

ETHICS AND MALPRACTICE IN FAMILY LAW

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A. Chapter Competencies

After studying chapter 2 the student should be able to:

1. help a law firm avoid violating ethical rules and other malpractice problems.
2. define ethics and distinguish between the two main kinds of ethics rules.
3. identify the bar association rules and procedures for disciplining attorneys in your state.
4. identify potential ethical problems involving attorney competence in a family law practice.
5. identify potential ethical problems involving attorney fees in a family law practice.
6. state three meanings of the word “retainer.”
7. distinguish a fixed fee from a contingent fee.
8. identify potential ethical problems involving confidentiality in a family law case.
9. define a conflict of interest.
10. identify potential ethical problems in handling client funds or other client assets.
11. state some general guidelines for reducing an attorney’s potential exposure to liability for legal malpractice.

The student should also know/understand:

1. whether paralegals are subject to bar association discipline.
2. what paralegal conduct could lead to bar association discipline of the paralegal’s attorney supervisor.
3. the role of the American Bar Association and its Model Rules of Professional Conduct in the enactment of ethical rules governing attorneys.
4. the factors that determine whether a fee is reasonable.
5. the consequences of providing a warranty to a family law client.
6. when a contingent fee is unethical in a family law case.
7. when fee splitting is ethical.
8. what the confidentiality rule is designed to encourage.
9. when the disclosure of confidential information about a family law client can be ethical.
10. when multiple representation in a family law case can be a conflict of interest.
11. how the existence of no-fault divorce may lead to pressure on the legal profession to relax rules on conflict of interest.

12. when having a former client as an adversary can be a conflict of interest in a family law case.
13. when an entire law firm can be disqualified (imputed disqualification) because of a conflict of interest caused by an attorney.
14. when an entire law firm can be disqualified (imputed disqualification) because of a conflict of interest caused by a paralegal.
15. the function of a Chinese Wall.
16. when entering a business transaction with a client can be a conflict of interest.
17. when taking a gift from a client can be a conflict of interest.
18. when loaning money to a client can be a conflict of interest.
19. when a sexual relationship with a client can be a conflict of interest.
20. when an attorney must withdraw from a case.
21. what disclosures to a tribunal an attorney has an ethical obligation to make.
22. when criminal and noncriminal misconduct by an attorney can be unethical.
23. when an attorney can communicate with a represented party or an unrepresented party on the other side of a case.
24. what an attorney can say to an unrepresented party on the other side of a case.
25. the attorney's ethical obligations when using nonattorney assistants.
26. what legal advice is and when giving it can cause ethical problems.
27. when solicitation is unethical.
28. when advertising is unethical.
29. when an attorney unethically assists a nonattorney in the unauthorized practice of law.
30. when an attorney can be held in contempt of court.
31. when an attorney can be subjected to criminal prosecution.
32. when an attorney can be sued for malicious prosecution.
33. when an attorney can be sued for abuse of process.
34. whether attorneys can be sued for defamation because of statements made during litigation.
35. the standard of care used by a court when an attorney is sued for negligence.
36. what is meant by *respondeat superior* and how it is used in negligence actions against attorneys.
37. when a paralegal is personally liable for his or her torts.
38. when a paralegal's employer can be liable for the intentional tort or criminal acts of the paralegal.

B. Fees: \$250 a Second To Collect Child Support!

When you get to the discussion of attorney fees in family law cases, you may want to tell the class about the famous \$100,000 plus 1,000-an-hour fee case that recently was given a great deal of publicity throughout the country: Becky Klemt, Esq. is a partner in the law firm of Pence & MacMillan in Laramie, Wyoming. She needed a Los Angeles attorney to collect a \$4,240 child support judgment for one of her clients. She sent out letters to law firms in the L.A. area. No one replied except for a solo practitioner, Steven Corris, Esq. in Irvine. He wrote back to her as follows: "Without sounding pretentious my retainer is a flat \$100,000 plus \$1,000 an hour. I specialize in international trade and geopolitical relations between the Middle East and Europe. My clientele is unique. I am afraid I am unable to accept other work at this time."

