A PANEL DISCUSSION ON "THE CHANGING STANDARDS OF THE PRACTICE OF LAW"

These commentaries represent a revised version of a panel discussion given on the "Changing Standards of the Practice of Law." Sponsored by the Seton Hall University School of Law Alumni Office, this discussion was held at the Law School on October 21, 1987.

A FOREWORD

*Michael P. Ambrosio**

Examining the concepts of professionalism and professional responsibility, and assessing some of the practical implications of the new rules of professional conduct, I am reminded of Aristotle's warning that in any study one should look only for the kind of certainty that the subject matter admits. Terms like professionalism and professional responsibility are broad, ambiguous and not easily defined. They cannot be reduced to a single definition or simple formulas because they encompass all aspects of the role of lawyers in our society. What makes a profession different from a business or trade is the primacy of public and private service over profit. Although lawyers earn their living serving clients, professionalism requires much more. While serving clients, lawyers must be ever mindful of their professional obligations to serve the public interest and to maintain public respect for the law and the legal profession. A growing number of critics of the legal profession charge that too many of today's lawyers have lost sight of the fundamental distinction between a profession and a mere trade and ignore the public interest while seeking profits.

There have been dramatic changes in the legal profession in the last quarter century both in the nation and in New Jersey. Amid a growing concern over the declining professionalism among America's lawyers, there has been a tremendous growth in the number of lawyers, the number of law schools, the size of law firms, and the fees paid for lawyers services. With the advent

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of lawyer advertising, the highly publicized ethical breaches of prominent lawyers and the explosion in legal malpractice claims, the public image of lawyers has suffered. The legal profession has been subjected to a great deal of critical scrutiny by both legal scholars and academics from other disciplines who question whether the self-regulation of the profession is in the public interest.

In recent years, in response to mounting criticism of lawyers, the American Bar Association (ABA) has fostered reforms of professional practices, disciplinary procedures and ethical standards. In an effort to raise the standards of the profession, the ABA has established the ABA Center for Professional Responsibility, created a Standing Committee on Professional Discipline, developed ABA Standards for Lawyer Discipline and Disciplinary Proceedings and adopted the new ABA Model Rules of Professional Conduct to replace the former Code of Professional Responsibility. In 1985, to address the perception of declining professionalism of lawyers, the ABA formed a Commission on Professionalism chaired by Robert Stanley (the Commission). The title to the commission's report, *"In the Spirit of Public Service:" A Blueprint for the Rekindling of Lawyer Professionalism* (the Report), draws upon Roscoe Pound's definition of a profession as "the practice of a learned art in the spirit of public service."[1] The following statement of purpose accompanied the preface to the Report:

> The Commission shall examine and report on matters affecting the performance of legal services by the bar, having in mind both how those services are being performed and how they are perceived to be performed. Thus, the Commission shall examine such matters as advertising and other forms of solicitation, fee structures, so-called commercialization, competence and the duty of the lawyer to his or her client and to the courts before whom the lawyer practices.[2]

The Commission's findings paint a rather dismal picture of the present state of legal professionalism. A survey conducted by the Commission revealed that "only 6% of corporate users of legal services rated 'all or most' lawyers as deserving to be called professionals."[3] The survey also indicated that 55% of federal and state

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[1] R. POUND, LAW AND MORALS (1985).

[2] *Preface to* AMERICAN BAR ASSOCIATION COMMISSION ON PROFESSIONALISM, "In the Spirit of Public Service:" A Blueprint for the Rekindling of Lawyer Professionalism (1986).

[3] *Id.* at 3 (citation omitted).

judges polled said lawyer professionalism was declining.[4] While offering no explanations for the apparent decline in professionalism, the Report sets forth a number of recommendations as to what law schools, courts and the organized bar can do to rekindle lawyer professionalism. Recommendations for the law schools are to develop more creative approaches to the teaching of professional responsibility, to create new courses to teach new methods of dealing with legal problems such as alternate dispute resolution, to enact codes of ethics for students and report student misconduct to bar admissions committees.[5] The report also recommends that law schools follow high ethical standards, that law professors should serve as role models and that high admission standards be maintained.[6]

There are ten specific recommendations for practicing lawyers and bar associations including: assisting new and inexperienced lawyers to face practical and ethical problems, establishing mandatory continuing legal education (MCLE) programs with written examinations, preparing films or video tapes on ethical and professional responsibility issues for MCLE and law school use, monitoring legal advertising, placing greater emphasis on the lawyer's role as an officer of the court, studying conflicts of interests arising from lawyer involvement in business activities, promoting legislation in the public interest, putting fee agreements in writing and submitting fee disputes to arbitration with lay person participation, reporting misconduct to authorities, and seeking to improve the legal system.[7]

The Commission's recommendations for the courts include a more active role for judges in litigation, imposing sanctions on lawyers and clients who abuse the litigation process, merit selection of judges, increase funding and staffing of disciplinary agencies and bar admission committees.[8]

There is nothing very new in all of these recommendations but it is of some value to have them all set forth in one document. In addition to these specific recommendations to the three separate branches of the profession, there are seven general recommendations which urge all lawyers: to "[p]reserve and develop within the profession integrity, competence, fairness, independence, courage and a devotion to the public interest;" to go beyond required minimum standards of conduct set forth in the Rules of Professional

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4 *Id.*
5 *Id.* at 12.
6 *Id.*
7 *Id.* at 12-14.
8 *Id.* at 14.

Conduct; to participate in pro bono activities; to resist pursuit of wealth as the principal goal of the practice of law; to develop simpler and less expensive methods to render legal services; to endeavor to educate the public about the law and the legal system; and to employ all resources to ensure the Bar remains self-regulating.[9] Although it is difficult to find fault with most of the Commission's recommendations, the report makes no new proposals. It provides no analysis of the reasons for the decline in lawyer professionalism. As an agenda for reform, it has the virtue of calling for specific actions and providing a fairly realistic list of steps, most of which should meet with little objection.

Despite the salutary nature of these recommendations and, perhaps, because there are so many attempts to implement them are not likely to produce improvements in the legal profession unless there is a concerted effort to develop better understanding, communication and cooperation between law schools, the courts and the practicing bar. Although the three branches of the profession, from their different vantage points, have different means to foster high standards of professional behavior and ethics, they can be much more effective if they join together as members of one profession. There is perhaps no better environment in which to explore the potential for joint efforts on the part of law schools, the bench and the organized bar to improve the professionalism of lawyers than in New Jersey. First and foremost, the history of cooperation among the three branches of the profession in New Jersey provides a solid foundation for new and improved efforts. Second, there are only three law schools in New Jersey and together their graduates make up almost half of New Jersey's lawyers. Third, both the New Jersey Supreme Court and the New Jersey Bar Association have led the nation in efforts to reform the self-regulation of lawyers. New Jersey was the first state to adopt the ABA Model Rules of Professional Conduct and New Jersey's version of the Rules of Conduct raise the level of public accountability for lawyers beyond that of the level of public accountability for lawyers of any other state. On a practical level, despite the fact that it is a major industrial state with upwards of eight million people, New Jersey's geographical area is small enough to facilitate attendance at statewide meetings and conferences.

While graduation from law school should insure knowledge of the law and skill in its application, it is important that law schools recognize their obligation to train lawyers to make sound moral or

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[9] *Id.* at 15.

ethical appraisals of laws. Similarly, the organized bar should use its expertise to evaluate existing laws and propose law reforms. The members of the judiciary have specialized knowledge of the law and legal system that they can share with academics at the law school and knowledgeable members of the bar to evaluate specific laws or legal problems with a view to their reform. In the final analysis every member of the legal profession has a special duty to improve the law and the legal system.

The program "Changing Standards of the Practice of Law," held on October 21, 1987, at Seton Hall Law School, in which law professors, judges and practicing lawyers participated, is a good example of the kind of collaborative effort by the law schools, the judiciary and the Bar that should take place on a regular and ongoing basis to foster awareness of the professional obligations of lawyers and their practical implications.

THE NEW JERSEY RULES OF PROFESSIONAL CONDUCT: A RECIPE FOR GOOD LAWYERING

*Raymond R. Trombadore**

When the Model Rules were debated in the House of Delegates, the first two full days of debate were devoted to Rule 1.5, the rule on fees. The rest of the debate took a half day, and all the rules were adopted in a half day in New Orleans, after two days of debate in San Francisco with no progress on the fee issue. I had a young teenage son who sat through that debate in the House of Delegates, and at the end of the debate, he came away having read all the Rules, because I gave that to him as an assignment. He said, "Well, when are they going to talk about the important things in these Rules?" And I said, "Well, they did." He said, "No, all they talked about were fees." And I said, "Well, that's important to them."

I have been asked to talk about a topic which has nothing to do with that aspect of the practice. I have been asked to talk about the changes in the lawyer-client relationship. There are some changes that are very practical. Obviously, the rule on fees

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impinges upon that. The rules on competence, the rules on diligence, the rules with respect to communication with clients, the conflict rules—all of these touch upon the lawyer-client relationship, but in a tangential way, and in a way which I like to think of as a method for developing good standards of practice. I look upon the rules of conduct not as rules of discipline, but as a recipe for good lawyering.

When people talk about the image of the profession, about professionalism, about the public perception of lawyers, I talk about the rules of conduct as a recipe for good lawyering, because any lawyer worth his salt who looks at these rules and pays some attention to them knows how to be a good lawyer. We start with Rule 1, which says, be competent; do not take work that you cannot do or that you will not have time to do;[1] be diligent (RPC 1.3);[2] communicate with your client (RPC 1.4);[3] be fair in the way you charge fees to your client (RPC 1.5);[4] respect the confidences of your client (RPC 1.6);[5] safeguard the property of your client (RPC 1.15);[6] do not involve yourself in conflicts which in any way take away from your ability to devote yourself wholeheartedly to the work of your client (RPC 1.7-1.12).[7] These are all prescriptions for good lawyering, and the list continues with respect to how you deal in the relationship with your client.

