963 OK 207, 388 P.2d 867 (Okla. 1963).
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[FN6] Bertrand v. Lax, 2005-Ohio-3261, 2005 WL 1503721 (Ohio Ct. App. 11th Dist. Portage County 2005).
- Account stated generally, see § 256.
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Topic Summary Correlation Table References

§ 306. Expert testimony

West's Key Number Digest

West's Key Number Digest, Attorney and Client 166(1) to 166(5)

Although courts are deemed to be experts on the question of the reasonableness of an attorney's fee and able to draw on their own knowledge and experience in determining a reasonable fee,[FN1] the testimony of duly qualified witnesses, given as expert opinion evidence, is admissible on the issue of the value of an attorney's services.[FN2] Generally the testimony of expert witnesses is not essential,[FN3] but at times a fair and reasonable compensation for the professional services of a lawyer can only be ascertained by the opinion of members of the bar who have become familiar by experience and practice with the character of such services; practicing lawyers occupy the position of experts on questions of this nature.[FN4]

One court reversed an award of attorney's fees where no expert testimony was adduced at the hearing on the fees other than from the lawyer who was claiming the fees.[FN5]

[FN1] Weatherly v. Longoria, 292 S.W.2d 139 (Tex. Civ. App. San Antonio 1956), writ refused n.r.e.
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[FN2] Succession of D'Antoni, 342 So. 2d 1281 (La. Ct. App. 4th Cir. 1977).
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[FN3] Ball v. Posey, 176 Cal. App. 3d 1209, 222 Cal. Rptr. 746 (1st Dist. 1986); Wildes v. Dappinian, 87 R.I. 131, 138 A.2d 823 (1958).
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[FN4] Sullivan v. Fawver, 58 Ill. App. 2d 37, 206 N.E.2d 492 (2d Dist. 1965).
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[FN5] Mullane v. Lorenz, 372 So. 2d 168 (Fla. Dist. Ct. App. 4th Dist. 1979).
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Topic Summary Correlation Table References

§ 307. Expert testimony—Weight

West's Key Number Digest

West's Key Number Digest, Attorney and Client 166(1) to 166(5)

The opinion evidence of expert witnesses as to the value of an attorney's services is not conclusive or binding either on the court or on the jury.[FN1] The jury, or the court, in cases tried without a jury, must weigh the testimony of attorneys as to the value of the services, by reference to their nature, the time occupied in their performance, and other attending circumstances, and by applying to it their own experience and knowledge of the character of such services.[FN2]

The services of an attorney, when rendered in litigation before the same court that is passing on the value of such services, may, of themselves, constitute evidence from which the court alone, unaided by opinion of others as to value, or even contrary to opinion evidence, may reach a conclusion.[FN3]

[FN1] State By and Through State Highway Commission v. Zachary, 230 Or. 381, 370 P.2d 237 (1962).
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[FN2] Brown Oil Tools, Inc. v. Broughton, 353 S.W.2d 505 (Tex. Civ. App. Houston 1962), writ refused n.r.e., (May 23, 1962).
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[FN3] Maryland Cas. Co. v. Turner, 235 Ark. 718, 361 S.W.2d 646 (1962); Murray v. Eagle, 1956 OK 220, 300 P.2d 652 (Okla. 1956); Swenson v. Lowe, 5 Wash. App. 186, 486 P.2d 1120 (Div. 1 1971).
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VI. Compensation of Attorneys
F. Division of Fees on Dissolution of Law Firm

Topic Summary Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Partnership 30

A.L.R. Library

A.L.R. Index, Attorneys' Fees

West's A.L.R. Digest, Attorney and Client §§30

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Topic Summary Correlation Table References

§ 308. Dissolution by death of partner

West's Key Number Digest

West's Key Number Digest, Attorney and Client 30

A.L.R. Library

Rights as to business unfinished or fees uncollected upon withdrawal or death of partner in law firm, 78 A.L.R.2d 280

An attorney's pending contingent fee files are assets of a law partnership for purposes of evaluating the interest of a deceased partner.[FN1]

[FN1] Bader v. Cox, 701 S.W.2d 677 (Tex. App. Dallas 1985), writ refused n.r.e., (Mar. 26, 1986).
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Topic Summary Correlation Table References

§ 309. Dissolution by agreement

West's Key Number Digest

West's Key Number Digest, Attorney and Client 30

A.L.R. Library

Rights in profits earned by partnership or joint adventure after death or dissolution, 55 A.L.R.2d 1391

Fees paid by a law firm's clients after dissolution of a professional limited liability company could be treated as the assets of the firm to be distributed equally among the members,[FN1] but a withdrawing partner is not entitled to share in fees from new business earned by the remaining partners during the winding up of the partnership's affairs.[FN2] A law firm's partnership agreement, which directs that proceeds be distributed in accordance with the terms and percentages as agreed upon by the partners, prevails over a statutory equal allocation rule in an action for an accounting as part of the dissolution of a law firm.[FN3] However, in the absence of a partnership agreement, attorney's fees received on cases in progress upon the dissolution of a law partnership are to be shared by the former partners according to their right to fees in their former partnership, regardless of which partner provides the legal services in the case after dissolution.[FN4]

CUMULATIVE SUPPLEMENT

Cases:

Law firm partner failed to show he "worked" on contingent-fee case that entitled him to a percentage of the referral fee paid to the firm under terms of the partnership agreement, where he did not perform any substantive work on the case, and he failed to show that his good relationship with the city enhanced the firm's reputation such that a court employee recommended another partner in the firm to represent the prospective plaintiff in the contingent-fee action. Phelps v. Frampton, 2007 MT 263, 339 Mont. 330, 170 P.3d 474 (2007).

[END OF SUPPLEMENT]

[FN1] Howard v. Perry, 141 Idaho 139, 106 P.3d 465 (2005).
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[FN2] Gull v. Van Epps, 185 Wis. 2d 609, 517 N.W.2d 531 (Ct. App. 1994).
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[FN3] Sexter v. Kimmelman, Sexter, Warmflash & Leitner, 19 A.D.3d 298, 798 N.Y.S.2d 409 (1st Dep't 2005).
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[FN4] Fox v. Abrams, 163 Cal. App. 3d 610, 210 Cal. Rptr. 260 (2d Dist. 1985).
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VII. Attorneys' Liens
A. General or Retaining Lien

Topic Summary Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Attorney and Client 171 to 192(2)

A.L.R. Library

A.L.R. Index, Attorneys' Liens

West's A.L.R. Digest, Attorney and Client 171 to 192(2))

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VII. Attorneys' Liens
A. General or Retaining Lien

Topic Summary Correlation Table References

§ 310. Generally; dependency on possession of property

West's Key Number Digest

West's Key Number Digest, Attorney and Client 171 to 181, 183 to 185, 187 to 191

A general or retaining lien entitles an attorney, if discharged by the client, to retain the client's papers, property or money until a court, at the request of the client, requires the attorney to deliver the retained items upon the client's furnishing of payment or security for the attorney's fees.[FN1]

A retaining lien prevents a client from using materials held by the attorney until either the parties settle their fee dispute or the client posts adequate security for the payment of the fees.[FN2]

An attorney's general or retaining lien has its roots in the common law, is founded on general principles of justice, does not depend on an express agreement, and is effectuated through the exercise of the inherent power of courts over the relation between attorneys and their clients.[FN3]

Caution: One court has held that a provision of a retainer contract giving the attorney a general retaining, possessory lien on a client's papers and personal property coming into the attorney's possession, to secure payment of the attorney's fees, is void as against public policy.[FN4]

Such a lien's existence depends on possession by the attorney of money or property of the client.[FN5] It is a passive lien which rests wholly upon the right to retain possession until the bill is paid.[FN6]

In some states, there is an express statutory provision for a general or retaining lien that supersedes the common-law lien.[FN7] Where no statute provides for a lien, an attorney secures a lien on a client's cause of action solely by virtue of the agreement between the parties, and the lien need not be created expressly but rather may be implied where the contract between the parties indicates that the attorney is to look to the judgment for the payment of his or her fees.[FN8] However, in the absence of a statute or an express or implied contract, an attorney is not entitled to impose a lien on the real estate of a client for legal fees due in foreclosing a mortgage held by the client.[FN9]

CUMULATIVE SUPPLEMENT

Cases:

A common law possessory or retaining lien, by which an attorney may secure payment for his services, is a passive lien, it is dependent on possession, and it is not actively enforced by foreclosure; it simply allows a lawyer to retain possession of a client's papers, money, or property under certain conditions until the client pays the bill. Mehdipour v. Holland, 2007 OK 69, 177 P.3d 544 (Okla. 2007).

Attorney lien for compensation of law firm, which represented judgment debtor in legal malpractice action against attorneys who allegedly provided the advice that led to the judgment, was not discharged or otherwise

affected when judgment creditors purchased judgment debtor's interest in the malpractice action at sheriff's sale; though provision in attorney's lien statute stated that attorneys had the same right and power over actions and judgments to enforce their liens as their clients had for the amount due thereon to them, such provision's purpose was to recognize an attorney's property interest in a client's case in order to avoid double federal income taxation, and provision was not intended to discharge or otherwise affect the property interest of a law firm in its client's case when the client was displaced by others during the case. Smith v. Moran, Windes & Wong, PLLC, 145 Wash. App. 459, 187 P.3d 275 (Div. 1 2008).

Attorney's lien against proceeds of settlement of client's legal malpractice claim could be enforced against client's judgment creditors who purchased the malpractice cause of action from client at execution sale. Smith v. Moran, Windes & Wong, PLLC, 145 Wash. App. 459, 187 P.3d 275 (Div. 1 2008).

