SURVEY OF RECENT DEVELOPMENTS IN LEGAL ETHICS

Traditionally, in this section, the Seton Hall Law Review *presents synopses of recent cases of interest to practitioners. In connection with this symposium issue, we present digests of recent legal ethics cases which have emanated from various jurisdictions. In so doing, we hope to assist the legal community in keeping abreast of some of the significant developments in the field of law.*

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PROFESSIONAL RESPONSIBILITY—FIRM NAMES—NON-PARTNERSHIP ATTORNEY ASSOCIATIONS MAY NOT USE A FIRM NAME WHICH IMPLIES THE EXISTENCE OF A PARTNERSHIP—*In re Weiss, Healey & Rea*, 109 N.J. 246, 536 A.2d 266 (1988).

Eight attorneys (the association), who were full-time employees of an insurance company, conducted business in New Jersey under the name "Weiss, Healey & Rea." 109 N.J. at 248, 536 A.2d at 266. The attorneys worked exclusively for the insurance company defending the company's policyholders. *Id.*, 536 A.2d at 267. Attorneys Weiss, Healey and Rea held upper level positions in the association, handling budgetary and personnel matters as well as trial work. *Id.*, 536 A.2d at 266-67. As in a typical partnership, the attorneys shared the workload and exchanged strategies. *Id.*, 536 A.2d at 267. No profits or losses were shared and there was no written agreement between them. *Id.* at 249, 536 A.2d at 267. In 1986, the association asked the Advisory Committee on Professional Ethics (ACPE) for an opinion as to whether it could practice law under the name "Weiss, Healey & Rea."

Citing Rule of Professional Conduct 7.5(d), the ACPE determined that the association's use of the name was improper. *Id.* Specifically, the ACPE held that non-partnership attorneys may not use their names in a firm designation if doing so would imply the existence of a partnership. *Id.* The ACPE observed that partnership status is typically granted to associates who have earned the respect of the current partners through a demonstration of responsibility, skill and commitment to the legal profession. *Id.* (quoting Advisory Committee on Professional Ethics *Opinion 593*, 118 N.J.L.J. 580, 592 (1986)). As such, the ACPE rejected the assertion that a disclaimer could be added to the list of names to refute any inference of a partnership. *Id.*

The New Jersey Supreme Court granted the association's petition for review, and affirmed the decision of the ACPE. *Id.* Justice O'Hern, writing for the majority, held that the attorney's use of the name violated Rule 7.5(d). *Id.* at 254, 536 A.2d at 269. The court initially observed that firm names are a form of commercial speech. *Id.* at 250, 536 A.2d at 267 (citing *In re Professional Ethics Advisory Comm. Opinion 475*, 89 N.J. 74, 444 A.2d 1092 (1982), *appeal dismissed*, 459 U.S. 962 (1982)). The court noted, however, that a firm name is only constitutionally protected to the extent that it "conveys facts which facilitate honest commer-

cial transactions." *Id.*, 536 A.2d 267-68 (quoting *In re Professional Ethics Advisory Comm. Opinion 475*, 89 N.J. 74, 83, 444 A.2d 1092, 1097 (1982), *appeal dismissed*, 459 U.S. 962 (1982)).

Additionally, the court emphasized the state's interest in providing the public with clear and accurate information regarding the type of legal services an attorney provides. *See id.* at 251-52, 536 A.2d at 268. In this context, the court considered whether the association's use of combined proper names of attorneys was deceptive. *Id.* at 252, 536 A.2d at 268. The court stated that such a designation suggested that the three attorneys were partners with a general practice. *Id.*, 536 A.2d at 268-69. The court further observed that partnership implies a contribution of intellect and capital by attorneys who are ready to serve the general public. *Id.*, 536 A.2d at 269. Justice O'Hern asserted that a name such as "A, B & C" would not provide notice to clients that they were dealing with employees of an insurer, a fact which could substantially affect reliance on the services rendered. *Id.* The court suggested that in-house counsel for an insurer might offer a more narrow approach to the interests of the insured than an attorney in general practice. *Id.* at 253, 536 A.2d 269. The risk involved in allowing such associations to use a partnership-type name, the court observed, is that clients might be misled as to the nature of representation they would be receiving. *Id.* at 253-54, 536 A.2d at 269.