Upon receiving this response, it would be an understatement to say that Becky gasped. Her response back to him received a great deal of media attention. The *Wall Street Journal* did a story on the exchange between the two attorneys. Becky made an appearance on *The Tonight Show* and *Penthouse* asked her to appear in its magazine! Here in substance was her reply:

"Steve, I've got news—you can't say you charge a \$100,000 retainer fee and an additional \$1,000 an hour without sounding pretentious. Especially when you are writing to someone in Laramie, Wyoming, where you're considered pretentious if you wear socks to court, or drive anything fancier than a Ford Bronco. Hell, Steve, all the lawyers in Laramie, put together, don't charge \$1,000 an hour. My client is willing to pay you \$1,000 to collect this judgment provided it doesn't take you more than four seconds. You say you do international work. My firm has an international flavor because we regularly order Mexican food and one partner studied Latin. We should merge our Wyoming and Irvine law firms. Let us know when we should join you in California so that we can begin doing whatever it is you do. In anticipation of our move, we've all been practicing trying to say we charge \$1,000 an hour with a straight face, but so far we have not been able to do it. Anyway, because I'll be new to the area of international trade and geopolitical relations, I'm thinking of only charging \$500 to \$600 an hour to begin with. Will that cover our overhead?"

Letter Lampoons Lawyer, 76 *American Bar Association Journal* 48 (November 1990).

C. Assignment 2.1 (ethics in your state)

You might want to consider inviting a member of the local bar association to your class for a twenty minute presentation on the discipline process as it would apply to a family law practitioner. The chairperson of the ethics or unauthorized practice-of-law committee might be willing to come. Perhaps the bar has a general counsel who is knowledgeable about disciplinary procedures and about the kinds of ethical problems that are common to a family law practice.

One of the themes of such a presentation could be how your state would handle some of the examples presented in chapter 2.

Ask the bar to send you an ethical opinion that grew out of a family law practice. Photocopy the opinion and distribute it to the class. Seeing an actual written opinion on your state's ethics law can help bring the subject alive.

If no such ethical opinions are available, you might try running a query in WESTLAW, LEXIS-NEXIS, or LOISLAW in the database covering state court opinions of your state. Try to find a case in which a family law attorney was disciplined for unethical behavior. If one exists, let the students read it. In WESTLAW, for example, the query might read:

attorney lawyer /p ethics unethical "professional responsibility" & "family law" "domestic relations" divorce

D. Assignment 2.2 (fees)

There are no arrearages in this case. There is no past debt. Dan has faithfully paid the \$350 a month to date. Elaine wants \$150 more *for the future*.

Logically, however, there should be no difference between a case seeking money past due and new money. Since the parties are already divorced, the attorney will not be hindering a reconciliation by being concerned about collecting a fee in either case.

But some states *do* make this distinction. In such states, the contingent fee would be ethical when trying to collect arrearages, but unethical when trying to collect increased future support. Although the marriage has been dissolved by divorce, a reconciliation is still possible, e.g., remarriage.

Ask the class whether a relationship has the same chance of reconciliation if a party is seeking payment of a past debt as opposed to seeking an increase in money for the future. The chances seem bleak in both situations, but arguably *more* bleak when seeking an increase. If so, it *does* make sense to continue the ethical ban on contingent fees in cases in which a client is seeking an increase in support money.

E. Conflict of Interest: Introduction

In the discussion on conflict of interest, it may help at the outset to emphasize the point made in the text that every conflict of interest does not disqualify the attorney. Tell the class to distinguish between the following two questions:

- Does a conflict of interest exist between an attorney and client in a particular situation?
- If a conflict of interest does exist, will it disqualify the attorney from representing the client with whom the attorney has the conflict?

Every conflict of interest does not mean the attorney has acted unethically and should be disciplined. Client *consent* or an Ethical Wall, for example, may allow the attorney to proceed in spite of the clear presence of a conflict of interest.