Attorney's lien statute does not require any affirmative acts to establish an attorney's lien for an attorney representing a plaintiff in a lawsuit other than commencing the lawsuit. Smith v. Moran, Windes & Wong, PLLC, 145 Wash. App. 459, 187 P.3d 275 (Div. 1 2008).

[END OF SUPPLEMENT]

[FN1] Michel v. Eighth Judicial Dist. Court ex rel. County of Clark, 117 Nev. 145, 17 P.3d 1003 (2001).
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[FN2] Jernryd v. Nilsson, 117 F.R.D. 416 (N.D. Ill. 1987).
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[FN3] Davidson v. Collier, 104 Ga. App. 546, 122 S.E.2d 465 (1961); Kysor Indus. Corp. v. D.M. Liquidating Co., 11 Mich. App. 438, 161 N.W.2d 452 (1968); Downs v. Hodge, 413 S.W.2d 519 (Mo. Ct. App. 1967).
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[FN4] Academy of California Optometrists, Inc. v. Superior Court, 51 Cal. App. 3d 999, 124 Cal. Rptr. 668 (3d Dist. 1975).
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[FN5] Tri City Equipment Co. v. Modern Real Estate Investments, Ltd., 460 N.W.2d 464, 13 U.C.C. Rep. Serv. 2d 884 (Iowa 1990); Panarello v. Panarello, 245 N.J. Super. 318, 585 A.2d 428 (Ch. Div. 1990); Trendi Sportswear, Inc. v. Air France, 146 Misc. 2d 111, 549 N.Y.S.2d 561 (N.Y. City Civ. Ct. 1989).
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[FN6] Wintter v. Fabber, 618 So. 2d 375 (Fla. Dist. Ct. App. 4th Dist. 1993); Brauer v. Hotel Associates, Inc., 40 N.J. 415, 192 A.2d 831 (1963).
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[FN7] Downs v. Hodge, 413 S.W.2d 519 (Mo. Ct. App. 1967); Mahomet v. Hartford Ins. Co., 3 Wash. App. 560, 477 P.2d 191 (Div. 2 1970).
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[FN8] Trimble v. Steinfeldt, 178 Cal. App. 3d 646, 224 Cal. Rptr. 195 (2d Dist. 1986); Shelowitz, Shelowitz, Terrell & Coffey, P.A. v. Peters, 931 So. 2d 1059 (Fla. Dist. Ct. App. 4th Dist. 2006) (a firm had an implied-in-fact contract and did not need a court order to maintain its lien).
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[FN9] Overholser v. Walsh and Nottebaum, 362 So. 2d 471 (Fla. Dist. Ct. App. 3d Dist. 1978).
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VII. Attorneys' Liens
A. General or Retaining Lien

Topic Summary Correlation Table References

§ 311. Property subject to lien

West's Key Number Digest

West's Key Number Digest, Attorney and Client 182(1) to 182(4)

An attorney's general or retaining lien attaches to all papers, books, documents, securities, moneys, and property of the client coming into the possession of the attorney in the course of and with reference to the attorney's professional employment.[FN1] The lien is not limited to the moneys due in the particular cause out of which possession of the property came, but embraces all such indebtedness arising out of other matters in which the professional relation existed between the attorney and the client.[FN2] However, it is improper for the lien to attach to a document given by the client to the attorney for a purpose inconsistent with the fixing of a lien upon it.[FN3]

The lien may be asserted against a promissory note or other negotiable paper,[FN4] the attorney's and staff's research notes and internal memoranda concerning the client's case,[FN5] or discovery papers.[FN6]

CUMULATIVE SUPPLEMENT

Cases:

Patient's previous attorney had a valid retaining lien over patient's medical records, and therefore trial court improperly compelled attorney to provide records to current attorney in medical malpractice action; portion of contract between attorney and patient that required attorney to make file available to patient did not preclude attorney's common law right to assert a retaining lien as there was provision that excluded a retaining lien. Grimes v. Crockrom, 947 N.E.2d 452 (Ind. Ct. App. 2011).

[END OF SUPPLEMENT]

[FN1] National Sales & Service Co., Inc. v. Superior Court of Maricopa County Arizona, 136 Ariz. 544, 667 P.2d 738 (1983); In re Marriage of Comley, 272 Kan. 202, 32 P.3d 1128 (2001) (papers and money); Brauer v. Hotel Associates, Inc., 40 N.J. 415, 192 A.2d 831 (1963); Capehart v. Church, 136 W. Va. 929, 69 S.E.2d 127 (1952).

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[FN2] Mahomet v. Hartford Ins. Co., 3 Wash. App. 560, 477 P.2d 191 (Div. 2 1970).

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[FN3] National Sales & Service Co., Inc. v. Superior Court of Maricopa County Arizona, 136 Ariz. 544, 667 P.2d 738 (1983).

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[FN4] Kysor Indus. Corp. v. D.M. Liquidating Co., 11 Mich. App. 438, 161 N.W.2d 452 (1968).

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[FN5] National Sales & Service Co., Inc. v. Superior Court of Maricopa County Arizona, 136 Ariz. 544, 667 P.2d 738 (1983).

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[FN6] Shelowitz, Shelowitz, Terrell & Coffey, P.A. v. Peters, 931 So. 2d 1059 (Fla. Dist. Ct. App. 4th Dist. 2006).

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VII. Attorneys' Liens
A. General or Retaining Lien

Topic Summary Correlation Table References

§ 312. Property subject to lien—Money collected by attorney

West's Key Number Digest

West's Key Number Digest, Attorney and Client 182(1) to 182(4)

The general or retaining lien of an attorney generally extends to moneys collected by the attorney for the client in the course of his or her employment, whether on a judgment or not.[FN1] An attorney's possession of client funds is sufficient, in se, to perfect a retaining lien to the extent of the value of the attorney's services.[FN2] However, an attorney is not permitted to withhold payment to a client pursuant to a retaining lien of the client's money over and above the maximum amount of the attorney's claim against the client; thus, the retention of an excess sum after demand by the client amounts to a conversion of the client's money, making the attorney liable for interest on the retained amount.[FN3]

One attorney collecting moneys for a client must honor the retaining lien of co-counsel in the matter when the attorney has notice that co-counsel deems such a lien to exist.[FN4]

[FN1] Perlmutter v. Johnson, 6 Conn. App. 292, 505 A.2d 13 (1986); JLA Inv. Corp. v. Colony Ins. Co., 922 So. 2d 249 (Fla. Dist. Ct. App. 2d Dist. 2006).

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[FN2] In re Miglia, 345 B.R. 919 (Bankr. N.D. Iowa 2006).

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[FN3] Adams, George, Lee, Schulte, & Ward, P. A. v. Westinghouse Elec. Corp., 597 F.2d 570 (5th Cir. 1979).

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[FN4] Jones v. Miller, 203 F.2d 131 (3d Cir. 1953).

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A. General or Retaining Lien

Topic Summary Correlation Table References

§ 313. Property not affected by lien

West's Key Number Digest

West's Key Number Digest, Attorney and Client 182(1) to 182(4)

A.L.R. Library

Attorney's retaining lien: what items of client's property or funds are not subject to lien, 70 A.L.R.4th 827

A general or retaining lien does not attach to papers and documents that come into the hands of an attorney otherwise than in the course of his or her professional employment.[FN1] And the lien does not attach to money or property that a client left with the attorney as a trustee or for a special purpose.[FN2] Thus, where attorneys held half of a personal injury judgment award pending resolution of a dispute with the client, who asserted that attorneys were entitled to a contingency fee of only one-third of the award, the attorneys did not hold a retaining lien on the client's personal materials related to the injury claim.[FN3]

A client's passport could not be subjected to an attorney's retaining lien, as security for payment of a fee for services rendered.[FN4]

[FN1] Thomson v. Findlater Hardware Co., 109 Tex. 235, 205 S.W. 831, 2 A.L.R. 1486 (1918).

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[FN2] Severdia v. Alaimo, 41 Cal. App. 3d 881, 116 Cal. Rptr. 405 (1st Dist. 1974); The Florida Bar v. Bratton, 413 So. 2d 754 (Fla. 1982).

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[FN3] White v. Zeff, 107 Mich. App. 520, 309 N.W.2d 650 (1981).

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[FN4] Bonner v. Goonewardene, 9 Misc. 3d 1059, 800 N.Y.S.2d 821 (N.Y. City Civ. Ct. 2005).

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VII. Attorneys' Liens
A. General or Retaining Lien

Topic Summary Correlation Table References

§ 314. Loss of lien

West's Key Number Digest

West's Key Number Digest, Attorney and Client 186

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Attorney's retaining lien as affected by action to collect legal fees, 45 A.L.R.4th 198

Rights and remedies of client as regards papers and documents on which attorney has retaining lien, 3 A.L.R.2d 148

An attorney's general or retaining lien may be defeated or lost when the attorney unjustifiably terminates his or her relationship with the client, or when the attorney is justifiably discharged by the client.[FN1] And an attorney who consents to the substitution of attorneys without arranging for the payment of bills owed to him or her waives a lien, if any existed, as to exhibits in his or her possession.[FN2] Where recognition of a consensual retaining lien would condone a violation of the ethical duties owed by a lawyer to a client, the lien is void.[FN3] An attorney's retaining lien survives bankruptcy, and is enforceable against the clients or the trustee; however, the attorney will be required to allow examination of the bankrupt's corporate books and records held under such a lien where examination is necessary for the proper administration of the bankruptcy estate.[FN4]

[FN1] Friedman v. Park Cake, Inc., 34 A.D.3d 286, 825 N.Y.S.2d 11 (1st Dep't 2006); Midvale Motors, Inc. v. Saunders, 21 Utah 2d 181, 442 P.2d 938 (1968).