The court acknowledged that the addition of a disclaimer might provide an adequate disclosure of the nature and quality of the practice. *Id.* at 254, 536 A.2d at 270. Nevertheless, the court declined to decide this issue and, instead, remitted the question to a special Supreme Court committee for consideration. *Id.* at 255, 536 A.2d at 270. The court stated that the wisdom and experience of such a committee would, as in the past, assist the courts in evaluating the "fine-tuning" of Rule 7-5(d). *Id.* In concluding, the court permitted the association to continue practice under the name "Weiss, Healey & Rea" during the period of review, so long as full disclosure was made to its clients, adversaries and the courts. *Id.* at 256, 536 A.2d at 270.

In his dissenting opinion, Justice Clifford criticized the majority for putting "the cart before the horse." *Id.* (Clifford, J., dissenting). Justice Clifford expressed the view that the designation of a non-partnership association of attorneys should be allowed until it is established that someone is injured by such a practice. *Id.*, 536 A.2d at 271 (Clifford, J., dissenting). Absent

evidence of harm to the public, Justice Clifford concluded that the rule should be discarded and the associations permitted to operate as they have for years without complaint. *Id.* at 256-57, 536 A.2d at 271 (Clifford, J., dissenting).

The *Weiss, Healey & Rea* opinion suggests that the court will in the future carefully analyze firm names for any misleading or deceptive inferences. The court's desire to provide clients with clear and accurate information about the services they are receiving is honorable. As Justice Clifford noted, however, the court should identify the harm before providing a remedy. The rule as it stands arguably placed non-partnership associations in a less competitive position without justification. Absent evidence of injury to the public, the court should proceed cautiously in restricting a previously accepted practice.

Lisa M. Boyle

PROFESSIONAL RESPONSIBILITY—DISCIPLINARY PROCEEDINGS—STATE DISCIPLINARY BOARD RECOMMENDATIONS WILL BE UPHELD ABSENT SPECIFIC, ARTICULABLE REASONS MANDATING REVERSAL—*In re Allotta*, 109 Wash.2d 787, 748 P.2d 628 (1988) (en banc).

Samuel J. Allotta maintained a general practice in the State of Washington in an office which he shared with another Washington attorney, Robert Izzo. 109 Wash.2d at 789, 748 P.2d at 629. While not associated with Allotta, Izzo occasionally performed work for Allotta in exchange for office space. In October 1981, Emily Donovan sought Allotta's representation in a medical malpractice matter. At Allotta's request, Izzo sought Mrs. Donovan's medical records. Shortly thereafter, Mrs. Donovan died. Allotta did not pursue the medical malpractice claim, believing the cause of action had not survived Mrs. Donovan's death. The file remained open, however, and the statute of limitations on her claim expired in July 1984.

In December 1984, the decedent's son, David Donovan, requested his mother's file. Approximately two months later Donovan initiated a legal malpractice action against Allotta and Izzo for negligently allowing the statute of limitations to run on his

mother's suit. During this time, Izzo separated his practice from Allotta's and relocated elsewhere. Izzo took with him photocopies of pertinent records in the Donovan file. *Id.* at 789-90, 748 P.2d at 629.

During a deposition by Donovan's attorney in March 1985, Allotta produced a copy of a letter dated two years before the statute of limitations had run, advising David Donovan to "pick up the file and seek other counsel." *Id.* at 790, 748 P.2d at 629. When Izzo learned of the letter, he suspected it was fabricated. He searched through Allotta's trash immediately following Allotta's deposition to find the original letter. Izzo found the original letter, which had been torn into many pieces, but did not disclose its existence until his own deposition a month later. *Id.*, 748 P.2d at 629-30. Izzo then filed a complaint against Allotta. *Id.*, 748 P.2d at 630. After an investigation, the bar association brought charges against Allotta for fabricating the letter, attempting to conceal the fabrication by destroying the original letter and testifying falsely under oath at his deposition. *Id.* at 791, 748 P.2d at 630.

Following hearings before the bar association, the presiding officer concluded Allotta had committed the charged offenses and recommended disbarment. *Id.* at 791-92, 748 P.2d at 630. The disciplinary board reviewed the recommendation and unanimously affirmed. *Id.* at 792, 748 P.2d at 630. Allotta appealed the decision. *Id.* The Washington Supreme Court upheld the findings of misconduct and affirmed the recommendation of disbarment. *Id.* at 794-95, 748 P.2d at 632.

Writing for the court, Justice Utter noted that in disciplinary proceedings the "state bar counsel has the burden of establishing an act of misconduct by a clear preponderance of the evidence." *Id.* at 792, 748 P.2d at 630. The court reasoned that this intermediate evidentiary standard necessarily reflects the greater stigma associated with a disciplinary action than that of other civil actions which require only a "simple preponderance." *Id.*, 748 P.2d at 630-31. Justice Utter also observed that a standard as strict as "beyond a reasonable doubt" was not appropriate because of the interests in maintaining the character of the legal profession, preserving the public confidence, and protecting the citizenry. *Id.*, 748 P.2d at 631.

