CONFLICTS OF INTEREST

Battledore and Shuttlecock's a wery good game,
Vhen you an't the shuttlecock and two lawyers
the battledores,
in which case it gets too excitin'
to be pleasant.

CHARLES DICKENS, THE PICKWICK PAPERS, (1837)

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PREFACE

As we look to the conflicts of interest we will face in the 21st century, the teachings of 19th century still seem, at least to me, to be pertinent. In his classic work entitled *Essays in Legal Ethics*, Geo. W. Warvelle, L.L.D. said:

> Representing Both Sides: There is an implied obligation in every employment that the employee shall be faithful to his employer and will do nothing that may militate against his best interests. This obligation is nowhere so sharply accentuated as in the relation of attorney and client, and because of the peculiar personal quality which characterizes this relation it necessarily follows that the attorney may not assume to represent any person or party whose interests are in any way inimical to those of the client who first retained him. [Published in 1902]

Much has changed in the 97 years since Prof. Warvelle wrote his essays. For starters the attorney/client relationship is not one of employment but rather of agency. And, women also practice law. What is still the same is the "peculiar personal quality" of the relationship and the obvious mandate that we cannot represent anyone who is "in any way inimical" to the client that first retained us.

The law is never static and ethical standards are no exception. At times we constrict or expand the rules but the core principles of loyalty and trust remain embedded in our professional lives. Look up "loyalty" in the any dictionary and you will find a definition predicated on faithfulness, devotion, obligation, duty and words of like import. Of course "loyalty" is also the geographic name given to a variety of locales, the most interesting of which are a group of islands in the South Pacific, northwest of New Caledonia. Because of their failure to follow our conflict rules, some of our colleagues are now resident there (without the benefit of their licenses).

Early in the 20th century, a prominent Boston lawyer was subjected to a rigorous investigation into his "ethics" because he, on occasion, represented several clients in matters

involving a single transaction. That famous Boston lawyer coined the phrase *"Lawyer for the Situation"* in 1916. The occasion was the floor of the United States Senate where the members of the Judiciary Committee vigorously interrogated the lawyer. Justice Louis D. Brandeis survived the inquiry and went on to become one of our most revered and prolific members of the Court.

Later in the 20th century, the subject of conflict of interest surfaced again in another prominent situation known as the Watergate Affair. The rampant conflicts of interest inherent in the office of the United States Attorney General, not to mention those in the office of the Presidency, caused the passage of the 1978 Ethics in Government Act, which gave birth to the Office of Independent Counsel. That, in turn, gave us Judge Kenneth Starr, which in turn gave us _____. Perhaps it's best to let the reader fill in his or her own blank at this point.

The prohibition against representing conflicting interests was certainly not new to the 19th Century. The injunction against representing "both sides" goes back to the earliest references to lawyering, including the *London Ordinance of 1280*.[1] The first version of the prohibition in modern times appears in Canon 6 in the 1908 ABA Canons of Ethics:

> It is the duty of a lawyer at the time of the retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

The thoroughly modern version of the ABA rule on conflicts is found in ER 1.7:

RULE 1.7[2] CONFLICT OF INTEREST: GENERAL RULE

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[1] Cohen, *History of the English Bar, p.* 233.

[2]. Amended February 17, 1987, American Bar Association House of Delegates, New Orleans, Louisiana, per Report No. 121.

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Lest I leave a nit unpicked, the comment to the thoroughly modern conflict rule says:

> Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. The lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the parties and issues involved and to determine whether there are actual or potential conflicts of interest.

In comparing the1902 version with the 1999 version one quickly sees a change in writing in writing style and a more subtle use of adjectives and descriptive nouns. What used to be acting in a way "inimical" to the client's interests has been modified to mean clients whose interests are "directly adverse." What used to be labeled as "representing both sides" has been verbally laundered to "conflict of interest." What has not changed is the core premise that it is disloyal to take on a client's cause while engaged in serving either your own interest or that of some other client. The most eminent ethicist of this century, Professor Henry Drinker may have said it best when he said:

> When the interest of clients diverge and become antagonistic, their lawyer must be absolutely impartial between them, which, unless they both or all desire him to represent them both or all, usually means that he may represent none of them.[3]

Ours is a self-regulating profession and, as such, is dependent on the premise of *noblesse oblige.* We are assumed by our clients, our judges and our colleagues to be capable of compliance with what is arguably the most important of our ethical rules, i.e., the rule prohibiting the representation of conflicting interests. Thus it is appropriate to end this preface and begin my monologue with a citation to Lord Moulton who famously said:

> ***True civilization is measured***
> ***by the extent of obedience to***
> ***the unenforceable.***

[3] Drinker, *Legal Ethics*, p. 112 (Columbia University Press, New York, 1953).

THE FIRST CONFLICT

Lawyers often must decide the priority of apparently equally important obligations. The most difficult of these ethical dilemmas pits the client's interests against those of the court. Substantive law and procedural rules impose obligations on lawyers that often conflict with the client's ultimate objectives. Although the lawyer's paramount duty is to vigorously pursue the interests of the client, "that duty must be met in conjunction with, rather than in opposition to, other professional obligations."[4] As noted in the "court first, client second" doctrine in *In re Integration of Nebraska State Bar Association*:[5]

> An attorney owes his first duty to the court. He assumed his obligations toward it before he ever had a client. His oath requires him to be absolutely honest even though his client's interests may seem to require a contrary course. The lawyers cannot serve two masters; and the one they have undertaken to serve primarily is the court.[6]

Chief Justice Burger (then Circuit Judge Burger) eloquently described the "court first, client second" dilemma in *Johnson v. United States*:[7]

> A lawyer complying with the canons and traditions of the bar advocates but does not *identify* with his client. The alter ego or "mouthpiece" school of thought, which is happily a minute fraction of the legal profession, would carry this perverted notion to the point of complete identification of lawyer with client, *i.e.*, the lawyer as an extension of the accused himself with a community of interest, motivation and goals, bound to engage in falsehood and chicane at the command of the client. These concepts have long been rejected by the legal profession and find no acceptance among honorable members of the bar.[8]

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[4]Thornton v. United States, 357 A.2d 429, 437 (D.C. 1976).
[5]275 N.W. 265 (Neb. 1937).
[6]*Id*. at 268.
[7]360 F.2d 844 (D.C. Cir. 1966) (per curiam).
[8]*Id*. at 846 (Burger, J., concurring).

The Court First—Client Second Doctrine

The Supreme Court of Arizona has adopted the "court first, client second" rule. "The duty of an attorney to a client, whether in a private or criminal proceeding, is subordinate to his responsibility for the due and proper administration of justice. In case of conflict, the former must yield to the latter."[9]

Hitch v. Pima County Superior Court[10] illustrates this principle. In *Hitch,* the trial court ordered the defense attorney to produce potentially incriminating physical evidence obtained from a third party and then withdraw from further representation. Relying on ER 1.6, the Arizona Supreme Court ruled that the lower court order did nothing more than reflect the defense attorney's ethical obligations.

> At issue is the conflict between a defense attorney's obligation to his client and to the court. As the Preamble to the Rules of Professional Conduct notes, a lawyer is both "a representative of [his] clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." As a representative of his client, a lawyer must act as a zealous advocate, demonstrating loyalty to his client and giving him the best legal advice possible within the bounds of the law. As part of this zealous representation, the lawyer is admonished not to reveal information relating to representation of his client. . . . Balanced against the attorney's obligation to his client is the attorney's obligation as an officer of the court, which requires him "[to aid] in determining truth whenever possible."[11]

The *Hitch* majority resolved those particular facts in favor of the obligation to the court rather than the obligation to the client. A compelling dissent by Justice Feldman, in which Justice Gordon joined, voiced concern over the majority's holding:

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[9]State v. Kruchten, 101 Ariz. 186, 191, 417 P.2d 510, 515 (1966). *See also* Matter of Fee, 182 Ariz. 597, 898 P.2d 975 (1995); Guzzetta v. State Bar of California, 43 Cal.3d 962, 741 P.2d 172, 239 Cal.Rptr. 675 (1987); Ferrell Jewelers of Tampa, Inc. v. Southern Mill Creek Products Co., 205 So.2d 657 (Fla. 1967).

[10]146 Ariz. 588, 708 P.2d 72 (1985). *See also* People v. Mattson, 51 Cal.2d 777, 336 P.2d 937 (1959); In re Anastaplo, 18 Ill.2d 182, 163 N.E.2d 429 (1959); In re Amendments to Rules Regulating The Florida Bar- 1-3.1(a) and Rules of Judicial Admin.- 2.065 (Legal Aid), 573 So.2d 800, 15 Fla. L. Weekly S651 (1990).

[11]Hitch v. Pima County Superior Court, 146 Ariz. 588, 592, 708 P.2d 72, 76 (citations omitted).

> The court fails to consider the full scope of the role of defense counsel. The opinion indicates . . . that defense counsel acts both as an advocate for the defendant and an officer of the court. I believe that the role of defense counsel has an even more profound dimension. The adversary feature of the criminal justice system evolved as a control on governmental absolutism and is, therefore, a fundamental component of political liberty. Viewed in this framework, the role of defense counsel goes beyond assisting in the search for truth or helping to convict the guilty and acquit the innocent. Beside these two functions, defense counsel also must maintain the integrity of our personal rights by assuring that the government meet the constitutional requirements that it both prove its case and give the defendant due process of law. These are rights which may be invoked by all defendants, not just the innocent. The constitutional guarantee of due process of law extends to all, even those whose innocence is subject to doubt and those whose guilt is certain. The system was designed to restrain governmental power and protect all citizens from tyranny. In my view, therefore, defense counsel should never be put in the position of helping the government prove its case.[12]

Hitch involved the receipt of inculpatory evidence from a third party. A different result may be obtained when the lawyer receives incriminating evidence directly from the client. Generally, the attorney-client privilege does not permit the attorney to withhold physical evidence received from the client.[13] Various criminal statutes might be applicable to support this position, *e.g.*, proscriptions against possession of stolen property, hindering criminal prosecution, or concealing of evidence. The Pennsylvania Ethics Committee opined that a criminal defense attorney must turn incriminating evidence over to the prosecutor, although the attorney is not required to turn over evidence not in their possession (despite having been told of its whereabouts by the defendant, as long as the attorney has neither verified or seen the evidence).[14] Some defense attorneys therefore argue that it is client first, court second, as

[12]*Id.* at 596, 708 P.2d at 80 (Feldman, J., dissenting) (citations omitted).

