Lawyers and Leadership

Deborah L. Rhode

M ost lawyers come to the subject of leadership with well-founded skepticism. On first glance, the field seems a backwater of vacuous rhetoric and slick marketing. Retired CEOs peddle complacent memoirs, and consultants churn out endless variations of “management by fad.” “Leadership lite” includes classics such as If Aristotle Ran General Motors, and Leadership Secrets from sources as varied as Attila the Hun, The Toys You Loved as a Child, and Star Trek. Why should lawyers squander time on that?

An equally interesting and possibly more important question is why we generally don’t. Why don’t we address the topic of leadership and in a more serious way than pop publications provide? After all, no other occupation accounts for such a large proportion of leaders. The legal profession has supplied a majority of American presidents, and in recent decades, almost half of Congress, and 10 percent of S&P 500 companies’ CEOs. Lawyers occupy leadership roles as governors, state legislators, judges, prosecutors, general counsel, law firm managing partners, and heads of government and nonprofit organizations. In advising influential clients, or chairsing community and charitable boards, lawyers are also “leaders of leaders.”

Even members of the bar who do not land in top positions frequently play leadership roles in teams, committees, campaigns, and other group efforts. Moreover, many of the decision making, organizational, interpersonal, and ethical skills that are critical for leadership positions are important for professionals at all levels. Yet most lawyers never receive formal education in such leadership skills. Nor do they generally perceive that to be a problem, which is itself problematic, particularly considering the leadership deficit facing our profession and our world.

I. The Importance of Leaders and Leadership Development

The Leadership Deficit

Today’s leaders face challenges of unprecedented scale and complexity. In representing clients, shaping public policy, and leading corporate, government, and non-profit organizations, lawyers confront society’s most urgent unsolved issues. On many of these issues, effective leadership is lacking. Corporate governance, environmental protection, human rights, national security, civil liberties, and entrenched poverty all demand leaders with broad skills and deep ethical commitments. So too, lawyers who head law firms, bar associations, and other legal organizations must cope with increased pressure, including intense competition and growing needs for legal assistance among those who cannot afford it.

Public confidence in many of these leaders is distressingly low. For example, only about a fifth of Americans have a great deal of confidence in the integrity of lawyers; only 11 percent have “a great deal of confidence . . . in people in charge of running law firms” and almost a third have “hardly any.” Trust in business leaders is at its lowest ebb since polls started measuring it a half century ago, and they are now the least trusted group in American society. Less than a quarter of surveyed Americans trust the government in Washington “almost always” or even “most of the time,” one of the lowest measures in the last fifty years.

The Educational Deficit

At the heart of the problem are issues of ethics, which makes this topic of special relevance for teachers of ethics. Our profession’s need for leaders with inspiring visions and values has never been greater. Yet our current educational system does little to produce them. Law schools and continuing legal education programs have lagged behind

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Expanding Screening Further

Robert A. Creamer

At the 36th ABA National Conference on Professional Responsibility held in June 2010, one of the proposals debated was that Model Rule 1.10 be amended to remove imputation within a law firm in the context of concurrent representation where: (1) a timely screen is erected; (2) the matters are not substantially related; (3) each involved client is given timely notice; and (4) there is no substantial risk that representation of any firm client will be adversely affected.

Background

This proposal seeks to permit lawyers in law firms to avoid automatic imputation of conflicts of interest in unrelated matters in a manner that protects the legitimate interests of existing clients and provides potential clients greater flexibility in choice of counsel. Presently, Model Rule 1.7(a) defines a concurrent conflict of interest to include any representation “directly adverse” to another client. Unless the affected clients grant informed consent, confirmed in writing, or the conflict is “personal” to an individual lawyer, Model Rule 1.10(a) automatically imputes any conflict to every other lawyer in a law firm. In this context, “any” and “every” are taken literally. There are no exceptions. There are no de minimus or geographic limits. A dog bite case in East Peoria counts just as much as a billion Euro dispute in Paris.

In October 1999, the Drafting Group on Screening of the Ad Hoc Committee on Ethics 2000 of the ABA Section of Business Law submitted a proposal to the Ethics 2000 Commission to amend Model Rule 1.10 to permit screening to remove imputation within a law firm of certain current conflicts of interest. Specifically, the Drafting Committee recommended that there be no imputation in the context of concurrent representation if (i) screening is in place, (ii) the matters are not related, (iii) each affected client is notified, and (iv) there is no significant risk of diminution of the loyalty owed by any lawyer in the firm to its clients.

In support of its proposal, the Drafting Group took issue with the basic assumptions behind the then current version of Model Rule 1.10(a): that every lawyer in every law firm always knows everything about every matter in which every other lawyer in the firm may be involved; and that every lawyer with confidential information of a firm client that may be material to a current adverse representation will inevitably disclose that information to every other lawyer in the firm.

The Drafting Group also noted that the practice settings on which these assumptions were based had changed dramatically. For example, the number of U.S. law firms with 50 or more lawyers increased from 19 in 1950 to over 700 in 1995, with approximately 70% practicing in multi-office firms. At the same time, large users of legal services fundamentally changed their relationships with lawyers, with many large clients regularly engaging hundreds of law firms. These developments were recognized in ABA Formal Opinion 93-372, which gave limited approval to prospective client consents to future conflicts:

The impetus for seeking prospective waivers has grown as the nature of both law firms and clients has changed. In an era when law firms operated in just one location, when there were few mega-conglomerate clients and when clients typically hired only a single firm to undertake all of their legal business, the thought of seeking prospective waivers rarely arose. However, when corporate clients with multiple operating divisions hired tens if not hundreds of law firms, the idea of that, for example, a corporation in Miami retaining the Florida office of a national law firm to negotiate a lease should preclude that firm’s New York office from taking an adverse position in a totally unrelated commercial dispute against another division of the same corporation strikes some as placing unreasonable commercial limitations on the opportunities of both clients and lawyers.

Formal Opinion 93-372 was withdrawn by ABA Formal Opinion 05-436 in view of the 2002 amendments to Model Rule 1.7, which adopted new Comment [22] that provided express guidance with respect to advance consents. (A copy of the Drafting Group’s letter dated October 5, 1999 to the Ethics 2000 Commission follows this article.)

The Ethics 2000 Commission took scant, if any, notice of the Drafting Group’s proposal. The Commission did, however, propose an amendment to Model Rule 1.10 that removed the automatic imputation of so-called “personal interest” conflicts—conflicts between a lawyer’s own personal interests and those of a client, but the circumstances suggest that the conflict of the personally prohibited lawyer is unlikely to influence other firm lawyers. The Commission recognized that this was a substantive change in the Rule, but believed that the amendment “provides clients with all the protection they need, given that the exception applies only where there is no significant risk that the personal-interest conflict will affect others in the lawyer’s firm.” Nevertheless, all other conflicts of interest remained subject to automatic imputation, regardless of the circumstances.

The Commission also proposed to amend Model Rule 1.10 to permit “lateral” screening, the screening of private lawyers moving between law firms, to remove automatic imputation to avoid vicarious disqualification of a moving lawyer’s new firm from a representation adverse to a client of the moving lawyer’s former firm. In August 2001, by a

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vote of 176 to 130, the ABA House of Delegates rejected this proposal. Despite the ABA position on lateral screening, at least 24 states adopted rules that permitted lateral screening. Eventually, in February 2009, the House revisited the issue and narrowly approved a lateral screening rule, now Model Rule 1.10(a)(2), which is substantially similar to the original Ethics 2000 draft.

The Lawyers’ World Continues to Change
Although the 1999 Drafting Group proposal to amend Model Rule 1.10 was ignored by the Ethics 2000 Commission, subsequent events have proven the proposal prescient. In the past decade, the trends in the provision of legal services noted by the Drafting Group have continued. If anything, those trends appear to have accelerated. Law firms continued to grow even larger. For example, by 2006, the Baker & McKenzie firm had more than 3,500 lawyers, DLA Piper had more than 3,300 lawyers, and at least other 20 firms had more than 1,000 lawyers.6

And large clients continued to use more different law firms. Long-term relationships between law firms and their clients have become even more attenuated, and many corporate clients are more interested in retaining individual lawyers than specific firms.7 And many in-house general counsel have publically called legal services “commodities” and described lawyers and law firms as “fungible.” Indeed, as Professor Thomas Morgan observes: “many lawyer-client relationships are likely to remain less like marriages and more like one-night stands.”8 For lawyers in law firms, these changes have meant the end of a culture where “nobody starves” to a business model where partners are more akin to individual entrepreneurs, compensated primarily on the basis of their own business.9 There is nothing to suggest that these changes in the legal landscape are temporary.

The Rationale for Automatic Imputation
The changes in the legal services landscape also challenge the assumptions underlying the notion of automatic imputation of a conflict of interest to all affiliated lawyers. Comment b to Restatement of the Law Third, The Law Governing Lawyers § 123 (2000) gives the rationale for automatic imputation of conflicts, citing three concerns. First, affiliated lawyers are said to share each other’s interests because a fee for one lawyer, for example, normally benefits all lawyers in the partnership, which allegedly creates an incentive in affiliated lawyers to cooperate to favor one client over the other. Aside from the questionable assumption that firm lawyers would engage in improper conduct, such nefarious cooperation seems most unlikely in a contemporary “eat what you kill” compensation scheme.

Second, Comment b states that affiliated lawyers ordinarily have access to files and other confidential information about each other’s clients. Third, the comment observes that a client would often have difficulty proving that an adverse representation by an affiliated lawyer was wholly isolated. These latter concerns are both issues of preserving client confidentiality. As a practical matter, it is improbable that lawyers in most firms, much less modern mega firms, have easy access to the confidence of every firm client. In any event, concerns over access to client information can be addressed and resolved by appropriate and effective screening.

Ironically, automatic imputation is a latecomer to legal ethics rules. It was not part of the 1908 ABA Canons of Professional Ethics. The notion first appears in ABA Formal Opinion 3310 in a situation involving a two-partner firm. The opinion concludes: “The relations of partners in a law firm are so close that the firm, and all the members thereof, are barred from accepting any employment, that any one member of the firm is prohibited from taking.”10 The automatic prohibition was first codified as DR 5-105(D) of the 1969 ABA Model Code of Professional Responsibility: “If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner or associate, or any other lawyer affiliated with him or his firm may accept or continue such employment.” This Code provision is the antecedent of current Model Rule 1.10(a).

It is important to note that in both the Restatement and the ethics rules provisions, loyalty to a client is not given as a rationale for automatic imputation. There is good reason for this apparent omission. The notion of loyalty to a client is derived from the law of agency.12 Under agency law, the scope of that duty is typically limited to “matters connected with the agency relationship.”13 Thus, if the scope of a lawyer’s duty of loyalty were consistent with the law of agency, it would be limited to the matter for which the lawyer has been retained. Even though Comment [6] to Model Rule 1.7 extends the duty of loyalty to unrelated matters in the case of an individual lawyer, the reasons given to justify imputation do not support the automatic imposition of that duty on all affiliated lawyers.

There May Be No Conflict to Impute
The reference to Comment [6] to Model Rule 1.7 raises the related, but different, issue of whether a representation adverse to a current client in a wholly unrelated matter should be considered a conflict of interest at all. Professor Morgan explores this question in a thoughtful 1996 article, where he shows that the prohibition of any representation adverse to a current client, regardless of any connection to the lawyer’s representation of that client, evolved during a period when the practice of law was much different from what it has become.14 He also argues that the current rule does not
simply codify well-established case law, but rather applies *dicta* from cases that involved very different factual settings from those to which the rule is now typically applied. Professor Morgan observes that application of the strict current client rule can deprive litigants of their counsel of choice in circumstances where the other firm client faces no credible harm from the adverse representation, but may well refuse to consent for tactical reasons.

In some legal regimes, adversity against a current client in an unrelated matter is simply not a disqualifying conflict. For example, Section 3.2 of the Council of Bars and Law Societies of Europe (CCBE) code of Conduct for European Lawyers engaged in transnational practice defines conflicts of interest in terms of “the same matter.” In a similar fashion, Rule 3.01 of the Solicitors’ Code of Conduct 2007 for England and Wales limits the prohibition against conflicts of interest to the “same or related matters.” In July 2010, the Solicitors Regulatory Authority of the United Kingdom amended Rule 4.05 of the Code to permit a firm to accept matters adverse to a client without consent of the client if confidential information material to the client’s representation if appropriate “safeguards” or “information barriers” are timely implemented.