Justice Utter rejected Allotta's claim that the evidence of misconduct, which was purely circumstantial, was subject to varying interpretations including the conclusion that Izzo had

fabricated the letter. *Id.* at 792-93, 748 P.2d at 631. The court noted that to establish a theory by circumstantial evidence the facts relied upon "must be of such a nature and so related to each other that it is the only conclusion that fairly or reasonably can be drawn from them." *Id.* at 793, 748 P.2d at 631 (quoting *Schmidt v. Pioneer United Dairies*, 60 Wash.2d 271, 276, 373 P.2d 764, 767 (1962)). Justice Utter noted that the standard of review in disciplinary proceedings gives the hearing officer's findings "considerable weight." *Id.* (citing *In re Eddelman*, 77 Wash.2d 42, 459 P.2d 387, 451 P.2d 9 (1969)). The court held that the hearing officer's conclusions should be accepted unless the record revealed some reason to upset them. *Id.* at 793-94, 748 P.2d at 631. Accordingly, the court refused to question the hearing officer's evaluation of the witnesses' veracity and credibility, as it found ample evidence to support the findings of misconduct. *Id.* at 794, 748 P.2d at 632.

Justice Utter next addressed Allotta's contention that the sanction of disbarment was too severe. *Id.* The justice noted that the applicable standard of review required it to affirm the disciplinary board's recommendation unless it could "articulate a specific reason to reject the recommendation." *Id.* at 794-95, 748 P.2d at 632 (quoting *In re McLeod*, 104 Wash.2d 859, 865, 711 P.2d 310, 314 (1985) (en banc)). Justice Utter also noted the court's reluctance to reject a unanimous Board decision. *Id.* at 795, 748 P.2d at 632.

The court analyzed the sanction in light of a four-prong test which considers the attorney's ethical duty, the attorney's state of mind, the potential or actual injury and the existence of aggravating or mitigating circumstances. *Id.* The court asserted that when Allotta tampered with the evidence and committed perjury, he violated ethical duties to both his clients and the legal profession. *Id.* Moreover, the court posited that Allotta's actions were intentional and that the potential resulting injuries were very serious. *Id.* Finally, the court stated that while there was no evidence of mitigating circumstances, there was ample evidence of aggravating factors. *Id.* at 795-96, 748 P.2d at 632.

The Washington Supreme Court sent a strong message to the members of its bar that the findings of a hearing officer in attorney disciplinary proceedings will be given great deference and that the scope of appellate review is carefully circumscribed. Arguably, the *Allotta* decision was motivated by an awareness of growing concern over the decline in the integrity of the legal pro-

fession. Accordingly, the opinion indicates a strong desire to restore the diminished public trust in the moral character of attorneys.

Douglas M. D'Alessandro

PROFESSIONAL RESPONSIBILITY—CONFLICT OF INTEREST—LAW FIRM DISQUALIFIED UNDER IMPUTED DISQUALIFICATION RULE MAY CONTINUE REPRESENTATION TO AVOID UNDUE PREJUDICE TO CLIENT, BUT MAY NOT COLLECT A FEE—*Dewey v. R.J. Reynolds Tobacco Co.*, 109 N.J. 201, 536 A.2d 243 (1988).

Claire Dewey brought suit in August 1982, against Brown & Williamson Tobacco Corporation (Brown & Williamson) and other tobacco and cigarette companies claiming that her husband's fatal lung cancer was caused by their products. 109 N.J. at 205, 536 A.2d at 245. Dewey was represented by the firm of Budd, Larner, Gross, Picillo, Rosenbaum, Greenberg & Sade (Budd, Larner). The law firm of Wilentz, Goldman & Spitzer (Wilentz, Goldman) later became co-counsel to Budd, Larner. Brown & Williamson retained Rosen, Weiss, Slattery & Burstein (Rosen) to defend it. *Id.* at 206, 536 A.2d at 245. At that time, Sidney Weiss was a partner in the Rosen firm. Although he billed some time to Brown & Williamson, he was not directly involved with the case. *Id.* at 207, 536 A.2d at 245. He did, however, share in the firm's revenues generated in part by Brown & Williamson billings. *Id.*, 536 A.2d at 246. In 1986, Weiss joined Wilentz, Goldman as a partner and has had no subsequent involvement in tobacco litigation. *Id.* at 207-08, 536 A.2d at 246.