The biggest debate, short of the pro bono debate that came out in 1981, when the first rules called for mandatory pro bono with a reporting requirement, was the debate on the rules of confidentiality. The initial draft of the rules proposed by the Kutak Commission called for mandatory disclosure of client confidences and secrets in seven separate instances. There was a tremendous outcry in opposition to those proposed rules. The debate, at the time, was typified by the published materials that went between Judge Frankel and Professor Monroe Friedman. On the one hand was a cry for the knight on the white horse; on the other, a cry for the hired gun.

The debate went on for two years. The rules were modified. Much of what was in the original proposed rules was deleted. The debate came down to a number of critical issues here in New

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1 *See* N.J. RULES OF PROFESSIONAL CONDUCT RULE 1.1.
2 *See id.* Rule 1.3.
3 *See id.* Rule 1.4.
4 *See id.* Rule 1.5.
5 *See id.* Rule 1.6.
6 *See id.* Rule 1.15.
7 *See id.* Rules 1.7 to 1.12.

Jersey. While the House of Delegates debated the same issues and the American College of Trial Lawyers commandeered the debate on the floor of the house, New Jersey conducted a simultaneous debate through its Bar Committee and through its Supreme Court Committee. The issues were:

1. When must a lawyer disclose the client's confidences?
2. Is there ever a scenario in the life of a lawyer when he must violate the confidence of his client?
3. When should a lawyer violate that confidence and disclose those confidences to other persons?
4. What is the appropriate role of the lawyer whose client is a bit more amorphous—an organization, a corporation, a government agency?
5. Is a lawyer appropriately cast in the role of whistleblower?

Then you overlay all of those issues of disclosure, both mandatory and discretionary, with further questions with respect to a lawyer's liability or potential liability for either disclosure or nondisclosure. If the lawyer fails to disclose because of confidentiality, self-imposed or by virtue of court rule or by rules recommended by the Bar, is he nevertheless exposed to civil liability or criminal liability? Does he run the risk, for instance, of becoming an aider and abettor in a criminal fraud if he fails to disclose in certain fact situations?

Now, I do not want to go through the fact situations. We don't have time here today to develop the various scenarios. Most of you are familiar with the prominent cases where this dilemma has been presented.[8] What about nondisclosure in the case where there is great physical harm or death threatened? That is still a big debate. We have resolved it in New Jersey by a mandatory rule. We are one of the few jurisdictions which has a mandatory rule. The American Bar Association does not. For example, in *Tarasoff v. The Regents of the University of California*,[9] a psychiatrist, bound by rules of confi-

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[8] *See, e.g., In re* O.P.M. Leasing Services, Inc., 16 Bankr. 932 (S.D.N.Y. 1982). The *O.P.M.* case resulted in very substantial liability to a respected firm in New York for its failure to disclose the ongoing fraud perpetrated by its client—millions of dollars in lawsuits in a vast leaseback scheme. The lawyers involved relied upon what they considered to be competent advice and opinions with respect to their obligations. Indeed, they hired outside counsel, a former dean of a respected law school and a former district court judge, who said by all means, the rule is clear, you may not disclose. You are not permitted to disclose, and, mind you, this by virtue of an amendment to ABA Rule 7:102(b)(i), excepting confidential information. The firm did not disclose, even though they knew the matter was ongoing. They withdrew, ultimately withdrew, but in a rather belated fashion. None of that saved them from liability. There were millions of dollars in damages paid in settlement of the claims of the persons who sustained losses.

[9] 131 Cal. Rptr. 14, 17 Cal. 3d 425, 551 P.2d 334 (1976).

dence very similar to those of a lawyer, did not disclose his patient's threats to kill and indeed, when the patient did go out and kill, there was a suit and there was liability in the case. It is not peculiar to California; it is also true in New Jersey. There is a case here in New Jersey, a law division case, *MacIntosh v. Milano*.[10] Dr. Milano, a psychiatrist, failed to disclose. There was a murder. The victim's family brought suit against Milano. Milano moved to dismiss on the grounds that he was protected, that he was immunized, that he was prohibited from disclosing, because the information was confidential, protected and privileged. The motion to dismiss was denied, and the case never did go up, but it is the only case that I know of in New Jersey where the principle is exactly the same.

In my opinion, lawyers can not rely upon the rules of nondisclosure and confidentiality to protect themselves from this kind of civil liability. We see lawyers more and more threatened in criminal prosecutions. The tendency of prosecutors to reach out and implicate lawyers in the activities of those they represent becomes more imminent all of the time.

Now, what is peculiar about New Jersey's rules? New Jersey is, to my knowledge, the only state in the Union which adopted the Kutak rules in the form recommended by the Kutak Commission in its revised draft. These rules were adopted without some changes and the changes are significant, taking New Jersey beyond the point recommended by the Kutak Commission. For example, rule 1.6, the rule of confidentiality, has two standards which provide for mandatory disclosure. The American Bar rule provides only one exception to the rule of confidentiality, and that exception is discretionary, to prevent the client from committing conduct which would result in substantial physical harm or death to a third person. In New Jersey, that rule is mandatory. Additionally, if the lawyer has a reasonable basis to believe that the client's conduct will result in substantial property damage or substantial monetary loss the obligation to disclose is mandatory. Consequently, there are two thresholds. Moreover, our supreme court included in the language of the rule not only criminal and fraudulent conduct, but illegal conduct, so that in any of those situations there is presently a mandatory rule.

Rule 1.6 also has another distinction. Paragraph (b)2 of rule 1.6 has language which is peculiar to New Jersey. It says, a lawyer shall reveal such information to the proper authorities, to the extent the lawyer believes reasonably necessary, to prevent the client

[10] 168 N.J. Super. 466, 403 A.2d 500 (Law Div. 1979).

"from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to perpetrate a fraud upon a tribunal."[11] This is an exception to the confidentiality rule. This is not the candor rule, but for some reason, our court, decided that it wanted to emphasize this obligation to disclose by inserting that language in paragraph (b) of the confidentiality rule.

Now, when you go over to the candor rule, rule 3.3,[12] New Jersey again has done something that is unique to the State of New Jersey. The court, without the benefit of recommendation from the State Bar, and without the recommendation of its own Committee on these rules, drafted a new rule 3.3(a)(5), which essentially says, in the context of candor toward the tribunal, that a lawyer shall not withhold information from a tribunal, when the withholding of that information might tend to mislead the tribunal. That language is so broad and so sweeping that it essentially destroys whatever confidentiality exists between lawyer and client, because it is totally unlimited. There are no standards to the rule except the standard that failure to disclose might tend to mislead the court, and it does not even say "the court," it says "the Tribunal." If one is dealing with the trial of a fact, the tribunal is considered the jury. There is no limitation of the rule to civil cases. There is no comment which tells you whether or not constitutional issues are excepted, whether the right to counsel and the privilege against self-incrimination create any exception to the rule.

The profession has taken exception to rule 3.3(a)(5). We have asked the court to withhold its implementation. The court has promised once again to look at the rule. I don't know of any case that has come up which implicates rule 3.3(a)(5). However, I am satisfied, just from my knowledge of practice that the rule is violated, grossly violated, by every lawyer who does trial work, because no lawyer can represent a client and comply with that rule. Just think about the language. Failure to disclose to the tribunal information without which the tribunal might be misled. Obviously, everything unfavorable to the client would have to be disclosed, because, without it the tribunal might be misled.

Apart from these unique rules, the practice in New Jersey is changing, because our Advisory Committee on Professional Ethics has seen fit in a number of instances to go beyond the requirement of a rule in this area of disclosure of confidences. Advisory Opinion

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[11] *See supra* note 5.

[12] N.J. RULES OF PROFESSIONAL CONDUCT Rule 3.3.

586,[13] dealt with a lawyer who represented a wife in a divorce action. The action was settled. There was distribution of property, including distribution of the proceeds of a sale of real estate. A year and a half later, that lawyer represented a client buying that same real estate that was disposed of in the divorce action. In the course of representing his client, the buyer, he was told by his client, the buyer, "You know, I've got a side deal with the seller. I'm paying off the secret mortgage on that property to the seller." The lawyer, for the first time, learned that his former client, the wife, was the victim of a fraud with respect to the sale of that property, having not been informed that there was an additional $70,000 realized in connection with the sale by virtue of this secret mortgage. The questions submitted to the Committee were: (1) What is the obligation of that lawyer? (2) Does he have an obligation to disclose the fraud that was perpetrated to his former client, and perhaps to the court, or is the communication which came to him from his second client in confidence protected by rule 1.6?

When you think about the fact situation and analyze the rules, you have to conclude that there is no exception to rule 1.6 which permits the attorney to disclose. It is not a rectification case, because he was not involved, and his services were not used in the perpetration of a fraud. It is not a situation of ongoing conduct by his own client because his client, the buyer, is not involved in the perpetration of a fraud. A literal reading of the rules, in effect, tells the lawyer that he is not free to disclose that information, because it came to him in confidence. He probably should withdraw from representation; but how does that help his former client? It does not. Some other lawyer who has no interest in his former client would represent that buyer and his client would never be relieved.

