

NATIONAL ROUNDUP

By

William J. Wernz, Director
Minnesota Office of Lawyers Professional Responsibility

Reprinted from *Bench & Bar of Minnesota* (March 1991)

The law of lawyering has grown nearly as fast in the last decade as the number of lawyers in the United States. The "Current Reports" of the ABA/BNA Manual on Professional Conduct is the best way of keeping up with lawyers' law.

Developments come in the forms of malpractice cases, ethics advisory opinions, discipline cases, rule changes, disqualification rulings, Rule 11 practice, and more. Among the more interesting developments are the following.

Regulated Sex. It is perhaps inevitable that such culturally dominant topics as sex and regulation should converge. For lawyers and clients the question of regulated sex has taken several forms. The California legislature recently required the State Bar to submit a proposed rule governing sexual relationships between attorneys and clients in areas of law including domestic relations and probate. The mandate was based on a legislative finding that "it is difficult to separate sound judgment from emotion or bias which may result from sexual involvement between a lawyer and client." The first four Bar proposals have been rejected. A law professor writing in the *Georgetown Journal of Legal Ethics* proposes a flat ban on lawyer-client sex in family law cases. In Minnesota, several private disciplines have resulted from lawyer-client sexual relationships, particularly when the client was vulnerable. The malpractice dimension of such relationships was considered in *Suppressed v. Suppressed*, (Ill. App., 11/30/90). A malpractice action alleging that the consensual sex was a breach of fiduciary duty was dismissed because any such breach must be "clearly linked to the attorney's legal representation." Plaintiff did not allege an actual conflict or that her legal action was harmed; moreover, even if there had been a breach, the court found the plaintiff failed to allege damages directly attributable to the breach. Damages alleged in the form of emotional harm were found to be insufficient to support an action based on breach of fiduciary duty.

Advertising. Increasing regulation of lawyer ads is a hot topic in many Bar circles, including Florida, Iowa, and Minnesota. The Florida Supreme Court recently delivered a lengthy opinion on the constitutionality of new advertising rules. The rules, together with the Court's revisions, comments, and opinion, run over 60 pages. Among the new provisions is that electronic ads "shall be articulated by a single voice, with no background sound other than instrumental music." Letters to prospective clients "shall be on letter-size paper." The Florida Bar now employs several full-time attorneys devoted exclusively to considering the propriety of individual Florida lawyer ads. In Minnesota, two bar committees are considering whether advertising rules should be more restrictive. The Minnesota "country lawyers" group has looked to the Iowa rules as a model. The Iowa rules are less elaborate and restrictive than Florida's, but they require disclaimers and "advertising" labels on printed materials; and have various restrictions on TV and radio ads, such as use of only "a single nondramatic voice, not that of the lawyer" The U.S. Supreme Court has declined to review the constitutionality of the Iowa rules. Taking a different

tack, the New York State Bar Association has opined that lawyers may use client testimonials, with a disclaimer, in broadcast advertising.

Privilege and Contempt. Is an attorney in contempt for disobeying a court order to divulge any information she had of her client's "intent to commit a crime" by continuing to keep a child, in violation of a custody order? The attorney argued that her client's communications on the subject were privileged, but the Illinois Court of Appeals rejected that argument, citing an exception to the privilege where the "communication is to further a crime or to discuss future intended illegality." The attorney next argued that under the Code of Professional Responsibility her disclosure of future client criminal conduct was purely discretionary. The court found that the discretion was superseded by a court order. The attorney was given an opportunity to purge her contempt. *In re Decker*, 562 N.E.2d 1000 (1990).

Lawyer-Legislator Conflict. Edward Vrdolyak was a prominent Chicago alderman and attorney for workers compensation claimants. His firm brought 35 cases against the city over a 10-year period. Vrdolyak did not vote on any city actions on workers compensation claims, but he did participate in appointments of personnel involved in claim recommendation and adjudication. The court censured Vrdolyak for a conflict of interest, holding that a "lawyer-legislator" may not represent adverse parties against "the governmental unit of which he is a member." *In re Vrdolyak*, 516 N.E.2d 840 (1990).

Defense Lawyer's Press Conference. Defense attorney Dominic Gentile's client was charged with taking drugs and money. At a press conference Gentile attempted "to respond to adverse publicity" by criticizing potential witnesses as convicted money launderers and drug dealers, and naming a policeman as the likely perpetrator. Gentile was reprimanded, on a finding that his comments "were substantially likely to materially prejudice the proceedings." In later developments, the client was acquitted and it was found that Gentile's comments caused no actual prejudice. The Nevada Supreme Court concluded summarily, "we also reject appellant's constitutional challenges as lacking merit under either the federal or Nevada constitutions." However, the United States Supreme Court has now granted *certiorari* to Gentile. *Gentile v. State Bar of Nevada*, 787 P.2d 386 (1990).

Nonlawyer Partner in Law Firm. Howray & Simon, a large Washington, D.C. law firm, made history when it promoted a nonlawyer employee to partner of the firm on January 1, 1991. The nonlawyer partner is an accountant who does not deal with the firm's clients and instead acts as the firm's chief financial officer.

The addition of a nonlawyer partner was made possible by an amendment to the Washington, D.C. Rules of Professional Conduct, effective January 1, 1991. Amended Rule 5.4(b) permits nonlawyer ownership in law firms if: 1) the organization's sole purpose is providing legal services; 2) the nonlawyer partner agrees to abide by the Rules of Professional Conduct; and 3) the lawyer partners agree in writing to be responsible for ethical violations by the nonlawyer partners. "Nonlawyer Financial Officer Becomes Partner in D.C. Firm," 6 *Law. Man. Prof. Conduct* 415 (December 19, 1990).

Interviewed Law Firm Disqualified. The plaintiff corporation interviewed four law firms as replacement counsel in pending litigation. One of the interviewed firms, Sibley & Austin (S&A), had two partners meet with the plaintiff's chief executive and general counsel. Privileged communications, trial strategy, and proposed settlement offers were disclosed to S&A.

Several months later the defendant hired Sibley & Austin as litigation counsel in the same case. Plaintiff moved to disqualify S&A. Although there was no formal attorney-client relationship between

plaintiff and S&A, confidential information was disclosed to S&A with the reasonable belief that S&A was acting as the plaintiff's attorney. Because S&A did not make it clear that the initial meeting was purely preliminary and that confidences would not necessarily be protected, the court found that S&A was responsible for the confusion. Due to the substantial relationship between the prior and present representations, S&A was disqualified.

The court rejected S&A's suggestion of a "Chinese Wall" and that the conflict should not be imputed to the entire firm. *Bridge Products, Inc. v. Quantum Chemical Corp.*, No. 88 C 10734 (D.C. N.Ill. April 27, 1990).

Malpractice Settlement Conditioned Upon Agreement Not to File Ethics Complaint. The lawyer failed to file a brief, resulting in his client's action being dismissed. The client retained other counsel for a malpractice action. The lawyer made a settlement offer of \$5,000, if the client agreed not to file an ethics complaint. The lawyer later defaulted and discharged the debt in bankruptcy.

The court found the lawyer's failure to file the brief constituted neglect and that his effort to condition settlement of the malpractice claim on agreement not to file an ethics complaint was prejudicial to the administration of justice. The court rejected the disciplinary board's recommendation of a private admonition and instead imposed a public reprimand. *People v. Moffitt*, 808 P.2d 1197 (Colo. 1990).