On September 3, 1986, Brown & Williamson asked Wilentz, Goldman to voluntarily withdraw from the case due to Weiss's affiliation with them. *Id.* at 208, 536 A.2d at 246. Upon Wilentz, Goldman's refusal, Brown & Williamson moved to disqualify the firm. The trial court held that an evidentiary hearing was necessary. *Id.* The appellate division affirmed the trial court's decision, but ordered that the hearing be limited to whether there was a public perception of a significant relationship between the issue in the case at bar and the subject matter of Brown & Wil-

liamson's previous representation, and whether Weiss had access to confidential information acquired from Brown & Williamson by the Rosen firm. *Id.*

Thereafter, without a hearing, the trial court disqualified Wilentz, Goldman. *Id.* Dewey appealed, and the appellate division remanded the case for determination whether Weiss had actually acquired relevant confidential information. *Id.* at 208-09, 536 A.2d at 246. Brown & Williamson successfully moved for a stay of this order, and appealed to the New Jersey Supreme Court. *Id.* at 209, 536 A.2d at 246.

The supreme court initially remanded the case to the trial court for determination of whether Weiss, while a partner at Rosen, had obtained privileged information about the *Dewey* case. *Id.*, 536 A.2d at 246-47. The trial court concluded Weiss had some direct involvement in Brown & Williamson's matters and had gained some confidential information regarding Brown & Williamson's defense strategy. *Id.* at 210, 536 A.2d at 247. Based on this finding, the supreme court held that continued representation of Dewey by Wilentz, Goldman constituted a conflict of interest. *See id.* at 218, 536 A.2d at 251. Nevertheless, a unanimous court ordered Wilentz, Goldman to continue representation to prevent undue prejudice, but at no further charge to the client. *Id.* at 219, 536 A.2d at 252.

The court began its analysis by observing that the appearance of impropriety doctrine was "relevant to the determination of whether an attorney had 'represented' a client" pursuant to Rules of Professional Conduct 1.9(b) and 1.7(c). *Id.* at 214, 536 A.2d at 249. As the word "represented" was not defined in the rules, the court looked to other authorities for guidance. *Id.* Advisory opinions and case law prior to the adoption of the Rules of Professional Conduct held that if any member of a firm represented a client, then all partners of that firm represented that client. *Id.* at 215, 536 A.2d at 250. The court asserted, however, that the adoption of the RPC modified the prior rule mandating disqualification per se of an attorney in Weiss's position. *Id.* Instead, Justice Clifford, writing for the court, announced a new test which looked to whether a reasonable person acquainted with the facts would conclude that Weiss's representation of the plaintiff would "pose a 'substantial risk of disservice either to the public interest or the interest of one of the clients.' " *Id.* at 216, 536 A.2d at 250 (quoting Rule 1.7(c)(2)).

Applying these principles, the court determined that Weiss

had represented Brown & Williamson, and therefore was barred from representing Dewey pursuant to Rule 1.9(a). *Id.*, 536 A.2d at 251. The court emphasized the necessity for protecting the confidentiality of the attorney-client relationship. *Id.* at 217, 536 A.2d at 251. The court nevertheless declined to disqualify the Wilentz firm from representing Dewey. *Id.* at 219, 536 A.2d at 252. Justice Clifford asserted that a motion for disqualification requires balancing the interests of maintaining high professional standards against a client's right to free choice of counsel. *Id.* at 218, 536 A.2d at 251. In balancing these interests, the court noted the amount of time and effort expended by the Wilentz firm in preparation for trial and the proximity of the trial date. *Id.* at 218-19, 536 A.2d at 252. Accordingly, the court held that to disqualify the firm on the eve of trial would erode the public's confidence in the legal profession. *Id.* at 219, 536 A.2d at 252.

The court, however, further held that the firm could not receive compensation for its continued representation of Dewey. *Id.* Justice Clifford reasoned that a firm should not profit from violation of the Rules of Professional Conduct. *Id.* at 219-20, 536 A.2d at 252. Justice Clifford noted that Wilentz, Goldman, in recognizing its ethical dilemma, could have either sought Brown & Williamson's consent to its representation of Dewey, or postponed Weiss's affiliation with the firm until the conclusion of the litigation. *Id.* at 221, 536 A.2d at 253. The court emphasized that its decision was fact-sensitive and may have been different if Weiss had actually represented Brown & Williamson or had acquired confidential information. *Id.* at 220, 536 A.2d at 252-53.