In fact, the Committee said, and it based this on exceptions to the attorney-client privilege. (Frankly, I do not understand what the attorney-client privilege has to do with this fact situation, because that is a testimonial privilege, but it did look at cases involving attorney-client privilege and exceptions to the attorney-client privilege) the spirit of our rules in New Jersey calls upon the lawyer to correct the wrong. Therefore, he is not only permitted to disclose, he is required to disclose. You go from what I think is a nondisclosure to a mandatory disclosure, by virtue of an advisory opinion.

Clearly, the spirit in New Jersey, and a spirit which we have fostered and supported, is that lawyers should not simply be mouth-

[13] Opinions of the Advisory Committee on Professional Ethics, Opinion 586, 117 N.J.L.J. 503, 533.

pieces. As much as we want to protect the lawyer-client privilege and the lawyer-client confidential relationship, there are situations in which the lawyer must protect other interests, including his own. I think we have good rules in New Jersey, and the profession is respected for them. A recent survey done by the Gannett newspapers singled out New Jersey as the one state which has developed a set of rules and a disciplinary system that elevate it above the other forty-nine states in the Union.

ATTORNEY FEE-SHIFTING: A VIEW FROM THE BENCH

*Honorable John J. Gibbons**

What many think of as an unfortunate development is the phenomenon of attorneys litigating with each other over fees; something that was relatively unheard of in the day when the principal fee-shifting device was the contingent fee arrangement. Back then, the general assumption was that attorneys and competent adults ought to be left free to arrange for themselves the level of attorney compensation, since no one else was affected. Developments in the statutory fee area gradually led to a change in that assumption and exposed the fact that, frequently, there were conflicts of interest between the attorney and the clients, particularly in the class action area, which required a more careful judicial scrutiny of the fee problem, and which resulted in the court taking a more active role in supervising the level of compensation for attorneys. Lately, that has even begun to shift over into the court's attitude toward contingent fees. Now we are beginning to see litigation between attorneys and dissatisfied clients who think that they made a bad deal on the contingent fee, and that is a major change in the culture of the profession, at least insofar as it involves relationships with clients. That branch of litigation tends to be acrimonious and unpleasant for all concerned, but we have it with us, and we certainly are not going to undo the massive decision to move away from the American rule. We are going to see, I think, more and more litigation over attorneys' fee issues.

The movement away from the American rule towards fee

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shifting has had the significant effect of providing a market solution for those problems which, perhaps, the profession should have faced up to and handled in a different way. But, one thing that has come about, in part at least from the decision by the legislatures to encourage fee shifting, has been an enormous growth in the size of the profession. In New Jersey it tripled in twenty years—astonishing growth that has been matched in other states. The astonishing growth of the Bar and the astonishing growth of opportunities, by virtue of fee shifting, to litigate more extreme and more exotic issues has also produced resistance from segments of society which were formerly largely immune from scrutiny, and from the lawyers who represent those segments of society. The result has been a somewhat alarming development; a movement which the courts seem to be endorsing enthusiastically, toward more reliance on sanctions, particularly sanctions against attorneys.

There has been a constant agitation against the increased cost of litigation, and the prime alleged culprits have been the attorneys who abuse the process by perhaps overenthusiastic litigation in pre-trial stages and who file frivolous lawsuits. There is little or no empirical evidence that either group was imposing significant costs really beyond what was intended by the fee-shifting devices in the first place. Nevertheless the courts, a few years ago, began to move more and more in the direction of authorizing sanctions against attorneys personally, a movement that in some jurisdictions has now made the sanction motion a standard weapon in the arsenal of aggressive litigation.

This development, at least as I view it, has produced a significant change in the legal culture of the community. Lawyers are saying things to each other and about each other today that, years ago, they would be ashamed to say; that they would never be impolite enough to say. I wonder whether this change in the legal culture is all to the good. You are part of a learned profession which, until recently, had a strong tradition of civil discourse among its members. Twenty years ago, attorneys who acted uncivilly, tended to be treated as outcasts, even among members of their own firm. Today, they are probably made managing partners.

One final point, and this is not addressed at all in the Rules of Professional Conduct. There has been, in the past twenty years, enormous increase in compensation for attorneys, particularly senior partners, and that I think has been accomplished by

two things—first, the growth in the size of law firms and their ability to manage people, and secondly, the ability of lawyers to make money on other lawyers. The emphasis seems to me to have become the creation of profit centers in law firms, and that is not all to the good. Undoubtedly, the marketplace rewards efficient operation, but the increase in compensation seems to me to have been accomplished, to some extent, at the expense of other aspects of life. The young associates hired in law firms are expected to put in enormously long hours at the neglect of outside activities, such as participation in other community activities, legal scholarship, avocational study in fields other than the law, recreation, and even family life. The result has been in a number of firms that I know of, a marked increase in the rate of divorce and the incidence of psychological problems that lawyers have undergone, the incidents of excessive drinking and the like. It seems to me that this is a major and almost totally neglected area of professional responsibility with which the management level people in law firms have to come to grips. We are, I think, coming to the point where we are excessively exploitive of the people who come to work for some of our major law firms. Well, so much for the view behind the veil of ignorance on the court of appeals about how things are in the profession, which I only see second- or third-hand.

THE ATTORNEY'S PROFESSIONAL RESPONSIBILITY IN THE ATTORNEY-CLIENT RELATIONSHIP.

*Colette A. Coolbaugh**

I always enjoy the opportunity to talk about ethics with my colleagues. However I feel that speaking to attorneys such as yourselves is a bit superfluous. It is something akin to a clergyman addressing the parishioners sitting in the congregation about absenteeism from services. Attorneys who are active members of bar associations, who take the time to appear and attend

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symposiums such as this, are truly not the group we need to reach. As a whole, and there have been several studies done in this area, attorneys who are active in the organized bar, who make an effort to attend professional seminars, are the people who need this talk least. Lawyers who participate in bar meetings and continuing legal education programs have a lower rate of ethics violations. That you are the attorneys who seek further education is surely part of the reason. Peer group support is also part of the reason. It is indicative of a professional attitude which should be encouraged. I am pleased to be here and hope that you will carry the message further.

In discussing attorney ethics with you, I am not going to suggest that you should not take your client's money. We all know that.[1] There are, nevertheless, many ways a lawyer can inadvertently run afoul of the ethics system. It is possible, within the course of your career, that you may transgress one of the Rules of Professional Conduct either through ignorance, overzealousness or inexplicable apathy. Therefore, my talk today will be limited to the ways an attorney, certainly not with intent, may be forced to confront ethical or fee arbitration problems which with some foresight could most probably have been avoided. This discussion will confine itself to matters which can result in a reprimand, either public or private—problems which certainly no attorney would have immediately foreseen and surely would have avoided had more thought been given on a timely basis. The thrust of this talk is to address the handling of a case file from the time you initiate representation until its conclusion.

1. *Opening the Case File*

When you first meet with a client you are both filled with expectation. The client expects that through you, he or she will obtain complete vindication by means of monetary remuneration or other substantial satisfaction. My first piece of advice is that after the initial interview you refrain from accepting a case which is beyond the area of your expertise. This does not mean that you must totally divorce yourself from the client, but certainly you should seek the assistance and guidance of counsel who has more expertise and more years of solid background in areas with which you are not totally conversant. Under New Jersey Court Rule 1:39-6(d), there are situations whereby you can refer a case

[1] *See In re* Wilson, 81 N.J. 451 (1979) (misappropriation of client funds will result in disbarment).

to a certified trial attorney and still continue to perform services for the client who sought your advice initially.[2]

It is not only important but very fair that the client should know the reasonable expectations of his or her claim. To paint a rosy picture in the beginning, at a juncture when you both may be ignorant of all of the facts, can only result in disappointment and dissatisfaction for you both at the end. Consequently, a full and thorough discussion of the merits and liabilities of the cause of action are imperative to a good attorney-client relationship.

The next thing is to have an upfront discussion about fees. This should be specific and in detail as to what your fees are, what they include, what they do not include, what your client may expect from you, and what you may expect from your client. Specifically, spell out the fact that your stock in trade is your expertise and your time. Failure to do this can result in a fee arbitration complaint and a possible spillover into an ethics complaint. Many times a client will not understand the word "retainer." Clients frequently regard a retainer as being full payment for the job to be done; attorneys, however, consider a retainer to be a down payment towards services to be rendered. A frank discussion concerning contingency fees versus hourly rates, charges for telephone calls, preparation of interrogatories, appearance at depositions, telephone conferences with your adversary should all be made clear. There are rules to help you in this regard. Court rule 1:21-7 governs contingent fees.[3] Fixed percentages are set forth as to what may be charged in a contingent fee situation for an adult, a minor or multiple parties. You must offer the client the alternative of an hourly rate or a contingency fee. If you and the client agree to a contingent fee arrangement, your fee must be calculated after the disbursements for costs are made.[4] If you believe the case is exceptional due to the amount of time and effort that you have put in, you may seek

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[2] N.J. CT. R. 1:39-6(d) provides:

> (d) Division of Fees. A certified trial attorney who receives a case referral from a lawyer who is not a partner in or associate of the certified attorney's law firm or law office may divide a fee for legal services with the referring attorney. The fee division may be made without regard to services performed or responsibility assumed by the referring attorney, provided that the total fee charged the client relates only to the matter referred and does not exceed reasonable compensation for the legal services rendered therein.

Id.

[3] *See id.* R. 1:21-7.