[13]ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 61:704 (1996).

[14]Pa 94-140, in ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1001:7345 (Ethical Opinions 1990-1995). *Cf.* NC 221, *id.* at 6616: a criminal defense attorney who receives physical evidence from the defendant may inspect the evidence, but absent a court order for its delivery to the prosecutor or its being contraband, must return it to the defendant, advising the client of the legal consequences of possession or destruction of evidence.

long as the lawyer receives the property from the client and does not violate the law in the process.[15]

Complicating the doctrine of "court first, client second" is the well-established notion that lawyers have fewer first amendment rights than the ordinary citizen.[16] In *In re Sawyer*,[17] the United States Supreme Court explained that "obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech."[18] Nevertheless, free speech is a right which belongs to lawyers and to clients speaking through lawyers and has a strong presence in the courtroom.[19]

CONFLICTS—THE DUTY TO SEEK JUSTICE AND TELL THE TRUTH

British Barristers

For American lawyers, one of the most challenging aspects of theory formulation is the tension between the duty of zealous advocacy and the duty of candor toward the court. This conflict is less troublesome to British barristers, who swear an oath to seek only the truth and whose traditions strongly emphasize the preeminence of the advocate's obligations to the court. Historically, the British bar has been far less fragmented than American advocates have. Barristers may be defense lawyers on one day, and prosecutors on the other. It is only comparatively recently that Britain has adopted a public prosecution system, where the barristers work exclusively for the prosecution. Because of this unitary vision of the role of the advocate and for other reasons, such as the traditions of the Inns of Court and common dining, the British bar has historically been far less partisan than the American bar. The collegiality of the British bar has made it easier for them not to lose sight of the overriding obligations to the judicial system, even at the expense of client's interests. The concept of

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[15]*See* ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 61:302 (1996). For a detailed discussion regarding a criminal defense lawyer's duty to tender inculpatory evidence, see *infra* § 16.3.

[16]*See In re* Frerichs, 238 N.W.2d 764, 769 (Iowa 1976) (citing *In re* Woodward, 300 S.W.2d 385 (Mo. 1957)); *In re* Sawyer, 360 U.S. 622 (1959).

[17]360 U.S. 622 (1959).

[18]*Id.* at 646-47.

[19]*See* Hawk v. Cardoza, 575 F.2d 732 (9th Cir. 1978).

"court first, client second" is much more generally accepted by British lawyers than it is by Americans.

It can be argued that the British deference to the court and the judicial system goes too far. In particular, defendants in the criminal justice system may sometimes wonder whether they are truly represented. In a British court, the defendant sits in a "dock", at the back of the courtroom and several rows behind his barrister. The defendant is frequently unable to communicate directly with him or her during the proceedings. A passive participant in the trial, he watches from a distance as the barristers and the judge resolve issues affecting his fate. The formalism of counsel's required bows to the judge, as well as the exaggerated politeness of opposing counsel to the court and to each other may lead the defendant to question whether his barrister is his champion, or simply a cog in a rather elaborate machine designed to go through a ritual to convict him.

Partisan Advocacy

In marked contrast to the British system, the American adversary system has often placed a premium on partisan advocacy. A 1958 report on professional responsibility stated that "The man who has been called into court to answer for his own actions is entitled to fair hearing. Partisan advocacy plays its essential part in such a hearing, and the lawyer pleading his client's case may properly present it in the most favorable light."[20] Both the more recent Arizona Ethical Rules and the ABA Model Code of Professional Responsibility adopted in 1969 make an explicit distinction between the ethical obligations to be applied to the advocate and those to be applied to the counselor.[21] The lines between the two are drawn more sharply in the earlier Model Code. The two roles were seen to be "essentially different".[22] In contrast to the counselor, the advocate was advised to "resolve in favor of the client doubts as to the bounds of the law."[23] An ABA ethical opinion from the late 1940's stated flatly "The lawyer...is not

[20]Professional Responsibility: Report of the Joint Conference, 44 A.B.J. 1159, 1161 (1958).

[21]ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 2.2 et seq. (Duties applicable to counselors) and 3.1 et seq (Duties applicable to advocate); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-3 (1981).

[22]*Id.*

[23]*Id.*

an umpire, but an advocate. He is under no duty to refrain from making every proper argument in support of any legal point because he is not convinced of its inherent soundness.... His personal belief in the soundness of his cause or of the authorities supporting it, is irrelevant."[24] The observation that unbounded partisanship might lead to public distrust of lawyers was summarily dismissed "Lawyers are accused of taking advantage of 'loopholes' and 'technicalities' to win. Persons who make this charge are unaware, or do not understand, that the lawyer is hired to win and if he does not exercise every legitimate effort in his client's behalf, then he is betraying a sacred trust."[25]

The Model Code carved out a significant exception to the duty of zealous advocacy. EC 7-13 provided that "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict."[26] The curious unstated corollary of this rule is that somehow criminal defense lawyer and civil lawyers have no duty to seek justice. Thus, only on prosecutors did the Model Code impose the duty of timely disclosure to the defense of available evidence that tended to negate guilt and a duty not to intentionally avoid pursuit of evidence merely because it might be damaging to the prosecutor's case.[27]

From a 21st century perspective the wisdom of the partisan approach may be questioned. The American lawyer today faces a jury panel which is cynical about institutions in general and deeply distrustful of lawyers in particular. In politics, the ethic of winning at all costs has produced Watergate and other political scandals. In the legal arena, zealous advocacy has produced verdicts which appear to the public as aberrant or excessive. Rightly or wrongly, the Rodney King police brutality case, the O.J. Simpson double murder case, and the MacDonald's coffee scalding case have deeply eroded public confidence in the jury system. Although lawyers have always been viewed with suspicion, the last half of the twentieth century has seen an unprecedented decline in the public perception of the lawyer's trustworthiness. Lawyers are now ranked on a par with used car salesmen. Perhaps the partisan advocacy of the past was too profligate. Perhaps we have squandered the public trust.

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[24]ABA Opinion 280 (1949).
[25]Rochelle & Payne, The Struggle for Public Understanding, 25 TEXAS B.J. 109, 159 (1962).
[26]Compare with the more moderately worded Arizona Ethical Rule 3.8, Comment 1.
[27]MODEL CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-13 (1981).

It is therefore not surprising that the "court first, client second" doctrine is gaining increasing acceptance in this country today.[28] Justice and truth seeking are no longer seen as a special obligation of prosecutors.[29] New discovery rules in Arizona[30] and under the Federal Rules of Civil Procedure[31] make the disclosure of adverse information obligatory by civil lawyers. California voters have demanded that criminal defense lawyers, like their counterparts, be subject to far reaching discovery requests and obligations to produce evidence.[32]

CONFLICTS—DIRECT ADVERSITY

Client Loyalty

Arizona Ethical Rule 1.7 prohibits lawyers from taking cases that are directly adverse to their other clients. Taking cases that are "directly adverse" is allowed where the lawyer reasonably believes representation will not adversely affect the relationship with the other client and each client consents after consultation.[33] As stated in the Comment to Arizona Ethical Rule 1.7, loyalty is the fundamental basis for the prohibition against undertaking directly adverse representation. According to the same comment, the affirmative obligation of loyalty should "ordinarily" prevent a lawyer from advocating against a person the lawyer represents in some other matter, even if it is wholly unrelated.

A lawyer is obligated to accept Arizona Ethical Rule 1.7's general prohibition against undertaking adverse representation against a client. The Comment to Arizona Ethical Rule 1.7

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[28]*In re* Integration of Nebraska State Bar Association, 275 N.W. 265, 268 (1937); Johnson v. United States, 360 F.2d 844, 846 (D.C. Cir 1966) (per curiam) (Burger, J. concurring); Hitch v. Pima County Superior Court, 146 Ariz 588, 592; 708 P.2d 72, 76 (1985); State v. Taylor, 648 So.2d 701 (Fla.1995).

[29]*See generally*, Nix v. Whiteside, 475 U.S. 157 (1986).

[30]ARIZ. R. CIV. P. 26.1 (as amended 1991).

[31]FED. R. CIV. P. 26 as amended Apr. 22, 1993, effective Dec. 1, 1993.

[32]Cal. Penal Code §§ 1054 *et. seq.* (Addition adopted by California voters, Prop. 115 § 23, effective June 6, 1990.)

[33]*See* ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.7 (1983). *Cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101, 5-105 (1981). *Cf. also* CAL. RULES OF PROFESSIONAL CONDUCT 3-210.

suggests that advocacy against a client in unrelated matters must be tempered by the standards of practice and the availability of counsel.

For example, it is commonly accepted practice for large institutions, public bodies, and large corporate clients to utilize the services of several law firms for their litigation needs. To "conflict out" all of these law firms even in wholly unrelated cases is undesirable even from the most stringent ethical perspective. The basic test is whether the lawyer reasonably believes the representation will not adversely affect the relationship with the other client.[34] If that test can be met, it is submitted that in some situations lawyers may take cases that are wholly unrelated notwithstanding the fact that the lawyer or the firm represents the adverse party. A common example exists where a law firm may occasionally represent the state or county in defensive tort claims while other firm members may act as advocates against the state or county in contracts or other unrelated actions.