The court concluded by setting forth procedural guidelines for lower courts to more efficiently determine attorney conflict questions. *Id.* at 221-23, 536 A.2d at 253-54. First, the court stated that the initial burden is on a former client to establish that it has been represented by the challenged attorney. *Id.* at 222, 536 A.2d at 253. Justice Clifford asserted that such motions should be decided by affidavits and documentary evidence. *Id.* The justice posited that a hearing should be held only when there are issues that cannot be decided on the basis of documentary evidence. *Id.* If the court determines that the former client was represented by the challenged attorney, it should disqualify the attorney and the attorney's firm from further representing the adverse party. *Id.* Justice Clifford stated, however, that if the court determines the challenged attorney did not represent the former client, then it must decide whether the attorney acquired

confidential information. *Id.* The justice observed that the burden then shifts to the challenged attorney to prove he has not obtained such information. *Id.*, 536 A.2d at 253-54. Finally, Justice Clifford noted that if a court concludes disqualification is warranted, the court must weigh such a course against the client's right to free choice of counsel. *Id.*, 536 A.2d at 254. Justice Clifford cautioned that only in the most unusual circumstances will the client's right prevail. *Id.*

The effect of this decision is somewhat limited by the court's emphasis upon the facts of this case. The court's opinion, however, clarifies what has been a gray area, and demonstrates that case law prior to the adoption of the RPC while not controlling, is relevant. The opinion also evidences the court's unwillingness to permit an attorney's ethical violations to cause his client undue hardship. The court's decision to deny further compensation to the firm for its continued representation, however, raises a question as to the quality of services the client will receive. The court is apparently content to rely upon the rules of professional conduct which impose upon an attorney a duty to pursue a client's lawful objectives, even absent financial reward.

Paul DiMaio

PROFESSIONAL RESPONSIBILITY—DISCIPLINARY PROCEEDINGS—SERIOUS MEDICAL DISORDERS EXACERBATED BY ALCOHOLISM, COMBINED WITH EVIDENCE OF REHABILITATION, ARE DEEMED MITIGATING FACTORS IN A DISCIPLINARY PROCEEDING FOR NEGLIGENT MISCONDUCT—*In re Barbour*, 109 N.J. 143, 536 A.2d 214 (1988).

Attorney Richard L. Barbour committed several ethical violations while representing three clients in unrelated matters between 1972 and 1980. 109 N.J. at 146, 536 A.2d at 215. The first matter related to Barbour's handling of Walter H. Bachmann's estate. In November 1972, Barbour agreed to represent Bachmann's estate as both an attorney and an accountant. *Id.* at 147, 536 A.2d at 215. Barbour was to receive a $10,000 retainer and five percent of the estate's value for his services. It was expected that his services would be needed for approximately two years.

The estate consisted of a home and a large tract of vacant land which was affected by a one-year moratorium. Barbour hired an appraiser to assess the value of the property. Despite the appraiser's warning that it was impossible to determine the impact of the moratorium on the property's value, Barbour relied on the appraisal when filing the estate's tax return. The Internal Revenue Service (IRS) audited the tax return, determined that $115,000 was due and subsequently granted Barbour's application to allow the heirs to pay the estate tax over a period of ten years. *Id.*, 536 A.2d at 215-16. Shortly after the home was sole in 1975, the IRS rescinded the estate's long-term payout arrangement due to delinquency. *Id.* at 148, 536 A.2d at 216. In 1979, the IRS accepted a $50,000 deposit as part of a settlement offer suggested by Barbour. Thereafter, the vacant land became subject to more stringent state environmental land use regulations and was subsequently appraised as having nominal value. Because the land was practically worthless, the IRS refunded $50,000 to the estate. Barbour then billed the estate $16,670 for his efforts in obtaining the refund. *Id.* at 150, 536 A.2d at 217. Barbour had already received $22,500 for his other efforts on behalf of the estate.

The second matter involved Barbour's representation of Marlin Kratzer as administrator of Mr. Kratzer's wife's estate. *Id.* at 151-52, 536 A.2d at 218. Mrs. Kratzer died intestate, survived by her husband and three adult children. The Kratzer's home represented the estate's major asset. *Id.* at 151, 536 A.2d at 218. The children, who were from Mrs. Kratzer's former marriage, wanted Mr. Kratzer to leave the house. *Id.* at 152, 536 A.2d at 218. An attorney representing the children brought suit to partition the house, following an almost one year period of neglect of the matter by Barbour. Barbour then made efforts to sell the house but was delayed by his illness, Mr. Kratzer's reluctance to sell the home and general market conditions. Despite attempts by Kratzer to replace Barbour, the house was finally sold. *Id.* at 152-53, 536 A.2d at 218. Seven months later, Kratzer wrote Barbour to advise him that he had not received any proceeds from the sale of the house and warned Barbour that he would file an ethics complaint if action was not taken. *Id.* at 153, 536 A.2d at 218. When Barbour did not respond, Kratzer filed a complaint.