[4] *See id.* R. 1:21-7(d).

an increase in fees.[5] All contingent fee agreements must in writing. Additionally, all matters concerning family actions must also be in writing.[6] There are certain areas where no contingency fee is permitted. In particular, you may not seek a contingency fee in any family action or in any criminal matter.[7]

Regardless of whether it is required by a specific New Jersey Supreme Court rule or the Rules of Professional Conduct, it is strongly suggested that you put all fee agreements in writing. This will avoid unnecessary disputes in the future. Additionally, attorneys should bill periodically. This will avoid the very nasty surprise to the client at the end of the case when there is a several thousand dollar bill outstanding. If the client is aware of the services being rendered, and what they are costing, there will be far fewer problems at the end. It is recommended that you bill monthly or quarterly, certainly no less than quarterly, so that there is no confusion which can result in an unhappy termination of the relationship. If you are on a contingency fee basis, you may nevertheless wish to advise your client of the costs being expended. This will place both of you in a better position to evaluate settlement offers and the advisability of pursuing the matter through trial.

2. *Communication*

Another area which can result in innumerable and unnecessary grievances is the failure of a busy attorney to communicate with his client. You have a professional responsibility to communicate with your client on a regular and reasonable basis. You have the duty to keep a client informed about the status of a matter and to comply promptly with reasonable requests for information.[8] Communication includes conveying to your client information reasonably necessary to permit the client to make informed decisions regarding the matter.[9] Repeated failure to communicate with a client, or failure to communicate with several clients in several cases, can result in a determination of gross neglect or a pattern of neglect.[10] It is important to return your clients' telephone calls, if ever so briefly. If you are out of the office and simply cannot get back to a client, have your secretary

5 *See id.* R. 1:21-7(f).
6 *See id.* R. 1:21-7A.
7 N.J. RULES OF PROFESSIONAL CONDUCT Rule 1.5(d)(1)-(2).
8 *Id.* Rule 1.4(a).
9 *Id.* Rule 1.4(b).
10 *Id.* Rule 1.1.

leave a message and just say: "Your attorney is not available but will call you next week." Let your clients know how their case is progressing. One good technique is to carbon your clients in the various correspondence concerning their case. It is not necessary to send them all sixty-seven pages of the interrogatories which you have served, but a copy of the cover letter transmitting those interrogatories will let your client know that you are working on his or her case. They will know that progress is being made and the case is moving. This will also avoid unnecessary and time consuming telephone calls with the client asking what is happening with the case. Regular communication with your client will not merely satisfy his or her need for reassurance but will also provide a checkpoint for the attorney to make sure that things are not sliding into oblivion. A systematic approach to client communication will keep you both on an even track and will keep the matter moving toward an orderly conclusion.

3. *Neglect of a Matter*

Neglect is a very difficult area in attorney discipline. Unfortunately it is a prevalent area for complaint. The standard in New Jersey, whether under the old Disciplinary Rule 6-101 or the new Rule of Professional Conduct 1.1, is gross neglect or a pattern of neglect. Simple negligence or carelessness which might be a cause for legal malpractice is not an ethical violation in New Jersey.[11]

There is not a human being alive that does not have some case file, some matter, some problem which has been ignored. Every one of us has that "ugly green monster" sitting on the corner of our desk. Unfortunately the longer it sits, the uglier and larger it grows. Despite wishes and prayers it simply will not go away. If you have taken on a matter with which you cannot cope, please do not ignore it. Turn to someone for assistance. Within your acquaintances, there has to be a law school colleague, a former law school professor, the attorney in the next office, someone who can assist you in getting over the psychological barrier of dealing with the problem. Please go to that person and say, "I cannot deal with this; I need help." You might be surprised at the resources of informal help that are out there to assist another member of the Bar who is dealing with a particular problem. Alternatively if you feel that you cannot handle a case, and the mat-

[11] *See In re* Gelzer, 31 N.J. 542, 158 A.2d 331 (1960); *In re* K, 24 N.J. 207, 131 A.2d 502 (1957).

ter cannot be referred out to a certified trial attorney under rule 1:39-6(d),[12] obviously the best course is to advise your client and terminate your representation.

If, however, the case has reached the point where damage has been done, (*i.e.*, the statute of limitations has run or the matter has been dismissed for failure to prosecute) you must face the problem without flinching. Do not allow simple negligence, possible legal malpractice, to turn into unethical conduct. Simple negligence in a single matter is not unethical conduct, but misrepresentation to your client is. It is very tempting not to have to admit error, but be assured that confession is not only good for the soul, it is also good for the retention of your license as an attorney. Admitting your neglect will probably cost you the client, it may well raise your legal malpractice insurance fee, but you will still be practicing law. Misrepresentation to a client, particularly if it results in damage to the client, will surely result in attorney discipline and may well result in a suspension of your license.[13]

4. *Overzealousness*

The other side of neglect is being overzealous. Do not overidentify with your client and do not step beyond the bounds of propriety to accomplish your client's goal. A lawyer should not adopt his client's position to the extent that his or her own ethical responsibilities are compromised. A lawyer should not assert a claim which he believes to be frivolous unless there is a good faith argument for an extension, modification or reversal of existing law.[14] A lawyer has the responsibility to treat with courtesy and consideration all persons involved in the legal process.[15] A lawyer has the duty of candor towards the court or tribunal before whom he or she is appearing. A false statement of material fact or law or the failure to disclose a material fact may result in discipline.[16] These are all basic tenets of litigation. Overiden-

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[12] *See supra* note 1 and accompanying text.

[13] To contrast the levels of discipline involved, compare *In re* Rosenthal, 90 N.J. 12, 446 A.2d 1198 (1982) (attorney who failed to inform client of imminent dismissal of case and failed to prosecute bankruptcy claim of another client, publicly reprimanded) with *In re* Stern, 81 N.J. 297, 406 A.2d 970 (1979) (attorney who misrepresented to clients that case had been filed and then manufactured court documents to deceive clients, coupled with settling another case without client's consent, was disbarred).

[14] N.J. RULES OF PROFESSIONAL CONDUCT Rule 3.1.

[15] *Id.* Rule 3.2.

[16] *Id.* Rule 3.3.

tifying with your client's cause, however, is usually of far less moment and requires an immediate judgment call. For example, as an attorney you have handled a real estate closing for the buyers. At the closing there have been certain adjustments made and a check from your trust account is delivered to the sellers for a specified item. That night you are called at home. It is your client who advises you to stop payment on the check since the sellers of the home have taken all the storm doors with them. Do not stop payment on that check. The check was issued at the closing for a particular purpose. You cannot indulge in self-help to better your client's position in possible future civil litigation even though your client urges you to do so. There are alternatives available to resolve the storm door problem through the civil courts. Do not overrepresent your client and attempt to take advantage of one situation in order to rectify another wrong.

5. *Conflict of Interest*

Conflict of Interest is another very difficult and grey area which affects all attorneys on a daily basis in their professional lives. There is a volume published by the Institute for Continuing Legal Education entitled *Opinions of the New Jersey Supreme Court Advisory Committee on Professional Ethics*. This committee has issued over six hundred opinions in the last twenty-five years. Approximately half of those opinions deal with the area of conflict of interest. The opinions of the committee are initially published in the *New Jersey Law Journal*. It is imperative all attorneys realize that, pursuant to rule 1:19-6, these opinions are binding on the district ethics committees in their evaluation of unethical conduct. This translates that if you run afoul of one of these opinions you may well be held to have committed unethical conduct even though you did not have actual knowledge of the particular opinion at the time you took the action in question.

Conflicts of interest frequently center around either the representation of two adverse parties in the same proceeding or else the involvement of an attorney and a client in the same business transaction. Our State Supreme Court has given very clear and strict guidelines in these matters.

First, if you contemplate undertaking the representation of two parties with potentially conflicting interests (such as in a real estate transaction), it is essential that you obtain the express consent of each after full disclosure of the facts. It is insufficient to simply advise the clients that you see no conflict and then request

the consent of each. A client cannot be expected to foresee the great variety of potential areas for disagreement which may arise. The attorney, as the professional, is expected to and must discuss with the client the pitfalls of any dual representation at length and with considerable specificity. Failure to fully inform each client, so that an intelligent and knowledgeable decision concerning the dual representation may be made, may result in discipline.[17]

Second, an attorney who enters into a business transaction with his client may not shed "in chameleon fashion" his professional standing and ethical obligations as an attorney.[18] If entering into a joint business venture with a client, the attorney carries with him the "elemental obligation of honesty, uprightness and fair dealing."[19] Moreover, in any such business enterprise, an attorney should insist that the client obtain independent legal advice concerning the proposed transaction.[20] The attorney's self-interest must necessarily cloud his ability to render objective legal advice to his client/partner.

Third, remember that you are an attorney twenty-four hours a day. The totality of your conduct whether as an attorney or as a business entrepreneur may be scrutinized and subject you to discipline. An attorney is "obligated to adhere to the high standard of conduct required of a member of the bar even though his activities did not involve the practice of law."[21] For example, an attorney was suspended from the practice of law for one year for padding his business expense account as a corporate employee.[22]

The bottom line with conflict of interest situations is, if you have to think about it, the answer is, "No!" Usually your gut instinct, a sense of fair play, will steer you clear of the pitfalls of conflict of interest. Even though the issues seem clear at the time, and you are sure that you can negotiate for the two clients fairly, the situation should be avoided. Certainly, if you are going to try and represent both sides, you must remember that it requires full and informed disclosure. Each client must be aware of

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17 *See In re* Lanza, 65 N.J. 347, 322 A.2d 445 (1974); *In re* Kamp, 40 N.J. 588, 194 A.2d 236 (1963).

18 *See In re* Carlsen, 17 N.J. 338, 346, 111 A.2d 395, 397 (1955).

19 *See id.*; *In re* Miller, 100 N.J. 537, 543, 498 A.2d 356, 360 (1985).

20 *See In re* Barrett, 88 N.J. 450, 453, 443 A.2d 678, 680 (1982).