Within the United States, current Texas Disciplinary Rule 1.06 allows a lawyer to be adverse to a current client in an unrelated matter without client consent. Even if a client gives initial consent, that consent may be revoked “at any time.” Whether the revocation is justified or prevent a lawyer from continuing to represent the other client normally depends on the circumstances, but will inevitably result in additional delay and expense. Routinely seeking advance consent from new clients could enable lawyers or law firms to ameliorate the risk of a client’s refusal to consent if a later conflict in an unrelated matter arises, but advance consents are still subject to revocation as well as disputes over whether the consent was valid or covers the conflict that eventually arose.

Another practical problem with consent is the need to protect client information. Model Rule 1.7(b)(4) requires that consent to a conflict of interest be “informed.” And Model Rule 1.0(e) defines “informed consent” to denote agreement after the lawyer has communicated adequate information and explanation about the material risks and of and reasonably available alternatives to the proposed course of conduct. Given that Model Rule 1.6(a) protects all information relating to the representation of a client, it may be difficult for a lawyer to disclose sufficient information about one client to another to obtain “informed” consent. ABA Formal Opinion 90-358 (Sept. 13, 1990) recognized this problem and held that because the lawyer in the situation presented was precluded from disclosing the information necessary to make the consent informed, the conflict was nonconsentable. Formal Opinion 05-436 (mentioned above), which generally recognized advance consents to future conflicts, also notes that “a client’s informed consent to a future conflict, without more, does not constitute the client’s informed consent to the disclosure or use of the client’s confidential information . . . .” Even with an advance consent by the existing client, a lawyer may be unable to disclose sufficient information to the prospective client, as the other “affected client” who must consent under Model Rule 1.7(b)(4), to obtain valid informed consent.

**Client Consent Is Not a Solution**

Some have suggested that the negative effects of automatic imputation can be remedied easily by client consent. But consent is not predictable and offers no reliable way for lawyers and other clients to plan their affairs. At the outset, clients can withhold consent for any reason or no reason. And experience suggests that many, perhaps most, clients will refuse to consent for what they consider the tactical advantage of denying the other party of their counsel of choice, without regard to whether the matters in question are related. Even if a client gives initial consent, that consent may be revoked “at any time.” Whether the revocation is justified or prevent a lawyer from continuing to represent the other client normally depends on the circumstances, but will inevitably result in additional delay and expense. Routinely seeking advance consent from new clients could enable lawyers or law firms to ameliorate the risk of a client’s refusal to consent if a later conflict in an unrelated matter arises, but advance consents are still subject to revocation as well as disputes over whether the consent was valid or covers the conflict that eventually arose.

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**Screening Has Been a Success**

Screening has been recognized for decades. Long before Model Rule 1.10 was amended in February 2009 to permit screening of private lateral lawyers, Model Rule 1.11 allowed lateral screening for former government lawyers; and Model Rule 1.12 provided for the screening of former judges, arbitrators and law clerks to prevent imputed disqualification of their new law firms in matters in which they participated personally and substantially. Model Rule 1.18(d) permits screening of lawyers who received disqualifying information from prospective clients. Comment [4] to Model Rule 1.10 permits screening of nonlawyers such as paralegals and secretaries, as well as former law student clerks. ABA Formal Opinion 88-356 regarding temporary or “contract” lawyers, recognized screening as a proper method of preventing vicarious disqualification when such lawyers moved among law firms. In addition, Restatement § 124(2) allows screening to remove imputation with respect to a former-client conflict when there is no substantial risk that the confidential information of the former client will be used with material adverse effect on the former client.

Since the 1980s, at least 24 states have adopted ethics rules to permit screening of lateral lawyers moving between private firms. And virtually every state permits screening of nonlawyer personnel to prevent vicarious disqualification.
With the prevalence of screening in various contexts for many years in almost every state, there appears to be little, if any, empirical reason to believe that lawyers cannot be trusted to comply with an appropriate screen. Clients appear to have experienced few, if any, problems accepting the concept or practice of screening.\(^2\) By any rational measure, screening has been a success.

**The Courts Are Leading the Way**

The experience of the courts with lateral screening is instructive when considering the proposal to permit screening to remove automatic imputation in unrelated matters. In 1983, the Seventh Circuit suggested the elements of an acceptable screen to remove automatic imputation in a lateral situation in *LaSalle National Bank v. County of Lake,*\(^2\) seven years before the Illinois lateral screening rule was adopted. In 1999, Peter Moser observed that trial and appellate courts in the Second, Third, Sixth, Seventh, Eleventh and Federal Circuits recognized lateral screening in appropriate situations even when otherwise applicable state ethics rules did not provide for screening.\(^2\) Unfortunately, it was another decade before the ABA followed the lead of the courts and finally amended Model Rule 1.10.

Once again, the courts are leading the way. Three relatively recent decisions confirm that screening can remove automatic imputation when a law firm may be adverse to an existing client in an unrelated matter.\(^2\)

It is not surprising that the courts have taken leadership on this issue. It is the courts that must deal with the reality of tactical disqualification motions that have nothing to do with the merits of the litigation before the court. Such motions waste scarce resources, imposing needless expense and delay on the courts and clients alike. Yet such motions will continue to be made as long as there is no practical way to remove automatic imputation in unrelated matters imposed by Model Rule 1.10(a). It is time for the ABA to change that rule in the interests of clients and the courts as well as lawyers.  

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**Commission Ethics 20/20**

Follow the work of the ABA Commission on Ethics 20/20 at [http://www.abanet.org/ethics2020/home.html](http://www.abanet.org/ethics2020/home.html). The Commission seeks comments on issues papers posted to the site. It also invites interested parties to join its list serve to receive periodic updates and participate in discussions on the Commission’s work, and to learn about meetings, public hearings, roundtables, and educational opportunities.

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**Endnotes**

2. Id.
3. See further discussion of Formal Opinion 05-436 infra.
5. Screening of former government lawyers was already allowed by Model Rule 1.11.
8. MORGAN, supra note 6, at 123.
9. REGAN, supra, note 7 at 26, 42.
11. Id.
13. See RESTATEMENT OF THE LAW THIRD, AGENCY § 8.01 (2006); and RESTATEMENT OF THE LAW SECOND, AGENCY § 390, Comment d (1958) (agent is not, as such, in fiduciary relation with the principal as to matters in which agent is not employed).
23. 703 F.2d 252, 259 (7th Cir. 1983) (an appeal from a district court in Illinois).
October 5, 1999

American Bar Association
Commission on the Evaluation of the
Rules of Professional Conduct
541 North Fairbanks, 14th Floor
Chicago, Illinois 60611
Attention: Susan Campbell

Re: Proposed Rule 1.10—Public Discussion Draft
Ladies and Gentlemen:

This letter is being sent in response to the publication by the Ethics 2000 Commission of its Draft for Public Comment dated March 23, 1999 of Model Rule 1.10.

These comments have been prepared by the Drafting Group on Screening of the Ad Hoc Committee on Ethics 2000, Section of Business Law of the American Bar Association. The Ad Hoc Committee on Ethics 2000 is composed of the members of the Section of Business Law listed at the end of this letter, including the Chairs of the principal Committees of the Section on practice, professionalism and ethics, the Committees on Conflicts of Interest, Counsel Responsibility, Law Firms, Lawyer Business Ethics, Corporate General Counsel and the Ad Hoc Committee on Multidisciplinary Practice, as well as other Section leaders and members knowledgeable in the field, including two members of the ABA Standing Committee on Ethics and Professional Responsibility (the “Ethics Committee”). A draft of this letter was circulated for comment among the members of the Ad Hoc Committee and the Officers of the Section. A substantial majority of those who have reviewed the letter in draft form have indicated their agreement with the views expressed. However, this letter does not represent the official position of the Section nor does it necessarily reflect the views of all of those who have reviewed it.

We recommend that there be no imputation in the context of concurrent representation if (i) screening is in place, (ii) the matters are not related, (iii) each affected client is notified, and (iv) there is no significant risk of diminution of the loyalty owed by any lawyer in the firm to its clients. We also support the proposal of the Ethics Committee to modify the Commission’s Proposed Rule 1.10 to allow for screening when a personally prohibited lawyer joins a firm. We believe, however, that screening should also be allowed to avoid the imputation of current conflicts.

In its Proposed Rule 1.10, the Commission does not adequately recognize the enormous changes in the past 20 years in the practice settings in which legal services are provided and in the relationships between lawyers in private practice and the large users of legal services. Because of that, the proposed rule continues to require the imputation of conflicts to all lawyers in all firms in all circumstances of adverse representation involving current clients.

In our view, the Commission’s Proposed Rule 1.10 treatment of screening is based on two presumptions that are not valid. The first presumption, as Robert Creamer points out in his Comments to the Commission dated August 5, 1999, is that every lawyer in every law firm always knows everything about every matter in which every other lawyer in the firm may be involved. This is true only in a solo practice setting. It may be substantially true in small firm settings, but it obviously is wrong in large multi-office law firms. There is then the further incorrect presumption, ordinarily rebuttable only in the case of government lawyers, that lawyers who have confidential information of a firm’s client that may be material to a current adverse matter will inevitably disclose that information within the firm. This is also wrong and is a misconception of the response by lawyers to their obligations of confidentiality. See Brian Redding, Comments to the Commission regarding Proposed Model Rules 1.7, 1.8, 1.9, & 1.10, August 4, 1999 (for a convincing argument that disclosure of client confidential information does not occur when a formal screening mechanism is in place).

The practice settings on which these presumptions were based have changed dramatically. By 1950, only 19 firms in the country consisted of 50 or more lawyers and by 1970, a year after the adoption of the Model Code of

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By 1995, there were 280 firms of over 50 lawyers that maintained offices in more than one state. These firms consisted of approximately 70,000 lawyers. Statistical Report.

The practices of the large users of legal services also have changed as have their relationships to their lawyers. Large multi-office conglomerate clients through their highly sophisticated employed attorneys now regularly engage many different law firms and different lawyers for representation in different substantive areas. For instance, several years ago General Motors was reported “historically” to have used 800 firms but intended to reduce that number to 300. Many of these clients also consider it a good business practice to hire lawyers and not law firms, and to hire these lawyers after a “beauty contest” or a response to a request for bids. This has resulted in changing the nature of the loyalty owed to these clients. As early as 1981, commentators concluded that the concept of “legal friend” in these circumstances is outmoded. See *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 Harv. L. Rev. 1244, 1302 (1981).

These developments were recognized by the Ethics Committee in its Formal Opinion 93-372, dated April 16, 1993, addressing the changes in legal practice that have also prompted the recourse to waivers of future conflicts, when it stated:

“The impetus for seeking prospective waivers has grown as the nature of both law firms and clients has changed. In an era when law firms operated in just one location, when there were few mega-conglomerate clients and when clients typically hired only a single firm to undertake all of their legal business, the thought of seeking prospective waivers rarely arose. However, when corporate clients with multiple operating divisions hired tens if not hundreds of law firms, the idea of that, for example, a corporation in Miami retaining the Florida office of a national law firm to negotiate a lease should preclude that firm’s New York office from taking an adverse position in a totally unrelated commercial dispute against another division of the same corporation strikes some as placing unreasonable limitations on the opportunities of both clients and lawyers.”

Although the opinion continues by endorsing the view that such a situation presented a conflict, it recognizes that there was nothing in the example that should prevent a prospective waiver from being effective.

The analysis and understanding of the duty of loyalty to clients has also lagged behind the reality of practice and results in a continuing misapprehension of when a duty of loyalty might be breached. Lawyers must serve their clients with competence, independent judgment, to the best of their ability and with undivided loyalty. This includes maintaining the clients’ confidences. The presumption that the lawyers in the situation in the example in Opinion 93-372 will not do so is unsupported and, in the circumstances of many large clients, is unwarranted.

An additional change to the practice of law has been the recent dramatic increase in the lateral movement of attorneys between firms. According to a recent national survey conducted by the National Association for Law Placement, the movement of lawyers from firm to firm during their careers has become increasingly commonplace, and firms are now hiring new attorneys laterally at a rate that surpasses entry-level hiring. Martha Neil, *More Firms Eschew New Grads for Lateral Hires*, CHI. DAILY LAW BULLETIN, Feb. 18, 1999, at 1. There appear to be many reasons for this phenomenon. For example, many lawyers are seeking greater autonomy, more interesting work, higher compensation or more flexible hours. Other lawyers relocate due to family relocations or law firm downsizing, dissolution or bankruptcy. Whatever the cause, strict application of the current Rule 1.10 without screening restricts the ability of these lawyers to find new positions without unnecessary delay and disruption. The
increasingly common lateral movement of lawyers between firms requires that Rule 1.10 be reexamined to operate properly in the new practice settings.