The third matter related to Barbour's management of the financial affairs of seventy-five year old Anthony Massarella. *Id.* at 154, 536 A.2d at 219. Massarella had financial difficulties and

required nursing care. He and a friend of Massarella's agreed that Barbour would place Massarella in a nursing home and sell his home to pay expenses and existing debts. Massarella entered a nursing home as a medicaid patient in August 1976, and his home was sold in June 1977 for $19,526.72. *Id.* at 154-55, 536 A.2d at 219. Barbour charged Massarella approximately $7,500 for legal fees and placed the remainder of the proceeds from the sale of the house into a trust savings account. *Id.* at 155, 536 A.2d at 219. In September 1977, Massarella complained to a welfare agency representative that he had no knowledge as to the whereabouts of the proceeds of the sale. A welfare investigation was started concerning improprieties related to the sale of Massarella's home. Massarella's medicaid benefits were temporarily suspended in December 1977 due to Barbour's failure to provide information concerning the sale of the house. Ultimately, the welfare investigation was not completed because of Barbour's lack of cooperation. During the time he represented Massarella, Barbour failed to maintain financial records. *Id.* at 156, 536 A.2d at 220. Barbour explained that his neglect was due in large part to a debilitating illness known as Reiter's Syndrome. *Id.* at 157, 536 A.2d at 220.

Barbour was charged with committing a variety of ethical offenses and was brought before the District Ethics Committee (Committee). *See id.* at 146, 536 A.2d at 215. In his representation of Walter H. Bachmann's estate the Committee concluded that Barbour was grossly negligent and that he overcharged the estate for his services. *Id.* at 149, 536 A.2d at 216. With regard to the Marlin Kratzer, the Committee determined that Barbour was grossly negligent and had failed to pursue the client's lawful objectives. *Id.* at 153, 536 A.2d at 219. Additionally, the Committee concluded that Barbour's behavior negatively reflected on his ability to practice law and evidenced a clear pattern of neglect. *Id.* at 153-54, 536 A.2d at 219. Finally, the Committee asserted that Barbour's representation of Anthony Massarella was a total failure. *Id.* at 156, 536 A.2d at 220. The committee concluded that Barbour overreached in collecting his fees, neglected to maintain accurate records, and acted in a manner inconsistent with established standards of professional responsibility. *Id.* The Committee noted, however, that Barbour's alcoholism was partially responsible for his offenses. *Id.*

The Disciplinary Review Board (DRB) concurred with the Committee's findings and concluded that Barbour had commit-

ted serious ethical violations. *Id.* at 159, 536 A.2d at 221. The DRB recommended that Barbour be given a two-year suspension from practicing law. *Id.* at 146, 536 A.2d at 215. The DRB did not give Barbour's medical illness and alcoholism much weight, however, because little evidence had been presented. *Id.* at 160, 536 A.2d at 222.

The New Jersey Supreme Court, in a per curiam opinion, upheld the DRB's recommendation to suspend Barbour from the practice of law, but reduced the suspension to six months. *Id.* at 162-63, 536 A.2d at 223. The court determined that Barbour's conduct clearly violated applicable disciplinary rules. *Id.* at 159, 536 A.2d at 222. The court held, however, that mitigating evidence must be considered in conjunction with the gravity of the violations before any disciplinary sanctions can be imposed. *Id.* at 161, 536 A.2d at 222.

The court first examined Barbour's claim that he suffered from Reiter's Syndrome, a debilitating medical condition typified by psoriasis and arthritis. *Id.* at 157, 536 A.2d at 220. In January 1978, Barbour was diagnosed as having Reiter's Syndrome and his insurance carrier certified him to be totally disabled. *Id.* at 536 A.2d at 220-21. From October 1977 to January 1980, Barbour was only able to spend about ten percent of his time at his law office. *Id.*, 536 A.2d at 221. During the same period, Barbour also suffered from alcoholism. *Id.* at 158, 536 A.2d at 221. He testified that he consumed more than one quart of whiskey per day during this period. *Id.* Based on this evidence, the court concluded that Barbour's professional abilities were detrimentally affected by his illness, which was exacerbated by alcohol dependency. *Id.* at 160, 536 A.2d at 222.