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[FN2] Atlantic and Great Lakes Steamship Corp. v. Steelmet, Inc., 431 F. Supp. 327 (S.D. N.Y. 1977).

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[FN3] Academy of California Optometrists, Inc. v. Superior Court, 51 Cal. App. 3d 999, 124 Cal. Rptr. 668 (3d Dist. 1975).

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[FN4] Matter of Browy, 527 F.2d 799 (7th Cir. 1976).

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Topic Summary Correlation Table References

§ 315. Loss of lien—Giving up possession of property

West's Key Number Digest

West's Key Number Digest, Attorney and Client 186

An attorney's retaining lien may be lost by voluntarily parting with the possession of items to which it may have attached.[FN1] However, an involuntary surrender of possession pursuant to court order will not relinquish a lien.[FN2]

When a court orders a withdrawing attorney to turn over files in his or her possession concerning a pending cause of action to the client's remaining attorney, and a statutory lien is inadequate security, the court should determine the value of the withdrawing attorney's services to the client so that such amount may be paid or otherwise secured before the production order is enforced.[FN3]

[FN1] Kysor Indus. Corp. v. D.M. Liquidating Co., 11 Mich. App. 438, 161 N.W.2d 452 (1968); Eiduson Fuel & Hardware Co. v. Drew, 59 A.D.2d 1025, 399 N.Y.S.2d 764 (4th Dep't 1977); Mahomet v. Hartford Ins. Co., 3 Wash. App. 560, 477 P.2d 191 (Div. 2 1970).

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[FN2] Brauer v. Hotel Associates, Inc., 40 N.J. 415, 192 A.2d 831 (1963); People v. Altvater, 78 Misc. 2d 24, 355 N.Y.S.2d 736 (Sup 1974).

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[FN3] Upgrade Corp. v. Michigan Carton Co., 87 Ill. App. 3d 662, 43 Ill. Dec. 159, 410 N.E.2d 159 (1st Dist. 1980).

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VII. Attorneys' Liens
A. General or Retaining Lien

Topic Summary Correlation Table References

§ 316. Enforcement of lien

West's Key Number Digest

West's Key Number Digest, Attorney and Client 192(1), 192(2)

The general lien of an attorney upon a client's papers is a passive one and cannot ordinarily be actively enforced, either at law or in equity; rather, it is a mere right to retain property of the client until the attorney is fully paid.[FN1] A retaining lien is enforceable only by possession and cannot be satisfied out of moneys retained.[FN2] A retaining lien cannot be foreclosed.[FN3]

Generally, the only advantage the attorney gains from a retaining lien is the possibility of forcing the client to settle because of the embarrassment, inconvenience, or worry caused by the attorney's asserting the lien.[FN4]

Observation: A retaining lien exists as part of the court's inherent power to oversee the relationship of attorneys, as officers of the court, with their client by providing a means of securing the legitimate interest of the attorney in payment for his or her services and expenses on behalf of the client, but it is subject to the court's control for the protection of the client and third parties; it is not a right intended to protect the client from other creditors, or to permit the attorney to withhold indefinitely assets of the client exceeding in value the claim for which the lien is asserted.[FN5]

A defendant who had been indicted for murder was permitted to obtain documents, including a psychiatric report, from his former attorney, who claimed a retaining lien, in order that they could be copied; however, the original documents were ordered returned to the former attorney as evidence of a lien.[FN6]

[FN1] Hoxsey v. Hoffpauir, 180 F.2d 84 (5th Cir. 1950); Elting v. Frieman, 89 N.J. Super. 433, 215 A.2d 367 (App. Div. 1965).

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[FN2] Hoke v. Ortiz, 83 N.Y.2d 323, 610 N.Y.S.2d 455, 632 N.E.2d 861 (1994).

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[FN3] Brauer v. Hotel Associates, Inc., 40 N.J. 415, 192 A.2d 831 (1963); Eiduson Fuel & Hardware Co. v. Drew, 59 A.D.2d 1025, 399 N.Y.S.2d 764 (4th Dep't 1977); Midvale Motors, Inc. v. Saunders, 21 Utah 2d 181, 442 P.2d 938 (1968).

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[FN4] Mahomet v. Hartford Ins. Co., 3 Wash. App. 560, 477 P.2d 191 (Div. 2 1970).

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[FN5] Kysor Indus. Corp. v. D.M. Liquidating Co., 11 Mich. App. 438, 161 N.W.2d 452 (1968).

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[FN6] People v. Altvater, 78 Misc. 2d 24, 355 N.Y.S.2d 736 (Sup 1974).
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VII. Attorneys' Liens
B. Special or Charging Lien

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VII. Attorneys' Liens
B. Special or Charging Lien
1. In General
a. Overview

Topic Summary Correlation Table References

§ 317. Generally

West's Key Number Digest

West's Key Number Digest, Attorney and Client 171

An attorney has a special or charging lien on the judgment or settlement the attorney has obtained for the client.[FN1] This lien is not dependent upon possession,[FN2] as in the case of a general or retaining lien, but is founded on the equitable right of an attorney to recover his or her fees and costs due him or her for his or her services out of the judgment he or she has obtained.[FN3] Thus, an attorney's charging lien does not merely give the attorney an enforceable right against the property of another, but rather it gives the attorney an equitable ownership interest in the client's cause of action, and the client's property right in his or her own cause of action is only what remains after transfer to the attorney of the attorney's agreed-on share.[FN4]
Observation: Since the attorney's lien is a tool for recovery of legal fees, which was created as a matter of public policy to protect an attorneys' right to compensation for services legitimately rendered, the right to enforce the lien may be considered, legally as well as functionally, the equivalent of the right to compensation.[FN5]

It is necessary to the existence of the lien that there be a valid contract for fees, either express or implied, entered into between the attorney and the client.[FN6] A charging lien for attorney's fees automatically comes into existence, without notice or filing, upon commencement or institution of the action.[FN7]

An attorney is entitled to a charging lien upon delivery of his or her files to an attorney substituted in the original attorney's place.[FN8]

[FN1] Michel v. Eighth Judicial Dist. Court ex rel. County of Clark, 117 Nev. 145, 17 P.3d 1003 (2001).
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[FN2] Morse v. Eighth Judicial Dist. Court in and for Clark County, 65 Nev. 275, 195 P.2d 199, 3 A.L.R.2d 136 (1948); Brauer v. Hotel Associates, Inc., 40 N.J. 415, 192 A.2d 831 (1963).
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[FN3] Hoover-Reynolds v. Superior Court, 50 Cal. App. 4th 1273, 58 Cal. Rptr. 2d 173 (4th Dist. 1996); Howe & Associates, P.C. v. Daniels, 274 Ga. App. 312, 618 S.E.2d 42 (2005), cert. granted, (Nov. 21, 2005) and judgment aff'd, 280 Ga. 803, 631 S.E.2d 356 (2006); Tri City Equipment Co. v. Modern Real Estate Investments, Ltd., 460 N.W.2d 464, 13 U.C.C. Rep. Serv. 2d 884 (Iowa 1990); Panarello v. Panarello, 245 N.J. Super. 318, 585 A.2d 428 (Ch. Div. 1990).
- General or retaining lien and dependency on possession generally, see § 310.
- The purpose of the charging lien is to satisfy the attorney's equitable claim for services rendered to the client. Cope v. Woznicki, 140 P.3d 239 (Colo. Ct. App. 2006).
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[FN4] LMWT Realty Corp. v. Davis Agency Inc., 85 N.Y.2d 462, 626 N.Y.S.2d 39, 649 N.E.2d 1183 (1995).
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[FN5] Kourouvacilis v. American Federation of State, County And Municipal Employees, 65 Mass. App. Ct. 521, 841 N.E.2d 1273 (2006), review denied, 446 Mass. 1108, 846 N.E.2d 781 (2006).
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[FN6] JLA Inv. Corp. v. Colony Ins. Co., 922 So. 2d 249 (Fla. Dist. Ct. App. 2d Dist. 2006); Rangel v. Save Mart, Inc., 140 N.M. 395, 2006-NMCA-120, 142 P.3d 983 (Ct. App. 2006), as revised, (Sept. 25, 2006); Miller v. Miller, 83 S.D. 227, 157 N.W.2d 537 (1968).
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[FN7] Howe & Associates P.C. v. Daniels, 280 Ga. 803, 631 S.E.2d 356 (2006); Resnick v. Resnick, 24 A.D.3d 238, 806 N.Y.S.2d 200 (1st Dep't 2005).
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[FN8] Matter of Shaad, 59 A.D.2d 1061, 399 N.Y.S.2d 822 (4th Dep't 1977).
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VII. Attorneys' Liens

Topic Summary Correlation Table References

§ 318. Common-law or statutory basis of lien

West's Key Number Digest

West's Key Number Digest, Attorney and Client 171, 172

A common-law charging lien is recognized in some states,[FN1] but in many states it rests entirely on statutes.[FN2] Such a statute, being remedial in character, is liberally construed[FN3] although it has also been held that since the attorney's lien is a creature of statute, it must be strictly construed.[FN4] Statutory provisions which prescribe the conditions under which, or the mode by which, an attorney may secure a charging lien, prevent the attaching of liens of this class except where the statutory conditions exist and the statutory mode is pursued.[FN5] Federal courts recognize no common-law lien, but give effect to the laws of the state in which the court sits.[FN6]