In spite of these developments, there is no dispute between lawyers and their clients over the goals and principles embodied in the practice of law. Clients must be assured of undivided and undiminished loyalty on the part of the individual lawyer or lawyers actually serving them and be assured that client confidences will not be misused. The general rule of imputation, however, by employing presumptions that are not now valid, does not necessarily further these goals; rather, it unnecessarily ignores the interests of clients and restricts the mobility of lawyers.

Permitting a law firm to be adverse to a current client in an unrelated matter is not unknown. Since January 1990, Rule 1.06(b)(1) of the Texas Disciplinary Rules of Professional Conduct has provided that a lawyer could represent a client adversely to another client of the firm if the matters in question were not substantially related. In such situations, the firm may proceed without notice to or consent from the other client. Nor is screening required by the Texas rule. (The Fifth Circuit has declined to recognize this rule in federal cases. See In re American Airlines, Inc., 972 F.2d 605, 610 (5th Cir. 1992)). In contrast, the Ad Hoc Committee’s proposal would allow a firm to proceed with an adverse representation in an unrelated matter only after written notice to each affected client and the imposition of an effective screening procedure. The firm’s loyalty would also be subject to review under the five factors discussed in the proposed comment. Viewed in context, the Ad Hoc Committee’s proposal offers a practical solution to the technical conflicts that arise from contemporary practice while preserving protection of the legitimate concerns of firm clients.

As stated above, we support the proposal of the Ethics Committee. Our proposal would build on those suggested changes. For convenience, we have shown below, first, the Ethics 2000 Commission proposal in which material added to the current Model Rule has been underlined and deletions from the current Model Rule have been struck through; second, additions suggested by the Ethics Committee (and not deleted by the Ad Hoc Committee proposals) are bold printed, and its deletions are [bracketed]; and third, the additions that we present are shown by double underlining.

Rule 1.10

**IMPUTED DISQUALIFICATION: GENERAL RULE**

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when the lawyer knows or reasonably should know that any one of them practicing alone would be prohibited from doing so by Rules 1.7(a), 1.8(c), or 1.9 or 2.2, except as permitted in paragraphs (b) and (c).

(b) If the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm, except as permitted in paragraphs (b) and (c).

(c) The provisions of paragraph (a) shall not be applicable to conflicts arising under either Rule 1.7 or 1.9 if:

1. The prohibited lawyer is screened from any contact with the new matter in accordance with paragraph (f);
2. the lawyer undertaking the new matter is screened from any contact with any disqualifying matter in accordance with paragraph (f);
3. any disqualifying matter and the new matter are not the same or substantially related;
4. there is no significant risk of a diminution of the obligation of loyalty by a lawyer of the firm to its clients; and
(5) in the case of conflicts arising under Rule 1.7, each affected client is advised in writing of the circumstances warranting the implementation of screening procedures and of the actions taken to comply with this rule.

[(b)](d) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by rules 1.6 and 1.9(c) that is material to the matter.

[(c)](e) A disqualification prescribed by paragraph (a) may be waived by the affected client under the conditions stated in rule 1.7.

(f) For purposes of this rule, a lawyer in a firm will be deemed to have been screened from any contact with a matter if:

(1) the lawyer is specially apportioned no part of the fee therefrom; and

(2) the firm adopts procedures that are reasonably likely to be effective in preventing material information from being disclosed to the screened party or parties.”

We also suggest that the proposed Comment to Proposed Rule 1.10, specifically proposed Comment [5], be modified to conform to our proposed Rule and that there be added to the proposed Comments to Rule 1.10, the following (additional commentary proposed by the Ethics Committee is **bold printed** and additional commentary we present appears as normal text):

**COMMENT:**

[7A] For purposes of this Rule and Rules 1.11, 1.12 and 1.18, effective screening requires both that the lawyer is not specially apportioned any part of the fee from the representation adverse to the former client, see Comment [5] of Rule 1.11, and that procedures are adopted and followed that are reasonably likely to prevent material information from being disclosed by the prohibited lawyer to the firm or its client and its client. Effective screening procedures will vary according to the situation, but at a minimum will entail an agreement by the prohibited lawyer not to participate in or discuss the matter with any other firm member and adherence of the prohibited lawyer to that agreement, notice to all lawyers associated with the firm of this requirement, and, to the extent feasible, isolation of sensitive documents and other information relating to the matter.

[ ] The rule in paragraph (a) does not prohibit representation where neither question of client loyalty nor protection of confidential information is presented. Whether a lawyer would be deemed materially limited in pursuing a matter on behalf of a client because of loyalty to another client of the firm would depend upon several factors, including (i) the size of the firm; (ii) the number of the firm’s offices and where the lawyers representing each client are located; (iii) the type of work the firm has done or is doing for each client in question; (iv) the relationship between the firm and each client; (v) the characteristics of each client; and (vi) the relationship between the clients in question. For example, where a lawyer in a firm’s New York office represents a particular client, and another lawyer in the firm’s San Francisco office represents another client, the risk of each representation affecting the other is smaller than if both lawyers worked in the same office. Other divisions within law firms, such as departments and practice groups, further reduce the risk that unrelated representations will adversely affect the relationships with the clients in question. Also, when evaluating the risk of diminution of loyalty under factor (iii), if a lawyer at the firm represents a client with respect to an isolated minor matter and the firm does not act as that client’s regular outside counsel, it is less likely such representation would materially limit the representation by another lawyer at the firm.
of another client in an unrelated matter. However, the conclusion perhaps would be different with respect to the firm’s representation of a particular client in an ongoing matter or litigation. Such concerns would also be evaluated under factor (iv). Where a client regularly engages a firm to perform legal services and there is an expectation of an ongoing relationship, the risk of such representation affecting the representation of another client in an unrelated matter is greater than where an assignment is obtained from a client through a beauty contest.

[ ] In the case of conflicts arising under Rule 1.7, Rule 1.10(c)(5) requires the firm to advise each affected client of the screening procedure being implemented. Following receipt of the notice of the screen, the new client would have the opportunity to engage alternative counsel if it believed the firm’s obligation of loyalty to it was diminished or confidential information was at risk because of the firm’s representation of the other client. Whether the firm’s representation of the initial client would be prejudiced because of the new client matter must be taken into consideration under factor (iii) of Comment [ ] above, e.g., such client may not be in a position to change counsel.

[ ] Rule 1.10(f) establishes basic requirements for effective screening. In practice, screening procedures will vary according to the particular situation and law firm. In evaluating whether a particular screening procedure is effective, several of the factors listed in Comment [ ] would be relevant, including (i) the size of the firm; and (ii) the number of the firm’s offices and where the lawyers representing each client are located.

We appreciate the opportunity to submit comments and are available to meet with the Commission or your Reporter to respond to any questions.

Respectfully submitted,

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other institutions in developing leadership skills. The recent
cession has caused cutbacks in most of the few law firms
that offer such training.8 By contrast, corporate spending on
leadership development totals forty-five-billion dollars an-
nually and at least seven hundred academic institutions have
leadership programs, largely at the undergraduate level.9

As Gregory Williams noted while president of the Associa-
tion of American Law Schools, schools are happy to take
credit for launching the careers of their prominent graduates,
but have “not generally focused attention on fostering leader-
ship . . . curricula.”10 Lawyers’ leadership responsibilities are
a dominant theme in extracurricular programs, commence-
ment speeches, and alumni awards, but the topic is missing in
action in day-to-day teaching. Ironically, of the mission state-
ments available on law school websites, 38 include fostering
leadership, but only two of these schools are actually offering
a leadership course.11

Explanations for this neglect mirror those tradition-
ally given for the marginalization of professional ethics. Legal
education’s still inadequate treatment of the moral
dimensions of professional life parallels and reinforces its
devaluation of leadership development. Many of the urgent
challenges facing lawyers as leaders involve ethical concerns
that law schools have not effectively addressed elsewhere in
the curricula. Let me begin by reviewing some of the shared
obstacles to education in both leadership and professional
responsibility, and conclude with some promising responses.

II. Education in Ethics and Education in Leader-
ship: Obstacles and Overlap
Legal Ethics in Legal Education
Ethics in legal education was traditionally notable for its ab-
sence. Most faculty treated the subject as “beneath our notice
or . . . [beyond] our capacities.”12 Early courses amounted to
little more than “platitudinous exhortation;” “general piffle”
was the general assessment.13 The prevailing assumption
was that the “right kind of law student already knows what
constitutes moral and ethical conduct and . . . a formal course
in Legal Ethics will not supply the proper sort of character
training for students who are not the right kind.”14 American
bar examiners took a similar view. Questions were infrequent
and typically invited undemanding reflection on topics like
“what the [state’s] Code of Professional Responsibility
mean[s] to me.” It is not clear anyone read the answers.15

Over the last several decades, much has changed but
too much has remained the same. In the United States, law
schools must offer instruction in the legal profession and
its responsibilities as a condition of accreditation, and state
bars generally include a separate examination on the rules
of professional conduct.16 In other countries, the subject is
often relegated to post-graduate practical training, and is
still fighting for an academic toehold.17 But even where legal

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example, and experts in related fields. Martin Luther King, Jr. studied communication and nonviolent techniques of conflict resolution. John F. Kennedy worked hard on developing the personal magnetism he observed among Hollywood actors. Barack Obama looked for guidance in historical accounts of Franklin Roosevelt’s first 100 days as president.

Yet for many lawyers, informal education often falls short. Large law firms, in-house counsel offices, government agencies, and public interest organizations are run by individuals who generally have had no management training, and whose skills as lawyers do not necessarily meet the demands of leadership. As one managing partner summed it up: “the historical model for law firms is to put [people] in a leadership position . . . often not because of leadership skills but because of [rainmaking] . . . and hope they don’t drive into a ditch.” This inattention to leadership development raises particular concern in light of a recent statistical study finding that the most powerful predictor of large firm profitability is “the quality of partners’ leadership skills.”

In my recent survey of the nation’s most prominent public interest organizations, one director put it rhetorically: “Why didn’t I go to business school.”

In fact, that would not necessarily have solved his problem. Harvard Professors Nitin Nohria and Rakesh Khurana note that despite significant improvements over the last decade, the subject still “is at the periphery rather than the center of most [business] schools that profess to educate the leaders of the future.” Attention to ethical issues in leadership is in particularly short supply. In surveys by the Aspen Institute, graduates of MBA programs report that confidence in their ability to manage value conflicts actually falls during their time as students. Only about two fifths of surveyed students believed that business schools were doing enough to enable them to address such ethical issues.

Law schools cannot afford to replicate this neglect, yet most give leadership even less attention. Society, as well as the profession, has a large stake in addressing that oversight. As Robert Gordon has noted, in any democracy, the legal profession plays pivotal roles both in amplyfying and constraining authority. In the public sector, lawyers shape and enforce law. In the private sector, they orchestrate responses to law through compliance, evasion, resistance, and reform. Moreover, because law is to large extent a self-regulating occupation, its leaders have special responsibility to act for the public, not just the profession, when its own governance is at issue. If, as experts have long argued, the organized bar has not always lived up to that responsibility, then legal education is part of both the problem and the solution.

III. Learning Leadership
Defining Leadership

How then can we teach lawyers to lead? A threshold question is what we mean by leadership, and what core competencies are central to its exercise. This issue has generated a cottage industry of commentary, and by some researchers’ accounts, over 1,500 definitions and forty distinctive theories.

Although popular usage sometime equates leadership with power or position, most experts draw a distinction. They view leadership in terms of traits, processes, skills, and relationships. John Gardner, founder of Common Cause, famously noted that heads of public and private organizations often mistakenly assume that their status “has given them a body of followers. And of course it has not. They have been given subordinates. Whether the subordinates become followers depends on whether the executives act like leaders.” Moreover, just as many high officials are not leaders, many leaders do not hold formal offices. Mahatma Gandhi and Martin Luther King, Jr. led from the outside. In essence, “leadership requires a relationship, not simply a title. Leaders must be able to inspire, not just compel or direct their followers.”

What enables leaders to inspire commitment? Do they share identifiable personal characteristics and styles that are effective across varying situations? The traditional assumption was that they did. Early Greek, Roman, and Chinese philosophers generally assumed that leadership required exceptional personal qualities. A 10th-century Persian theorist distilled from these philosophical accounts a list of traits that looks remarkably similar to those generated by contemporary surveys. Historian Thomas Carlyle famously argued that behind every great institution and social movement was the shadow of a “great man,” and Max Weber elaborated the charismatic styles that he believed enabled their success.