The court next took note of Barbour's rehabilitative efforts. *Id.* at 158, 536 A.2d at 221. The court observed that once Barbour's life became unmanageable due to excessive alcohol abuse, he sought professional treatment for his problem. *Id.* In December 1979, after several rehabilitation attempts had failed, Barbour entered a new rehabilitation program, underwent psychotherapy and began to regularly attend Alcoholics Anonymous meetings. *Id.* The court pointed out that this effort was successful and that Barbour had abstained from consuming alcohol for more than eight years. *Id.* Based on the testimony of a licensed physician and the report of a board certified psychiatrist, among other things, the court concluded that Barbour had apparently been rehabilitated and that the likelihood of future alco-

hol abuse by him was small. *Id.* at 158-59, 162, 536 A.2d at 221, 223.

Additionally, the court analyzed the nature of Barbour's ethical violations. *Id.* at 161, 536 A.2d at 222-23. The court observed that the goal of the disciplinary system was to guard the public from attorneys who fail to meet the established standards of professional responsibility. *Id.* at 161, 536 A.2d at 222. The court asserted that mitigating factors are pertinent to the decision of "whether the public interest requires the extended suspension from the practice of law or the ultimate sanction of disbarment." *Id.* The court also emphasized that the gravity of an attorney's misconduct is important in determining the severity of a disciplinary sanction. *Id.*

The court observed that Barbour's misconduct was grounded in negligence and did not involve intentional dishonesty or deception. *Id.*, 536 A.2d at 223. Although, the court determined that illness and alcoholism would not excuse his serious and continual ethical failures, the court nevertheless posited that in this case the combination mitigated the egregiousness of his misconduct. *Id.* at 162, 536 A.2d at 223. The court held that these factors, coupled with apparent rehabilitation and the fact that the violations had occurred nearly ten years ago, made a six month suspension adequate. *Id.* at 162-63, 536 A.2d at 223.

The *Barbour* opinion represents an intelligent and sensitive attempt to balance the scales of justice. Attorneys have important legal and moral obligations to their clients, the profession, and to the public at large. Attorneys should be disciplined whenever one of these obligations is violated. Such discipline, however, should reflect not only the severity of the wrongful conduct, but also the existence of mitigating and extenuating circumstances. In *Barbour* the court correctly balanced these factors and imposed disciplinary sanctions that adequately protected the public, yet were not unduly harsh.

David J. Paulin

PROFESSIONAL RESPONSIBILITY—READMISSION AFTER DISBARMENT—ATTORNEY CAN BE REINSTATED ONLY UPON PROOF READMISSION WOULD NOT BE DETRIMENTAL TO THE PUBLIC INTEREST AND PUBLIC PERCEPTION OF THE BAR—*In re Pool*, 401 Mass. 460, 517 N.E.2d 444 (1988).

In March 1973, James M. Pool agreed to represent a client charged with kidnapping a Mexican national. *Id.* at 461, 517 N.E.2d at 446. The client agreed to a $1,500 fee for Pool's handling of an extradition hearing to Virginia. When Pool later expressed concern over costs he incurred in establishing the client's defense, the client revealed the existence of two safe deposit boxes which contained false identifications, a large amount of cash and a handgun, all of which were allegedly unconnected to the kidnapping charge. Pool obtained the keys to the safe deposit boxes, which had been confiscated by the Federal Bureau of Investigation, pursuant to an order to return items "not likely to be used as evidence." *Id.* Pool told the Assistant United States Attorney that he was taking money from the safe deposit boxes to use for his client's defense. Unknown to his client, however, Pool also revealed the contents of the boxes and offered to reveal their location if he were given the keys. *Id.* at 461-62, 517 N.E.2d at 446. Pool removed the cash from the boxes, kept $800 for expenses and gave the remaining $47,800 to his client's sister. *Id.* at 462, 517 N.E.2d at 446. Thereafter, the Assistant United States Attorney obtained a search warrant to investigate the contents of the boxes. Pool, without disclosing his agreement with the prosecutor, negotiated with his client an additional $7,500 fee and agreed to remove the remainder of the contents from the boxes. The next day Pool returned to the bank and discovered that the boxes had already been seized. *Id.*, 517 N.E.2d at 446-47. The client later learned of Pool's agreement with the prosecutor. *Id.*, 517 N.E.2d at 447.