[FN1] Sommer v. Rhoads, 171 Md. App. 392, 910 A.2d 514 (2006), cert. granted, 396 Md. 524, 914 A.2d 768 (2007); Rangel v. Save Mart, Inc., 140 N.M. 395, 2006-NMCA-120, 142 P.3d 983 (Ct. App. 2006), as revised, (Sept. 25, 2006).
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[FN2] Schlang v. Key Airlines, Inc., 158 F.R.D. 666 (D. Nev. 1994); In re Del Grosso, 111 B.R. 178 (Bankr. N.D. Ill. 1990); In re Marriage of Berkland, 762 P.2d 779 (Colo. Ct. App. 1988); Northeastern Avionics, Inc. v. City of Westfield, 63 Mass. App. Ct. 509, 827 N.E.2d 721 (2005); Bero-Wachs v. Law Office of Logar & Pulver, 157 P.3d 704 (Nev. 2007); Levine v. Levine, 381 N.J. Super. 1, 884 A.2d 222 (App. Div. 2005).
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[FN3] Metropolitan Life Ins. Co. v. Roberts, 241 Ark. 994, 411 S.W.2d 299 (1967); Fein v. Schwartz, 404 S.W.2d 210 (Mo. Ct. App. 1966).
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[FN4] TM Ryan Co. v. 5350 South Shore, L.L.C., 361 Ill. App. 3d 352, 297 Ill. Dec. 72, 836 N.E.2d 803 (1st Dist. 2005).
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[FN5] Woodward v. Lawson, 225 Ga. 261, 167 S.E.2d 660 (1969); Lewis v. Gallemore, 175 Neb. 279, 121 N.W.2d 388 (1963).
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[FN6] Hanna Paint Mfg. Co. v. Rodey, Dickason, Sloan, Akin & Robb, 298 F.2d 371 (10th Cir. 1962) (pointing out that charging liens are recognized by the law of New Mexico).
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VII. Attorneys' Liens
B. Special or Charging Lien
1. In General
a. Overview

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§ 319. Agreement creating lien

West's Key Number Digest

West's Key Number Digest, Attorney and Client 176

An attorney's charging lien is contractual in nature[FN1] and a lien may be created by an express agreement on the part of the client that the attorney will have a lien for his or her compensation on the amount recovered.[FN2] Such lien becomes effective upon execution of the contract.[FN3]
Observation: At least one court has held that an attorney has no lien in the absence of an agreement.[FN4]

Where the parties contract that the attorney will receive his or her fee from the amount recovered, the agreement creates an equitable lien in favor of the attorney to the extent of the amount stipulated.[FN5]

Where a client discharges an attorney and later rehires the same attorney and agrees to pay the attorney a set sum for past legal services and an hourly sum for future legal services, the agreement constitutes a novation superseding the parties' initial contract, and the amount of the attorney's charging lien should be determined on the basis of the later contract.[FN6]

CUMULATIVE SUPPLEMENT

Cases:

In California, an attorney's lien is created only by contract, either expressly in the fee contract or by implication where a retainer agreement provides the attorney is to look to the judgment for payment. King County v. Seawest Inv. Associates, LLC, 141 Wash. App. 304, 170 P.3d 53 (Div. 1 2007).

[END OF SUPPLEMENT]

[FN1] Gossett & Gossett, P.A. v. Mervolion, 941 So. 2d 1207 (Fla. Dist. Ct. App. 4th Dist. 2006).
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[FN2] Cappa v. F & K Rock & Sand, Inc., 203 Cal. App. 3d 172, 249 Cal. Rptr. 718 (5th Dist. 1988); Markwardt v. Zurich American Ins. Co., 296 Wis. 2d 512, 2006 WI App 200, 724 N.W.2d 669 (Ct. App. 2006), review denied, 2007 WI 61, 732 N.W.2d 857 (Wis. 2007) and review denied, 2007 WI 61, 732 N.W.2d 858 (Wis. 2007) and review denied, 2007 WI 61, 732 N.W.2d 858 (Wis. 2007) and review denied, 2007 WI 61, 732 N.W.2d 858 (Wis. 2007) and review denied, 2007 WI 61, 732 N.W.2d 859 (Wis. 2007) and petition for cert. filed, 75 U.S.L.W. 3696, 76 U.S.L.W. 3022 (U.S. June 13, 2007) (lien arose from the clients' contingent-fee retainer agreements with law firm).
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[FN3] Cappa v. F & K Rock & Sand, Inc., 203 Cal. App. 3d 172, 249 Cal. Rptr. 718 (5th Dist. 1988).
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[FN4] Gelfand, Greer, Popko & Miller v. Shivener, 30 Cal. App. 3d 364, 105 Cal. Rptr. 445 (4th Dist. 1973) (also holding that creation of a lien is not dependent on the use of the word “lien” in the contract).
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[FN5] Camp v. Park, 226 Ark. 1026, 295 S.W.2d 613 (1956); Neighbors & Danielson v. West Nebraska Methodist Hospital, 162 Neb. 816, 77 N.W.2d 667 (1956).
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[FN6] Kenney v. Vandiver, 414 So. 2d 237 (Fla. Dist. Ct. App. 4th Dist. 1982).
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B. Special or Charging Lien
1. In General
a. Overview

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§ 320. Extent of lien

West's Key Number Digest

West's Key Number Digest, Attorney and Client 173 to 177

A.L.R. Library

Attorney's charging lien upon continuing payments to which client becomes entitled as result of litigation, 99 A.L.R.2d 451

An attorney's charging lien is to be based upon the amount agreed with the client.[FN1] In other words, the value of an attorney's charging lien ordinarily is determined based on the terms of the fee provisions of a retainer agreement.[FN2] When a retainer agreement does not exist, the amount of an attorney's charging lien is determined by the reasonable value of the services rendered.[FN3]

An attorney may include costs in his or her lien to the extent such costs were incurred in furtherance of the client's litigation.[FN4]

Attorneys may assert a lien for the services they render to a client either prior to judgment or after a judgment has obtained.[FN5]

CUMULATIVE SUPPLEMENT

Cases:

In determining a proper award of attorney fees pursuant to a charging lien under New York attorney lien statute, a court may consider (1) the difficulty of the matter; (2) the nature and extent of the services rendered; (3) the time reasonably expended on those services; (4) the quality of performance by counsel; (5) the qualifications of counsel; (6) the amount at issue; and (7) the results obtained. N.Y.McKinney's Judiciary Law § 475. Stair v. Calhoun, 722 F. Supp. 2d 258 (E.D. N.Y. 2010).

[END OF SUPPLEMENT]

[FN1] Gossett & Gossett, P.A. v. Mervolion, 941 So. 2d 1207 (Fla. Dist. Ct. App. 4th Dist. 2006).
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[FN2] Thomas A. Foster & Associates, LTD v. Paulson, 699 N.W.2d 1 (Minn. Ct. App. 2005).
- Retainer agreement generally, see § 249.
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[FN3] Thomas A. Foster & Associates, LTD v. Paulson, 699 N.W.2d 1 (Minn. Ct. App. 2005); Resnick v. Resnick, 24 A.D.3d 238, 806 N.Y.S.2d 200 (1st Dep't 2005).
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[FN4] Bero-Wachs v. Law Office of Logar & Pulver, 157 P.3d 704 (Nev. 2007).
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[FN5] St. Peter & Warren, P.C. v. Purdom, 2006 MT 172, 333 Mont. 9, 140 P.3d 478 (2006).
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a. Overview

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§ 321. Lien limited to services in particular suit

West's Key Number Digest

West's Key Number Digest, Attorney and Client 181

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Attorney's charging lien as including services rendered or disbursements made in other than instant action or proceeding, 23 A.L.R.4th 336

In the absence of a statute or a special agreement, a charging lien does not extend beyond the charges and fees in the suit in which the judgment was recovered; it does not cover any general balance that may be due the attorney from the client for professional services rendered in other causes or transactions.[FN1] Thus, an attorney who represented a former client in a traffic case could not assert a charging lien for attorney fees against any judgment recovered by the former client in his unrelated action against a food store for malicious prosecution and false arrest, and thus the attorney lacked an interest in the property or transaction that was the subject of the malicious prosecution action and could not intervene in the action as a matter of right in order to assert a charging lien.[FN2] Similarly, an attorney's lien may not be imposed on the clients' interest in a nursery where the clients had executed an agreement authorizing the imposition of a lien on the proceeds from the sale of the nursery, and the agreement referred to future security agreements covering the rights to proceeds from the sale, but not to an actual interest in the nursery.[FN3]

The charging lien has been held to extend to charges for fees or disbursement in suits incident to, or growing out of, the principal object of the employment.[FN4] Accordingly, a plaintiff's uninsured/underinsured motorist (UM) settlement with his automobile insurer was a part of a single cause of action that began with the plaintiff's claim against a personal injury defendant, and thus an attorney lien claimed by the plaintiff's attorney in the

action against the defendant attached to funds arising from both lawsuits; the UM claim was a logical sequence of the prior action against the defendant.[FN5]

[FN1] Skelton v. Spencer, 102 Idaho 69, 625 P.2d 1072, 23 A.L.R.4th 315 (1981); Crolley v. O'Hare Intern. Bank, 346 N.W.2d 156 (Minn. 1984).

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[FN2] Petty v. Kroger Food & Pharmacy, 165 Ohio App. 3d 16, 2005-Ohio-6641, 844 N.E.2d 869 (10th Dist. Franklin County 2005).