Yet most recent research casts doubt on whether effective leaders are cut from the same mold. Over the last half century, leadership scholars have conducted more than 1,000 studies in an attempt to define the ideal leaders. Summarizing this work, a Harvard Business Review overview concludes that it has produced no clear profile. Nor is the much celebrated quality of charisma necessarily related to effective performance. Indeed, some studies find that the leaders of the most continuously profitable corporations have tended to be self-effacing and lacking in the qualities commonly considered charismatic. In Drucker’s view, it is a mistake for organizations to look for some “boardroom Elvis Presley.” Genuine leadership, he argued, has little to do with charisma. It is “mundane . . . and boring. Its essence is performance.”

Building on such research, many contemporary experts advance some version of a contingency theory of leadership. This framework places the key to effectiveness in a match between what the circumstances demand and what an individual has to offer. Situations vary in terms of the...
capabilities and expectations of followers and the power and resources of leaders. This is not, however, to deny all possibility of generalization. It is, as Nohria and Khurana note, “hard to imagine what leadership is if there isn’t a core set of functions or behaviors that cut across different situations and persons.” Certain attributes consistently emerge in research on effective leadership. Most characteristics cluster in five categories:

- values (integrity, honesty, trust, an ethic of service);
- personal skills (self-awareness, self-control, self-direction);
- interpersonal skills (social awareness, empathy, persuasion, conflict management);
- vision (forward looking, inspirational);
- technical competence (knowledge, preparation, judgment).

Although legal education can only do so much to develop or reinforce these qualities, it should do what it can, which is far more than it currently attempts.

**Learning to Lead**

How then can individuals learn to lead? Theories about learning abound, but on one point there is virtual agreement. Leaders need the capacity to learn from experience—both their own and others’. As Mark Twain famously observed, a cat that sits on a hot stove will not sit on a hot stove again, but it won’t sit on a cold one either. What distinguishes effective leaders is the ability to draw appropriate lessons from the successes and failures that they experience and observe. In an apt, if possibly apocryphal exchange, a young lawyer asked a leader in his field how he came to acquire such a reputation. “People respect my judgment” was the response. “Why?” the associate wanted to know. “Well I guess I’ve made the right decisions.” “How did you know what decisions were right?,” the associate asked. “Experience” said the partner. The associate wouldn’t give up. He was probably in training as a law professor. “What was the experience based on?” The answer: “Wrong decisions.”

That is, no doubt, how most lawyers acquire leadership skills. But other ways are available through legal education. An effective curriculum should begin from the premise that individuals vary in how they learn best, and the ideal strategy is to incorporate multiple approaches such as interdisciplinary research and theory, problems, case studies, role simulations, group interaction, literature, and film. Three goals should be paramount. One is to enhance students’ capacities to achieve and exercise leadership, and to understand the cognitive biases, interpersonal responses, and organizational dynamics that can sabotage effectiveness. A second objective is to help students become lifetime learners, and to manage their own leadership development. A third objective, and the one most relevant to legal ethics, is to reinforce a sense of responsibility to use leadership for the public good. Ben Heineman, former General Counsel of General Electric, now a lecturer at Harvard, puts it this way: the decisions of “the lawyer as leader” should seek “to make our national or global society a ‘better place’ however difficult that goal is to define, much less achieve.” The point is not, of course, for faculty to use the podium as a pulpit to advance their own personal conceptions of the public good. It is rather to encourage students to develop their own views, and to see leadership not only as a way station to power and status, but also as an exercise of social responsibility.

With those objectives in view, law schools should both offer a course focused on leadership and integrate leadership issues throughout the curricula. Not all students will be comfortable self-selecting for a course labeled “leadership,” so it is important to ensure some basic coverage of its core competencies in other offerings. For example, the leadership failures underpinning the recent financial crisis could become topics in corporate law and securities regulation. Lawyers’ role in the forefront of social change movements could figure in courses on civil rights, human rights, sex discrimination, poverty, environmental law, and public interest practice. Clinical courses could provide skills training in conflict management, team work, and problem solving.

Professional responsibility classes could address a wide range of leadership issues, such as the importance of diversity, the relationship between supervisory and subordinate lawyers, the role of moral counseling, the management of law firms, the special obligations of government attorneys, and the structure of pro bono programs. Leadership can be an ideal lens for exploring how the “good go bad” in circumstances where it matters most. A key determinant of ethical behavior in organizations is the “tone at the top.” Students who will someday occupy those positions can benefit from analyzing the personal and institutional dynamics that sabotage moral judgment.

Among those dynamics is the disconnect between the qualities that often enable individuals to achieve leadership positions and the qualities that are necessary to perform effectively once they get there. What makes individuals willing to accept the pressure, hours, scrutiny, and risks that accompany leadership? For many lawyers, it is not only commitment to a cause, an organization, or a client. It is also power, prestige, and money. Successful leadership requires subordinating these personal interests to a greater good. The result is what some psychologists label the “leadership paradox.” Individuals reach top positions because of their high needs for personal achievement. Yet to perform effectively once there, they need to focus on creating the conditions for achievement by others.

One mission of leadership education is to help future lawyers anticipate and avoid the consequences of unchecked
ambition. Case histories of failed law firms and failed causes can illustrate how the self-centeredness that may propel individuals to leadership positions may sabotage their subsequent performance.54 The risk is exacerbated by leaders’ reluctance to learn about their weaknesses. James Kouzes and Barry Posner put it bluntly: “most leaders don’t want honest feedback, don’t ask for honest feedback, and don’t get much of it unless it’s forced on them.”55 Only about 40 percent of law firms offer associates opportunities to evaluate supervisors, and of those who engage in the process, only about 5 percent report changes for the better. 56

Of course, lawyer leaders are scarcely unique in their tendency towards self-protection. But the understandable human aversion to criticism is particularly problematic for leaders, because of both the power they hold and the understandable unwillingness of many subordinates to volunteer unwelcome messages. In Kouzes and Posner’s survey of some 70,000 individuals, the rank that ranked the lowest in a list of thirty leadership behaviors was that the leader “asks for feedback on how his/her actions affect others’ performance.”57

Yet without such information, lawyers may fail to identify problems in their own performance. Harvard economist John Kenneth Galbraith once noted that “[f]aced with the alternatives between changing one’s mind and proving it unnecessary, just about everybody gets busy on the proof.”58 Defensiveness and denial are particularly apparent when individuals’ own self-evaluations are at issue. Leadership education can explore the cognitive biases that compromise not only performance but also learning from performance failures. One such bias is the “fundamental attribution error”: a tendency to attribute personal successes to competence and character, and failures to external circumstances.59

A related problem stems from confirmation and assimilation biases. People tend to seek out evidence that confirms their preexisting, typically favorable vision of themselves, and biases. People tend to seek out evidence that confirms their preexisting beliefs and values.56 The result is to reinforce narcissism and a sense of entitlement; leaders may feel free to disregard legal or ethical rules, and standards of respect that are applicable to others.57 Yet by thinking that they are “better than those . . . little people,” leaders “cut themselves off from [followers’] good ideas and good graces” and run the risk of scandal.60 Perceptions of entitlement concerning sex and money have marred the careers of many prominent lawyer leaders; students can benefit from exploring these cautionary tales.61

One final pathology worth flagging in leadership education arises from leaders’ high needs for approval and disdain for “soft” skills that may be essential to obtaining it. As one consultant notes, leaders’ desire “to look good [often] displaces the intention to be good” and to pay attention to others’ needs that don’t translate into immediate payoffs.62 A related problem is the assumption that education in interpersonal dynamics and conflict management is a “touchy feely process,” unworthy of attention from intellectually sophisticated individuals. Yet research makes clear that for many professionals, “the soft stuff is the hard stuff.”63 Effective leadership requires more than analytic skills, and high achievers in intellectual domains may not have developed corresponding emotional intelligence.64

* * *

Almost two decades ago, John Gardner noted that “we have barely scratched the surface in our feeble efforts toward leadership development.”70 For lawyers, that remains true today. Legal education prides itself on teaching future practitioners to think like lawyers but does little to teach them to think like leaders. Many challenges they will face involve questions of values, so those of us who specialize in professional responsibility have a special opportunity and obligation to address them. We are, in effect, leaders of those who will become leaders. We owe it to our students, to our profession, and to our world to prepare them for that role. 71

Endnotes

1. WILLIAM A. COHEN, DRUCKER ON LEADERSHIP 167 (2010).

10. Williams, supra note 9.


25. For twins studies see Richard D. Arvey, Maria Rotundo, Wendy Johnson, Zhen Zhang, and Matt McGue, The determinants of leadership role occupancy: Genetic and personality factors, 17 LEADERSHIP QUARTERLY 1 (2006); Bruce Avolio, Pursuing Authentic Leadership Development, in HANDBOOK OF LEADERSHIP THEORY AND PRACTICE, supra note 22 at 739, 752; Warren G. Bennis & Bert Nanus, LEADERSHIP: STRATEGIES FOR TAKING CHARGE 207 (1997).


28. Cohen, supra note 1, at 204.


33. Nohria & Khurana, supra note 22, at 5. Signs of neglect include reliance on adjunct faculty to teach most leadership courses, and lack of doctoral programs and publications in the most prominent journals.

34. Pfeffer, Leadership Development; Kelley Holland, Leadership Programs Born from Lack of Born Leaders: The Legal Intelligencer, November 5, 2007 (quoting Jeffrey Lutsky, managing partner of Stradley Ronon Stevens and Young).


43. Jim Collins, Level 5 Leadership: The Triumph of Humility and Fierce Resolve, HARVARD BUS. REV., Jan., 2001, 73; Roger Gill,


66. Among the prominent recent examples are John Edwards, Eliot Spitzer, Bill Clinton, Gary Hart, Mark Dreier, and Kwanke Kilpatrick.


69. For an overview, see DANIEL GOLEMAN, EMOTIONAL INTELLIGENCE (1995); GOLEMAN, BOYATZIS, and MCKEE, supra note 47; Argyris, supra note 67.

70. JOHN GARDNER, ON LEADERSHIP xv (1990).
Courtroom Technology and Legal Ethics: Considerations for the ABA Commission on Ethics 20/20

Michelle L. Quigley

The use of technology in litigation is not a new phenomenon. For more than thirty years, lawyers have used equipment such as overhead projectors, television sets, and VCRs in the courtroom to present their cases. Today’s courtroom technology, however, provides lawyers with much more sophisticated and versatile options.

Because of the many benefits of using courtroom technology to visually present one’s case, from enhancing the jury’s comprehension and retention of the information presented to reducing the overall length of trials, its use will only continue to rise. Indeed, the adversary process itself will likely lead to this result as lawyers realize that an unwillingness to take advantage of courtroom technology, especially when one’s opponent does, is an unacceptable risk.

Two important questions necessarily follow. First, what ethical considerations are implicated as technology-augmented litigation becomes the norm? And second, do the current Model Rules of Professional Conduct (“Model Rules”) adequately address those ethical concerns?

The ABA Commission on Ethics 20/20

In 2009, the ABA created the Commission on Ethics 20/20 (“the Commission”) to assess the adequacy of the current Model Rules in light of modern technological advances and the increased globalization of the practice of law. The Commission’s work is expected to take three years, with the first year dedicated to research, and the second and third years dedicated to developing and vetting proposed policies and principles and presenting them to the ABA’s House of Delegates for approval.

The Commission has identified three focus areas:

(1) issues that arise because U.S. lawyers are regulated by states but work increasingly across state and international borders; (2) issues that arise in light of current and future advances in technology that enhance virtual cross-border access; and (3) particular ethical issues raised by changing technology.

Though the effects of technological advances on the ethical duties of lawyers is clearly one of the Commission’s primary focuses, courtroom technology is not specifically set out as an area of concern in the Commission’s Preliminary Issues Outline. The most relevant topic to courtroom technology in the Preliminary Issues Outline is “Competence: Does the rapid pace of technological evolution raise issues relating to lawyer competence.” Because technology-augmented litigation is steadily becoming the norm for modern courtroom practice, the Commission should consider, as part of its technology discussion, whether the Model Rules adequately cover the use of courtroom technology.

Courtroom Technology under the Model Rules

But for the mention of electronic communications in connection with lawyer advertising and solicitation of professional employment from prospective clients, the Model Rules do not specifically address technology or how technological advances affect a lawyer’s ethical duties. The lack of an explicit reference notwithstanding, however, technological advances can affect a lawyer’s duties even under the current Model Rules. Specifically, when it comes to technology-related issues, the duties of confidentiality, competence, and diligence are the duties most often implicated.