F. Assignment 2.3 (Ethics Opinion RPC 176)

a. Steps Attorney B can take:

- tell the paralegal not to talk with anyone at Attorney B's firm about the domestic case;
- tell all other employees of Attorney B's firm not to talk with the paralegal about the domestic case;
- keep the file of the domestic case away from the paralegal;
- put a special tag or warning sign on the front of each folder in the file that warns everyone that paralegal "x" must not see this file;
- if the domestic case is on the computer, ask the computer programmer if an alert can be called up on the screen anytime the domestic case is used in the computer; the alert would tell everyone the paralegal must stay away from the case;

b. The Committee in *Ethics Opinion RPC 176* said the paralegal must be "totally screened." This seems to suggest that the Chinese Wall must be 100 percent effective, even as to "negligible" matters. The Committee might conclude that Attorney B acted unethically in not preventing the paralegal from revealing the fact that the client was once late for a meeting.

G. The Paralegal Profession and Conflict of Interest

If you are bold enough, you may want to try to make the definition of conflict of interest come alive by asking the class the following question: Is it a conflict of interest for groups of practicing attorneys (e.g., through bar associations) to control and regulate the paralegal occupation?

Could the economic incentive that attorneys have in hiring paralegals interfere with making decisions on the development of the paralegal profession? For example, when an attorney must decide whether paralegals should be licensed, would the attorney be influenced solely by what is in the best interests of paralegals? Or might the judgment of the attorney be influenced in what is in his or her own economic interest? Would an attorney think that paralegal licensing might mean the attorney would have to pay higher salaries to licensed paralegals?

H. Can I Have Your Autograph?

Later in chapter 4, we will study the premarital agreement case of *In re Marriage of Bonds* involving the famous baseball player Barry Bonds. On a separate issue before the court, Bonds asked the trial court to reduce his alimony payments during a baseball strike. Here is one report of what happened at the trial court:

“Bonds petitioned for a reduction in alimony payments during the 1995 baseball strike. In a move that was widely criticized in the media, the judge reduced his alimony payments and then asked Bonds for an autograph!”

Tom Friend, *Bonds Battles on Field and in Court*, The New York Times, April 8, 1995 at 33.

Ask the class if it sees a conflict of interest in what happened? Did the judge have a conflict of interest? At least the judge didn't ask for the autograph *during* the trial!

I. Attorney-Client Sexual Relations

You might want to ask the class how to resolve the following case: Mary Smith, Esq. represents John Simms in a contract case. Jane Robinson, Esq. is Mary's law partner. Jane begins a sexual relationship with John Simms. Is there an ethical problem? Imputed disqualification?

Florida has an ethical rule and comment that covers a situation such as this:

Rule 4-8.4, Rules regulating the florida bar

A lawyer shall not “engage in sexual conduct with a client that exploits the attorney-client relationship.”

Comment:

The rule “proscribes exploitation of the lawyer-client relationship by means of commencement of sexual conduct. The lawyer-client relationship is grounded on mutual trust. A sexual relationship that exploits that trust compromises the lawyer-client relationship. A sexual relationship between lawyer and client that exists before the commencement of the lawyer-client relationship does not violate this [rule] if the lawyer and client continue to engage in sexual conduct during the legal representation. For purposes of this [rule], client means an individual, not a corporate or other non-personal entity, and lawyer refers only to the lawyer(s) engaged in the legal representation and *not other members of the law firm.*” (Emphasis added.)

Mark D. Killian, *Court Okays New Bar Rules*, The Florida Bar News, 1 (August 15, 1995).

J. Unauthorized Practice of Law: “Good, Fast, and Cheap”

Suncoast Paralegal is a Florida paralegal (legal technician) service offering help in divorces. One of its ads said:

“Before you got married you liked your women good, fast, and cheap. Now you wish your divorce could only be fast and cheap. It can. Suncoast Paralegal can get you unhitched for less.”

Legal? Apparently so. The owner of Suncoast Paralegal says, “We do paperwork; that is all we do. We don't give legal advice. We don't interpret the law.” He has plans to open branches throughout cities of Florida.

Breaking Up Gets Cheaper and Louder, St. Petersburg Times, August 5, 1995.