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[FN3] Boline v. Doty, 345 N.W.2d 285 (Minn. Ct. App. 1984).

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[FN4] Skelton v. Spencer, 102 Idaho 69, 625 P.2d 1072, 23 A.L.R.4th 315 (1981).

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[FN5] Gibbs v. Geico General Ins. Co., 2006 OK CIV APP 104, 143 P.3d 235 (Div. 4 2006).

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VII. Attorneys' Liens
B. Special or Charging Lien
1. In General
a. Overview

Topic Summary Correlation Table References

§ 322. Notice of lien; when required

West's Key Number Digest

West's Key Number Digest, Attorney and Client 180

One of the elements of an attorney charging lien in some jurisdictions is that notice of intent to assert a lien must be given.[FN1]

Observation: The purpose of the attorney's lien statute's notice-of-lien requirement is to protect innocent persons who have no notice or knowledge that an attorney claims a lien on the judgment.[FN2] Additionally, the purpose of a rule requiring an attorney to send notice to each person against whom the lien is to be enforced is to satisfy due process by guaranteeing that the client knows of the attorney's intent to enforce the lien before the attorney is able to transfer a possessory interest to himself or herself as a part of his or her enforcement action.[FN3]

An attorney has a lien upon money in the hands of the adverse party, belonging to the attorney's client, from the time the attorney gives notice of the attorney's lien.[FN4]

In order to be timely, notice of an attorney's charging lien must be filed before the lawsuit has been reduced to judgment or dismissed pursuant to settlement.[FN5] An attorney's filing of an untimely petition does not constitute notice of the attorney's lien because the untimely petition is a void cause of action to which no attorney's lien can attach.[FN6]

CUMULATIVE SUPPLEMENT

Cases:

An attorney's charging lien places third parties on notice that the attorney has an interest in the funds subject to the lien. In re Fisher, 202 P.3d 1186 (Colo. 2009), petition for cert. filed, 77 U.S.L.W. 3680 (U.S. June 1, 2009).

[END OF SUPPLEMENT]

[FN1] Rangel v. Save Mart, Inc., 140 N.M. 395, 2006-NMCA-120, 142 P.3d 983 (Ct. App. 2006), as revised, (Sept. 25, 2006).

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[FN2] Stover v. County of Lancaster, 271 Neb. 107, 710 N.W.2d 84 (2006).

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[FN3] Sommer v. Rhoads, 171 Md. App. 392, 910 A.2d 514 (2006), cert. granted, 396 Md. 524, 914 A.2d 768 (2007).

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[FN4] Stover v. County of Lancaster, 271 Neb. 107, 710 N.W.2d 84 (2006).

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[FN5] Levine v. Gonzalez, 901 So. 2d 969 (Fla. Dist. Ct. App. 4th Dist. 2005).

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[FN6] Ross v. American Telephone & Telegraph Communications Corp., 836 S.W.2d 952 (Mo. Ct. App. W.D. 1992).

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a. Overview

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§ 323. Notice of lien; when required—Sufficiency

West's Key Number Digest

West's Key Number Digest, Attorney and Client 180

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Sufficiency of notice to opposing party (or of serving or filing thereof) required to establish attorney's lien upon client's claim or cause of action, 85 A.L.R.2d 859

Forms

Am. Jur. Legal Forms 2d §§ 30:173 to 30:176 (Notice of lien)

Where notice of an attorney's lien is necessary, no special form of notice is required in the absence of statutory specifications; actual notice of the claim, whether verbal or in writing, answers every purpose of the requirement and is sufficient to protect the rights of the attorney.[FN1] However, an attorney's letter to opposing counsel indicating the amount of attorney's fees and costs claimed by the attorney's client is not sufficient notice of the attorney's charging lien where the letter is written before the attorney is discharged and before the attorney knew the payment of fees was in jeopardy.[FN2] Where the judgment debtor has actual notice of the lien or claim of the attorney, and in some states, where he or she has notice of the facts such as to put a prudent person upon inquiry, it is sufficient to protect the rights of the attorney.[FN3] Thus, statutory notice is unnecessary to make an attorney's lien valid against a judgment debtor where the debtor has actual notice of the claim.[FN4]

Where the right to the lien depends, by statute, on notice given in a prescribed manner, all the conditions imposed by the statute must be met.[FN5] In some jurisdictions, a written notice of an attorney's lien must

contain language claiming the lien and stating the interest the attorney has in the claim.[FN6] An attorney's lien is sufficiently definite to permit the trial court's clerk to note the claim in the execution docket, as required by statute, where the lien claims the "amount of $4,143.78, which amount is reasonable, due and unpaid and for which demand has been made and payment refused."[FN7]

In passing on the sufficiency of notice of lien under pertinent statutes, the courts have considered the contents of the notice,[FN8] the person on whom the notice may be served,[FN9] by whom notice may be served,[FN10] when service by mail is sufficient,[FN11] and the time of filing or serving the notice.[FN12]

[FN1] Matter of Armando Gerstel, Inc., 43 B.R. 925, 40 U.C.C. Rep. Serv. 643 (Bankr. S.D. Fla. 1984), decision aff'd in part, rev'd in part on other grounds, 65 B.R. 602, 2 U.C.C. Rep. Serv. 2d 615 (S.D. Fla. 1986); Kleager v. Schaneman, 212 Neb. 333, 322 N.W.2d 659 (1982) (holding that discussion by the wife's attorney with the husband concerning a contingent fee arrangement sufficient notice); Barber v. Barber, 207 Neb. 101, 296 N.W.2d 463 (1980) (holding that a petition to intervene is sufficient notice).

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[FN2] Thompson v. Montgomery & Andrews, P.A., 112 N.M. 463, 816 P.2d 532 (Ct. App. 1991).

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[FN3] Downs v. Hodge, 413 S.W.2d 519 (Mo. Ct. App. 1967).

- The Kansas Payment Center, as a payment agent, had constructive notice of an attorney's lien held by a former wife's divorce attorney against a property settlement and spousal support payments received by the former wife, and thus, the Center, when it received checks from the former husband satisfying his entire property settlement and the spousal support obligations to wife, had a duty to inquire as to the attorney's role and claim before disbursing the proceeds of the checks; the checks clearly indicated an attorney's interest by naming him as a payee. In re Marriage of Brown, 279 Kan. 282, 109 P.3d 1212 (2005).

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[FN4] In re Campbell, 26 B.R. 145 (Bankr. D. Colo. 1983).

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[FN5] Metropolitan Life Ins. Co. v. Roberts, 241 Ark. 994, 411 S.W.2d 299 (1967) (allowing substantial compliance); Alexander v. Clarkson, 100 Kan. 294, 164 P. 294 (1917).

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[FN6] TM Ryan Co. v. 5350 South Shore, L.L.C., 361 Ill. App. 3d 352, 297 Ill. Dec. 72, 836 N.E.2d 803 (1st Dist. 2005).

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[FN7] Barney, Cromwell, Weiner & Mendoza, P.S. v. Kreider, 32 Wash. App. 904, 650 P.2d 1133 (Div. 1 1982).

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[FN8] Pugh, Buatt, Landry and Pugh v. Theall, 342 So. 2d 274 (La. Ct. App. 3d Cir. 1977) (wherein the lien used the husband's name rather than the maiden name of the wife).

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[FN9] Phillips v. Jones, 355 P.2d 166 (Alaska 1960) (service on opposing attorney); Downs v. Hodge, 413 S.W.2d 519 (Mo. Ct. App. 1967) (service on an insured as notice to the insurer).

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[FN10] Fein v. Schwartz, 404 S.W.2d 210 (Mo. Ct. App. 1966).

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[FN11] Unger v. Checker Taxi Co., 30 Ill. App. 2d 238, 174 N.E.2d 219, 85 A.L.R.2d 856 (1st Dist. 1961).

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[FN12] In re Nicholson, 57 B.R. 672 (Bankr. D. Nev. 1986); Rhoades v. Norfolk & W. Ry. Co., 78 Ill. 2d 217, 35 Ill. Dec. 680, 399 N.E.2d 969 (1979) (holding, however, if notice of a lien is untimely, the attorney may

recover in quantum meruit for services rendered).
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VII. Attorneys' Liens
B. Special or Charging Lien
1. In General
b. Priority of Lien

Topic Summary Correlation Table References

§ 324. Generally

West's Key Number Digest

West's Key Number Digest, Attorney and Client 183, 184

A.L.R. Library

Priority between attorney's lien for fees against a judgment and lien of creditor against same judgment, 34 A.L.R.4th 665

Depending on construction of the statutes involved, an attorney's statutory charging lien may be superior to other liens which may be asserted against a client's judgment or recovery.[FN1] When it attaches to a judgment it is superior to the claim of a creditor of the client who levies on the judgment, even though he or she levies prior to notice of the lien,[FN2] and it is superior to a subsequent attachment, garnishment, or trustee process.[FN3] However, where a judgment creditor perfects its interests before an attorney does, the attorney's lien is junior to the interests of the judgment creditor.[FN4]

Since it is the attorney's efforts that create the fund to which a prior existing lien may attach, an attorney's charging lien has priority over a tax lien.[FN5]

A statute may specifically give priority to an attorney's lien for expenses over a claim by a social services department for subrogation based on payment of public assistance benefits.[FN6]

After properly appointing a guardian ad litem to represent a child's interests in marriage dissolution proceedings, a trial court has the inherent authority to give the guardian's fees priority over an attorney charging lien filed by the former wife's attorneys.[FN7]

An attorney's lien claimed by a plaintiff's attorney in a personal injury action against a defendant, if not destroyed or released, was prior to any claim or lien of an attorney who represented the plaintiff in his subsequent claim against his insurer for uninsured/underinsured motorist (UM) coverage.[FN8]

[FN1] Spielvogel v. Harkins & Maeger Ltd., 639 F. Supp. 1397 (S.D. N.Y. 1986); St. Joseph Hospital v. Quinn, 241 Md. 371, 216 A.2d 732, 25 A.L.R.3d 849 (1966).