For example, when sending an electronic document to third-parties, lawyers may need to consider whether they are also transmitting confidential client information as metadata. Metadata, which accompanies electronic documents, can reveal information regarding the authorship of a document and changes made during drafting including, among other things, deletions. Some state bar opinions have held that, in order to avoid violating the duties of competence and confidentiality, attorneys must take reasonable steps to safeguard against revealing such information. Some states have also held that lawyers may not ethically attempt to “mine” for such data when receiving electronic documents. Similarly, the duties of confidentiality, competence, and diligence have been implicated in other technology-related activities such as e-discovery, switching to a paperless filing system, transmitting sensitive information via email, and conducting online research.

When it comes to using courtroom technology to visually present one’s case, maintaining confidentiality is generally not an issue, yet several other Model Rules may be implicated. Of particular relevance are Model Rule 1.1, requiring competence, Model Rule 1.3, requiring diligence, and Model Rule 1.5, requiring reasonable fees. Although all three rules could be interpreted so as to cover courtroom technology, an examination of each reveals that many questions are left unanswered.

1. The Duty of Competence

According to Model Rule 1.1, competence “requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” The comments indicate that in order to maintain the knowledge and skill required for competent representation, “a lawyer should keep abreast of..
changes in the law and its practice.” Indeed, even the ABA’s own website indicates that “[c]ompetence in using a technology can be a requirement of practicing law.” Thus, one could argue that, as using courtroom technology to visually display evidence becomes the standard, the duty of competence will require lawyers to adjust accordingly. That is, at a minimum, lawyers should have a general understanding of how to use courtroom technology in presenting their cases.

The comments to Model Rule 1.1 also indicate that the requisite thoroughness and preparation “are determined in part by what is at stake.” That is, major or complex litigation may require more preparation and treatment to satisfy the competency requirement. Thus, a complex patent or similar type case that requires the jury to understand a detailed scientific process may require more preparation and treatment than an uncomplicated contract dispute. If a simple graphic or chart explaining the scientific process involved would greatly improve the jury’s ability to understand a pivotal issue in the case, would the duty of competent representation require the lawyer to use one?

Assuming that the duty of competence does entail an obligation to be at least minimally competent in the use of courtroom technology, further questions still arise. One example would be whether and to what extent the lawyer who does use courtroom technology to present her case must also be prepared in the event that technology fails. If an evidence camera stops working in the middle of trial, for example, because the light bulb failed, must the “adequately prepared” attorney have a spare light bulb on hand, acetate transparencies ready to place on an overhead projector instead, or paper copies of the exhibits available to pass to the jurors? If the courtroom itself was equipped with the camera, can the attorney depend on the court to also supply a spare bulb? If the attorney intends to use a PowerPoint presentation, would simply bringing an extra copy of the presentation on a CD or flash drive be sufficient? Or should the attorney also bring a copy of the Microsoft software program that would be necessary to view it on another computer? Should an attorney using her own laptop for presentation purposes be prepared with a second laptop in the event the first laptop crashes? In other words, even if one believes that the duty of competence requires lawyers to be capable of using courtroom technology, which is uncertain under the current Model Rules, the question of whether and to what extent the “thoroughness and preparation” element of that duty requires lawyers to be prepared for technology failures is also open for discussion.

2. The Duty of Reasonable Diligence

Whereas the Model Code of Professional Responsibility explicitly included a duty of zealous representation, the current Model Rules have reshaped that duty into a combination of the duties of competence and diligent representation. Because of fears that the term “zealous” could slip into “overzealous,” no Model Rule contains an outright duty of zeal. Even so, the comments do refer to an obligation of zealous representation: (1) “A lawyer must also act with . . . zeal in advocacy upon the client’s behalf”; (2) “[W]hen an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done”; and (3) “These principles include the lawyer’s obligation zealously to protect and pursue a client’s legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.”

Considering all three of these comments and the many benefits to using courtroom technology, one might assume that diligent representation requires attorneys to visually present their cases using courtroom technology, especially where opposing counsel is doing so. To be sure, when surveyed, many attorneys indicate that if opposing counsel is using litigation support software, they would be inclined to do so as well. One defense attorney, after unsuccessfully objecting to the prosecution’s use of a computer slide show in closing arguments, confessed to reporters that his own arguments had appeared “slipshod in comparison.” Indeed, many computer-savvy jurors may even expect attorneys to use technology in presenting their cases. The comments to Model Rule 1.3’s duty of reasonable diligence, however, also provide that lawyers are “not bound . . . to press for every advantage that might be realized for a client.” This statement alone makes it difficult to argue that the current diligence requirement includes a duty to use courtroom technology to present one’s case, even in the situation where one’s opponent is doing so.

3. The Duty to Keep Fees Reasonable

The duties of competence and diligence must be balanced against the countervailing duty to keep fees reasonable, which is set out in Model Rule 1.5. The rule itself requires that lawyers’ fees be reasonable and sets out a non-exclusive list of factors to consider. Thus, there is substantial room for discretion in determining a proper fee.

When it comes to courtroom technology, it is a question of balancing the cost and effectiveness of a given evidence display technology or particular type of computer-generated exhibit (“CGE”). For example, because moving CGEs, such as animations and simulations, can cost upwards of $5,000 to produce, attorneys must have an adequate knowledge of when and why one would want to use such evidence. Some potential guidelines that have been suggested by commentators include the following: (1) whether your case involves
a risk of exposure in excess of $500,000; (2) whether your case creates a “story” that should be presented clearly; (3) whether your case hinges in causation; (4) whether your case involves complex expert testimony; and (5) whether your opponent is using an animation or simulation, which you should attack with one of your own.36 More simple CGEs, on the other hand, such as static or enhanced images, can be used much more frequently and cost-effectively, especially where the courtroom itself is equipped with the evidence display technology. Even if the courtroom itself is not equipped, most of the basic evidence display technologies, such as evidence cameras and digital projectors, can be purchased or even rented at a relatively low cost.37

Considerations for the ABA Commission on Ethics 20/20

There are numerous benefits to using courtroom technology to visually present one’s case: increased juror comprehension and retention of the information presented, increased persuasive power, increased efficiency, the appearance of competence and preparedness, and the ability to control the room. As such, using courtroom technology will soon be, if it is not already, standard practice in modern litigation. Therefore, as part of its technology discussions, the Commission should consider the use of courtroom technology specifically and whether the Model Rules themselves, or at least their comments, need to be amended to better address it.

Of the three rules discussed that might relate to courtroom technology, the fee issue is probably the most sufficiently addressed under the current Model Rules. This is so simply because the rule itself does not impose a “bright line” fee structure, but rather leaves room for discretion. Thus, whether the effectiveness of using a particular type of courtroom technology is valid justification for the potential increase in the attorney’s fee is also subject to discretion. The duties of competent and diligent representation, on the other hand, could be read either way. That is, perhaps a lawyer’s duties of competent and diligent representation require that she be familiar with how to use courtroom technology and when and why one should do so, but perhaps not. Because of the clear message of the comments to Model Rule 1.3 on diligence—that lawyers do not have an ethical obligation to “press for every advantage that might be realized for a client”38—it is unlikely that courtroom technology can be addressed under that rule, short of deleting that comment altogether, which would have a broader unintended effect. Thus, the real issue here lies in the duty of competence and its effect on the use of courtroom technology.

Specifically, as part of its technology discussion, the Commission should consider, first, whether lawyers have an ethical obligation to be minimally competent in the use of courtroom technology when advocating for their clients, which this author would suggest they do, and second, whether the current Model Rule on competence adequately expresses that duty, which this author would suggest it does not. It is not necessary, however, to drastically reword Model Rule 1.1 to make the duty clear. Indeed, an additional comment to the rule would be more than sufficient. A possible starting point for discussion is the following:

Maintaining the requisite knowledge and skill necessary for competent representation includes a duty to keep abreast of technological advances that significantly affect the practice of law. For example, in certain circumstances, lawyers may have an ethical obligation to use courtroom technology in advocating for their clients and to be competent in the use of technology when doing so.

The structure of a comment like this allows not only for courtroom technology to be addressed, but other areas in which technology has affected the practice of law as well. That is, other “for example” sentences could follow, further clarifying how and in what circumstances technology shapes the duty of competence.

Finally, regardless of whether the Commission modifies the Model Rules to address courtroom technology, trial lawyers must still consider this issue in light of the rules as they are today. That is, trial lawyers need to apply their current understanding of the duties of competence, diligence, and reasonable fees when deciding whether and how to take advantage of courtroom technology. Only those lawyers who have done so will be adequately prepared to defend themselves in the event their compliance with these obligations, as they relate to the use of courtroom technology, is ever challenged.39

Conclusion

As more trial attorneys become aware of the many benefits of using courtroom technology in presenting their cases, technology-augmented litigation will become standard practice. As such, the Model Rules should address the ethical duties of attorneys with regard to the use of courtroom technology, even if only to clarify that a minimal competence in the use of courtroom technology is, in fact, an ethical obligation for all trial attorneys. Courtroom technology should, therefore, be considered by the Commission as part of its discussions on modern technology and the practice of law.

Endnotes


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2. Available technologies include the following: (1) evidence cameras; (2) laptop computers equipped with presentation software, such as Trial Director, Sanctum, Trial Pro, or Microsoft’s PowerPoint; (3) electronic whiteboards; (4) digital monitors, which vary in size and can be located anywhere in the courtroom including the bench, behind the witness stand, and in the jury box; (5) digital projectors and projection screens; (6) annotation equipment; (7) integrated lecterns; and (8) kill switch and control systems. See Elizabeth C. Wiggins, The Courtroom of the Future is Here: Introduction to Emerging Technologies in the Legal System, 28 Law & Pol’y 182 (2006) and Lawyer’s Guide, supra note 1, at 6-20.


4. Lederer, supra note 3, at 830.


8. See id. at 3-9.

9. Id. at 8.


11. See, e.g., id.; N.Y. State Bar Ass’n, Ethics Op. 782 (2004) (holding that a lawyer must take reasonable care to ensure that confidential information is not disclosed when sending electronic documents and that “[r]easonable care may, in some circumstances, call for the lawyer to stay abreast of technological advances and the potential risks of transmission in order to make an appropriate decision with respect to the mode of transmission”).


14. See, e.g., VSB Comm. on Legal Ethics, Ethics Op. 1818 (2005) (“[W]hen making decisions as to what to keep in the file and in what form, while an attorney may consider storage expediency, those decisions must be made such that the attorney’s duties of competence, diligence, and communication are not compromised.”); N.J. Sup. Ct. Advisory Comm. on Prof’l Ethics, Ethics Op. 701 (2006).


16. Paul W. Vanek et al., CAL. PRAC. GUIDE: PROF’L RESP. § 6:93-94 (“Performing Services “diligently” may require certain resources and capabilities beyond legal knowledge and skill. . . . Lawyers cannot ignore technological advancements such as computerized legal research and computer-accessible libraries.”).


18. Id. at R. 1.1 cmt. 6 (emphasis added).

Should States Ban Contingency Fee Agreements between Attorneys General and Private Attorneys?