21 *See In re* Franklin, 71 N.J. 425, 429, 365 A.2d 1361, 1363 (1976) (citing *In re* Ryan, 66 N.J. 147, 150, 329 A.2d 553, 555 (1974); *In re* Carlsen, 17 N.J. at 346, 111 A.2d at 397; *In re* Genser, 15 N.J. 600, 606, 105 A.2d 829, 832 (1954)).

22 *In re* Franklin, 71 N.J. 425, 365 A.2d 1361.

the possible problems, the conflict in your loyalties, and the adverse consequences. A full and informed discussion, coupled with a written waiver of conflict, is essential. Another independent attorney in the picture is always better.

6. *Jurats*

With admission to the bar, an attorney acquires the authority and privilege to act as a Notary Public. The taking of jurats and acknowledgments is a solemn responsibility which should never be done in a cavalier manner. A defective jurat cannot only damage or prejudice your client, but may subject you to discipline. There are five essential elements in taking the jurat to an affidavit or in subscribing an acknowledgment which must always be followed, which are:

a. the personal appearance by the party before the attorney;
b. the identification of the party;
c. the assurance by the party signing that he or she is aware of the contents of the document;
d. the administration of the oath or affirmation by the attorney; and
e. execution of the jurat or certificate or acknowledgment by the attorney in the presence of the party.

Unless all of these steps are complied with, the notarization process is both legally and ethically defective.[23]

7. *Closing the File*

Another area which seems to plague the legal profession is the administrative detail surrounding the effective and prompt closing out of a case file. Whether it is a real estate closing, tort litigation or the details in settling an estate, many attorneys hate the small administrative follow-up which is required to close a file finally and in an orderly manner. Everything substantive has been accomplished. The case has been settled, releases exchanged, checks issued, but then the attorney fails to send the

[23] For specific disciplinary cases on point, you may wish to review *In re* Coughlin, 91 N.J. 374, 450 A.2d 1326 (1982) (public reprimand); *In re* Spagnoli, 89 N.J. 128, 445 A.2d 39 (1982) (public reprimand); *In re* Barrett, 88 N.J. 450, 443 A.2d 678 (1982) (three-year suspension); *In re* Rinaldo, 86 N.J. 640 (1981) (public reprimand); *In re* Surgent, 79 N.J. 529, 401 A.2d 522 (1979) (six-month suspension); *In re* Terkowitz, 76 N.J. 329, 387 A.2d 362 (1978) (one-year suspension); *In re* Mocco, 75 N.J. 313, 381 A.2d 1212 (1978) (one-year suspension); *In re* Conti, 75 N.J. 114, 380 A.2d 691 (1977) (public reprimand). For a further general discussion of the attorney's obligations, see *Notarizations and Ethics*, 95 NEW JERSEY LAWYER 14 (May 1981).

client a copy of his or her own judgment. The real estate closing has been held, mortgages cancelled and recorded, the deed recorded, but then the attorney fails to take care of the title insurance policy. Every attorney should establish a checklist for every case delineating what must be accomplished. Thereafter, either the attorney or his clerical staff should have a tickler system so that everything is checked off and a closed file is truly closed. It may seem trivial but it can make the difference between a happy client who will seek your services again or a disgruntled client who will file a grievance against you.

8. *Essence of Ethics*

New Jersey has a long history of strict ethics and fair lawyering. It is a history and tradition of which we are justifiably proud. The essence of attorney ethics, and the key to avoiding ethics grievances, is really a matter of common sense and fair play. Two tried and true precepts are offered. First, follow the old Golden Rule of, "do unto others as you would have them do unto you." Second, if you have to think twice about it, "don't do it." Although every lawyer should read the Rules of Professional Conduct and hopefully commit each one to memory, if you follow these two basic rules, you may reasonably expect only to meet ethics professionals at seminars such as these.

ASPECTS OF THE NEW JERSEY ETHICS SYSTEM

*David E. Johnson, Jr.**

Before entering into the substance of my portion of this symposium, I would like to make two opening comments. The first comment is an important concept: Attorneys may seek advice of counsel and may rely on it to resolve difficult ethical questions. I do not see many people doing that here in New Jersey. However, in addition to consulting the Advisory Committee on Professional Ethics, it is certainly an alternative way to resolve ethical questions. You can always ask an attorney, in whom you have

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trust and confidence, to give you a written opinion on a conflict case. Now I am not talking about casual conversation at happy hour, or something like that; I mean bona fide written advice to you by counsel whom you hire—something that you and an ethics committee can rely on, and something that is reasonable. So there are some alternatives other than waiting four to six months for a traditional advisory opinion from our busy Advisory Committee on Professional Ethics. It's certainly going to cost you something to get advice of counsel, but it is not a bad idea to think about, and we have not seen very much of that in our disciplinary system.

Second, I would like to address the substantive rules of ethics, vis-a-vis, malpractice. Simple negligence in New Jersey is not unethical conduct. Rather, conduct has to be gross negligence or must result in a pattern of simple negligence to make it unethical. It may still be malpractice, but it's not unethical conduct. I point that out here because you hear often about how New Jersey is very tough on lawyers who steal; we are the toughest state in the nation. If you knowingly misappropriate clients' funds you will be disbarred, and in New Jersey disbarment is permanent. It might be interesting for you to know that we are not the toughest state in the nation when it comes to treating attorney malpractice as an ethical violation. The American Bar Association has recommended for years that one simple act of neglect should be cause for disciplinary sanctions. In New Jersey our supreme court has never subscribed to that rule and, I think, wisely so. So malpractice claims in this state have got to rise to the level of gross neglect or a pattern of neglect to be unethical conduct, and that is important to keep in mind.

With those two preliminary observations out of the way, let me talk to you now about our ethics structure. A lot of you, I am sure, have had no experience directly with the ethics structure, certainly not as respondents; you may have been on ethics committees. In New Jersey, we have a three-tiered structure, starting with the supreme court at the highest level. They are the only body which can impose any type of public discipline. All the disbarments, suspensions, public reprimands, that you hear about emanate from the supreme court. The Disciplinary Review Board (DRB), which is the intermediate appellate tribunal in ethics matters, does have jurisdiction to impose private reprimands. It is that board which reviews all trial records and makes detailed findings of fact and conclusions of law in all of the cases which

eventually go to the supreme court and which result in some type of public discipline. The trial level in the structure of ethics proceedings is handled by District Ethics Committees (DEC's). There are seventeen such committees now, in New Jersey, scattered all across the State, roughly in districts equivalent to our state court vicinages. Some are a little more regionalized than that. These are the committees which handle the vast majority of ethics grievances that are filed. They are the ones who receive grievances initially, investigate them, prosecute them, and their hearing panel decisions recommending public discipline eventually go to the DRB and then to the New Jersey Supreme Court. I should also mention here that the disciplinary review board receives appeals from all dismissals by the DEC's, whether it comes at the conclusion of a preliminary investigation or whether a hearing has already been held and the matter is dismissed at that point.

Now, our office, the Office of Attorney Ethics (OAE), has been in existence only for about five years, since October of 1983. The OAE manages and assists the DEC's. We also investigate and prosecute a certain number of cases ourselves. Our jurisdiction extends exclusively to all criminal cases against attorneys, whether they are dismissed or result in some type of criminal penalty. An attorney from my office prosecuted the *Rigolosi* case,[1] where Vincent Rigolosi was acquitted by a jury after a criminal trial. We believed there was compelling evidence in the record to support a disciplinary prosecution. There was a tape recording of certain incriminating statements made the attorney. We felt, for that reason, among others, that the matter should be tried, and it was tried, before a special master. The respondent was found guilty. The DRB reviewed the case, and it ultimately went up to the New Jersey Supreme Court which made the final, and ultimate, disposition—disbarment. We do not make a habit of going behind criminal verdicts and dispositions. We do not do it unless we are convinced that there is substantial evidence to warrant a disciplinary finding of unethical conduct by clear and convincing evidence. In the *Rigolosi* case, we felt that the tape recording was compelling evidence, and so we pursued it.

The OAE is also responsible for conducting random audits of attorneys' trust accounts throughout the State. We are one of only five states nationally that have a random auditing program.

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[1] *In re* Rigolosi, 107 N.J. 192, 526 A.2d 670 (1987).

We employ five full-time auditors, who conduct about 390 audits per year. About ninety-nine percent of those audits are handled totally without any disciplinary involvement and without any disciplinary record. So, if you are ever being considered for a judgeship, and you had previously undergone a random audit, as far as I am concerned, on any questionnaire inquiring into your disciplinary record you do not have to list random audits because they do not result in a disciplinary record except in less than one percent of the cases where specific charges are filed.

The same is true with respect to the trust overdraft notification program which is also administered by OAE. All banks, as you may know, are required to notify the OAE if an attorney overdrafts an attorney trust account. Again, probably ninety-seven percent of attorney overdrafts are handled without any disciplinary involvement at all, and again, if you are up for a judgeship, you need not disclose the fact, for example, that in 1985, you once had a trust overdraft which was caused by your secretary who made a deposit in the business account, rather than the trust account. As distinguished from the random audit program, however, the trust overdraft program is primarily designed to detect fraud and misappropriation, and that accounts for the percentage differential, between the two programs, not resulting in disciplinary involvement. The overdraft program has been somewhat successful in fulfilling its objective. As of 1987, five attorneys have been disbarred and one legal secretary was criminally prosecuted for stealing from her employers.