There is no such uncertainty about the prohibition in Arizona Ethical Rule 1.7 against representation of "opposing parties" in litigation. Where the parties are opposed, a lawyer simply cannot represent both sides.

Lawyers may represent parties having antagonistic positions on legal questions that have arisen in different cases unless representation of either client would be adversely affected. Thus, lawyers are not obligated to decline a case simply because the "legal issues" are antagonistic to positions taken by the lawyer in other cases.

"Direct adversity," as contrasted with potential adversity, is controlled by Arizona Ethical Rule 1.7(a). This general conflict of interest rule mandates that a lawyer shall not represent a client if the representation will be directly adverse to another client, unless the lawyer reasonably believes the representation will not adversely affect the relationship with the other client, and each client consents after consultation.[35] The Comment to Arizona Ethical Rule 1.7 makes it clear that a lawyer ordinarily may not act as an advocate in one matter against a party the lawyer represents in some other matter, even if the matters are wholly unrelated. There are circumstances, however, in which the lawyer may advocate against a client. For example, a lawyer who represents an enterprise with diverse operations may become an

[34] *See id.*

[35] ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.7(a) (1983). *Cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(A), 5-105(A),(C) (1981). *Cf. also* CAL. RULES OF PROFESSIONAL CONDUCT 3-310.

advocate against the enterprise in an unrelated matter "if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation."[36]

Government Lawyers

Similarly, government lawyers in some circumstances may represent government employees in proceedings in which the government agency is the opposing party.[37] The propriety of concurrent representation depends on the nature of the litigation.[38] One example cited in the Comment to Arizona Ethical Rule 1.7 suggests that a suit for fraud engenders a degree of conflict not involved in a declaratory judgment action concerning statutory interpretation.

While not specifically set forth in Arizona Ethical Rule 1.7, it appears that the "initial" client always retains the right to object to a multiple representation. Thus, the "first" client accepted by the lawyer ought to be the one consulted before the lawyer in multiparty litigation adds a second client.

Representing Both Parent and Child in Personal Injury Case

Personal injury litigation often presents ethical dilemmas regarding multiple representation. For example, in *Streenz v. Streenz,*[39] the court held that an unemancipated child had a right of action against her parents for injuries incurred in an accident allegedly caused by the mother's negligent driving. The *Streenz* case therefore presented the ethical issue of whether separate representation of the minor children was necessary or representation by one lawyer was proper. The *Streenz* case was presented to the Arizona Ethics Committee for resolution in Opinion 71-21.[40] The Arizona Ethics Committee declined to interpret the

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[36]ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.7 cmt. (1983).
[37]*Id.*
[38]*Id.*
[39]106 Ariz. 86, 471 P.2d 282 (1970).
[40]State Bar of Ariz., Comm. on Rules of Professional Conduct, Ariz. Ethics Opinions, Op. 71-21 (July 26, 1971).

procedural requirements arising in *Streenz* but did provide some general guidance for the underlying ethical conflict issues.

> If, in processing the particular case in which inquiring counsel are interested, it is deemed advisable to pursue a cause of action against the parents in behalf of the minor children, then counsel should act accordingly in the light of the Canon [Canon 5—a lawyer should exercise independent professional judgment on behalf of a client]. Undoubtedly, a conflicting situation would be presented requiring independent counsel for the children. The Committee can make no determination, however, regarding the advisability of pursuing the cause in behalf of the children.[41]

A minority of the Committee offered the following suggestion regarding the issue of multiple representation in the *Streenz* case:

> The inquiring lawyer's principal concern relates to his inability to objectively determine whether or not the children should be referred to independent counsel. We would suggest that if inquiring counsel has *any doubt* about whether the children should have independent representation, he should have someone other than the parents, either a competent layman or a lawyer with whom he is *not* associated, professionally or otherwise, appointed as guardian ad litem for the children. The guardian ad litem can then objectively determine whether or not the children should have independent representation and, if so, what arrangements, if any, should be made with respect to existing fee arrangements.[42]

Cf. Ill 96-6, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1101:3002 (Ethics Opinions 1996) [personal injury attorney representing an injured minor and parents may not continue dual representation when parents ask attorney not to seek damages beyond defendant's insurance benefits because parents are friends of defendants--the parents directive impermissibly restricts attorney's ability properly to represent child's interest]; NC 163, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1001:6609 (Ethics Opinions 1991-1995) [attorney retained by father to represent minor in a personal injury matter may properly seek the appointment of a guardian ad litem for the minor if attorney believes father's decision not to pursue a suit on minor's behalf is motivated by his desire to protect his insurance rates]; Mich RI-140, *id.* at 4764 [permits attorney representing minor to seek guardian ad litem for minor if conflict of interest arises between minor and parents]; Pa 95-142, *id.* at 7352 [attorney hired to represent a minor in suit against a park where minor was injured, but whose parents were subsequently joined as defendants for failure adequately to supervise the minor, may either represent the appointed guardian of the minor or the parents (against the joinder), provided no confidential information is exchanged].

[41] *Id.* at 3.

[42] *Id.* at 4.

In *Hurt v. Superior Court,*[43] the Arizona Supreme Court held that both a surviving parent and a surviving child of a decedent could be proper parties plaintiff in a wrongful death action. The court next addressed whether there existed an impermissible conflict of interest for the same attorneys to represent both the child and the parent in the action. The court held that the dual representation would be proper if lawyers were to fulfill their obligations to both clients under DR 5-106(A), the predecessor to Arizona Ethical Rule 1.7(a). The court also noted that the infancy of the surviving minor required a special concern for his legal rights.[44] The court noted further that, if a party desired separate counsel in this situation, the right of the party must be honored.[45]

The Virginia Ethics Committee considered the situation of an attorney who represented a client against her husband's estate for injuries sustained in an automobile accident, and who subsequently represented the same client in her capacity as administrator of the estate in a suit against the other party to the accident.[46] The Committee held that the client may waive any conflict between her own representation and her role as administrator.

The New York County Ethics Committee considered the situation of an attorney representing both parents in a malpractice matter on behalf of their child, and who subsequently represented one parent in a divorce action against the other.[47] If each parent consents to the representation after full disclosure, and the attorney is clearly able to represent each party zealously, the attorney is permitted to proceed with both representations.

Joint Representation in Criminal Cases

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[43]124 Ariz. 45, 601 P.2d 1329 (1979).

[44]*Id.* (citing *In re* Milliman's Estate, 101 Ariz. 54, 415 P.2d 877 (1966)). *See also* Kapelus v. State Bar of California, 44 Cal.3d 179, 745 P.2d 917, 242 Cal.Rptr. 196 (1987); Matter of Abrams, 62 N.Y.2d 183, 465 N.E.2d 1, 476 N.Y.S.2d 494 (1984); Chemprene, Inc. v. X-Tyal Intern. Corp., 55 N.Y.2d 900, 433 N.E.2d 1271, 449 N.Y.S.2d 23 (1982); National Medical Enterprises, Inc. v. Godbey, 924 S.W.2d 123, 39 Tex. Sup. Ct. J. 698 (1996); Metropolitan Life Ins. Co. v. Syntek Finance Corp., 881 S.W.2d 319 (Tex. 1994); Swafford v. Dugger, 569 So.2d 1264, 15 Fla. L. Weekly S599 (1990).

[45]*Hurt*, 124 Ariz. at 50 (citing Nunez v. Nunez, 25 Ariz. App. 558, 545 P.2d 69 (1976)).

[46]Va 1561, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1001:8724 (Ethics Opinions 1991-1995).

[47]NY County 704, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1001:6505 (Ethics Opinions 1991-1995).

The joint representation of criminal defendants gives rise to both constitutional and professional responsibility questions. There exist several points of possible conflict of interest: at the plea-bargaining stage; when trial strategy promotes the interest of one defendant over another; from testimony of the respective defendants or their witnesses; with closing arguments; and regarding sentencing.[48] In the event of actual conflicts of interest among multiple criminal defendants, the Oregon Ethics Committee disallows joint representation, even with disclosure and consent. If a conflict of interest is likely, however, an attorney may jointly represent multiple criminal defendants if full disclosure is made and consent given by all defendants. If no conflict exists, either actual or potential, joint representation is permitted.[49]

Joint Representation in Domestic Relations Cases

The issue of multiple representation occasionally arises in domestic relation's matters. Ordinarily, due to the inherent conflicts of interest, it is not ethically proper for a lawyer to represent both parties to a marriage dissolution proceeding.[50] The Oregon Ethics Committee, however, would permit an attorney who acquired confidential information concerning a former client in a prior divorce proceeding to represent a subsequent spouse of the former client in divorce proceedings if both the former and the current client consent after full disclosure.[51]

In accordance with many jurisdictions, The Cincinnati Ethics Committee would expressly prohibit a public defender from representing both parties in a domestic violence dispute, even if the representation is confined to the arrest, arraignment, or the setting of bond. Rather, two

[48]ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 51:304 (1993).

[49]Ore 91-82, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1001:7111 (Ethics Opinions 1991-1995).

[50]DC 243, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1001:2305 (Ethics Opinions 1991-1995) [attorney who is an ordained minister as well may not represent both husband and wife in order to negotiate terms of divorce settlement].