Carson R. Griffis

Contingency fee arrangements have long been debated by the legal profession.1 On the one hand, they enable many clients to obtain representation they would otherwise be unable to afford.2 On the other hand, contingency fees present the possibility of conflicts of interest.3 One such conflict, and the topic of this article, is the one that may arise when attorneys general enter into contingency fee agreements with private firms that help conduct state litigation.4 In the wake of the tobacco litigation of the 1990’s, concern over state attorneys general contracting with private firms sparked a reform movement to curb such arrangements.5 The 2010 Deepwater Horizon disaster in the Gulf of Mexico, with its potential for vast recoveries for plaintiffs,6 raises the question of whether reform efforts will continue to succeed as attorneys general of Gulf Coast states face public pressure to sue BP and Transocean.7

The History of Contingency Fee Agreements between Private Firms and Attorneys General

Contingency fee agreements between state attorneys general and private attorneys were thrust into the limelight in the 1990s when the total settlement in the 1990’s tobacco litigation netted private attorneys $14 billion in fees nationwide.8 These huge fees prompted reform efforts aimed at requiring public disclosure of the agreements.9

In 1998, the American Legislative Exchange Council (ALEC), a nonpartisan organization of state legislators, approved model legislation entitled the Private Attorney Retention Sunshine Act, which includes requirements for open and competitive bidding for state contracts, public hearings for contracts larger than $1 million, capped hourly wages of $1000, and documentation of attorneys’ hours, expenses, and hourly rates.10 Currently, Connecticut, Colorado, Florida, Kansas, Minnesota, North Dakota, Texas, and Virginia have adopted variations of the Private Attorney Retention Sunshine Act.11 Similar bills await passage in Alabama, Iowa, Mississippi, and South Carolina.12

States that have adopted some form of legislation vary in the degree to which they adhere to ALEC’s guidelines. Most of these states require some kind of reporting by either the attorney general or the private attorney to the court, the public, or the legislature. For example, Kansas requires that any contingency fees to be paid by the state be approved by the judge in the case, who determines whether they are reasonable, using as guidelines the same eight factors found in Rule 1.5(a) of the Kansas Rules of Professional Conduct (and the Model Rules of Professional Conduct) in regard to the reasonableness of any fees.13 Colorado requires that the private attorney provide reports of his or her hours, services, and court costs to the governmental entity with which he or she contracted, and caps the hourly rate at $1000.14 As to public disclosure, North Dakota explicitly exempts the reports prepared by the attorney general from its public disclosure statutes.15 By contrast, Virginia subjects all contingency fee arrangements reasonably expected to yield more than $100,000 to “an open and competitive negotiation process.”16

Florida’s recent law is unique in that it both caps the total contingency fees and requires that the contract be posted on the website of the state entity within five days of the execution of the contract.17 The Florida statute requires a demanding analysis and justification by the attorney general. In deciding to hire a private firm or attorney, the Florida Attorney General is required to prepare a written determination for the public, specifically addressing three findings: 1) whether there are sufficient legal and financial resources available to handle the matter; 2) the time and nature of work involved, as well as the complexity of the issues; and 3) the geographic area where the services will be provided.18

While state reform has been effectuated through legislation, the federal government has acted through the executive branch. In 2007, President Bush issued Executive Order 13,433, which prohibits executive agencies from entering into contingency fee agreements for legal or expert witness services, unless such an agreement is required by law.19 The policy underlying the order is to “ensure the integrity and effective supervision of the legal . . . services provided to or on behalf of the United States.”20

In addition to supporting legislative restrictions on contingency fee agreements between state attorneys general and private attorneys, reformers have focused on claims that these agreements violate both separation of powers and neutrality.21 These contingency fee agreements allegedly violate separation of powers because they are not subjected to the legislative appropriations process typically required for the distribution of state funds.22 Thus, in Meredith v. Ieyoub,23 the Supreme Court of Louisiana held that the state attorney general’s use of contingent fees as a means to enforce environmental laws violated separation of powers because the state legislature had not expressly delegated the attorney general the authority to appropriate state funds.24 Louisiana is the sole example of a successful separation of powers challenge to such contingency fee arrangements.24

Contingency fee agreements between state attorneys general and private counsel also allegedly violate the duty of neutrality because attorneys general, who represent the

interest of the general public, may compromise their neutrality by possessing a financial stake in the outcome of cases where they are only paid if they “win.” For example, the Supreme Court of California held a contingency fee arrangement for a public nuisance abatement action invalid as a violation of the neutrality standards by which the state attorney general must abide. The court acknowledged, however, that only certain types of civil litigation by states demand heightened neutrality. Indeed, the Supreme Court of California recently held that neutrality is maintained in a public nuisance abatement action if the attorney general “controls” the litigation and the action does not pose a “threat to fundamental constitutional interests” or to “continued operation of an ongoing business.” The court specified that contingency fee agreements between public entities and private outside counsel are permissible so long as three requirements are met: (1) that the public-entity attorneys will retain complete control over the course and conduct of the case; (2) that government attorneys retain a veto power over any decisions made by outside counsel; and (3) that a government attorney with supervisory authority be personally involved in overseeing the litigation. Thus, a contingency fee contract only violates the neutrality principle when a public entity cedes complete control of a public nuisance abatement action that implicates constitutional rights or the ability of a business to continue its operations.

**Neutrality, Cronyism and Accountability: Why Attorneys General Should Not Employ Private Counsel**

Reformers posit several arguments regarding the hazards contingency fees pose. Those with concerns about neutrality point out that attorneys general do not represent a “client” in the traditional sense; rather, they represent the People. Therefore, they are mandated to act in the public interest, including the interest of defendants. By linking an attorney’s financial recovery to the success of litigation, such contracts allegedly provide an incentive for attorneys to seek maximum damages rather than justice for all citizens. Reformers also assert that contingency fee agreements create disincentives to seek equitable relief, which may be more appropriate than damages. Some even note that the litigation for which private attorneys are often retained involves defendants from controversial industries, for example, the tobacco industry. Stacking the moral authority of the state against such defendants jeopardizes their chance for a fair trial.

Reformers also note that contingent fee arrangements lead to political cronycism. For example, a Houston firm that contributed $75,000 to the Mississippi Attorney General’s campaign was hired to represent the state against Eli Lilly in a suit involving the drug Zyprexa. When the suit settled for $18.5 million, the firm netted $2.78 million in fees paid directly by Eli Lilly. As with all contingent fee arrangements between state attorneys general and private attorneys, awarding contingency fee contracts without public disclosure gives the impression that attorneys are winning these contracts based on patronage alone.

Finally, reformers suggest that a lack of accountability exists in the disbursement of monies. When a state prevails in litigation, private attorneys retained on contingency receive their percentage without consideration of the propriety of such agreements or the debate attendant in legislative appropriations. Moreover, reformers argue that the exorbitant fees paid to private attorneys siphon funds that could be used for the public interest. Although contingency fees are often presented as “no cost,” reformers argue that this diversion of funds comes at a high cost to the public.

**Cost and Benefit: Why Contingency Fees between the State and Private Counsel Can Be Useful**

Despite passionate calls from reformers, many state attorneys general continue to retain private counsel under contingency fee contracts. Several legitimate reasons justify these contracts, most of which revolve around the notion that many states lack the resources to pay for litigation in the public interest. Also, proponents of this use of private counsel assert that the charges of impartiality and corruption are overblown. All fifty states allow contingent fees in wholly private attorney-client relationships. The main justification is that contingency fees permit access to the legal system for those who otherwise could not afford litigation. Similarly, proponents of allowing states to retain counsel on contingency argue that poor states could not prosecute lawsuits without contingency fees.

Reformers argue that states are rich, as they possess the power to tax or cut services. Proponents of contingency fees counter by arguing that cutting services or raising taxes are not options for poor states, which also have poor citizens. Reformers also note that contingent fee arrangements lead to political cronycism. For example, a Houston firm that contributed $75,000 to the Mississippi Attorney General’s campaign was hired to represent the state against Eli Lilly in a suit involving the drug Zyprexa. When the suit settled for $18.5 million, the firm netted $2.78 million in fees paid directly by Eli Lilly. As with all contingent fee arrangements between state attorneys general and private attorneys, awarding contingency fee contracts without public disclosure gives the impression that attorneys are winning these contracts based on patronage alone.

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insurance companies frequently provide the costs of defense for these corporations.\textsuperscript{60}

Proponents posit several other reasons that the benefits of contingency fee agreements outweigh the detriments. First, they argue that reformers exaggerate the harm of such agreements. They note that outside counsel do not supplant attorneys general.\textsuperscript{61} So long as attorneys general supervise litigation and make final decisions, the assistance of outside counsel does not permit such counsel to exercise the authority of the state, so that neutrality and accountability are not jeopardized.\textsuperscript{62}

Second, they argue that prohibiting contingency fees would discourage private attorneys from contracting with attorneys general, since the plaintiffs’ bar typically litigates on contingency fees and might be resistant to litigating on any other terms.\textsuperscript{63} Thus, abolishing contingent fees might prevent attorneys general from retaining private counsel even when the reasons for doing so are wholly legitimate.

Lastly, proponents of contingency fee agreements contend that attorneys general do not need to exercise as high a level of neutrality in civil cases as they do in criminal prosecutions. Since civil actions involve no potential deprivation of life or liberty, the constitutional rights afforded defendants in criminal cases are not at issue, thus obviating the need for a high level of neutrality.\textsuperscript{64}

**Let the Sun Shine: The Future of Reform**

While contingency fee agreements between states and private attorneys are highly controversial, reformers should recognize that legitimate reasons exist for such agreements. At the same time, proponents of the agreements should recognize that the award of contingency fee contracts can facilitate political patronage and cronyism.

Both sides of the argument would likely agree that any award of a contingency fee contract should be an open process. Many states have already begun to recognize this principle.\textsuperscript{65} Public disclosure of contingency fee contract awards both deters patronage and legitimizes these arrangements. If the public sees the way in which a contract is awarded, it will be less likely to later suspect the legitimacy of the contract. Florida’s new legislation provides the best mechanism for public disclosure: the Internet.\textsuperscript{66} Posting the results of the bidding process for a contingency fee contract on the state agency’s website will effectuate public oversight throughout the contractual process.

On the other hand, reformers should make concessions on fee caps in order to avoid the pitfalls of caps on fees. Huge fees are in the nature of the massive torts cases in which outside counsel is customarily engaged.\textsuperscript{67} Most states require greater scrutiny when potentially huge fees are at issue,\textsuperscript{68} which means more oversight of the contract-award process. Florida’s new legislation caps contingency fees at $50 million,\textsuperscript{69} which may deter private attorneys from contracting with attorneys general in pursuit of civil litigation. Although Florida has not yet hired paid outside counsel, debates have begun as to whether the cap will be too low,\textsuperscript{70} since the fees for any action against BP are expected to exceed the $3 billion in fees Florida lawyers earned from the tobacco litigation.\textsuperscript{71} Indeed, one Pensacola, Florida plaintiffs’ attorney estimated that the costs of preparation and expert witnesses for a suit by the state could have easily reached $100 million.\textsuperscript{72} Thus, caps on fees may defeat the purpose of contingency fee agreements: allowing states to pursue publicly beneficial litigation that may otherwise be cost-prohibitive. Therefore, state legislators should approach contingency fee caps with utmost circumspection.

Although contingency fees often have the appearance of impropriety, they are an integral part of the American legal system. While these contracts can pose serious risks, they also serve legitimate public interests. Both sides of the debate over contingency fees between state attorneys general and private attorneys should keep these facts in mind when legislation is proposed both to curb their potential wrongdoing and to preserve their benefits.\textsuperscript{19}

**Endnotes**


3. E.g., Geoffrey P. Miller, *Preliminary Judgments*, 2010 U. Ill. L. Rev. 165, 177-78 (2010) (noting that contingency fees create the possibility that lawyers will act in their own self-interest and urge clients...
to accept settlements, when further litigation would yield greater results for the client).


5. See Op-Ed, Progress on Pay to Play, WALL ST. J., Feb. 12, 2010, at A22 (reporting that several states have taken steps to address hiring private attorneys who represent the state on contingency).


7. See Mark Ballard, Tucker, Chaisson Tangle Over Fees, BATON ROUGE ADVOCATE (June 23, 2010), at A6 (reporting that the Louisiana House and Senate leaders each blamed the other for a failure to pass legislation circumventing the ban on the state hiring private attorneys on contingency); Beth Kassab, Sides are Gearing up for BP Lawsuit, ORLANDO SENTINEL (June 11, 2010), at B5 (reporting that “money is a big sticking point” in whether Florida will sue BP).


9. E.g., KAN. STAT. ANN. § 75-37-135 (2009) (requiring any fee agreement between the attorney general and a private lawyer where the fees “reasonably may exceed $1,000,000” to be disclosed to the legislative budget committee for public hearing and approval); N.D. CENT. CODE § 54-12-08.1 (2009) (requiring the “emergency commission” to approve any contingency fee contract between the attorney general and outside counsel where the amount in controversy exceeds $150,000); VA. CODE ANN. § 2.2-510.1 (2009) (requiring any contingency fee between a state agency and a private attorney where the fees are “reasonably anticipated” to exceed $100,000 to be subject to “an open and competitive negotiation process” in accordance with the Virginia Public Procurement Act).


11. Godesky, supra note 8, at 610.


13. KAN. STAT. ANN. § 75–37,135(e) (2009). These factors are: 1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly; 2) the likelihood, if apparent to the client, that the acceptance of the particular employment will prejudice other employment by the attorney; 3) the fee customarily charged in the locality for similar services; 4) the amount involved and the results obtained; 5) the limitations imposed by the client or by the circumstances; 6) the nature and length of the professional relationship with the client; 7) the experience, reputation, and ability of the attorney performing the services; and 8) whether the fee is fixed or contingent. Id.


18. Id. at § 1(2).


20. Id.

21. Godesky, supra note 8, at 599.

22. E.g., Meredith v. Ieyoub, 700 So.2d 478, 481-84 (noting that fiscal matters of the state are the realm of the legislature, so payments to private attorneys by attorneys general violate separation of powers).

