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Professional Responsibility Pitfalls: Often But Not Always Apparent

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SHUTTERSTOCK

PROFESSIONAL RESPONSIBILITY PITFALLS:

BY PROF. JEFFREY W. STEMPEL

On a general level, legal ethics seem deceptively easy. Don't lie, cheat or steal. But the complex role of attorneys as client-centered advocates can mean that what strikes most laypersons as the "right" thing to do can be wrong for a lawyer. Perhaps the archetypical case, some 50 years ago, involved attorneys who were criticized and even prosecuted for refusing to reveal to grieving parents the location of buried bodies of children victimized by a serial killer; this silence also ostensibly violated state law requiring reporting of dead bodies. But lawyers for the loathsome killer (who was nonetheless a client), did the right thing by keeping quiet. See *People v. Belge*, 359 N.E.2d 377 (N.Y. 1976). Attorney Francis Belge fared less well when he refused to disclose details of a retainer agreement with a corporate client and was held in contempt. See *People v. Belge*, 59 A.D. 307 (Fourth Dept. 1977)(refusal to disclose justified contempt finding because corporate records were sought pursuant to valid grand jury subpoena; Court notes concern about businesses avoiding prosecution by funneling incriminating documents through counsel).

Or consider the government's request for attorney notes after Deputy Attorney General Vincent Foster had committed suicide and could not be interviewed by the special prosecutor investigating alleged misconduct concerning the firing of travel agency personnel during the Clinton Administration. Foster's law firm, even with no live client to support, said "no," arguing that the attorney-client privilege survived the client's death. The Supreme Court agreed. See *Swidler & Berlin v. United States*, 524 U.S. 399 (1998). But it was a 6-3 vote, reversing a 2-1 D.C. Circuit panel decision, that reversed the trial court's recognition of the privilege (a 9-4 tally among all the judges hearing the matter: a landslide in an election, but hardly the unanimity lawyers would like when structuring their decisions about when to defy a court).

Lawyers need to make judgment calls every day on issues of professional responsibility in which the right answer is not always clear, or seems clear only in the retrospective wake of an authoritative decision. Consider *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1998), where a criminal defense lawyer decided that he was justified in holding a press conference to refute leaked information damaging to his client and incurred state bar discipline, but was vindicated by the U.S. Supreme Court... but with four dissenting votes on aspects of the decision and four separate opinions.

In the wake of the case, ABA Model Rule of Professional Conduct 3.6 (Trial Publicity)(subsequently adopted as Nevada Rule of Professional Conduct (RPC) 3.6) was amended to provide that, even though attorneys should not try cases in the

sanctioned over behavior that seems to be well over the line of propriety and relatively lacking in nuance. A review of fairly recent Nevada decisions reflects the range.

In re Discipline of Reade, 405 P.3d 105 (Nov. 2017)(attorney

suspended four years for violating Nev. RPC 8.4(b) after

by the panel). In particular, the attorney had contacted a witness to a will being disputed by counsel's client. Counsel offered the witness \$7,000 in "exchange for your honest testimony ... that you never [actually] witnessed the Decedent signing a will." According to the court, the letter, which was several pages long, threatened the witness "with personal liability" and the legal implications of perjury if the witness did not disavow

the will. *See Id.* at *2. A similar communication was sent to another witness.

The panel found this constitutes an impermissible offer of money contingent on testimony in violation of RPC 3.4(b)

(Fairness to Opposing Counsel and the Court) and an improper threat of criminal prosecution in violation of RPC 8.4(d)(Misconduct Prejudicial to the Administration of Justice). The court agreed, holding that the record met the clear and convincing evidence standard required for attorney discipline. *Id.* at *3.

Callister illustrates once again a variance in disciplinary matters that can make counsel more than a little uncomfortable. Two of the panel members viewed the violations as unintentional errors of overzealousness in trying to ensure that witnesses would be willing to be available, while a third saw it as an intentional effort to intimidate witnesses into providing particular testimony favorable to counsel's client and sought a suspension of between 30 and 60 days. The split panel recommended a public reprimand. The court found that the misconduct was deliberate or at least knowing (*Id.* at *7) and imposed a suspension of 35 days, with readmission conditional on completion of six hours of CLE regarding the Nevada RPCs. (*Id.* at *8).

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press, "a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client." *See* Rule 3.6(c). However, the statement should "be limited to such information as is necessary to mitigate the recent adverse publicity."

Although *Gentile* established substantial breathing room for attorney speech, there are boundaries, of course. *See, e.g., United States v. Locascio*, 6 F.3d 924 (2d Cir. 1993) (Bruce Cutler, prominent attorney known for extensive public rhetoric on behalf of client, accused mobster John Gotti, disqualified – but on grounds other than his sometimes inflammatory statements on behalf of Gotti)(e.g., authorities "threw the constitution out the window" in effort to convict Gotti). Cutler's continued public statements after disqualification resulted in a finding of contempt of court, three months' house arrest, and a six-month suspension from practice. *See United States v. Cutler*, 58 F.3d 825 (2d Cir. 1995).