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[FN2] Cetenko v. United California Bank, 30 Cal. 3d 528, 179 Cal. Rptr. 902, 638 P.2d 1299, 34 A.L.R.4th 657 (1982); Cappa v. F & K Rock & Sand, Inc., 203 Cal. App. 3d 172, 249 Cal. Rptr. 718 (5th Dist. 1988); Morrone v. Thuring, 334 N.J. Super. 456, 759 A.2d 1238 (Law Div. 2000).

- Attorney charging liens attach to the proceeds of property distributions in marriage dissolution proceedings and have priority over judgment liens. Franklin & Criscuolo/Lienor v. Etter, 924 So. 2d 947 (Fla. Dist. Ct. App. 3d Dist. 2006).

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[FN3] Hanna Paint Mfg. Co. v. Rodey, Dickason, Sloan, Akin & Robb, 298 F.2d 371 (10th Cir. 1962).

- An attorneys' lien attached to settlement proceeds and was superior to the rights of a garnishor who had been represented by attorneys early in the civil litigation resulting in the settlement, even though the attorneys did not negotiate the settlement. Cope v. Woznicki, 140 P.3d 239 (Colo. Ct. App. 2006).

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[FN4] TM Ryan Co. v. 5350 South Shore, L.L.C., 361 Ill. App. 3d 352, 297 Ill. Dec. 72, 836 N.E.2d 803 (1st Dist. 2005).

- A debtor's judgment against a petitioner was filed prior to a charging lien by the petitioner's attorney for a later arbitration award, and thus, the debtor's judgment had priority over the claim for attorney fees; the debtor filed judgment against the petitioner before the arbitration award was even made. Shenango Systems Solutions, Inc. v. Micros-Systems, Inc., 2005 PA Super 370, 887 A.2d 772 (2005), appeal denied, 590 Pa. 661, 911 A.2d 936 (2006).

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[FN5] In re City of New York, 9 Misc. 3d 896, 804 N.Y.S.2d 612 (Sup 2005), order aff'd, 38 A.D.3d 665, 831 N.Y.S.2d 532 (2d Dep't 2007).

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[FN6] Ganaway v. Department of Social Services, 753 S.W.2d 12 (Mo. Ct. App. W.D. 1988).

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[FN7] Franklin & Criscuolo/Lienor v. Etter, 924 So. 2d 947 (Fla. Dist. Ct. App. 3d Dist. 2006).

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[FN8] Gibbs v. Geico General Ins. Co., 2006 OK CIV APP 104, 143 P.3d 235 (Div. 4 2006).

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§ 325. As to setoff by defendant

West's Key Number Digest

West's Key Number Digest, Attorney and Client 184

A.L.R. Library

Priority between attorney's charging lien against judgment and opposing party's right of setoff against same judgment, 27 A.L.R.5th 764

On the question of whether an attorney's charging lien on a judgment obtained through his or her services is superior to the right of the adverse party to assert a setoff against the client, there is a conflict of opinion; some decisions deny the priority of the lien.[FN1] Others uphold the superiority of the lien under lien statutes.[FN2]

[FN1] Alexander v. Clarkson, 100 Kan. 294, 164 P. 294 (1917); Bruegge v. State Bank of Wellston, 74 S.W.2d 835 (Mo. 1934).
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[FN2] La Fleur v. Schiff, 239 Minn. 206, 58 N.W.2d 320 (1953).
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1. In General
c. Loss of Lien

Topic Summary Correlation Table References

§ 326. Generally

West's Key Number Digest

West's Key Number Digest, Attorney and Client 186

A valid attorney's lien may be extinguished only through the voluntary release by the attorney or through payment,[FN1] particularly, payment into the court.[FN2] There is a waiver if the attorney agrees that the proceeds of judgment will be remitted as collected, and that he or she will receive payments at stated intervals.[FN3] An attorney who is suspended from practice pending disciplinary proceedings waives by his or her misconduct a lien on the files of clients, although the attorney retains the right to assert claims for unpaid fees or costs.[FN4]

Where a client's discharge of an attorney is for cause, the attorney is not entitled to a retaining lien, notwithstanding a specific retainer agreement.[FN5] Additionally, no right to an attorney's charging lien exists when an attorney withdraws prior to settlement or judgment being entered in the case.[FN6] However, an attorney does not waive his or her right to the attorney's lien by voluntarily withdrawing from the representation in certain circumstances; if withdrawal occurs because of a breakdown in the lawyer-client relationship, illness of the lawyer, or the development of an unforeseen, and reasonably not foreseeable, conflict of interest the attorney's lien remains intact.[FN7] Also, the discharge of an attorney by the client without good cause does not defeat a lien for attorney's fees.[FN8] Where an attorney makes significant contributions to a case before being discharged, he or she is entitled to claim a a charging lien.[FN9]

[FN1] In re Marriage of Brown, 279 Kan. 282, 109 P.3d 1212 (2005).
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[FN2] Stover v. County of Lancaster, 271 Neb. 107, 710 N.W.2d 84 (2006); In re Marriage of O'Meara and Cullick, 200 Or. App. 562, 116 P.3d 236 (2005).
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[FN3] Gross v. Holzworth, 151 Mont. 179, 440 P.2d 765 (1968).
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[FN4] People ex rel. MacFarlane v. Harthun, 195 Colo. 38, 581 P.2d 716 (1978); People v. Keeffe, 50 N.Y.2d 149, 428 N.Y.S.2d 446, 405 N.E.2d 1012 (1980).
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[FN5] O'Connor v. Spencer (1977) Inv. Ltd. Partnership, 8 Misc. 3d 658, 798 N.Y.S.2d 888 (Sup 2005).
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[FN6] Wilson v. Wilson, 644 S.E.2d 379 (N.C. Ct. App. 2007).
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[FN7] Kourouvacilis v. American Federation of State, County And Municipal Employees, 65 Mass. App. Ct. 521, 841 N.E.2d 1273 (2006), review denied, 446 Mass. 1108, 846 N.E.2d 781 (2006).
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[FN8] Peresipka v. Elgin, J. & E. Ry. Co., 231 F.2d 268, 59 A.L.R.2d 554 (7th Cir. 1956); Markwardt v. Zurich American Ins. Co., 296 Wis. 2d 512, 2006 WI App 200, 724 N.W.2d 669 (Ct. App. 2006), review denied, 2007 WI 61, 732 N.W.2d 857 (Wis. 2007) and review denied, 2007 WI 61, 732 N.W.2d 858 (Wis. 2007) and review denied, 2007 WI 61, 732 N.W.2d 858 (Wis. 2007) and review denied, 2007 WI 61, 732 N.W.2d 858 (Wis. 2007) and review denied, 2007 WI 61, 732 N.W.2d 859 (Wis. 2007) and petition for cert. filed, 75 U.S.L.W. 3696, 76 U.S.L.W. 3022 (U.S. June 13, 2007).
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[FN9] Rangel v. Save Mart, Inc., 140 N.M. 395, 2006-NMCA-120, 142 P.3d 983 (Ct. App. 2006), as revised, (Sept. 25, 2006).
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Topic Summary Correlation Table References

§ 327. Compromise or settlement by client

West's Key Number Digest

West's Key Number Digest, Attorney and Client 187 to 190(4)

By dismissing, compromising, or settling his or her cause of action, a client may defeat his or her attorney's right to a lien which the attorney would otherwise have had.[FN1] Additionally, a client has a right to dismiss his or her suit at will, even if he or she has a contingent-fee agreement with his or her lawyer and the lawyer has served notice of his or her attorney's lien; the lawyer may not compel the continuation of the lawsuit to protect his or her lien because the lien is inferior to the client's right to dismiss the action.[FN2] However, it has also been held that after suit has been filed it can not be settled so as to defeat the lien of the attorney for his or her fees.[FN3] A secret or collusive settlement between the parties to the litigation, made after the verdict, will not affect the lien of the attorney for the successful party.[FN4]

[FN1] Lyman v. Campbell, 182 F.2d 700 (D.C. Cir. 1950).
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[FN2] In re Estate of Simmons, 362 Ill. App. 3d 944, 299 Ill. Dec. 302, 841 N.E.2d 1034 (5th Dist. 2005).
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[FN3] Howe & Associates P.C. v. Daniels, 280 Ga. 803, 631 S.E.2d 356 (2006).
- An attorney's lien, in favor of an attorney representing a will beneficiary in a dispute with the executor of testator's estate, arose at the commencement of the beneficiary's suit against the executor and remained in effect despite the beneficiary's later discharge of the attorney and her settlement of the suit without the attorney's assistance. Craft v. Kane, 65 Mass. App. Ct. 322, 839 N.E.2d 854 (2005).
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[FN4] Sinclair, Louis, Siegel, Heath, Nussbaum & Zavertnik, P.A. v. Baucom, 428 So. 2d 1383 (Fla. 1983).
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§ 328. Cause of action

West's Key Number Digest

West's Key Number Digest, Attorney and Client 182(1) to 182(4)

An attorney's charging lien will attach to the proceeds of a judgment or settlement obtained by the attorney;[FN1] thus, the litigation or settlement must result in more than the mere entry of a judgment on behalf of a client, as there must be proceeds from the litigation upon which the lien can affix.[FN2] If the attorney's work produces no fruit, then the attorney has no lien.[FN3] An attorney's charging lien does not attach until after judgment.[FN4]

A statute providing an attorney with a lien upon a cause of action and upon proceeds or damages derived in any action brought for the enforcement of a cause of action, as security for fees in the conduct of litigation, does not create an attorney's lien on settlement proceeds in the absence of a contractual lien given by the client.[FN5]

CUMULATIVE SUPPLEMENT

Cases:

Attorney's charging lien attaches to the client's cause of action, verdict and judgment, and the proceeds thereof, and protects the attorney's right to recover his fees and money expended on behalf of his client from a fund recovered by his efforts. U.S. v. Board of County Com'rs of the County of Dona Ana, N.M., 730 F. Supp. 2d 1327 (D.N.M. 2010).