23. Id.

24. Godesky, supra note 8, at 590.

25. E.g., Godesky, supra note 8, p. 594 (outlining the challenge to a contingency fee contract for Oklahoma poultry industry litigation).


27. Id. at 352.

28. County of Santa Clara v. Superior Court, 50 Cal.4th 35, 58 (Cal. 2010).

29. Id. at 64.


31. Faulk & Gray, supra note 30, at 972.

32. Id.


35. Id.

general involved in the state tobacco litigation were motivated by “the opportunity . . . to give what was potentially a very lucrative contract . . . to friends in the private trial bar”).

37. Progress on Pay to Play, supra note 5; see also Bacak, supra note 10, at 182 (noting that former Alabama Governor Don Siegelman hired private attorneys that contributed $69,000 to his campaign to sue ExxonMobil).


39. Behrens & Crouse, supra note 4, at 179.

40. Bacak, supra note 10, at 183.

41. Faulk & Gray, supra note 30, at 975; Schwartz et al., supra note 34, at 3.

42. Faulk & Gray, supra note 30, at 975; Schwartz et al., supra note 34, at 3.

43. See Progress on Pay to Play, supra note 5.

44. Neil F.X. Kelly & Fidelma L. Fitzpatrick, Access to Justice: The Use of Contingent Fee Arrangements By Public Officials to Vindicate Public Rights, 13 CARDOZO J.L. & GENDER 759, 768 (2008); see also MODEL RULES OF PROF’L CONDUCT R. 1.5(c) (permitting the use of contingency fees generally).

45. E.g., Saucier v. Hayes Dairy Prod., Inc., 373 So.2d 102, 105 (La. 1978) (noting that contingency fee agreements “promote the distribution of needed legal services by . . . making legal services available to those without means).

46. E.g., Kelly & Fitzpatrick, supra note 44, at 760-61 (noting that the Rhode Island Attorney General hired outside counsel on contingency for litigation against lead paint manufacturers because of the limited financial and legal resources of the department).

47. Faulk & Gray, supra note 30, at 971, 975.


49. See Godesky, supra note 8, at 592-93 (noting that Oklahoma’s Attorney General retained private counsel on a contingency fee basis to helping in suing the poultry industry for polluting the state’s waters); Kelly & Fitzpatrick, supra note 44, at 760-61 (noting that Rhode Island’s attorney general used contingency fee agreements in suing lead pigment manufacturers); Julie E. Steiner, The Illegality of Contingency Fee Arrangements When Prosecuting Public Natural Resource Damage Claims and the Need for Legislative Reform, 38 ENVTL. L. REP. NEWS & ANALYSIS 10,773, 10,775-77 (2008) (highlighting the rise of contingency fees for outside counsel in natural resource damage cases brought on behalf of states under the Comprehensive Environmental Response, Compensation, and Liability Act).

50. Kelly & Fitzpatrick, supra note 44, at 780; but see Faulk & Gray, supra note 30, at 974 (criticizing this type of “regulation by litigation” for escaping the usual constitutional demands of regulation through legislation).

51. Kassab, supra note 7, at B5.


53. Will Sentell & Marsha Shuler, Bill to Hire on Contingency Fails: Legislation would have Let State Employ Attorneys in Oil Lawsuits, BATON ROUGE ADVOCATE (June 22, 2010), at A1 (reporting that a bill permitting Louisiana’s attorney general to hire outside counsel on contingency failed in the legislature).

54. Id.
Tough Decisions—or Easy Ones That Half Your Colleagues Will Disagree With

Peter J. Winders

“Failure to decide is a decision, too.”
“Great point. We’ll pick that one.”
—Overheard.

Following are a couple situations that I have found difficult, either because there are conflicting principles dictating what to do, or because the right answer is hard to swallow, or because there was no formal system in place to support or control individual decision-making. Many readers will find them easy, and will be surprised that the lawyers in the small (or large) group that every lawyer assembles for reality check purposes will come to opposite conclusions.

Client/senior lawyer destroying documents?
In the early days of a lawsuit, Associate is attending pre-production document review, with Senior Lawyer and House Counsel. House Counsel rips a 2 page document from a file, shows it to Senior Lawyer, tears it into pieces and throws them in the waste can. Associate is bothered by this. She has heard the stories about clients and their lawyers destroying documents. She knows that as a lawyer on the case she has some responsibility. She has also heard stories about the whistleblowers on such things and remembers reading about the professional nosedive that Mary Poppins (or whoever it was at Enron or Arthur Andersen) took. What should she do?

What she did do is retrieve the pieces of the document from the waste can and, averting her eyes, put them in an envelope, in her briefcase, so she could worry about it more at home. Eventually, at someone’s urging, she asked me what to do. I had her send me the pieces, and had a paralegal tape them back together. Anticlimactically, it was some off-color joke that never should have been in that or any other file, and it was appropriate to extract it and throw it away.

What was hard about that? Nothing from my point of view. From Associate’s point of view, it demonstrates the advantage of having a General Counsel to deal with such questions. What she did was about half right. She saw a problem (that is the half, or most of it). She could have asked Senior Lawyer about it and taken his word for it. After all, one of the things being checked for is that the files did not contain matters that should be in other files or not properly a part of what was requested, and a junior can in general accept the decision of her supervisor. Bring the document back until she figured out what to do was not all that bad, either. Asking her mentor what to do was contrary to firm policy to direct such questions to the General Counsel, but understandable, and that at least resulted in the appropriate consultation. If the document had been improperly pulled, we would have resolved that problem appropriately.

Confidential information conflicts.
Confidential information conflicts are among the most difficult and are particularly difficult to explain to firm management. When one of our retired partners was practicing with Dewey Ballentine in the 1950’s, he was told by an oil company president, “Young man, these antitrust laws of yours are out of step with American Business.” An ethics advisor will get a similar reaction more often in discussions about confidential information conflicts than most others.

A confidential information conflict is this: In representing Client A you learn something that would be vital to your representation of Client B. Your obligation to keep confidential any information from Client A prevents its disclosure to Client B without A’s consent. A refuses to consent. Therefore you have information vital to B’s representation that you cannot use. This puts a material limitation on your representation of B that requires withdrawal in the view of most (or many) commentators.

Lawyer A represented Client 1, a family company with a permitted environmentally sensitive business that is currently very difficult to permit. The representation had to do with a claimed license violation, and it is successfully concluded. Client 2, a long-time firm client in environment-oriented businesses wants to buy Client 1’s facility or the entity owning it. Client 1, now a former client, is enthusiastic and is willing to waive any confidential information limitations and to allow the firm to represent Client 2 in the transaction. As General Counsel I knew something about Client 1 because I had been consulted several times with goofy client issues during the prior representation. I asked the lawyer who handled that representation what would be her first advice to Client 2 if we had the unfettered ability to advise all we knew. Without hesitation, “I’d tell them not to do business with these people. They are crazy, literally in the case of brother number one, and maybe the rest as well. Any decision they make, they back out of, and their best friends one day they suspect of fraud the next. No matter what deal they make, they will end up in litigation, both with the opposite party and with themselves as well.”

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(Continued on page 31)
Crumbs from the Table

Lawrence J. Fox

Those who seek justice for denizens of death row were overjoyed on June 14 when the United States Supreme Court decided, 7-2, to grant some relief to the appellant in Holland v. Florida. This was a too rare event that spoke volumes about the current dismal state of play in the Supreme Court’s jurisprudence governing the availability of habeas relief to those facing the ultimate punishment. But the joy was only prompted by how little the capital defense bar really has to celebrate, not unlike the famished expressing gratitude over the availability of nothing more than stale white bread. And the real lesson from this “victory” is how terribly unjust is the law that would allow the sins of a death row inmate’s lawyer to be visited upon the helpless client. Such a result might be marginally acceptable in a world in which the injured client has a malpractice remedy against his or her counsel. But it is impossible to accept or reconcile with the individual’s right to habeas relief enshrined in the United States Constitution.

The centerpiece of Mr. Holland’s case was the Congressional mandate found in the chillingly named Antiterrorism and Effective Death Penalty Act (AEDPA) passed by Congress in 1996 to respond to outrages that the judicial process in handling collateral claims in capital cases was taking too long and involving too many proceedings. The result was an extraordinary piece of legislation that required the federal courts to give such obeisance to state court proceedings that it was no longer enough for the condemned to prove constitutional error. Henceforth the constitutional error had to be “an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States,” meaning that executions in America would proceed despite the fact that profound constitutional error occurred.

The act also established a one year statute of limitations for filing the only permissible federal habeas petition. That statute of limitations was to run from the day the Supreme Court denied certiorari on the death row inmate’s direct appeal from his or her conviction. And the statute was stayed for the period while any state habeas proceeding was pending (though not for any cert. petition therefrom). Finally, the statute clearly barred a federal habeas claim if the petition were filed outside the one year period.

It was with this one year statute of limitations that Mr. Holland’s case collided, and the specific uncontradicted facts of that collision bear repeating in extenso.

In 1997, Holland was convicted of first-degree murder and sentenced to death. After unsuccessful state appeals, Holland’s petition for certiorari to the Supreme Court was denied on October 1, 2001, at which point the one year AEDPA limitations clock began to run.

On November 7, 2001, Florida appointed attorney Bradley Collins to represent Holland but it took until September 19, 2002—316 days after his appointment and 12 days before the 1-year AEDPA limitations period expired—for Collins to file a motion for postconviction relief in the state trial court. That timing left Holland with only 12 days to file a federal petition, assuming the state proceedings concluded without any relief. Despite that short deadline, Collins asked for Holland’s “complete confidence and support as we litigate your case to the state and federal trial and appellate courts.”

While Holland’s petition remained pending for three years, Holland regularly wrote Collins for assurance that Holland’s federal review would be timely filed. As time passed and no responses were received, Holland became increasingly dissatisfied with Collins and even asked the Florida Supreme Court to replace Collins because Holland claimed he had been “abandoned.” The Florida Supreme Court, however, barred Holland from filing these pro se papers (including the request to replace Collins), because Holland was “represented,” a classic catch-22.

One letter Holland wrote to the Florida Supreme Court captures the problem:

“If I had a competent, conflict-free, post-conviction, appellate attorney representing me, I would not have write you this letter. I’m not trying to get on your nerves. I just would like to know exactly what is happening with my case on appeal to the Supreme Court of Florida.”

Collins did argue Holland’s appeal before the Florida Supreme Court on February 10, 2005. And even after that oral argument, Holland continued to urge Collins to remember the need to file a federal petition on a timely basis. Another letter reflects Mr. Holland’s mindset:

“Also, have you begun preparing my 28 U.S.C. §2254 writ of Habeas Corpus petition? Please let me know, as soon as possible.”

Yet Collins let this and Holland’s other letters go unanswered.

On December 1, 2005 the Florida Supreme Court issued its mandate, rendering final its decision to affirm the denial of relief. That started the 12-day period left to Holland by Collins’ earlier delay.

Sadly, Holland had no idea about this. He heard nothing from Collins, and Collins filed no federal petition. Holland’s letter to Collins of January 9, 2006, four weeks after the statute ran, is particularly poignant:

Lawrence J. Fox is a partner of Drinker Biddle & Reath LLP in Philadelphia, PA.
"I write this letter to ask that you please let me know the status of my appeals before the Supreme Court of Florida. Have my appeals been decided yet?

Please send me the [necessary information] . . . so that I can determine when the deadline will be to file my 28 U. S. C. Rule 2254 Federal Habeas Corpus Petition, in accordance with all United States Supreme Court and Eleventh Circuit case law and applicable ‘Antiterrorism and Effective Death Penalty Act,’ if my appeals before the Supreme Court of Florida are denied.

Please be advised that I want to preserve my privilege to federal review of all of my state convictions and sentences."

Then, incredibly enough, it was Holland himself, working in the prison library, who on January 18, 2006 discovered that the Florida Supreme Court’s adverse decision had been filed more than a month earlier, news that prompted him to file a pro se petition immediately. Holland also wrote Collins, who, dismayingly, incorrectly and in contradiction of his earlier assurances, informed Holland that the time for filing a federal petition had expired before Collins had ever been hired and, therefore, Collins’ failure to act was harmless error.

Collins never answered Holland’s subsequent plaintive letter correcting Collins’ mistaken view of the law and Collins, of course, never filed a federal habeas petition. That left Holland to rely on his pro se federal petition, filed 35 days after the statute had expired. That also left Holland and his new counsel limited to arguing that Holland was entitled to equitable tolling of the ADEPA one year statute based on his lawyer’s misconduct. After all, Mr. Holland had done everything he could do to make sure his lawyer complied with AEDPA, and barring his claim on this basis was the very definition of inequitable.