[51]Ore 91-17, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1001:7103 (Ethics Opinions 1991-1995).

different attorneys from the public defenders office must independently represent the respective parties, and each must maintain strict confidentiality.[52]

Joint Representation in Workers Compensation Cases

Trial counsel retained by insurance carriers to represent the interests of people' insured by the carrier occasionally face challenging conflict issues. An illustrative example is found in Arizona Ethics Opinion 80-22.[53] There, the inquiring lawyer had been retained by a liability insurance carrier to defend its insured in a claim arising out of an automobile accident. Coincidentally, the workers' compensation carrier retained another lawyer in the same firm to represent the injured party's employer in a workers' compensation claim arising from the same automobile accident. The Committee held that the law firm could not accept the representation:

> The inviolate rule has long been firmly established both in the Canons of Professional Ethics and by judicial opinions that attorneys cannot represent conflicting interests or undertake to discharge inconsistent duties. When an attorney has once been retained and received the confidence of a client, he cannot enter the services of those whose interests are adverse to that of his client or take employment in matters so closely related to those of his client or former client as, in effect, to be a part thereof. The rule is a rigid one, and it is well that it is so. It is designed not only to prevent the dishonest practitioner from fraudulent conduct, but to preclude the honest practitioner from placing himself in a position where he may be required to choose between two conflicting duties.[54]

The Committee noted that the inquiry was not a "traditional" case for disqualification for conflict of interest; rather, the Committee was concerned with a question of fairness to the third-party litigant. The Committee also noted that the consent the workers' compensation carrier, its insured employer, and the defendant insured in the third-party claim would not

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[52]Cincinnati 95-96-01, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1101:6925 (Ethics Opinions 1996).

[53]Ariz. Ethics Op. 80-22 (Oct. 8, 1980).

[54]*Id.* at 1-2 (citing Corbin v. Broadman, 6 Ariz. App. 436, 433 P.2d 289 (1967)).

eliminate the problem. The Committee specifically held that the lawyers could not solicit an "informed waiver" from the injured party and, thus, the conflict could not be waived.

Wrongful Death Actions

Wrongful death actions present unique ethical issues. While there is only one recovery for a wrongful death, the amount to which each statutory beneficiary is entitled may differ.

The Arizona Ethics Committee considered the situation of an attorney who was asked to represent the sister of a man who died in an auto accident. The sister was the personal representative of both her brother and his wife (who died in the same accident). The personal representative pursued the wrongful death action on behalf of the surviving children of her brother and his wife. The Committee held that it was ethically permissible for the inquiring attorney to represent the personal representative acting on behalf of the estates of both of the deceased husband and his wife. However, the Committee noted that the children of the deceased couple were entitled to representation by their own attorney if they so desired, and that the beneficiaries' attorney was entitled to participate in all of the proceedings concerning the wrongful death action.[55]

The Virginia Ethics Committee opined, however, that an attorney may not properly represent the administrator of an estate in a wrongful death action and also serve as co-administrator of the estate. As co-administrator, the attorney has a conflict of interest by virtue of a personal interest in the estate which may not be cured by the attorney's removal as co-administrator.[56]

CONFLICTS—POTENTIAL ADVERSITY

[55]Ariz. Ethics Op. 81-19 (June 22, 1981).

[56]Va 1524, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1001:8720 (Ethics Opinions 1991-1995).

Lawyers must decline cases where the client's interests may be "materially limited" by the lawyer's responsibilities to other clients, third persons, or the lawyer's own interests.[57] The exceptions to these potential conflicts are found in those cases where the lawyer reasonably believes the representation will not be adversely affected and the client consents after consultation.[58]

As in the case of direct adversity, the benchmark is "loyalty." Loyalty to a client may be impaired where the lawyer cannot undertake an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. These "potential" conflicts do not in and of themselves preclude the representation. The critical questions include the likelihood that a conflict may arise, and, if it does, whether any such conflict would materially interfere with the lawyer's independent professional judgment, or whether the conflict would limit courses of action that reasonably should be pursued on behalf of the client. Consideration should also be given to whether the client wishes to accommodate the "other interest" involved.[59]

Co-Plaintiffs and Co-Defendants

Simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is controlled by Arizona Ethical Rule 1.7(b). The Comment to Arizona Ethical Rule 1.7(b) provides several examples of impermissible conflicts in representing parties in lawsuits: (i) there may be a substantial discrepancy in the parties' testimony; (ii) there may be an inherent incompatibility in the parties' positions against the opposing party; (iii) there may be substantially different capacities to settle the claims or liabilities in question.

Common representation of parties having similar interests is proper if the risk of adverse effect is minimal and the requirements of Arizona Ethical Rule 1.7(b) are met: that the lawyer

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[57] *See* ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.7(b) (1983).
[58] *Id.*
[59] *See* ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.7 cmt. (1983).

reasonably believes the representation will not be adversely affected and the client consents after consultation.

Representation That "May Be" Materially Limited by Another Client, a Third Person, or the Lawyer's Own Interests

Potential conflicts do not in and of themselves preclude the representation.[60] The critical questions include whether a conflict is likely to occur, and, if so, whether it would materially interfere with the lawyer's independent professional judgment to consider or foreclose alternative courses of action that reasonably should be pursued on behalf of the client.[61] The Comment to Arizona Ethical Rule 1.7 also notes that consideration should be given to whether the client wishes to accommodate the other interests involved.

Representation of multiple clients by a law firm in wholly unrelated lawsuits is a relatively common practice. Neither the ABA Model Code nor the Arizona Ethical Rules of Professional Responsibility prohibit a lawyer or law firm from simultaneously representing adverse parties in separate actions involving wholly unrelated transactions. Certain situations, however, may give rise to conflicts of interest where such representation would be prohibited.

The Vermont Ethics Committee held that an attorney may not represent a town with regard to a construction project if the attorney's partner provided legal advice to an opponent of the project--even if the partner does not recall contact with the opponent, never billed the opponent or opened a file, and believed the advice concerned a different aspect of the project.[62]

The Rhode Island Ethics Committee considered the situation of an attorney who represented a client regarding the breach of a lease/option-to-purchase contract on a particular piece of property, whose partner was hired by the eventual purchaser of the property to handle the conveyance.[63] The Committee ruled that the attorney may not continue to represent the contract client absent consent by the purchaser.

The Utah Ethics Committee held that a guardian ad litem may represent the interests of siblings if the interests are not directly adverse, the representation of one sibling will not

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[60]ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.7 cmt. (1983).
[61]*Id.*
[62]Vt 93-11, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1001:8606).
[63]RI 94-80, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1001:7838 (Ethics Opinions 1991-1995).

materially limit representation of another, and it is not reasonably foreseeable that confidential information will be acquired from the representation of one sibling that might be used to the detriment of another. Absent these conditions being met, other attorney-guardians in the same office are similarly prohibited from representing any of the siblings as well. Attorney-guardians in different offices may, however, represent siblings of the represented child if no communication is conducted between the attorneys regarding any of the siblings, and the attorneys are not subject to common direction, planning or supervision regarding the case.[64]

The Iowa Ethics Committee ruled that a law firm may not represent a bond issuer in negotiations with an underwriter if another attorney in the firm represents the same underwriter in another, unrelated financing or legal matter, or if the firm regularly represents the underwriter in financing transactions.[65]

Lawyer's Business Interests

Under Arizona Ethical Rule 1.7(b), the lawyer's personal interests should not adversely affect the representation of a client. For example, a lawyer should not refer clients to an enterprise in which the lawyer has an undisclosed interest. *In re Pappas*[66] is a "business interest" case in which the lawyer's own interests were found to conflict with those of his client. In that disciplinary proceeding, the Arizona Supreme Court noted that the business interests of the lawyer need not be "antagonistic," as between buyer and seller. While the lawyer and his client may share many mutual interests, the lawyer's interests in profit and loss allocation, capital contribution, and exoneration clauses exemplify the differing interests between the client and the lawyer who engages in business with the client. The court cited *In re Neville*[67] as an example of a case where the potentially different interests of the business

[64]Utah 95-08, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1101:8501 (Ethics Opinions 1996).
[65]Iowa 95-20, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1101:3601 (Ethics Opinions 1996).
[66]159 Ariz 516, 768 P.2d 1161 (1988). *See also* Matter of Owens, 182 Ariz. 121, 893 P.2d 1284 (1995); Brockway v. State Bar of California, 53 Cal.3d 51, 806 P.2d 308, 278 Cal.Rptr. 836 (1991); Sugarman v. State Bar of California, 51 Cal.3d 609, 798 P.2d 843, 274 Cal.Rptr. 246 (1990); Ritter v. State Bar of California, 40 Cal.3d 595, 709 P.2d 1303, 221 Cal.Rptr. 134 (1985); *In re* Rosin, 118 Ill.2d 365, 515 N.E.2d 85 (1987); *In re* Howard, 69 Ill.2d 343, 372 N.E.2d 371 (1977); The Florida Bar v. Della-Donna, 583 So.2d 307, 16 Fla. L. Weekly S419 (1989); The Florida Bar v. Fitzgerald, 541 So.2d 602, 14 Fla. L. Weekly 192 (1989); The Florida Bar v. Lee, 396 So.2d 169 (Fla. 1981).
[67]147 Ariz. 106, 708 P.2d 1297 (1985).

lawyer and his client create exposure to the lawyer: "It is natural and proper for a client with a longstanding business relationship with a lawyer to feel that the lawyer is to be trusted, will not act unfairly, and will protect him against danger."[68]

Consultation with a Disinterested Lawyer

When a lawyer seeks the consent of multiple clients to joint representation, whether directly adverse under Arizona Ethical Rule 1.7(a) or potentially adverse under Arizona Ethical Rule 1.7(b), the consent must be obtained after "consultation." The Comment to Arizona Ethical Rule 1.7 notes that when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent.

When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In both situations, involving direct adversity or potentially differing interests, the consultation must include explanation of the implications, the advantages, and the risks involved in the common representation.

The ethical rules regarding consultation and consent to multiple representation does not expressly require that the consent be obtained "in writing." The burden of establishing disclosure to, and consent by, a client is on the lawyer, however, and any doubts and ambiguities on the issue will be resolved against the lawyer.[69] In *Neville,* the court held that a violation of the rule prohibiting multiple representation of parties with adverse interests was established when "in the absence of a writing," the lawyer could not prove that the client's consent to the lawyer's multiple representation was both voluntary and knowing.

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[68]159 Ariz. at 523, 768 P.2d at 1168 (citing *Neville,* 147 Ariz. at 112, 708 P.2d at 1303).