K. Furman Case

One of the most famous cases in the field of paralegal regulation is *The Florida Bar v. Furman*, 451 So. 2d 808 (Fla. 1984). Since it involved family law issues, you may want to review it with the students. Some call Rosemary Fur-

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man a hero; one of the judges in the Furman case calls her an invitation to “anarchy.” Here are some excerpts from the opinion:

The Florida Bar filed petitions charging Rosemary W. Furman, d/b/a Northside Secretarial Service, with engaging in the unauthorized practice of law in the State of Florida, in contempt of this Court’s order of November 1, 1979, as reported in *The Florida Bar v. Furman*, 376 So. 2d 378 (Fla. 1979). . . . Respondent Furman is not and never has been a member of The Florida Bar (Bar) and is not licensed to practice law within this state. . . .

We turn then to the referee’s findings that respondent contemptuously continued the unauthorized practice of law in violation of our injunction. The referee found in pertinent part:

- (J.) Ms. Furman prepared pleadings that went beyond just transposing information from an intake sheet to a form. She articulated that information in a fashion which raised justiciable issues regarding child custody, child support, division of property.
- (K.) Ms. Furman explained legal remedies and options to litigating parties which affected the procedural and substantive legal rights, duties, and privileges of those parties.
- (L.) Ms. Furman construed and interpreted the legal effects of Section 61.13, Florida Statutes, pertaining to shared parental responsibility.
- (M.) Ms. Furman gave advice on how to construct and prepare a financial picture that would result in increased monetary benefits or decreased monetary obligations as the case may be for the one seeking her advice, without regard for the truth, in some instances.
- (N.) Ms. Furman, as part of her comprehensive legal assistance, gave advice and direction on how and where to file documents with instructions on how to technically prepare and litigate the case in Court.
- (O.) Ms. Furman was available to her customers to correct erroneous or legally deficient pleadings that she had prepared, and to remedy problems experienced by her customers during the dissolution hearing which otherwise frustrated a conclusion thereto.
- (P.) Ms. Furman professed to her customers to have knowledge of the weight and credibility that judges attach and give to legal documents and crucial legal information and evidence.
- (Q.) Ms. Furman participated in oral dialogues with her customers regarding such issues as money for the support of children, safety of children from abusing parents, the placement of children with the most deserving parent, available remedies and options for litigating parties, her interpretation and understanding of legal documents and pertinent statutes, the financial status of husbands and wives as they bore on their need or ability to receive or pay, the ability of her customers to comply with financial Court-ordered obligations, the importance of Court orders and complications therewith, and corrective procedures for defective dissolution proceedings.
- (R.) Ms. Furman, in each case, was paid a monetary fee ranging up to \$100.00.

Turning to the referee’s recommendations, we approve the findings that respondent has violated the terms of our order enjoining and restraining her from performing the specific acts therein prohibited. We hold her in contempt of court. We, however, do not accept the referee’s recommendation that she be imprisoned in the state prison for two concurrent four-month terms. Under the facts of this case, we find it more appropriate to sentence respondent to the Duval County jail for a single term of 120 days. We suspend 90 days of the 120-day term of imprisonment. When this opinion becomes final, the sheriff of Duval County is authorized and directed to take respondent into custody and to imprison her for 30 days. If respondent does not violate the terms of our continuing injunction for a period of two years, the suspended term of 90 days shall be deemed satisfied. . . .

L. Assignment 2.4 (multiple ethical violations)

Possible Ethical Problems:

a. Contingent Fee

Contingent fees are unethical in domestic relations cases if the fee is directly tied to obtaining a divorce. Here, Smith will receive nothing if Ralph is not granted a divorce. Hence the fee is directly tied to obtaining a divorce.

Alternative argument: Smith is simply making a gift to his client of the amount of the fee in the event the divorce is not granted. This is a weak argument. The fee is still dependent on (i.e., is contingent on) the outcome of the divorce action.

Ask the class about the following variation: Smith tells Ralph that he will have to pay the attorney fees only if the divorce is granted and if Ralph is ordered to pay his wife alimony. Same result? Here, would Smith have a tendency to stand in the way of a reconciliation—one of the policy considerations underlying the ban on contingent fees in domestic relations cases? Perhaps, since Smith gets paid only if Ralph (1) is awarded a divorce, and (2) is ordered to pay alimony. It is not in Smith’s financial interest for a reconciliation to occur.