Ethical traps for the unwary present constant danger to counsel; though sometimes attorneys are

knowingly making false representations to National Futures Association that hindered investigation of client for money laundering). The lawyer was also convicted of being an accessory after the fact to money laundering. But, despite this misconduct, the state bar's recommended fine of \$25,000 was overturned by the court on the grounds that Nev. Supreme Court Rule (SCR) 102(2) did not give the state bar power to impose a fine along with an otherwise proper imposition of suspension or disbarment. The Southern Nevada Disciplinary Board had recommended a 30-month suspension. Thus, even in cases where a violation is clear, reasonable observers may differ quite substantially over the appropriate punishment.

In re Callister, 2017 Nev. Unpub. LEXIS 627 (July 25, 2017) (upholding disciplinary panel finding of misconduct, construed as threatening witness, and imposing a 30-day suspension rather than a public reprimand recommended

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In re Discipline of Treffinger, 393 P.3d 1084 (Nev. 2017)(attorney entering conditional guilty plea of heroin possession subject to diversion program is subject to automatic interim suspension during state bar investigation and disciplinary process but court stays suspension conditioned on counsel's "continued adherence to the terms and conditions of his probation, his successful participation in his diversion program, and the absence of any further disciplinary offenses" provided that that attorney provides the state bar with quarterly compliance reports from the probation officer and immediate notification of any probation violations).

In *Treffinger*, the court spells out the operation of interim suspension automatically triggered by a felony conviction of an attorney and notes that even a conditional guilty plea is still a guilty plea and is a "conviction" for purposes of SCR 111, making the attorney a felon for purposes of automatic interim suspension. *See* 393 P.3d at 1087. But because of mitigating factors (e.g. first offense, no prior bar discipline, no danger to clients or public from continued practice by attorney during probation and participation in diversionary program), the court exercised its discretion to stay the automatic suspension, something it may do if it finds "good cause." *See* 393 P.3d at 1087-89.

Although reading of instances of discipline or disqualification can justify more than a little concern, attorneys do not always lose. *See, e.g. New Horizons Kids Quest II, Inc. v. District Court*, 392 P.3d 166 (Nev. 2017)(attorney disqualification not required by prior representation of individual now adverse to counsel's

current client; no showing that challenged attorney had gained actual knowledge of any information

protected by rules of confidentiality). The attorney in question had worked at a law firm defending New Horizon Kids, a child care facility, in a tort action but had not participated in the case or learned any confidential information about the case. The attorney subsequently joined another law firm that was representing a plaintiff making a tort claim against the facility (apparently over a different incident, which

because of deference to trial court discretion.

Because the right to counsel of one's choice is important, particularly in criminal prosecutions that implicate the Sixth Amendment right to counsel, there is precedent finding that the "harmless error" concept does not apply, at least in criminal matters. *See, e.g., United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006)(denial of right to chosen counsel constitutes complete constitutional violation not subject to harmless error analysis); *Anaya v. People*, 764 P.2d 779 (Colo. 1988)(same). *But see Gonzalez-Lopez, supra*, 548 U.S. at 153 (Alito, J., dissenting, joined by Justices Roberts,

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arguably made the matters unrelated except that both cases can be said to be related because they involve the operation of the facility).

The *New Horizons Kids* case was before the court on a writ of mandamus seeking to require disqualification after the trial court had refused to disqualify. A mandamus grant and reversal essentially requires a showing of an "arbitrary and capricious exercise of discretion" by the trial court or the trial court's failure to perform an act required by law. *See International Game Tech. v. District Court*, 179 P.3d 556, 558 (Nev. 2006). If the trial court had ordered disqualification, which is not a final, immediately appealable order, a disqualification based on the same facts might be upheld on review

Kennedy and Thomas)(arguing that defendant should be required to make "at least some showing" that erroneous disqualification ruling adversely affected the quality of legal representation received); *In re Sabatino*, 2016 Pa. Super. Unpub. LEXIS 4363 (Nov. 30, 2016)(harmless error standard applied to erroneous disqualification of counsel in state's "Orphan's Court" dealing with probate and guardianship matters). Nevada law, as I read it, is unclear on this point.

Notwithstanding the mandamus setting, *New Horizons Kids* reads as a definitive court analysis of Rule 1.9 (providing for disqualification based on prior representation of a currently

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adverse party if the past and current matter are “substantially related”) and imputed disqualification (Rule 1.10, which imputes an individual attorney’s disqualification to the entire law firm). The court stated that Rule 1.10 applies and taints an entire law firm only if the attorney in question actually acquired confidential information about the particular former client matter that forms the purported basis for disqualification. *See* 392 P.3d at 169-70.

“The requirement that the attorney actually acquire confidential information about his former firm’s client is not a presumption; rather, it is a factual matter for the district court to resolve. In the absence of an attorney acquiring such confidential information, it follows that the attorney is not disqualified, and imputed disqualification pursuant to RPC 1.10 does not apply.” *Id.* at 169. An individual attorney must have had actual access to confidential information to “infect” a new employer via RPC 1.10.

Prior to *New Horizons Kids*, it could be argued that Nevada law had a presumption that an attorney in a law firm automatically acquired confidential information about matters being handled by the firm. The Nevada Supreme Court has now made it clear that this is not the case. An individual attorney must have had actual access to confidential information to “infect” a new employer via RPC 1.10.

In application, even supposedly “simple” rules of professional responsibility can result in disparate views regarding their application, necessitating care by counsel. **NL**



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