[69]*In re* Neville, 147 Ariz. 106, 708 P.2d 1297 (1985). *See also* Hunniecutt v. State Bar of California, 44 Cal.3d 362, 748 P.2d 1161, 243 Cal.Rptr. 699 (1988); Cutler v. State Bar of Cal., 71 Cal.2d 241, 455 P.2d 108, 78 Cal.Rptr. 172 (1969); Clancy v. State Bar of Cal., 71 Cal.2d 140, 454 P.2d 329, 77 Cal.Rptr. 657 (1969); Krieger v. State Bar of Cal., 43 Cal.2d 604, 275 P.2d 459 (1954); *In re* Schuyler, 91 Ill.2d 6, 434 N.E.2d 1137 (1982).

Explaining the "implications of the common representation and the advantages and risks involved" to a client is, of course, a matter of adequate communication. Arizona Ethical Rule 1.4 expressly requires lawyers to explain matters "to the extent reasonably necessary" to permit clients to make informed decisions regarding the representation.

Aggregate Settlements

The Rules of Professional Conduct also specifically deal with the representation by one lawyer of two or more clients who are participating in making "aggregate settlements" or aggregated agreements as to guilty or *nolo contendere* pleas in criminal cases. Arizona Ethical Rule 1.8(g) prohibits lawyers from participating in such "aggregated" agreements unless each client consents after consultation. The rule specifically requires disclosure of the existence and nature of all of the claims or pleas involved and of the participation of each person in the settlement.

Consent by Governmental Entities

The special problem of "consent" by a governmental entity was considered by the Arizona Ethics Committee.[70] There, the inquiring attorney was currently involved in the defense of three separate pieces of litigation concerning claims asserted under § 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983. All three cases involved claims for constitutional torts by terminated employees against Arizona towns.

The question presented was whether it was possible for a governmental entity and its current or former officers and employees to consent to joint representation as defendants in such actions. The Committee noted that it had held on numerous occasions that consent for joint representation is improper in the case of a public officer or entity because the public cannot give its consent to such representation. The Committee noted that its several prior

[70]Ariz. Ethics Op. 81-5 (Mar. 17, 1981).

opinions were entirely consistent with American Bar Association Formal Opinions 16, 34, 77, and 296, as well as ABA Informal Opinion 922.

Lawyers representing business or other organizations are often asked to represent directors, officers, employees, members, shareholders, or other constituents of the organization. Such multiple representation is controlled by Arizona Ethical Rule 1.13(e), which permits such representation subject to the provisions of Arizona Ethical Rule 1.7. If the organization's consent to dual representation is required by Arizona Ethical Rule 1.7, *i.e.,* in the case of direct adversity or potentially differing interests, the consent must be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders. The Rhode Island Ethics Committee, for example, held that an attorney who represents the city in a suit brought against the city as well as against several city officials may represent one of the officials if the city consents.[71]

CONFLICTS—THE DOCTINE OF LIMITED REPRESENTATION

There are a variety of factual situations in which a lawyer cannot or will not accept a case from a potential client "in full." Likewise, there are specific situations for which a client wishes to retain a lawyer on a narrow or "specific instruction" basis. The ethical rules provide for such "conditional" acceptance of the case whereby the scope of the representation is limited.

Arizona Ethical Rule 1.2(c) permits a lawyer to limit the objectives or scope of the representation, if the client consents after consultation.[72] The ethical rule does not explicitly define what is meant by "after consultation." By analogy to the same phraseology found in Arizona Ethical Rule 1.7, the ethical lawyer can infer that, where a disinterested lawyer would conclude that the client should not agree to limited representation, he or she cannot properly limit the scope of the representation.[73]

The Comment to Arizona Ethical Rule 1.2 reveals that the objectives or scope of services provided by a lawyer may be limited by agreement with a client. Lawyers can and should

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[71]RI 91-62, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1001:7806 (Ethics Opinions 1991-1995).

[72]ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.2(c) (1983). *Cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(B)(1) (1981). *Cf. also* CAL. RULES OF PROFESSIONAL CONDUCT 3-210.

[73]*See* ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.7 cmt. (1983).

defend the terms under which the lawyer's services are made available to the client.[74] By way of example, a retainer may be for a specifically designated purpose. The Comment to Arizona Ethical Rule 1.2 also suggests that when a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. The legality of this kind of limited representation is doubtful in light of the clear line of cases to the contrary, such as *Parsons v. Continental National American Group.*[75]

Arizona Ethical Rule 1.2(d) deals specifically with limited representation in those situations in which the client seeks legal services arising out of conduct that the lawyer knows is criminal or fraudulent. This rule permits the lawyer to discuss the legal consequences of any proposed course of conduct with the client, notwithstanding such knowledge.[76] This rule also permits the lawyer to assist the client in making a good faith effort to determine the validity, scope, meaning, or application of the law.[77]

Arizona Ethical Rule 1.2(e) provides that when the lawyer knows that the client expects assistance not permitted by the ethical rules or other substantive law, the lawyer shall consult with the client regarding the relevant limitations of the lawyer's conduct.

Tactical or Strategic Decisions

Arizona Ethical Rule 1.2(a) requires the lawyer to abide by the client's decisions concerning the objectives of the representation and permits the lawyer to consult with the client about how the objectives are to be pursued. On occasion, this mandate may conflict with the lawyer's own financial interest in the fees for legal services. While the factors to be considered in determining the reasonableness of a fee under Arizona Ethical Rule 1.5 are quite broad, the Comment to Arizona Ethical Rule 1.5 confirms that lawyers cannot make fee agreements with clients the terms of which might induce the lawyer to improperly curtail services for the client or to perform them in a manner contrary to the client's interest. The Comment offers as an example an agreement between a lawyer and client whereby services are to be provided only

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[74]ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.2 cmt. (1983).
[75]113 Ariz. 223, 550 P.2d 94 (1976).
[76]ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.2(d) (1983). *Cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A)(7) (1981). *Cf. also* CAL. RULES OF PROFESSIONAL CONDUCT 3-210.
[77]*Id.*

up to a stated amount when it is foreseeable that more extensive services may be required. The only exception to this limitation is said to be where the situation is adequately explained to the client.

Another example of limited or conditional representation often occurs where the client is an "organization." Arizona Ethical Rule 1.13 mandates that the lawyer's obligations are to the organization, "acting through its duly authorized constituents." The mandate is to be contrasted with representing individual directors, officers, employees, members, shareholders, or other constituents. Arizona Ethical Rule 1.13(d) specifically obligates lawyers who represent organizations to explain to any individual constituents with whom the lawyer is dealing the identity of the client, *i.e.*, the organization itself, when it is apparent that the organization's interests are adverse to those of the constituents. The rule permits lawyers representing organizations to also represent particular directors, officers, members, shareholders, or other constituents, subject to the conflict of interest rules found in Arizona Ethical Rule 1.7.

Another example of limited representation may be found in those situations where the lawyer undertakes the representation pending a complete investigation of the applicable facts and/or research with regard to the prevailing law. In these kinds of cases, the standard of practice dictates that the lawyer will clearly indicate in the engagement letter or other retention agreement that he or she may elect to withdraw from the representation at such time as the investigation and/or legal research is complete.

Arizona Ethical Rule 3.1 mandates that lawyers expedite litigation, which is not always practicable. Accordingly, limited representation may be offered to a client where it is made clear that the litigation cannot be reasonably expedited. The same situation prevails where pending time constraints on the lawyer's practice dictate limited representation of a new client. Those situations should clearly be explained to the client so that the conditional or limited nature of the representation is fully understood at the outset of the representation.

CONFLICTS—PRECLUDING FUTURE REPRESENTATION

Perhaps the most fundamental consideration in accepting any case is the impact the acceptance will have on other clients or cases which the lawyer has or may in the future wish

to take. That is, in assessing whether or not to take a case, lawyers should be mindful of the potential for precluding representation in a future matter. The essence of this impact on other cases and clients is a corollary to the lawyer's fundamental obligation of "loyalty" to the client. Arizona Ethical Rule 1.7 expressly prohibits lawyers from representing other clients whose interests are directly adverse to the client whose case has been accepted.[78] Arizona Ethical Rule 1.7(b) reminds all lawyers not only that their representation of a client may materially limit their ability to represent some future client, but also that taking cases may ultimately impair the lawyer's ability to protect his or her own interests.[79]

Vicarious Disqualification on Conflict Grounds

Lawyers associated in firms must consider that accepting a particular case may disqualify other associates from cases they may wish to take. Arizona Ethical Rule 1.10, the general rule of imputed disqualification, states that lawyers and firms may not knowingly represent clients when any one of them practicing alone would be prohibited from doing so by: (i) conflict of interest rules (Arizona Ethical Rule 1.7); (ii) substantial gift rules (Arizona Ethical Rule 1.8(c)); (iii) former client conflicts (Arizona Ethical Rule 1.9); or (iv) intermediary rules (Arizona Ethical Rule 2.2).[80]

Occasionally, lawyers accept cases without carefully considering the ethical requirement of prompt and efficient processing of those cases. Arizona Ethical Rule 1.3 mandates that a lawyer act with reasonable diligence and promptness in representing a client.[81] This ethical

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[78]ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.7(a) (1983). *Cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(A) (1981): "A lawyer shall decline proffered employment if the exercise of his independent professional judgement in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests ...." *Cf. also* CAL. RULES OF PROFESSIONAL CONDUCT 3-310.

[79]ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.7(b) (1983). *Cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-2 (1981): "A lawyer should not accept proffered employment if his personal interests or desires will, or there is a reasonable possibility that they will, adversely affect the advice to be given or services to be rendered the prospective client." *Cf. also* CAL. RULES OF PROFESSIONAL CONDUCT 3-310.

[80]ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.10 (1983). *Cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(D) (1981): "If a lawyer is required to decline or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or affiliate with him or his firm, may accept or continue such employment."