Attorney lien of law firm, which represented judgment debtor in legal malpractice action against attorneys who allegedly provided the advice that led to the judgment, arose when the legal malpractice action was commenced, and attached to any proceeds of the action including settlement that judgment creditors, who were substituted as the plaintiffs in the legal malpractice action after they purchased judgment debtor's interest in the action at a sheriff's sale, negotiated with the defendant law firm in the malpractice action, and was not affected by the settlement the parties negotiated until it was satisfied in full. Smith v. Moran, Windes & Wong, PLLC, 145 Wash. App. 459, 187 P.3d 275 (Div. 1 2008).

[END OF SUPPLEMENT]

[FN1] Cope v. Woznicki, 140 P.3d 239 (Colo. Ct. App. 2006) (settlement proceeds); Howe & Associates, P.C. v. Daniels, 274 Ga. App. 312, 618 S.E.2d 42 (2005), cert. granted, (Nov. 21, 2005) and judgment aff'd, 280 Ga. 803, 631 S.E.2d 356 (2006) (settlement proceeds); In re Estate of Simmons, 362 Ill. App. 3d 944, 299 Ill. Dec. 302, 841 N.E.2d 1034 (5th Dist. 2005); Craft v. Kane, 65 Mass. App. Ct. 322, 839 N.E.2d 854 (2005) (settlement proceeds); Panarello v. Panarello, 245 N.J. Super. 318, 585 A.2d 428 (Ch. Div. 1990); Oppenheim v. Pemberton, 164 A.D.2d 430, 563 N.Y.S.2d 908 (3d Dep't 1990); Jones v. International Land Corp. Ltd., 51 Wash. App. 737, 755 P.2d 184 (Div. 1 1988).

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[FN2] Chadbourne & Parke, LLP v. AB Recur Finans, 18 A.D.3d 222, 794 N.Y.S.2d 349 (1st Dep't 2005).

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[FN3] Midvale Motors, Inc. v. Saunders, 21 Utah 2d 181, 442 P.2d 938 (1968).
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[FN4] People v. Keeffe, 50 N.Y.2d 149, 428 N.Y.S.2d 446, 405 N.E.2d 1012 (1980); Dillon v. Consolidated Delivery, Inc., 43 N.C. App. 395, 258 S.E.2d 829 (1979).
- A law firm that had previously represented a client in defending an underlying suit and in pursuing a counterclaim in such suit was not entitled to the enforcement of an attorney's lien on a judgment that the client later obtained in the suit after securing different representation; the judgment favoring the client was reversed on appeal, and a directed verdict was rendered against the client, providing no judgment upon which attorney's lien might attach. Telxon Corp. v. Smart Media of Delaware, Inc., 2005-Ohio-6223, 2005 WL 3117132 (Ohio Ct. App. 9th Dist. Summit County 2005), appeal not allowed, 109 Ohio St. 3d 1423, 2006-Ohio-1967, 846 N.E.2d 533 (2006).
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[FN5] McBride v. Wausau Ins. Companies, 176 Wis. 2d 382, 500 N.W.2d 387 (Ct. App. 1993).
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2. To What Lien Attaches

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§ 329. Cause of action—Construction of statute giving lien

West's Key Number Digest

West's Key Number Digest, Attorney and Client 182(1) to 182(4)

A statute governing an attorney's charging lien provides for a lien in favor of an attorney against judgments or funds recovered for the attorney's client, to secure the fee earned by the attorney.[FN1] A statute codifying the common-law right to an attorney's charging lien creates an equitable assignment to the attorney of the fund procured by his or her efforts to the extent of the amount of his or her lien.[FN2]

For purposes of an attorney's lien statute, a "judgment" includes a stipulation of dismissal, and "proceeds" encompass monetary settlements.[FN3]

[FN1] Howe & Associates, P.C. v. Daniels, 274 Ga. App. 312, 618 S.E.2d 42 (2005), cert. granted, (Nov. 21, 2005) and judgment aff'd, 280 Ga. 803, 631 S.E.2d 356 (2006).

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[FN2] In re City of New York, 9 Misc. 3d 896, 804 N.Y.S.2d 612 (Sup 2005), order aff'd, 38 A.D.3d 665, 831 N.Y.S.2d 532 (2d Dep't 2007).

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[FN3] Northeastern Avionics, Inc. v. City of Westfield, 63 Mass. App. Ct. 509, 827 N.E.2d 721 (2005).

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§ 330. Decree for alimony or property settlement; child support

West's Key Number Digest

West's Key Number Digest, Attorney and Client 182(1) to 182(4)

A statutory attorney's lien may not be asserted against money which represents payments for child support.[FN1] A charging lien also does not attach to an award of alimony and maintenance.[FN2] However, money that a wife received in settlement of claims against a former husband for arrearages in his spousal maintenance obligation was not exempt from the attorney's lien held by the former wife's divorce attorney, where the former wife had already been adequately provided for when the money arrived.[FN3]

Although a charging lien does not attach to an award of alimony and maintenance, the enforcement of such lien upon any other award made in the action is not precluded.[FN4] Attorney charging liens attach to the proceeds of property distributions in marriage dissolution proceedings;[FN5] charging liens may be enforceable against equitable distribution awards in matrimonial actions.[FN6]

[FN1] In re Marriage of Etcheverry, 921 P.2d 82 (Colo. Ct. App. 1996); Law Office of Tony Center v. Baker, 185 Ga. App. 809, 366 S.E.2d 167 (1988); Jasper v. Smith, 540 N.W.2d 399, 49 A.L.R.5th 833 (S.D. 1995).
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[FN2] Bero-Wachs v. Law Office of Logar & Pulver, 157 P.3d 704 (Nev. 2007); Zelman v. Zelman, 15 Misc. 3d 372, 833 N.Y.S.2d 375 (Sup 2007).
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[FN3] In re Marriage of Brown, 279 Kan. 282, 109 P.3d 1212 (2005).
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[FN4] Zelman v. Zelman, 15 Misc. 3d 372, 833 N.Y.S.2d 375 (Sup 2007).
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[FN5] Franklin & Criscuolo/Lienor v. Etter, 924 So. 2d 947 (Fla. Dist. Ct. App. 3d Dist. 2006).
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[FN6] Zelman v. Zelman, 15 Misc. 3d 372, 833 N.Y.S.2d 375 (Sup 2007).
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2. To What Lien Attaches

Topic Summary Correlation Table References

§ 331. Property recovered in litigation

West's Key Number Digest

West's Key Number Digest, Attorney and Client 182(1) to 182(4)

An attorney's lien attaches automatically to any property due or owing to the client on any underlying judgment the attorney may have obtained or assisted in obtaining to the extent of the attorney's reasonable fees remaining due and unpaid.[FN1] However, in the absence of a controlling statute or contract, a charging lien does not attach to land which an attorney recovers for a client, or to the title which the attorney successfully defends against attack.[FN2]

Observation: An attorney has no lien on "property recovered," within the meaning of a statute, where the attorney is employed merely to examine title to the property.[FN3]

[FN1] Gold v. Duncan Ostrander & Dingess, P.C., 143 P.3d 1192 (Colo. Ct. App. 2006).

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[FN2] Hagearty v. Ryan, 123 Conn. 372, 195 A. 730 (1937); Billingham v. Thiele, 109 So. 2d 763 (Fla. 1959); Iowa Supreme Court Attorney Disciplinary Bd. v. Powell, 726 N.W.2d 397 (Iowa 2007).

- The husband's attorney in a marital dissolution action was not entitled to a lien on the real property purchased by a husband while the proceeding was pending; the property was not a marital asset, and the attorney did not recover it for the husband. Johnston v. First Federal Savings Bank, 822 N.E.2d 614 (Ind. Ct. App. 2005), transfer denied, 831 N.E.2d 747 (Ind. 2005).

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[FN3] Woodward v. Lawson, 225 Ga. 261, 167 S.E.2d 660 (1969).

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§ 332. Money

West's Key Number Digest

West's Key Number Digest, Attorney and Client 182(1) to 182(4)

When an attorney has given appropriate notice of an attorney's lien, the lien is perfected and attaches to funds in the hands of the adverse party and belonging to the attorney's client,[FN1] or to a fund in court or otherwise available for distribution.[FN2] In other words, if a client recovers money as a result of an attorney's services, the attorney has a charging lien on the recovery[FN3] to the extent of the attorney's reasonable fees remaining due and unpaid.[FN4]

Where the efforts of an attorney result in a reduction of a client's tax liability, a charging lien upon the proceeds will be upheld if a tax has been refunded or if there is a reserve fund for taxes conserved by reason of the attorney's successful efforts in reducing the anticipated taxes.[FN5]

An attorney's charging lien will not attach to money in the hands of receivers.[FN6]

[FN1] Stover v. County of Lancaster, 271 Neb. 107, 710 N.W.2d 84 (2006).