Also, ask the students if they see a conflict of interest in this change in facts. It is in Smith's financial interest to have the wife receive alimony. This is when he will be paid. But the wife is not Smith's client. Ralph, his client, probably does not want to pay alimony. Is this a conflict of interest?

b. Confidentiality

While representing Ralph, Smith found out that Ralph was a carpenter. Smith then revealed this information to someone else—Smith's other client, Helen. But is this "information relating to the representation" of Ralph under Rule 1.6? There is no indication in the facts that Ralph's occupation is particularly relevant to his divorce case against his wife. The phrase "relating to the representation" is quite broad. But close to everything about Ralph's adult life probably has *some* connection to his marriage and hence to his divorce. How broad is the rule on confidentiality?

The more interesting question is whether Smith told Helen that Ralph was a *client* of his. We are not told this in the facts. The likelihood, however, is that he said to Helen something like, "I've got a client, Ralph Grant, who is a carpenter you might want to talk to."

Smith probably told Helen how he knew Ralph. Ask the class if it is a breach of confidentiality to tell someone who your client is. (Answer: yes.)

What if Smith gave his entire client list to a researcher who wanted to contact all of them about some theoretical issue? Or what if Smith *sold* his client list to a vendor who wants to sell something to the clients? Unethical? (Answer: yes.)

The "answer" to such questions is less important than training the students to see a potential problem. The goal here should be to increase the student's sensitivity to potential ethical problems. A great deal will be accomplished if you can raise the student's level of ethical awareness, particularly about confidentiality.

Paralegals are going to be very tempted to tell their spouses, relatives, friends, and classmates about a particular client at the office, and hence reveal "information relating to the representation" of a client.

c. Conflict of Interest

Johnson & Johnson, through Smith, Esq., represented Ralph in a divorce case. Now the same law firm, through Georgia Quinton, Esq., is going to give advice to Helen Oberlin who may have a legal claim *against* Ralph. Is this an unethical switching of sides?

First of all, it should make no difference that Smith is no longer with Johnson & Johnson, or that Georgia Quinton was not personally involved in Ralph's divorce case. If *any* attorney in a law firm is disqualified from representing a client because of a conflict of interest, *every* attorney in the same firm is also disqualified. In effect, the entire firm is treated as one attorney.

The question, therefore, is whether Smith (if he were still around) would be disqualified from helping Helen against Ralph because of a conflict of interest. If the answer is yes, then no one at Johnson & Johnson can help her.

If the second case (Helen v. Ralph) is the same as the first case (Ralph v. Alice), or if the two cases are substantially related, a conflict of interest exists under Rule 1.9, and Johnson & Johnson cannot represent Helen against Ralph unless the latter consents.

Ralph may still be a client of Johnson & Johnson. If not, he is an ex-client.

Are the two cases the same or substantially related? Case #1 (Ralph v. Alice, divorce) is certainly not the same case as case #2 (Helen v. Ralph, contract case). The contract and divorce cases seem to be totally unrelated. While a very cautious firm would be reluctant to go against a present or former client, it would *not* be unethical to do so on these facts under Rule 1.9(a).

If, however, Johnson & Johnson does decide to help Helen against Ralph in the contract case, the firm cannot use any information relating to the divorce case (that might be in the file) to the disadvantage of Ralph in the contract case. Rule 1.9(b). We have no indication, however, that such information might exist.

Again, it should be pointed out to the students that a law firm would be very reluctant to take Helen's case against Ralph even if it would not be unethical to do so. The firm will not want to take the risk that it may later have to show that the two cases are *unrelated* and that it didn't use tainted information—a very unpleasant task.

M. Assignment 2.5 (In the Matter of Eloy F. Martinez)

The specific unethical conduct of the paralegal was the lie by Felix to the client about filing the divorce petition and the restraining order.

What should Martinez have done when he hired the paralegal to avoid such conduct? He could:

- provide better supervision of the paralegal employee in the firm.
- not allow the paralegal to have a separate office from the supervising attorney, and
- provide better training to the paralegal about ethics.