Let me move on and discuss with you the ethics procedures followed in New Jersey. Generally, if you have malpractice complaints or claims filed against you, the clients may also file with the ethics system. Occasionally, they do it before they file a civil suit; often, they will do it after. Usually, if they file an ethics grievance at the same time that a civil action is pending, the ethics system will defer consideration of an isolated malpractice matter until the pending litigation is concluded. However, all grievances that come to the ethics system have to be screened by the secretary of the local DEC; and the secretary has to make a determination whether the matter should be investigated, deferred or declined. If the secretary determines the grievance should be investigated, the matter is assigned to a member of the DEC, for preliminary investigation. The investigator will generally send a copy of the letter of grievance to the attorney who is the subject of that investigation and will ask for the attorney's

response. The investigator may also ask to meet with the attorney, if it seems appropriate, and may ask to talk with the grievant. He will then write up a written investigative report, which will be forwarded to both the attorney and the grievant. Generally, the investigator can either recommend dismissal or, if it is believed that there is unethical conduct, a formal hearing. Formal hearings are held before DEC hearing panels, consisting of two attorneys and one public member. There have been public members on DEC's since about 1979, so the public certainly has insight and input into all of our ethics work.

All ethics trials are conducted before hearing panels composed of DEC members. If the case is very complicated so that it will take an extended period of time, (for example, over three days) then I will ask the court to appoint a special master to hear that case. In these cases, it is unreasonable to require volunteer committee members to devote an excessive amount of time, in addition to their other duties, to sit and adjudicate such lengthy matters. Really, it is just not possible for them to work this way, although some of them, I am sure, would be willing to do it, because they are incredibly hard-working.

Any district ethics committee disposition may be reviewed by the disciplinary review board. There is a free right of appeal to any grievant who feels dissatisfied. A few may feel they have been railroaded, or that the complaint was "whitewashed" or, as sometimes happens, the grievant may allege there is some kind of a federal conspiracy by people flown in from Mars or Venus to intervene in these matters. I'm sure the DRB receives enough of those types of appeals; I know we certainly receive our share of these intergalactic communications. But, whatever the reason, and most of the appeals are taken in good faith, there are certainly rights of appeal established in the system. Any recommendation for discipline by a DEC hearing panel will go to the DRB. They'll review it, act on it and, if public discipline is warranted, the board will send its recommendation to the supreme court for its action. I believe that gives you an overview of the disciplinary procedure.

I would now like to provide you with some ethics statistics which will give you a perspective on all previously discussed substance and procedure. In 1986, there were fifty-three attorneys in this state who were publicly disciplined for various types of ethical violations. Well over half, fifty-eight percent, were sanctioned for some type of financial violation such as misappropria-

tion and recordkeeping, and in some cases, for criminal convictions involving theft. Another seventeen percent were disciplined for other criminal violations. Nine percent received public discipline for gross neglect, or a pattern of neglect. Discipline for gross neglect has increased slightly over the last couple of years. This appears to be a national trend. Finally, four percent of all sanctions were for fraud, and twelve percent were for other types of violations. Of those fifty-three attorneys, thirty-one were disbarred, either by an opinion of the court or because they consented to be disbarred (turned in their license so to speak), and another seventeen received some type of a term suspension (for example, six months, three years or five years). Five lawyers were publicly reprimanded. Moreover, there were forty-three attorneys in 1986 who were privately reprimanded. These cases, more often than the others, will involve issues of neglect. For example, a single instance of gross neglect, where there is no harm to the client, or where the harm has been minor in nature, might warrant a private reprimand. This is especially true if it is the first violation committed by the attorney. In addition to final public discipline and private discipline, twenty-two attorneys were emergently suspended and three other attorneys were put under some type of a temporary supervision. Attorneys are emergently suspended, frequently because they are either stealing money—for instance, they bounce a trust account check on some mortgage company which comes to the attention of the OAE who investigates it and applies to the supreme court for emergent action—or, because they are convicted of a serious crime. There is a provision for the automatic emergent suspension of an attorney, once a certification has been filed with the clerk of the court stating that the attorney has been convicted of a serious crime; for example, embezzlement, bribery, fraud, perjury, misappropriation. Occasionally, neglect cases will give rise to an emergent suspension. In 1987, the OAE suspended one attorney as the result of a pattern of neglect. I think the DEC found him guilty after a full hearing in connection with two or three formal neglect complaints. There were about eight or nine additional grievances and formal complaints pending, all relating to the same type of neglect allegations. We presented that to the supreme court as a pattern of neglect from which the public requires immediate protection and the court agreed.

Last year there were 828 grievances which were docketed by DEC's against New Jersey attorneys. We do not, in this state,

docket and count every grievance reported. Some states count every telephone call. If someone dials a wrong number, it is still recorded as a grievance and the statistics will reflect that it was handled by "administrative dismissal." Some people really count those things. We have taken, I think, a more common-sense approach in New Jersey. We look at the substance first, and if it does not merit disposition through the ethics system, after taking into consideration certain screening guidelines approved by the New Jersey Supreme Court, the OAE will advise grievants: "Your rights, here, are really to appeal this criminal sentence or jury verdict,"—if that is the crux of their complaint. Much responsibility is placed on committee secretaries to screen grievances. As I said earlier, 828 grievances were actually docketed and assigned for investigation by secretaries. Now, putting this in perspective, one must consider the fact that in 1986 according to the Clients' Security Fund, there were 28,284 attorneys who were actively practicing in New Jersey. This figure represents all the people who could potentially experience some type of ethical difficulty. However, if you divide 828 grievances by 28,284 attorneys, you can see you are going to come up with an awfully small number of docketed grievances. Actually only 2.1% of the active attorneys had a docketed grievance filed against them. If you divide the fifty-three attorneys finally publicly disciplined (or, even add to that the forty-three privately disciplined) by 28,284, you're going to get a figure of one-tenth of one percent of the lawyers in the state who were disciplined in 1986.

As these statistics change by four or five every year, I am always asked by the newspapers, "Well, does this mean lawyers are getting better, or getting worse?" Of course, there is no reason to believe that New Jersey lawyers are inherently any better, and certainly not, any worse, than any other lawyers throughout the nation. I think that the system is simply doing a better job of monitoring. We have better people on the committees; we have a full-time staff on the DRB; and a supreme court that is really interested in ethics. We are also trying to do a lot, in terms of education, so that mistakes are not repeated. In the Institute for Continuing Legal Education (ICLE), there is a mandatory part of the "Skills and Methods" course, which all newly admitted attorneys are required to attend, involving specific training in proper recordkeeping for attorney trust accounts and business accounts. This is something which did not exist three years ago. I am happy to participate in this symposium, just as I am in ICLE

courses and other educational programs, to show that ethics is a lot more than just discipline. It is concern, it is professionalism, and that is why I am proud to be involved in the New Jersey ethics system.

ATTORNEY MALPRACTICE: THE EXPANDING SCOPE OF LIABILITY

*William W. Voorhees, Jr.**

Since a large percentage of my work involves legal malpractice cases, and I am on the District Ethics Committee, and like most trial lawyers I frequently commit legal malpractice, I do suppose that I am a logical choice to speak to you on this topic.

If, two years from now, you remember one thing that I have told you I will consider that to be a success.

The one thing I want you to remember is this: your client may love you because of the superb job you have done for him on his closing or his will, but in his heart of hearts he considers you to be a member of a group known as "lawyers," whose main endeavor is to slither like a snake into the new Mercedes to deposit the client's hard earned money in their bank accounts without doing any work.

If you think I am exaggerating, I would suggest that you make it a point to serve on jury duty. Do not tell your fellow jurors in the jury room that you are connected with the law profession, and instead try to determine what they think about lawyers. You will be as totally shocked, as I was, to find not only that we as a group are disfavored, but that we are truly a *despised* group by a very large percentage of people. You absolutely must keep that in mind when you are practicing law because, to a certain degree, you will have to protect yourself from that small percentage of clients who inevitably are going to turn on you when things go wrong.

You must also keep in mind, particularly if you are ever a defendant in a lawsuit, that there is, in my view, an anti-lawyer judicial bias. This is not necessarily true with all judges, but I have found, in my practice of defending various types of professional people, that judges in general seem to lean over backwards

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to favor the client in a suit against the lawyer. My perception is that these judges do not do this to hurt the lawyer, but rather to be "super fair," if I can call it that, to the client or former client because they do not want to create a public perception that the judiciary views lawyers as favored litigants. If, in your daily practice, you remember that your actions are going to be viewed by a hypercritical judicial eye, you will have taken a major step toward avoiding malpractice claims and malpractice verdicts.

I next want to focus on some of the areas in which professional liability of attorneys is expanding. First of all, the scope of our liability has been expanded. We all know that we may be held liable for our mistakes. That is malpractice. It applies to all professionals, and normally the plaintiff needs an expert to testify on his behalf.

In 1984, however, the very distinguished Honorable William A. Dreier, J.A.D., wrote an opinion in a case entitled *Malewich v. Zacharias*.[1] Judge Dreier stated that the Disciplinary Rules themselves may be used to set forth a standard of conduct for attorneys in a malpractice suit. Without further analysis this may not seem too surprising, but it must be noted that the Disciplinary Rules or the Rules of Professional Conduct were designed to create standards of proof by *clear and convincing evidence* to a jury of *attorneys* on the question of whether a violation of the rules has taken place. After Judge Dreier's ruling, *jurors* will now be making those judgments and they will be making those judgments by a *preponderance of the evidence*, which is certainly a far easier burden of proof.

So now the things for which we can be liable are not only our mistakes but also our failure to abide by the Disciplinary Rules or Rules of Professional Conduct. You should take a look at the rules regarding confidentiality. Take a look at the rule regarding conflict of interest. Take a look at the rule regarding zealousness. If you look at those rules and recognize that jurors will be making decisions as to whether or not they were violated, I think you can see that there is a tremendously expanded area of civil exposure for anything which could be the subject of an ethical complaint.