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[FN2] Shenango Systems Solutions, Inc. v. Micros-Systems, Inc., 2005 PA Super 370, 887 A.2d 772 (2005), appeal denied, 590 Pa. 661, 911 A.2d 936 (2006).

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[FN3] Thomas A. Foster & Associates, LTD v. Paulson, 699 N.W.2d 1 (Minn. Ct. App. 2005); Wilson v. Wilson, 644 S.E.2d 379 (N.C. Ct. App. 2007) (“charging lien” gives an attorney the right to recover his fees from a fund recovered by his aid).

- An attorney had a valid charging lien against the proceeds recovered on behalf of a client in a foreclosure action, in the amount of the attorney fees he was owed pursuant to an hourly fee agreement signed by the client. D'Urso v. Lyons, 97 Conn. App. 253, 903 A.2d 697 (2006), certification denied, 280 Conn. 928, 909 A.2d 523 (2006).

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[FN4] Gold v. Duncan Ostrander & Dingess, P.C., 143 P.3d 1192 (Colo. Ct. App. 2006).

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[FN5] Goldstein, Goldman, Kessler & Underberg v. 4000 East River Road Associates, 64 A.D.2d 484, 409 N.Y.S.2d 886 (4th Dep't 1978), order aff'd, 48 N.Y.2d 890, 424 N.Y.S.2d 896, 400 N.E.2d 1348 (1979).

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[FN6] Lewis v. Gallemore, 175 Neb. 279, 121 N.W.2d 388 (1963) (holding that the receiver is an officer of the court and not an “adverse party” within the statutory intendment).

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B. Special or Charging Lien
3. Enforcement of Lien

Topic Summary Correlation Table References

§ 333. Enforcement in original action

West's Key Number Digest

West's Key Number Digest, Attorney and Client 192(1), 192(2)

An attorney's lien on property recovered may, on application to the court, be enforced in the original action in which the services were rendered.[FN1]
Practice Tip: A petition for an attorney's fee lien may be filed either before or after entry of the judgment in the underlying action; the petition should be filed as a step in the main cause, although it is to be tried as a separate and distinct plenary action.[FN2]

[FN1] Gold v. Duncan Ostrander & Dingess, P.C., 143 P.3d 1192 (Colo. Ct. App. 2006); de la Cruz v. Brown, 338 So. 2d 245 (Fla. Dist. Ct. App. 3d Dist. 1976) (holding that a separate action was not required).
- A state court has subject-matter jurisdiction over disputes involving an attorney's lien filed in a case before it. In re Marriage of Brown, 279 Kan. 282, 109 P.3d 1212 (2005).
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[FN2] Levine v. Levine, 381 N.J. Super. 1, 884 A.2d 222 (App. Div. 2005).
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Topic Summary Correlation Table References

§ 334. Equitable remedy

West's Key Number Digest

West's Key Number Digest, Attorney and Client 192(1), 192(2)

The charging lien of an attorney is equitable in nature,[FN1] and, in the absence of statutes giving jurisdiction to courts of law, the proper method for enforcing the lien is an equitable proceeding.[FN2]

[FN1] Local 58, Intern. Broth. of Elec. Workers, AFL-CIO v. G.T. Einstein Elec., Inc., 932 F. Supp. 974 (E.D. Mich. 1996); Brienza v. Tepper, 35 Cal. App. 4th 1839, 42 Cal. Rptr. 2d 690 (4th Dist. 1995); LMWT Realty Corp. v. Davis Agency Inc., 85 N.Y.2d 462, 626 N.Y.S.2d 39, 649 N.E.2d 1183 (1995).
- The lien is rooted in equitable considerations. Levine v. Levine, 381 N.J. Super. 1, 884 A.2d 222 (App. Div. 2005).
- An attorney's charging lien is based on principles of equity Thomas A. Foster & Associates, LTD v. Paulson, 699 N.W.2d 1 (Minn. Ct. App. 2005).
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[FN2] Neighbors & Danielson v. West Nebraska Methodist Hospital, 162 Neb. 816, 77 N.W.2d 667 (1956); Levine v. Levine, 381 N.J. Super. 1, 884 A.2d 222 (App. Div. 2005) (enforcement is within the equitable jurisdiction of the courts).
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Topic Summary Correlation Table References

§ 335. Independent legal action

West's Key Number Digest

West's Key Number Digest, Attorney and Client 192(1), 192(2)

By virtue of statutory provisions, a lien may be enforced by an independent action at law.[FN1]
Practice Tip: In one jurisdiction, an attorney must maintain an independent action to establish the existence and amount of the lien and to enforce it, although it is permissible and advisable to file a notice of lien in the client's pending action.[FN2]

Where the bulk of an attorney's fees will become due after the enforcement of a judgment on a default action upon a contract, the attorney must bring a subsequent action for legal fees based upon the value of his or her services rendered after enforcement or postpone completely the judicial assessment of attorney's fees due under the contract until the underlying judgment has been collected.[FN3]

[FN1] Gold v. Duncan Ostrander & Dingess, P.C., 143 P.3d 1192 (Colo. Ct. App. 2006); Litman v. Fine, Jacobson, Schwartz, Nash, Block & England, P.A., 517 So. 2d 88 (Fla. Dist. Ct. App. 3d Dist. 1987); Neilson v. Neilson, 780 P.2d 1264 (Utah Ct. App. 1989).
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[FN2] Valenta v. Regents of University of California, 231 Cal. App. 3d 1465, 282 Cal. Rptr. 812 (4th Dist. 1991), opinion modified, (July 22, 1991).
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[FN3] Marine Midland Bank v. Roberts, 102 Misc. 2d 903, 424 N.Y.S.2d 671 (N.Y. City Civ. Ct. 1980).
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VII. Attorneys' Liens
B. Special or Charging Lien
3. Enforcement of Lien

Topic Summary Correlation Table References

§ 336. Liability of adverse party for destroying lien

West's Key Number Digest

West's Key Number Digest, Attorney and Client 192(1), 192(2)

After an attorney's lien has attached, the party adverse to the client, with notice of the lien, cannot destroy it by a voluntary settlement of the claim, without the consent or knowledge of the attorney, without becoming personally liable for the value of the lien.[FN1]

If an attorney has a charging lien upon the proceeds produced by particular litigation for services in connection with it, the attorney may trace the proceeds into the hands of a third person or hold a defendant responsible if the defendant knowingly pays the client and frustrates the collection of the attorney's fee.[FN2] In an action by an attorney against a former client and an automobile liability insurer arising out of the insurer's alleged settlement of a lawsuit with the client in disregard of plaintiff's contingent fee contract and attorney's lien, the plaintiff's amended complaint sufficiently alleged an intentional interference by the insurer with the contract lien or the economic advantage therefrom which plaintiff would have gained, where it alleged actual notification given by plaintiff to the insurer of the existence of the lien, and the payment to the client by the insurer with knowledge of the attorney's lien.[FN3]

[FN1] Katopodis v. Liberian S/T Olympic Sun, 282 F. Supp. 369 (E.D. Va. 1968).
- Loss of lien by settlement or compromise by client, see § 327.
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[FN2] Goldstein, Goldman, Kessler & Underberg v. 4000 East River Road Associates, 64 A.D.2d 484, 409 N.Y.S.2d 886 (4th Dep't 1978), order aff'd, 48 N.Y.2d 890, 424 N.Y.S.2d 896, 400 N.E.2d 1348 (1979).
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[FN3] Siciliano v. Fireman's Fund Ins. Co., 62 Cal. App. 3d 745, 133 Cal. Rptr. 376 (2d Dist. 1976).
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VII. Attorneys' Liens
B. Special or Charging Lien
3. Enforcement of Lien

Topic Summary Correlation Table References

§ 337. Vacation of dismissal

West's Key Number Digest

West's Key Number Digest, Attorney and Client 192(1), 192(2)

A trial court that dismisses a tort action following a settlement has the authority to vacate its dismissal to permit a discharged attorney to satisfy his or her attorney's fee lien out of the settlement proceeds; an attorney's unsatisfied lien prevents the effective dismissal of the action.[FN1]

[FN1] Howe & Associates, P.C. v. Daniels, 274 Ga. App. 312, 618 S.E.2d 42 (2005), cert. granted, (Nov. 21, 2005) and judgment aff'd, 280 Ga. 803, 631 S.E.2d 356 (2006).
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Topic Summary Correlation Table References

§ 338. Conflict of laws

West's Key Number Digest

West's Key Number Digest, Attorney and Client 192(1), 192(2)

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Conflict of laws as to attorneys' liens, 59 A.L.R.2d 564

The existence and effect of an attorney's lien is governed by the law of the place in which the contract between the attorney and the client is to be performed, that is, the jurisdiction in which a contemplated action or proceeding is to be instituted.[FN1] In an action in another jurisdiction to enforce an order establishing a retaining lien in favor of an attorney, the attorney must establish his or her right to recover independently of the order fixing the lien, and the trial court in the foreign jurisdiction errs if it gives conclusive effect to the order of the domestic court.[FN2]

[FN1] Peresipka v. Elgin, J. & E. Ry. Co., 231 F.2d 268, 59 A.L.R.2d 554 (7th Cir. 1956).
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[FN2] Hoxsey v. Hoffpauir, 180 F.2d 84 (5th Cir. 1950).
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