One might then think this would be a lay-down. A client has a right to petition for habeas relief. A client has a right to be represented by a lawyer if the client chooses to do so (though no right to an appointed lawyer). A client desperately needs a lawyer to review the record, identify error, gather evidence, prepare briefs and present argument. Indeed, habeas jurisprudence is so labyrinthine that the lawyers who can master this body of law are thought to be the neurosurgeons of the legal profession.

But this is habeas land where one finds doctrine after doctrine so disposed to denying relief—and trying to do so unceremoniously—that almost all expectations of justice and fairness must be abandoned in trying to find the narrowest of pathways to relief. And so it was no surprise when the Eleventh Circuit, in its infinite wisdom, dismissed Mr. Holland to rely on his pro se federal petition, filed 35 days after the statute had expired. That also left Holland and his new counsel limited to arguing that Holland was entitled to equitable tolling of the ADEPA one year statute based on his lawyer’s misconduct. After all, Mr. Holland had done everything he could do to make sure his lawyer complied with AEDPA, and barring his claim on this basis was the very definition of inequitable.

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But this is habeas land where one finds doctrine after doctrine so disposed to denying relief—and trying to do so unceremoniously—that almost all expectations of justice and fairness must be abandoned in trying to find the narrowest of pathways to relief. And so it was no surprise when the Eleventh Circuit, in its infinite wisdom, dismissed Mr. Holland’s pleas out of hand as not worthy of consideration when, under its view, the client is responsible and, therefore, must suffer the consequences of his or her lawyer’s lapses. As the Eleventh Circuit observed:

"Pure professional negligence is not enough. This is a pure professional negligence case." Holland v. State of Florida, 553 F. 3d at 1339.

Then the Supreme Court granted certiorari in Holland v. Florida, an action that initially brought fear and trepidation to those who thought the Court’s intent in so proceeding was to make sure the bleeding heart Ninth Circuit, which might be more inclined to endure equitable tolling given its liberal leanings, henceforth would follow the callous, unforgiving Eleventh in this important regard.

But for once our paranoia was unjustified. In the Supreme Court’s decision, Justice Breyer, speaking for a 7-2 majority, concluded that Mr. Holland could have another day, a victory of sorts for a man on death row. Why the “of sorts?” In part, because Mr. Holland even now is not free to proceed with his request for federal review. With those compelling facts, the Supreme Court only remanded for further proceedings consistent with the opinion. Though the Court concluded that the Eleventh Circuit was wrong, and that there were circumstances in which the condemned could escape from the consequences of his or her lawyer’s derelictions, the Court left intact the obscene doctrine that a lawyer’s mere negligence or even gross negligence was not enough.

So the lawyer miscounts the number of days for filing. The courthouse door is slammed shut on the client. The lawyer thinks the statute of limitations is tolled during a state petitioner’s petition for certiorari from denial of state habeas relief. The about-to-be executed is refused entrance at the courthouse door. The lawyer forgets about the case until it is too late. The death row denizen is summarily denied a chance to rectify constitutional error in the only forum in which an Article III judge—a judge with life tenure and the ability (if not the inclination) to ignore the headlines and do the right thing—presides.

But the Court did conclude that the relief seeker need not go so far as to prove that his/her lawyer had turned against the “client.” Rather, the Court decided that there could be some extraordinary circumstances—as yet undefined—in the interstice between gross negligence and affirmative turncoat that could give rise to equitable tolling. Yet even there the Court could not bring itself to determine, on the uncontradicted facts presented by Mr. Holland, whether this was such a case! Thus, the remand described earlier and the description of mere crumbs falling from the table, rather than a chance to enjoy even the skimpiest of meals.
Why this extraordinary hostility? One answer, offered by the more conservative wing of the Court is the notion that Congress has entered the fray, mandated a short, difficult to calculate statute of limitations and the courts are rendered helpless to do anything about it. Justice Scalia’s instructive and frightening dissent gives full voice to this draconian proposition. Even when it comes to the great writ, where Congress acts the courts must follow.

There is also more than a hint here that if the courts were free to release those on death row from the consequences of their lawyers’ ethical and substantive errors, somehow that would permit lawyer and client to game a system that is designed to prevent any delay in the swift application of the lethal injection or Utah’s blood curdling firing squad.2

I have thought long and hard about that oft-repeated charge and remain mystified as to how any lawyer could reach the conclusion that his or her client would be better off missing a deadline. And even if the lawyer could be so inept as to reach that conclusion, that lawyer would have to recognize that such negligent conduct on the lawyer’s part would have profound consequences for the lawyer’s license. In short, granting capital defendants relief from their lawyer’s negligence, at least as to deadlines, is unlikely to contribute to less effective execution of executions.

Moreover, the consequences of not granting relief are tragic. This is because, whatever can be said of the importance of assuring a constitutionally sound adjudicative process for anyone accused of a crime (a topic on which a lot can be said), the finality and irreversibility of capital punishment cry out for the most punctilious observance of all constitutional protections. Moreover, as to all other wrongfully imprisoned criminal defendants, the visiting of the errors of the lawyers on the client, while devastating, could nonetheless, as a small consolation, leave the abused client with a civil action for malpractice and/or breach of fiduciary duty. But that relief, though arguably available,3 is no consolation whatsoever to the client who is about to be executed and therefore denied any hope whatsoever of enjoying any damage award the lapsed lawyer may be forced to pay.

The Holland case demonstrates the point. If Mr. Holland were denied a chance to file a federal habeas petition on remand, he would have exhausted all available remedies to overturn or ameliorate his conviction. He could then sue Mr. Collins and, if he were really fortunate, he could get that case adjudicated while still alive. He would have to demonstrate, of course, his actual innocence, relief that might not be available outside of habeas proceedings. But if it were, he would be required to prove the case within the case, i.e., that he would have won on federal habeas and that on a retrial or resentencing his life would have been spared. Even damages might be awarded. But the one thing that would not occur is the staying of the executioner’s hand. And that is a result our system of justice should view as intolerable.

But the real reason why Holland v. Florida leaves all those who seek justice totally unsatisfied is that the opinion left totally intact two elements of the current jurisprudence that are quite simply incompatible with any acceptable system of justice. The first is the notion that in evaluating whether lawyer lapses are to be imputed to the lawyer’s client, there should be an evaluation of whether the client was diligent. Indeed, to justify getting to his conclusion about Mr. Holland’s lawyer, Justice Breyer quotes, even more than this article does, from the extensive record of Mr. Holland’s attempts to goad his lawyer into action on a systematic and quite frequent basis.

But there is no reason—no reason whatsoever—to put such a burden on the client. Indeed, the doctrine is entirely inconsistent with the roles of lawyer and client as defined in all applicable professional rules of conduct. While the client certainly has an obligation to cooperate with the lawyer when the lawyer makes requests, all those ethical rules require is that the client have a lawyer, and, once that lawyer is available, the lawyer has sole responsibility for initiating a required action and then fulfilling what is required. Thus, there is no reason to treat the client who is pursuing state habeas, who is lucky enough to have a lawyer and who, once that lawyer is secured, decides to go to sleep, any differently from the client who calls his or her lawyer every day.

Each is entitled to competence. Each is entitled to diligence. Each is entitled to communication. Each is entitled to a lawyer who meets the standard of care. Each is entitled to a lawyer who tells the client what is required and by when it must be accomplished, not vice versa. And so any distinction to be drawn between those two clients has no basis in the law governing lawyers, nor should it have any basis in the jurisprudence of capital collateral litigation.

Finally, and most sadly, the Court perpetuates the notion that the degree of recklessness of the lawyer must be taken into account in deciding which clients are entitled to relief. So under the current jurisprudence, post Holland v. Florida (as it has been up until now), the client whose lawyer miscounts the days will have the lawyer’s sins visited upon the client. Whereas, the client whose lawyer engages in “extraordinary conduct” in missing the deadline will somehow not have the lawyer’s conduct visited upon the client. From the client’s perspective and the perspective of the system.

The finality and irreversibility of capital punishment cry out for the most punctilious observance of all constitutional protections.
of justice, that is a distinction totally without a difference; there is no reason to think that the client whose lawyer merely acted negligently is any less entitled to relief from that conduct than the client whose lawyer has acted egregiously. In either case, the client is barred from entering the courthouse door because of conduct totally out of the client’s control, by a lawyer who had an absolute obligation to represent the client competently and diligently and in compliance with all applicable deadlines, by an agent who clearly has betrayed his principal.

During oral argument of Holland v. Florida Justice Alito recognized this point, but for the opposite purpose. He seemed to agree that it was a distinction without a difference, but he expressed the view that the client in both cases should suffer the consequences of the lawyer’s conduct. Indeed, he used his concurrence to emphasize how both the negligence and the gross negligence of the lawyer should with equal force be visited upon the client. For this proposition Justice Alito and others rely on the notion that the lawyer is the agent of the client and, therefore, under common principles of agency law, the principal is responsible for the conduct of his or her agent.

But the lawyer-client relationship, though it operates generally under agency principles, is an extraordinary one. The lawyer is the one with all the skill, background, experience, education, understanding and responsibility. In the lawyer-client relationship the client’s responsibilities are virtually non-existent. Simple cooperation is enough. It is the lawyer who has all the knowledge and all the obligations. As a result of the foregoing, so long as the client did not contribute to the missed deadline, then the client should be entitled to full relief, regardless of how the lawyer’s conduct is characterized, from simple mistake to a hostile attack on the client’s interests. Let us hope that slowly we will succeed in getting the United States Supreme Court to see it that way. 5

Endnotes

1. See 28 U.S.C. §2254(d)(1); Woodford v. Visciotti, 537 U.S. 19, 25-27 (2002) (per curiam) (federal court of appeals erred in characterizing state court decision as having “unreasonably” viewed aggravating evidence to be so “overwhelming” as to render “trial counsel’s (assumed) inadequacy” nonprejudicial: given extensive and severe aggravating evidence in case (which Supreme Court itemizes) and given that most that could be said about federal and state courts’ differing views of evidence was that federal court “perhaps” was correct on merits, court of appeals should have concluded “at the very least that the state court’s contrary assessment was not “unreasonable”’ and should not have “substituted its own judgment for that of the state court”). See also, e.g., Uttecht v. Brown, 551 U.S. 1, 20 (2007) (state courts’ application of rules announced in Witherspoon v. Illinois, 391 U.S. 510 (1968), and Wainwright v. Witt, 469 U.S. 412 (1985), for removal of venireperson based upon attitude toward capital punishment could not be deemed “unreasonable application” of federal law under section 2254(d)(1) because “trial court . . . supervised a diligent and thoughtful voir dire,” “record does not show the trial court exceeded . . . [its] discretion in excusing” venireperson pursuant to Witherspoon-Witt rule, and reviewing state appellate court “identified the correct standard required by federal law and found it satisfied”).

2. The first draft of this was written on the day of Ronnie Lee Gardner’s scheduled Utah execution in that manner.

3. Albeit as a general proposition only to those who can prove actual innocence by successfully pursuing habeas relief.

Tough Decisions—or Easy Ones That Half Your Colleagues Will Disagree With

(Continued from page 27)

I explained to Management (who happen to be more or less coextensive with the lawyers closest to Client 2) that we could not represent Client 2 in an acquisition because of a confidential information conflict.

“But Client 1 will consent.”

“Before we get the consent we will have to tell Client 1 what we will say about them: that they are unstable, unreliable and untrustworthy and that Client 2 should forget about the deal. I don’t think we can imply that that disclosure is one Client 1 should consent to, even if they have separate counsel.”

“Surely we can word a consent broad enough to cover what we have to advise Client 2, that will not be that explicit. We have imaginative lawyers. I have negotiated language like that many times.”

“You have negotiated things at arms length in settlement agreements, broad language that would allow you to do what you want without telling the adversary exactly what you are thinking about, but here you are dealing within a fiduciary relationship where not only the words, but a full explanation of what they mean as a practical matter is required.”

“How can I explain to Client 2 that we can’t represent it even when Client 1 has told them they will consent? We are liable to lose the client. You are taking this too far.”

“Tell them we have a confidential information conflict. Tell them what a confidential information conflict is. Tell them that I have concluded that the confidential information is such that we cannot ask for a waiver. Both the CEO and the CFO are very clever businessmen. They will probably understand.”

Fortunately, I think, Client 2 backed off. The last recommendation was analogous to a “noisy withdrawal.” Maybe Client 2 backed off because of it. Too much information? Arguable, I guess, but I don’t think so. Client 1 is now in litigation with the follow-on purchaser, and Client 1’s constituents among themselves. Client 2 still loves us.”

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