[81]ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.3 (1983). *Cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101(A)(3) (1981): a lawyer shall not "neglect a matter entrusted to him."; EC 6-4: a lawyer should "give appropriate attention to his legal work."

requirement of diligence should be considered in determining whether or not a case is accepted. Failing to act with reasonable diligence and promptness in representing the client is grounds for serious discipline.[82] Inherent in the obligation to act with reasonable diligence is the lawyer's obligation to control his or her workload such that each matter can be handled adequately under both Arizona Ethical Rule 1.1 and Arizona Ethical Rule 1.3.

Competence as a Conflict of Interest factor

Inherent in the decision to take any case is whether the lawyer can competently provide appropriate representation. Lawyers should consider whether their level of training and experience is sufficient to handle the matter without the association of a lawyer of established competence in the field in question. Arizona Ethical Rule 1.1 mandates such competent representation, which may be achieved through the association of a lawyer established in the field.[83]

There are certain specified decisions in the ethical rules which belong exclusively to the client and which must be accepted by the lawyer, right or wrong.[84] Thus, an important factor in assessing whether or not to take a case is the willingness of the lawyer to accept a particular client's decision in such areas as narrowly specified in Arizona Ethical Rule 1.2.

Specifically, this ethical rule requires lawyers to abide by the client's decisions regarding whether to accept an offer of settlement and, in criminal cases, what pleas are to be entered, whether a jury will be waived, and whether the client will testify.[85] While clearly appropriate to advise a client about these issues, the client's decision controls. If the lawyer cannot suppress his or her own views, the case should not be accepted.

In considering whether to take a particular case, the lawyer must also consider the obligation to pursue the matter despite opposition, obstruction, or personal inconvenience.[86]

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[82]*In re* Egan, 127 Ariz. 105, 618 P.2d 599 (1980). *See also* Matter of Curtis, 184 Ariz. 256, 908 P.2d 472 (1995); Potack v. State Bar of California, 54 Cal.3d 132, 813 P.2d 1365, 284 Cal.Rptr. 335 (1991); *In re* Smith, 168 Ill.2d 269, 659 N.E.2d 896 (1995); The Florida Bar v. Robert P. Jordan, II, 1996 WL 627534 (Fla. 1996).

[83]*See* ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.1 cmt. (1983).

[84]*See* ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.2 (1983). *Cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7, 7-8 (1981). *Cf. also* CAL. RULES OF PROFESSIONAL CONDUCT 3-210.

[85]*Id.*

[86]*See* ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.3 cmt. (1983).

While the lawyer must act with commitment and dedication on the client's behalf, he or she is not bound to press for every advantage that might be realized for the client. The lawyer must exercise professional discretion in determining the means by which the matter is pursued, and this creates an obligation to explain such limitations to the client before the case is accepted.

Communication as a Conflict of Interest Factor

One of the most fundamental and important obligations assumed by lawyers is the duty to communicate with the client.[87] Inability to communicate, for whatever reason, must therefore be a factor in deciding whether to accept the case. Arizona Ethical Rule 1.4(a) requires a lawyer to keep a client reasonably informed about the status of a matter and to comply promptly with reasonable requests for information. A corresponding obligation imposed by Arizona Ethical Rule 1.4 requires a lawyer to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Obviously, the client must have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued. For example, lawyers negotiating on behalf of clients must provide clients with facts relevant to the matter, inform the client of communications from the other party, and take reasonable steps that permit the client to make decisions regarding offers from another party.[88] Lawyers who receive offers of settlement must promptly inform the client of the substance of the offer, unless prior discussions with the client have left it clear that the offer is unacceptable.[89]

Even when a client delegates authority to a lawyer, the client should be kept advised on the status of the matter.[90] Applied to the lawyer's situation, the rule implies a duty to explain to the client the general strategy and prospects for success of the case. This does not mean that

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[87]*See* ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.4 (1983). *Cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 9-2 (1981): "a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client." *Cf. also* CAL. RULES OF PROFESSIONAL CONDUCT 3-500, 3-510.

[88]*See* ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.4 cmt. (1983).

[89]*Id.*

[90]*Id.*

the lawyer is expected to describe trial or negotiation strategy in detail; rather, the guiding principles should be the fulfillment of reasonable client expectation for information consistent with the duty to act in the client's best interest.[91] Thus, in those situations where the lawyer cannot explain general strategy to the client or cannot consult with the client on tactics that might injure or coerce others, the case cannot be accepted at the outset.

A related question is that of withdrawing from a case where communication with a client about important matters becomes impossible. In Arizona Ethics Opinion 80-11,[92] the Committee considered the question of the lawyer's ethical obligations where, for reasons beyond his control, he was unable to communicate with or secure instructions from his client regarding an offer of settlement in a pending case. The Committee suggested that the lawyer's duty was to protect the interests of the client to the extent that he could reasonably do so, and when the lawyer cannot reasonably carry out that employment effectively, he should seek withdrawal from the case. If the client refuses to communicate with the lawyer, the lawyer must withdraw, but the lawyer is cautioned to ensure that he has exhausted all logical avenues of communication.

The rule of client confidentiality also provides an essential consideration in assessing whether or not to take a particular case. There are undoubtedly many cases where the lawyer's duty to maintain confidentiality is repugnant to his or her own personal or financial best interest. Likewise, there are no doubt many cases where the duty to maintain confidentiality is inconsistent with the lawyer's preexisting duty to other clients or causes.

Investigation as a Conflict of Interest Factor

The duty to investigate a case is of paramount importance in deciding whether to accept it. From an ethical perspective, the duty to investigate is derivative of the lawyer's obligation to refrain from bringing or defending frivolous proceedings under Arizona Ethical Rule 3.1. An important case on the duty to investigate is *Nelson v. Miller,*[93] in which a physician had

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[91]*Id.*

[92]State Bar of Ariz., Comm. on Rules of Professional Conduct, Ariz. Ethics Opinions, Op. 80-11 (Mar. 27, 1980).

[93]607 P.2d 438 (Kan. 1980).

sued his former adversary's attorneys for malicious prosecution and negligence following the dismissal in his favor of the medical malpractice action. The Kansas Supreme Court held that the physician had not shown the plaintiff's attorneys to have been negligent in failing to investigate the claim against the physician. The court said:

> In representing their clients, lawyers are expected to use the legitimate sidearms of a warrior. It is only when a lawyer uses the dagger of an assassin that he should be subjected to discipline or to personal liability. We believe that the public is adequately protected from harassment and abuse by an unprofessional member of the bar through the means of the traditional cause of action for malicious prosecution. We, therefore, hold in accordance with established law, that an attorney cannot be held liable for the consequence of his professional negligence to his client's adversary. We further hold that a violation of the Code of Professional Responsibility does not alone create a cause of action against an attorney in favor of a third party. The remedy provided a third-party adversary is solely through an action for malicious prosecution of a civil action.[94]

A "probable cause" standard of investigation was formulated in *Sheldon Appel Co. v. Albert & Olkier*.[95] The California Supreme Court found that an objective standard of what a reasonable attorney would have done under the same or similar circumstances was preferable to a subjective standard. This "objective standard" is limited to cases where the facts known to the lawyer are not in dispute. It is not necessary to determine whether the lawyer "subjectively believed that the claim was legally tenable."[96]

A different "test" was applied by the Michigan Supreme Court in *Friedman v. Dozorc*.[97] In *Friedman*, the attorneys filed a medical malpractice action against a physician who had treated the survivor's deceased wife. The trial court entered a directed verdict because no expert testimony was introduced to show that the defendants had breached the applicable standard of care. One of the physicians then sued the attorneys for damages arising from the defense of

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[94]*Id.* at 451.

[95]254 Cal. Rptr. 336, 765 P.2d 498 (1989).

[96]*See* Dobbs, *Belief and Doubt in Malicious Prosecution and Libel*, 21 ARIZ. L. REV. 607 (1979). *See also* Lewis v. Swenson, 126 Ariz. 561, 617 P.2d 69 (Ariz. Ct. App. 1980).

[97]312 N.W.2d 585 (Mich. 1981).

the allegedly groundless malpractice suit. The Michigan court rejected the "reasonable lawyer" standard, inquiring instead whether the attorney's conduct was "beyond the limits of reason or the bounds of the law."[98]

CONFLICTS—DOING BUSINESS WITH CLIENTS

As a general proposition, lawyers are subject to the same prohibitions applicable to transactional lawyers with respect to (i) business transactions with clients; (ii) use of client information; (iii) agreements regarding literary or video rights; (iv) providing financial assistance; (v) prospective agreements limiting the lawyer's liability to the client; and (vi) issuing criminal complaints against the client for nonpayment of fees.

Lawyers should be particularly sensitive to prohibited transactions involving (i) acquisition of proprietary interests in litigation; (ii) contracting for percentage fee recoveries even if discharged by the client prior to case resolution; and (iii) representing parties to litigation in which the lawyer is involved as either an additional party or witness.

Business transactions with clients have historically resulted in a variety of disciplinary complaints, malpractice actions, and occasional violent acts. Arizona Ethical Rule 1.8 prohibits lawyers from entering into business transactions with clients or knowingly acquiring ownership, possessory, security, or other pecuniary interests "adverse" to clients unless:

(i) The transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(ii) The client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(iii) The client consents in writing thereto.[99]

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[98] *Id.* at 606.

[99] ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.8(a) (1983). *Cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-103(B) (1981). *Cf. also* CAL. RULES OF PROFESSIONAL CONDUCT 4-210.

Fiduciary Standard

The Comment to Arizona Ethical Rule 1.8(a) rather simply states that, as a general principle, all transactions between client and lawyer should be fair and reasonable to the client. The simplicity of this statement is heightened when the lawyer recalls that the relationship is fiduciary in nature rather than at arm's length. That the lawyer and client agree to the terms and conditions of a business transaction is immaterial. The test is fairness and reasonableness, not agreement.