The next area of expanded exposure which I would like to address is the question of "to whom are we liable?" Traditionally, our liability has been limited to our clients. We know from

[1] 196 N.J. Super. 372, 482 A.2d 951 (App. Div. 1984).

our law school education that this makes perfect sense because we as lawyers are in privity with our clients—we deal directly with them, and we are responsible to them. In my view, today we are no longer liable *only* to our clients because privity in this regard is dead in New Jersey. You should examine a case entitled *R.J. Longo Construction Company v. Schragger*.[2]

In that case, a builder sued the township attorney because the builder had successfully bid on a township job and the township attorney erred in preparing the bid. The contractor claimed that the attorney's error caused him damage even though he was not the attorney's client. Instead of suing the town, the builder sued the attorney on this basis. The court said, in effect: "Privity is not dead. However, we find that the attorney for the town had a fiduciary duty to the builder and to others who might act upon that bid." The rationale for this decision was that the attorney knew, or should have known, that the builder would be a third party beneficiary of the work performed by the attorney for the township. So while the court stated that it was not abolishing privity, it effectively did so, at least for municipal attorneys.

If you want to project where the privity issue is going as far as attorneys are concerned, you should read a case called *Rosenblum v. Adler*.[3] It is a 1983 decision that deals with the issue of accounting malpractice. In *Rosenblum*, the Supreme Court of New Jersey abolished privity for accountants, and the way in which the court did it is tremendously interesting. First of all, the court held that accountants have a fiduciary duty. This "fiduciary duty" is a judicially-imposed duty which will be imposed on a case by case basis. In determining whether a fiduciary duty existed, the court directed the trial courts to address the question of what duty the accountant should bear to best serve *the public interest*, not only the client's interest in light of the role of the accountant in today's economy.

Change the word "accountant" to "lawyer," and in my view some day we are going to be judged by the standard of what duty we should bear to best serve *the public interest* in light of the role of the attorney in today's economy. The *Rosenblum* court specifically held: "Whether a *duty* exists is ultimately a question of fairness. The inquiry involves a weighing of the relationship of the parties, the nature of the risk, and the *public interest* in the proposed solu-

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[2] 218 N.J. Super. 206, 527 A.2d 480 (App. Div. 1987).

[3] 93 N.J. 324, 461 A.2d 138 (1983).

tion."[4] I suggest to you that within a very short period of time the courts are going to be measuring your conduct under the very subjective standard of "fairness" and will be asking whether you should, in the "public interest," have a duty to someone other than your client. Obviously, this subjective standard will vary from court to court.

You are probably familiar with *McIntosh v. Milano*,[5] where the psychiatrist was sued by his patient's victim for failing to disclose to the victim that his patient *might*, in a fit of jealous rage, do some kind of bodily harm to this victim who happened to be the girl next door. If you review Disciplinary Rules regarding disclosure you will see that within a very short period of time we are going to have the same kind of suit against an attorney because the fundamental groundwork for suits of this type has already been laid.

The third area of expanded liability involves the time within which we may be sued. The statute of limitations for attorney malpractice, as opposed to most other professions, is six years rather than two years. There is also the case of *Mant v. Gillespie*,[6] which holds that the six year statute is subject to a "discovery" rule very much like a medical malpractice case. I would suggest that you review that case because, in my view, the statute begins to run far later than when the wrong was known or should have been known. Unfortunately, when you are down there in Florida enjoying your retirement you should be very worried about what is happening here in New Jersey and whether you are going to be sued for something that happened a long time ago.

I now want to give you some general rules for avoiding malpractice and some specific instances for specific types of problems that can arise in specialized practice areas. First of all, read your malpractice policy. There are a couple of little tricks in there and you should know about them. Secondly, never, ever, ever, ever try to cover up in any way, shape or form any mistake that you have made in representing your client. Any attempt to cover up is going to make you look like an arch-villain rather than a decent fellow who simply made a mistake. Anytime there is an indication of a problem with regard to malpractice you should, rather than try to cover it up, report the problem to your carrier immediately.

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[4] *Id.* at 341, 461 A.2d at 147 (emphasis added).
[5] 168 N.J. Super. 466, 403 A.2d 500 (Law Div. 1979).
[6] 189 N.J. Super. 368, 460 A.2d 172 (App. Div. 1983).

There is another "never-never" for lawyers and this, in my view, is an absolute. You should *never* sue your client for a fee. Regardless of how much your client owes you, if you are foolish enough to allow yourself to get in over your head, as far as the client is concerned, you deserve to lose that money. The claim for a fee is frequently accompanied by a counterclaim for malpractice, and many times it is frivolous. The problem is that you, more likely than not, have at least a $5,000 deductible under your policy that applies to legal fees expended in defending that counterclaim. It may cost your insurer $5,000 in legal fees to get out of even a frivolous claim if the matter is complex enough. Ultimately, that money is going to come from your pocket and you will have a "bad" claims record following you throughout your career.

The problem areas for malpractice suits usually involve a lapsed statute of limitations. There is not too much that can be said about that, and I am not going to tell you how to install a proper diary system. What is extremely important for litigation attorneys is what I call "the non-retainer letter." We frequently get claims where the client, or I should say alleged client, comes in and says, "Well, I've met with the attorney in his office. He interviewed me, and he agreed to take my case. Two years later I called him back wondering where my money would be, and he said, to my surprise, that he had never agreed to act as my attorney." When I am asked to defend a case like this I consult with my attorney–client and find that, indeed, he has some notes from this meeting but he does not have a letter to the client saying that he would not take the case. We now have a credibility issue, and my experience has been that even though there is no retainer agreement the client is going to win the credibility issue in front of a jury eighty percent of the time solely because the defendant is a lawyer. Please make sure that when you interview someone but decide not to take the case that you make it clear in writing that no attorney-client relationship exists.

I have found that there is an increasing number of claims against workers compensation attorneys. Usually these involve the issue of whether the workers compensation attorney failed to pursue a third-party claim. Those of you who practice workers compensation law should make sure in any case where there is a potential third-party claim that it is discussed with the client and that a letter goes to the client even if you do not want to pursue this claim. You should advise the client to pursue it, at least to

the extent of seeking another attorney's advice, and you should remind the client about the two-year statute of limitations.

As far as real estate practitioners are concerned, the statistics nationwide show that these claims comprise roughly twenty-two percent or twenty-three percent of legal malpractice suits. In my office I think the percentage is much greater. I think that real estate practitioners, and not necessarily the ones that do big complex matters, but rather the attorneys who do simple closings, have got one problem that is going to be very difficult to solve. If your client returns two years later and says, "My attorney never told me about this encroachment and he knew that I wanted to build a swimming pool there," you, the attorney, are not going to remember whether this is true. At best you will be able to say: "I do 100 or 300 closings a year and I do a good job on all of them. I am sure I explained this to my client, but I would be lying to you if I said I specifically recalled explaining it to this particular client."

The solution to this type of problem is to take a little bit of extra time with your client. When you are going over the survey or the title binder with your clients, have them initial any potential problem areas which you have explained to them, particularly encroachments and use restrictions. Any kind of a little mark on the survey or binder is appropriate not only as a defensive practice but also to emphasize to the client the significance of these particular items. Frankly, in the hustle and bustle of a closing the significance of what you have explained verbally may get lost in the shuffle.

I have also had a lot of problems with two-family houses. If a two-family house is involved, make sure that the title company insures that the zoning is proper for a two-family house.

If you have problems at the closing with items that have not been taken care of or if some major issue comes up at the closing, take the time, not only as a matter of defensive practice but for the sake of your client, to prepare your own "punch list" of problems. Indicate what you have told your client: if you told them they could walk out of the closing but might face a lawsuit over it, put it in writing. If you have advised them of their options and they have chosen to accept the house even though, for example, the windows had been broken in the interim, you are protected and you know that they fully understand their options. Remember, that memory tends to be selective and clients truly can forget what you explained to them in the closing room.

Go over the initial contract *in your office* with both of the buyers if the buyers are husband and wife. Do not review the contract with just one of them. The contract has to be explained to both of them and if possible it should be done when they are together. If you unable to get them together for some reason, you can use the telephone and notify them separately, but husband and wife should both be given a full understanding of what the closing is about.

The next area of practice I would like to address is the matrimonial area. Fortunately for those of you who practice in this area, there are very few cases involving matrimonial situations. Frequently, the claim is something to the effect that, "My attorney forced me to accept this settlement and I was distraught. I know I said under oath that I was satisfied with the settlement, but I was lying." These are very winnable cases from the attorney's point of view.

Matrimonial attorneys should not rely upon standard disclosure forms in any case that has any type of complication. In these cases you should always take the deposition, as though you were taking a deposition in supplementary proceedings, of the major breadwinner or asset holder.

When it comes to recommending an accountant or an appraiser to your matrimonial client, do not force the client to accept your recommendation. Compile a list of two or three appraisers or accountants and let the client make the choice, preferably after the client interviews the accountant or the appraiser. In the event the accountant or appraiser fails to perform to the client's satisfaction, you do not want the client to allege that you tried to force the accountant or appraiser on the client.

For the matrimonial client in particular, it is very important for your office to have a lengthy and detailed standard retainer letter. You should explain in great detail the question of equitable distribution, and I guarantee you that a written explanation will help your client understand the issues. You know, they always return a year later and say, "When we met the first time you promised me that I was going to get 'X.' " If you have that letter indicating to the client that you cannot make any promises, it will ultimately serve to remind the client that indeed, you had not made any promises and that the client knew that equitable distribution would be a throw-of-the-dice.