Because of the federal government's initial refusal to cooperate, disbarment proceedings were delayed until 1981. *Id.* at 463 n.1, 517 N.E.2d at 447 n.1. In 1984, Pool was found guilty by a hearing panel of the Board of Bar Overseers (Board) of violating three state rules of professional responsibility and canons of ethics including deceit and misrepresentation, revealing clients confidences, and using client confidences to personal advantage without the client's consent. *Id.* at 462, 517 N.E.2d at 447. On January 17, 1984, Pool was disbarred. *Id.* Because eleven

years had elapsed between the misconduct and disbarment, and in light of his inexperience at the time of the events and his otherwise untarnished record, Pool was given permission to apply for reinstatement after one year. *Id.* at 462-63, 517 N.E.2d at 447.

In January 1985, Pool filed for reinstatement. *Id.* at 463, 517 N.E.2d at 447. Thereafter, the hearing panel recommended to the Board that he be reinstated to the Massachusetts Bar. *Id.* The Board adopted the panel's recommendation, subject to the requirement that Pool pass the multistate professional responsibility examination. *Id.* The Supreme Judicial Court of Massachusetts affirmed the decision. *Id.* at 460, 517 N.E.2d at 446.

Writing for a unanimous court, Justice Lynch held that a petitioner seeking reinstatement has the burden of proving "that he has moral qualifications, competency and learning in law required for admission to practice law in this Commonwealth, and that his resumption of the practice of law will not be detrimental to the integrity and standing of the bar, the administration of justice, or to the public interest." *Id.* at 463, 517 N.E.2d at 447 (quoting S.J.C. RULE 4:01 § 18(5) (as amended, 394 Mass. 1106 (1985)). Justice Lynch observed that the rule has two distinct requirements. *Id.* First, a petitioner's personal qualifications, such as competence, integrity, and legal knowledge must be considered. *Id.* Second, the hearing panel must analyze the effect reinstatement will have on the public interest and public perception of the bar. *Id.*

As to Pool's personal qualifications, Justice Lynch rejected Bar counsel's contention that the disbarment was conclusive proof of lack of moral character. *Id.* at 464, 517 N.E.2d at 448. The court cited with approval a five-prong test to determine rehabilitation. *Id.*, 517 N.E.2d at 447. The five factors include "(1) the nature of the original offense. . ., (2) the petitioner's character, maturity, and experience at the time of his disbarment, (3) the petitioner's occupations and conduct in the time since the disbarment, (4) the time elapsed since the disbarment, and (5) the petitioner's present competence in legal skills." *Id.* The court pointed to the petitioner's employment as director of the bicentennial celebrations of Harrison County and Clarksburg, West Virginia, as well as many letters written in his support, as clear evidence of petitioner's moral fitness. *Id.* at 464-65, 517 N.E.2d at 448. While observing that breach of the fiduciary duty and confidentiality of the attorney-client relationship was ex-

tremely serious, the court noted that the wrongful conduct was merely an isolated incident arising out of "highly unusual circumstances" in the first year of a twelve-year practice. *Id.* at 464, 517 N.E.2d at 448.

Regarding whether Pool appreciated the gravity of his conduct and had been rehabilitated, the court deferred to the credibility findings of the panel. *Id.* at 466, 517 N.E.2d 448. Noting that restitution was not required under the court rules, Justice Lynch disagreed that Pool's failure to make timely restitution was proof of his lack of rehabilitation. *Id.* at 466, 517 N.E.2d 449. Thus, the court determined that Pool was "presently trustworthy" despite the time lapse of only one year since his disbarment. *Id.* at 467, 517 N.E.2d at 449. Noting that while under normal circumstances it was desirable for at least five years to pass after disbarment to sufficiently judge a petitioner's rehabilitation, the unusual situation warranted the conclusion that Pool was trustworthy despite the passage of only one year since his disbarment. *Id.*

Finally, the court focused on whether Pool's reinstatement would be detrimental to either the integrity of the bar or the public welfare. *Id.* Justice Lynch observed that the crux of the issue was whether Pool's readmission would adversely affect the public interest or the administration of justice. *Id.* at 468, 517 N.E.2d at 450 (quoting *In re Gordon*, 385 Mass. 48, 52, 429 N.E.2d 1150, 1153 (1982)). The court relied on the letters of support from both inside and outside the legal community as evidence that public perceptions and confidence in the judicial system would not be undermined by Pool's reinstatement. *Id.*

The court utilized appropriate parameters in deciding whether the petitioner was deserving of reinstatement to the Massachusetts Bar. In doing so, however, the court only superficially scrutinized the petitioner's record since disbarment. In addressing ethical challenges, the court should in the future make diligent inquiry into the totality of a petitioner's professional behavior prior to making a decision of reinstatement.

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