The "use" of client information must not be confused with "revealing" client information. Arizona Ethical Rule 1.6 catalogs the circumstances under which lawyers may reveal information relating to the client's representation. As a separate matter, Arizona Ethical Rule 1.8(b) prohibits the lawyer from using information relating to the representation to the client's disadvantage unless the client consents after consultation. The problem occasionally arises when lawyers attempt to exploit information relating to the representation to the disadvantage of the client. The Comment to Arizona Ethical Rule 1.8 provides the example of a lawyer who has learned that the client is investing in specific real estate. The Comment reminds us that the lawyer cannot, without the client's consent, seek to acquire nearby property if such would adversely affect the client's plan for investment.

Literary Rights

Lawyers are occasionally offered literary or media rights regarding cases that are interesting or even notorious. Arizona Ethical Rule 1.8(d) prohibits negotiating agreements which give the lawyer rights to a portrayal or an account of the case. There are two limitations to this prohibition: (i) the agreement cannot be made "prior to" the conclusion of the representation of the client; and (ii) the prohibition assumes that the account will be based in substantial part on information relating to the representation.[100]

[100]*See* ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.8(d) (1983). *Cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-104(B) (1981), regarding prohibition against lawyer's interest in publication rights. *Cf. also* CAL. RULES OF PROFESSIONAL CONDUCT 3-400.

The basis for the prohibition is that the acquisition necessarily creates a conflict between client and lawyer.[101] The Comment to Arizona Ethical Rule 1.8 suggests that measures suitable in the representation of the client may detract from the publication value of an account of the representation. The prohibition does not mean that a lawyer representing a client in a transaction concerning literary property cannot agree that the lawyer's fee shall consist of a share and ownership in the property. Such a property share agreement, however, must conform both to Arizona Ethical Rule 1.5, regarding fees, and to the rule regarding acquisition of proprietary interest in the "cause of action or subject matter of the litigation."[102]

These agreements can create a conflict of interest between lawyer and client, tempting the lawyer to choose a course of action enhancing the value of the agreement and not in the best legal interests of the client.[103] Rule 1.8(d) attempts to avoid possible conflicts of interest that may arise when the lawyer's economic motivations run counter to the client's interests. Although there are few reported disciplinary decisions on the issue, the cases are almost uniform in their disapproval of fee contracts based on the acquisition of literary or media rights.[104]

An interesting California case stands out in contrast to the majority view. In *Maxwell v. Superior Court,*[105] petitioner was a criminal defendant in a particularly notorious serial murder case. He had hired skilled private counsel, agreeing that literary rights to his life story would constitute his fee. His lawyer prepared a detailed waiver of conflicts letter which is an interesting example of the explicitness required for an intelligent waiver. The letter clearly informed the client of numerous possible conflict scenarios between lawyer and client, including the fact that (1) the lawyer night wish to create damaging publicity to enhance the exploitation value of the client's story, (2) that the lawyer might be reluctant to plead an

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[101]*See* ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.8(d) cmt. (1983).

[102]*See* ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.8(j) (1983). *Cf. also* CAL. RULES OF PROFESSIONAL CONDUCT 3-300.

[103]*See* People v. Corona, 145 Cal. Rptr. 894 (Cal. Ct. App. 1978) (court overturned a murder conviction where defendant and lawyer entered into a media rights agreement).

[104]*See, e.g.*, Beets v. Scott, 65 F.3d 1258 (5th Cir. 1995) (lawyer should not enter into literary and media rights fee arrangement with client during pendency of representation, as arrangement may encourage counsel to misuse judicial process for sake of enrichment and publicity seeking, and necessarily trades on misery of victim and family); *United States v Hearst,* 638 F.2d 1190 (9th Cir. 1980) (client's covenant with lawyer to cooperate and not publish her own account constituted an "interest in publication rights" within the meaning of DR5-104(B); district court ordered to consider disciplinary action).

[105]Maxwell v Superior Court, 30 Cal 3d 606, 180 Cal Rptr 177, 639 P.2d 248 (Cal. 1982)

insanity defense because such a defense, if successful, might jeopardize the validity of the fee contract, and (3) that the lawyer might wish to see the client convicted and even sentenced to death to increase the publicity value of the case. The superior court dismissed counsel because of the conflicts of interest and petitioner appealed. The California Supreme Court reversed, holding that defendant had made a knowing and intelligent waiver of the conflicts, and had an overriding constitutional right to counsel of his choice. Significantly, the *Maxwell* case was decided before the ABA approval of Model Ethical Rule 1.8(d). Moreover, the case simply holds that the defense attorney will not be subject to disqualification merely for entering into an agreement for literary rights, because of the client's ability to make an intelligent waiver and the client's overriding right to counsel. The *Maxwell* case did not decide the question whether an attorney can be subject to discipline for entering into such an agreement. Consequently, even in California, agreements which provide for compensating the lawyer through literary or media rights to a portrayal or account based in substantial part on information relating to the representation of a client should be avoided.

Prospective Release From Legal Malpractice Claims

"Prospective" agreements limiting the lawyer's liability to clients for malpractice is prohibited by Arizona Ethical Rule 1.8(h). Interestingly, the lawyer would be ethically permitted to enter into such a prospective agreement if it were "permitted by law" and the client was independently represented in making the agreement.[106] Lawyers are also prohibited from settling claims for malpractice with unrepresented clients or former clients unless they are first advised in writing that independent representation is appropriate in connection with any such settlement or release.[107] The Arizona Supreme Court has censured lawyers for attempting to exonerate themselves or limit their liability to clients for personal malpractice.

Lawyers receive special treatment as the subjects of Arizona Ethical Rule 1.8(j). That rule prohibits lawyers from acquiring proprietary interests in the client's cause of action, except for acquiring a lien granted by law to secure the lawyer's fee or expenses, and contracting with the

[106]*See* ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.8(h) (1983). *Cf. also* CAL. RULES OF PROFESSIONAL CONDUCT 3-400.
[107]*Id.*

client for a reasonable contingent fee in a civil case. The Comment to Arizona Ethical Rule 1.8(j) makes it clear that this rule is a "traditional, general rule." It has its basis in the common law of champerty and maintenance but is subject to the specific exceptions developed by decision.

For example, the North Carolina Ethics Committee would prohibit an attorney from taking an assignment of a client's judgment as payment or security for legal services for representing the client's appeal of the judgment.[108] Similarly, the Virginia Ethics Committee would prohibit an attorney from receiving an assignment of a divorce client's share of the profits from the sale of the marital residence to secure payment of the attorney's legal fee.[109]

Lawyer as Witness in Client's Case

Another "unwise" decision arises where the lawyer attempts to represent a party to a lawsuit in which the lawyer is involved as either a party or witness. The Federal District Court in Eastern Wisconsin held that an attorney who had been representing his son is not permitted to bill for hours worked after he testified in the matter. The court reasoned that the attorney's testimony effected a withdrawal.[110] The Supreme Court of Arkansas, however, would permit a testifying attorney to share in a contingent fee provided the attorney withdraws from all other participation in the case, and if the fee agreement had been negotiated prior to the attorney knowing of the possibility of such testimony.[111]

The Arizona Ethics Committee noted that it would be "unwise" for an attorney who was named as a defendant in a civil action to represent a co-defendant, irrespective of whether the attorney-defendant was represented by outside counsel.[112]

Arizona Ethical Rule 3.7 prohibits lawyers from acting as advocates "at a trial" in which the lawyer is likely to be a necessary witness except where: (i) The testimony relates to an

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[108]NC 134, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1001:6605 (Ethics Opinions 1991-1995).

[109]Va 1653, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL ETHICS 1001:8736 (Ethics Opinions 1991-1995).

[110]ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 61:511 (1996)(*citing* Mahoney v. Kersey, 778 FSupp 1002 (DC EWis 1991)).

[111]*Id*. at 511-512 (*citing* Mobley v. Harmon, 854 SW2d 348).

[112]Ariz. Ethics Op. 76-11 (June 29, 1976).

uncontested issue; (ii) The testimony relates to the nature and value of the legal services rendered in the case; or (iii) Disqualification of the lawyer would work substantial hardship on the client.[113] Significantly, Arizona Ethical Rule 3.7 does not preclude a lawyer from acting as an advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by conflict of interest rules.[114]

The Comment to Arizona Ethical Rule 3.7 instructs that combining the roles can result in not only a conflict between lawyer and client but also prejudice to the opposing party. Whether the opposing party is likely to suffer prejudice depends upon the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses.[115] An advocate contemplating acting as witness must therefore balance the interests of the client with those of the opposing party. The principles of imputed disqualification found in Arizona Ethical Rule 1.10 have no application to this narrow issue.[116]

The "associated" disqualification of other lawyers in the firm comes about as follows: If a lawyer who is a member of the firm would not be able to act both as advocate and witness by reason of a conflict of interest, then Arizona Ethical Rule 1.10 imputed disqualification would be applied to the firm as well.

Another in the list of "prohibited or unwise" acts by lawyers is the advancement of claims that the lawyer believes are meritless, frivolous, or legally groundless.[117] An attorney may not ethically advance a claim on behalf of a client if the attorney knows that the claim is unreasonable or unsupportable. The San Diego Ethics Committee opined that an attorney who complies with client instructions to do everything possible to avoid judgment, and consequently files a cross-complaint to an unlawful detainer action, has acted without proper

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[113]ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 3.7(a) (1983). *Cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(B). *Cf. also* DR 5-102(A) (1981), regarding proscription against a lawyer serving as a witness on behalf of the client; and DR 5-102(B) regarding proscription against a lawyer serving as a witness other than on behalf of the client should the lawyer's testimony become prejudicial to the client's interests. *Cf. also* CAL. RULES OF PROFESSIONAL CONDUCT 5-210.