To those of you who practice in the wills and estates area—just use your common sense. Be careful who you represent. If

you represent Daughter number 1 who brings Mom into your office for a will, and it turns out that Mom wants to cut out Daughter number 2, I would suggest that you send Mom to another attorney. Once Mom dies and Daughter number 2 finds out that she was cut out, you, as well as Daughter number 1, will be a defendant in the will contest.

Be careful who pays the bill. When Daughter brings Mom in for the will, do not let Daughter pay the bill if she is a beneficiary. It simply looks bad.

Do not be an executor if you can possibly help it. It may be lucrative for you, but if a problem arises you may have insurance coverage questions.

Any time you have any type of unusual testamentary disposition, I think it is an excellent idea to send the testator a copy of the will along with a letter of explanation pointing out that the testator's wishes are somewhat unusual. This serves not only to reinforce to the client that the testamentary disposition is somewhat unusual, but will help you to defend yourself, twenty years later when the testator dies and the daughter who was cut out sues you, on the ground that you in fact improperly effectuated the testamentary intent of the decedent.

If you have a client who has difficulty with the English language do not use one of the beneficiaries as an interpreter. This is asking for trouble, particularly if a natural object of testamentary disposition is cut out of the will.

For those who practice corporate and transactional law, look at the conflict of interest rules in the Rules of Professional Conduct and recognize that they could be applied to you in a civil case. Take a look at *Sedima, S.P.R.L. v. Imrex Company*,[7] and recognize that you could be liable, in an ordinary business transaction, for RICO-type allegations which are not going to be covered by your insurance policy. My suggestion is that you be extra careful about getting involved in business deals with your client. I have heard many an attorney say that they have not made any money in the practice of law, but they do make money when they get a good entrepreneurial client and join in the business with him. If you are going to do that, please refrain from representing the business. If something goes wrong, you are going to have a major problem and you will be blamed for anything that could conceivably happen to the business. Err on the side of disclosure if

[7] 741 F.2d 482 (2d Cir. 1984), *cert. granted*, 469 U.S. 1157, *rev'd*, 473 U.S. 479 (1985).

you are doing anything that requires regulatory or administrative disclosure of the information concerning the deal you are working on.

As a corporate attorney you should not be a tout for your client. When you are in the conference room negotiating, do not say to the other attorney and his client, "What a wonderful deal your client is getting by buying in on this limited partnership venture!" When the deal goes sour it can come back to haunt you.

The last rule for the corporate attorney is "do not do anybody any favors." Many times I see cases in my office in which the attorney who sets up the business does not charge any fee because he expects to get a ton of work from the new business. It has been my experience that if you are not getting paid in full for your fee, psychologically, it is very difficult for you to do the job that you would be doing if you were paid for every minute of your time. Regardless of how hard you try, there is just an added factor of difficulty in doing your "A plus" type of job when you are not being paid in full.

When your client goes against your advice, particularly in disclosure situations, put it in writing. Again, a credibility issue between lawyer and client is a loser for the lawyer, and your brilliant entrepreneurial client is never going to admit that he did something as stupid as not following his lawyer's advice.

My last topic is the question of protection for retiring lawyers. Unfortunately, you have something to worry about, too, as I mentioned before. Even though you are fishing for tarpon off the Florida Keys, you should be aware that the legal advice you gave many years ago may come back to haunt you. You should purchase a "tail-end" policy when you retire. The phrase "tail-end" means that you are protected by a policy which will cover you in perpetuity no matter when the alleged malpractice occurred. You can then enjoy your tarpon fishing in peace. When you buy one of these policies do not ever get sold on the idea that you should only buy a "tail-end" policy with a six-year time period. As I mentioned before, the statute of limitations has a "tail" much longer than six years.

Do not be tempted to do any more legal work after you retire. When Aunt Sadie asks you to do her will as an accommodation, resist the temptation. If something goes wrong, your "tail-end" policy is not going to cover that because you are supposed to be retired. Do not be tempted to do a little favor for another

lawyer to make a quick buck or two because, again, after you are retired you are not going to be covered for any legal work you do while you are supposed to be out fishing.

After all of this advice I am certain that none of you will ever be my clients and, therefore, I have enjoyed this very brief meeting.

UNDERSTANDING THE PROFESSIONAL VALUE OF COMPETENCE

*Honorable Reginald Stanton**

I want to talk to you for a few minutes about the professional value of competence. A profession, of course, gets to be a profession, because it supposedly performs some specialized and demanding task that requires a higher level of education and special level of expertise that sets that group of people off from the rest of ordinary mortals. If we are to be a profession, that most essentially means, it seems to me, that we have to perform the work which we do with a marked and special competence. It is curious that, until about twenty years ago, when the Code of Professional Responsibility was adopted, there was no specific ethical rule which enjoined competence upon the practitioner. There were, of course, ethical decisions by the courts of many states which dealt with that issue. There was also the civil tort of malpractice which deals with that issue in terms of a standard of care and damages, but until Canon 6 of the Code of Professional Responsibility, there was no specific ethically-related regulatory rule which enjoined competence on the profession.

In the current Rules of Professional Conduct, we do have Rule 1.1, which specifically deals with competence. Interestingly enough, when our court, adopted, in general, the Rules of Professional Conduct, it did not simply adopt the ABA text. It basically retained Disciplinary Rule 6-101 of the old Code of Professional Responsibility. But, the fact is now that we have had for the last twenty years a specifically articulated rule of competence. It is a relatively simple rule. It says that a lawyer shall not handle or neglect a matter entrusted to the lawyer in such manner that the lawyer's conduct constitutes gross negligence. Now,

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* Judge, Superior Court of New Jersey. B.A. 1956, Saint Peter's College; B.A., M.A. 1958, Oxford University (Rhodes Scholar); J.D. 1962, New York University School of Law (Root Tilden Scholar).

the second part of the rule says that a lawyer shall not exhibit a pattern of negligence or neglect in the lawyer's handling of legal matters generally. Note that there is a double standard there; there are two levels of analysis. It is not an ethical wrong to commit an isolated act of legal malpractice which does not arise to the level of gross negligence, but a single act of malpractice which would be a grossly negligent act violates this rule, or a pattern of simply negligent acts, a lifestyle of not doing things well, although no single act would, in and of itself, constitute a violation of this rule.

A careful reader of disciplinary decisions throughout the country will see that an increasing number of reported decisions dealing with competence address, in particular, the aspect that involves failure to attend to business with professional diligence. We now see people getting disbarred for it, as opposed to the former practice, where a reprimand was considered sufficient for this kind of ethical dereliction. What is also interesting, I think, and something that I always pointed out at one time or another to every class in professional responsibility which I taught, is that this is the rule that troubles all of us. Most of us are not going to come close to violating in any serious way the other rules of professional conduct. I think, in our day-to-day practice, we simply do not often meet true ethical challenges that really tempt us and bring us close to failing in our duty. But, every day we have to grapple with this rule because every busy attorney has time management problems, and that is really what this comes down to. If a lawyer had nothing to do but handle one case, or a small number of cases, unless he or she were a complete idiot, he would not violate this rule.

But when an attorney has the kind of practices that all of you do, and that I had before I became a judge, somebody who has a going practice out of which you can make a living, automatically has built in a tremendous time management problem. He automatically has built into his practice the question: "Is he really handling, in an acceptably competent way, the general range of business which is presented to him?" It is a terribly difficult area, and it is, of course, not one in which there is much conceptual help. There is not much learning of an intellectual nature which will help a practitioner. What one really needs to do is to be a well-organized individual. What one really needs to do is to have exposure to the craftsmanship of the profession on a day-to-day, pragmatic, in-office, in-courtroom basis. He also needs the ad-

vantage of support, criticism, and assistance from other lawyers. A young, starting lawyer especially needs to have exposure to capable older lawyers.

It is because of this rule that I used to adopt the rather dogmatic posture of telling law students that I thought it was unethical for a young lawyer to be a sole practitioner, because I really think it is impossible for someone who starts out as a sole practitioner to get to be a professionally competent attorney. All right, I am sure there must be an exception to that rule, and please, if your mother or father was a sole practitioner, and you love them, as you should, they may be an exception, or some dear friend may be, or perhaps you will be, but don't deceive yourself about your abilities. You are not going to make it if you start out that way, and I really wish we would tell lawyers things like that. We are not telling them things like that, however, because many of our young people start out as sole practitioners.

In my judgment, it is even extraordinarily difficult to be a competent lawyer if one becomes a sole practitioner at any time, even if one, as a young lawyer, had the advantage of working with older craftspersons and learns the skills and competencies of the profession, learns the discipline of what to do next and how much energy and emphasis to put into it. Even if you start out getting that training (which a brand new solo practitioner never does) you run terrible risks, if, as a mature lawyer, you shift into a solo practice. I honestly do not know how people who go into solo practice cope with this; and it is not because they are bad people, it's because the demands are so enormous.

I was left to be the last speaker. Everybody took up an enormous amount of time, so I am not really going to have a chance to develop my subject fully, but I do think it's the central ethical question, of the profession—the competence with which we perform our job. I will say something else, I think most of us do tolerably well. None of us do perfectly, and all of us, in the privacy of our own hearts, know that we violate this rule from time to time. Perhaps not in a way that really calls for public censure, we all miss on this rule, and it is a constant nagging aggravation to every lawyer who is serious about what he's doing. We all miss on this.

However, I must say, I, for one, as someone who's been sitting in a busy trial court for thirteen years, I am, in general, upbeat about what I see. I certainly see people who are not perfect in this area. I sometimes see rather serious failures in this area.

But, in general, I am kind of upbeat. I think most of our lawyers are serious about the duty to be competent. Most of them work hard at it, and most of them are competent most of the time. But the challenge is that the rule requires us to be competent all of the time, and that's a mighty tall order.