[114]ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 3.7(a) (1983).

[115]*See* ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 3.7 cmt. (1983).

[116]*Id.*

[117]*See* ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 3.1 (1983). *Cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A) (1981), regarding proscription against actions that serve merely to harass or maliciously injure another. *Cf. also* CAL. RULES OF PROFESSIONAL CONDUCT 3-200.

investigation and is therefore subject to discipline.[118] Similarly, the Virginia Ethics Committee held that a criminal defense attorney whose motion to withdraw from representing a criminal defendant was denied by the state court of appeals, but who has a good faith belief that a motion to rehear the defendant's case would be frivolous, has no duty to file further post-trial motions, despite the client's insistence to the contrary.[119]

CONFLICTS –INSURANCE DEFENSE COUNSEL

One of the most common problems in conflict of interest analysis occurs when lawyers represent insureds in tort cases but are asked by insurers in those cases to render coverage advice.[120] Reference should be made to the ABA's formal opinion on the matter.[121] Absent an express agreement to the contrary, an attorney hired by an insurer to represent its insured may properly be construed to have an attorney-client relationship either with the insured alone or with both the insured and the insurer. But in either case, the interests of the insured must be represented with "undivided fidelity." Should the interests of the insured and the insurer come into conflict, the attorney may not proceed with representation of the insured without giving the insured an opportunity to obtain independent counsel. The attorney may also apprise the court of the dispute, and proceed under the direction of the court.[122]

The triangular relationship between an insurance company, its retained defense counsel, and the insured has been the subject of many opinions. At the heart of all of the opinions is determining when an insurance defense lawyer has an impermissible conflict of interest between insurer and insured. The analysis is necessarily *ad hoc*, as each triangular relationship carries its own unique facts and circumstances. Beyond that, the tools for solving the triangular ethical dilemma are contained in Arizona Ethical Rule 1.7 (Conflicts of Interest: General

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[118]San Diego County 1995-2, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1001:1802 (Ethics Opinions 1991-1995).

[119]Va 1530, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1001:8721 (Ethics Opinions 1991-1995).

[120]*See supra* § 7.11 for a more detailed treatment of this issue.

[121]ABA 96-403, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1101:105 (Ethics Opinions 1996).

[122]*Id*. at 109.

Rule), Arizona Ethical Rule 1.8 (Conflicts of Interest: Prohibited Transactions), and Arizona Ethical Rule 1.6 (Confidential Information).

The basic conflict rule in Arizona Ethical Rule 1.7 speaks in terms of "direct adversity." However, many of the problems endemic to insurance defense are founded on "differing interests," whether they be conflicting, inconsistent, or diverse. For an examination of the breadth of this problem, see *In re Mercer.*[123]

The ABA Position circa 1950

The initial question must always be: "Who is the client?" One of the first, and still fundamentally persuasive, answers to this question was provided by the ABA Standing Committee on Professional Conduct in its Formal Opinion 282, issued in 1950.[124] Opinion 282 accepts unequivocally that a lawyer may ethically represent both the insurer and the insured in the defense of a third-party action against the insured. The opinion is predicated upon the initial commonality of interest:

> From an analysis of their respective undertakings [in the insurance contract] it is evident at the outset that a community of interest exists between the company and the insured growing out of the contract of insurance with respect to any action brought by a third person against the insured within the policy limitations. The company and the insured are virtually one in their common interest.[125]

Opinion 282 states clearly that "the essential point of ethics involved is that the lawyer so employed shall represent the insured as his client with undivided fidelity." Beyond the initial commonality of interest, all courts and all opinions subsequent to ABA Formal Opinion 282 share one dogma: If "differing interests" of the insurer and the insured arise, then the lawyer's ethical duty of undivided loyalty to the client is owed only to the insured.

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[123]133 Ariz.391, 652 P.2d 130 (1982). *See also* Matter of Shannon, 179 Ariz. 52, 876 P.2d 548 (1994); General Dynamics Corp. v. Superior Court (Rose), 7 Cal.4th 1164, 876 P.2d 487, 32 Cal.Rptr.2d 1 (1994); *In re* Owens, 144 Ill.2d 372, 581 N.E.2d 633 (1991); *In re* Vrdolyak, 137 Ill.2d 407, 560 N.E.2d 840 (1990); The Florida Bar v. Beach, 675 So.2d 106, 21 Fla. L. Weekly S188 (1996); The Florida Bar v. Della-Donna, 583 So.2d 307, 16 Fla. L. Weekly S419 (1989).

[124]ABA Comm. on Professional Ethics and Grievances, Formal Op. 282 (1950).

[125]*Id*. at 6.

The leading Arizona case on the tri-party relationship is *Parsons v. Continental National American Group.*[126] In *Parsons*, the carrier had denied coverage to its insured based on the intentional act exclusion in the policy. The information regarding the policy defense had been secured by the retained defense lawyer while acting on behalf of the insured in the underlying tort action.

Having secured a favorable verdict against the insured, plaintiff instituted garnishment against CNA after settlement negotiations had proved unfruitful. The same law firm and attorney that had previously represented the insured represented the carrier in the garnishment action. The Arizona Supreme Court ruled that CNA should be estopped to deny coverage and that it had waived reliance upon its intentional act exclusion in the policy because the company had taken advantage of the fiduciary relationship between its agent, the retained defense lawyer, and its insured. The court relied, in part, upon the ABA Committee on Ethics of Professional Responsibility Informal Opinion 949:

> If the firm does represent the insured in the personal injury action, to subsequently reveal to the insurer any information received from the insured for possible use by the insurer in defense of a garnishment proceeding by the injured person, would be a clear violation of [the ethical rules] regarding confidences of a client.[127]

Common to many court decisions is the theorem that, while the insurance company pays for the lawyer, the real client is the insured. Thus, in *American Employers Insurance Co. v. Goble Aircraft Specialties, Inc.*,[128] the court said:

> When counsel, although paid by the casualty company, undertakes to represent the policyholder and files his notice of appearance, he owes to his client, the assured, and an

[126]113 Ariz. 223, 550 P.2d 94 (1976). *See also* Kelly v. Greason (State Report Title: Matter of Kelly), 23 N.Y.2d 368, 244 N.E.2d 456, 296 N.Y.S.2d 937 (1968).

[127]Parsons v. Continental National American Group, 113 Ariz. 223at 226, 550 P.2d 94 at 97 (1976) (citing ABA Comm. on Professional Ethics, Informal Op. 949 (1966)). *Cf.* Horace Mann Ins. Co. v. Barbara B., 4 Cal.4th 1076, 846 P.2d 792, 17 Cal.Rptr.2d 210 (1993); Albert J. Schiff Associates, Inc. v. Flack, 51 N.Y.2d 692, 417 N.E.2d 84, 435 N.Y.S.2d 972 (1980); Waste Management, Inc. v. International Surplus Lines Ins. Co., 144 Ill.2d 178, 579 N.E.2d 322 (1991); Western Cas. & Sur. Co. v. Brochu, 105 Ill.2d 486, 475 N.E.2d 872 (1985); Doe on Behalf of Doe v. Allstate Ins. Co., 653 So.2d 371, 20 Fla. L. Weekly S135 (1995); Tiedtke v. Fidelity & Cas. Co. of New York, 222 So.2d 206 (Fla. 1969).

[128]131 N.Y.S.2d 393 (1954).

> undeviating and single allegiance. His fealty embraces the requirement to produce in court all witnesses, fact and expert, who are available and necessary for the proper protection of the rights of his client. It is immaterial that such procedure increases the cost to the carrier beyond the policy coverage limit.[129]

In *San Diego Navy Federal Credit Union v. Cumis Insurance Society, Inc.,*[130] the insurer notified the insured that it had retained counsel to defend the insured in a third-party lawsuit but under reservation of rights. The California Court of Appeals broadly declared: "A conflict arises once the insurer takes the view a coverage issue is present."[131] The court stated its rationale as follows:

> In the usual tripartite relationship existing between insurer, insured and counsel, there is a single, common interest shared among them. Dual representation by counsel is beneficial since the shared goal of minimizing or eliminating liability to a third party is the same. A different situation is presented, however, when some or all of the allegations in the complaint do not fall within the scope of coverage under the policy. . . . Here, it is uncontested the basis for liability, if any, might rest on conduct excluded by the terms of the insurance policy.[132]

The *Cumis* court concluded that the ethical rules obligated defense counsel to explain to the insured and the insurer the full implications of joint representation where the insurer has reserved its rights to deny coverage. *Cumis* aroused considerable comment from the insurance defense bar. The California Court of Appeals, in *McGee v. Superior Court,*[133] later criticized the *Cumis* court for its "overly broad language." The court in *McGee* held that a reservation of rights by itself did not create a conflict of interest requiring disqualification of the insurer's designated counsel. According to the *McGee* court, the crucial fact in *Cumis* was that the insurer reserved its rights based upon the insured's conduct which, depending on the evidence developed at trial, would affect whether coverage existed. In *McGee,* on the other hand, the

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[129]*Id.* at 401.
[130]208 Cal. Rptr. 494 (Cal. Ct. App. 1984).
[131]*Id.* at 502.
[132]*Id.* at 498.
[133]221 Cal. Rptr. 421 (Cal. Ct. App. 1985).

basis for the reservation of rights was the resident relative exclusion in the insured's automobile policy.

In *Fulton v. Woodford,*[134] the insured sued his insurance defense counsel and the carrier for not settling the underlying wrongful death case against him. The Arizona Court of Appeals held that the insurer's duty of equal consideration to the insured and itself when considering settlement does not arise until it can be reasonably foreseen that the verdict would exceed policy limits. The court also held that, since the attorney was not authorized to settle the case through no fault of his own, he was not guilty of malpractice for failing to settle.

In *Farmers Insurance Co. of Arizona v. Vagnozzi,*[135] the court held that the insurer is bound by the judgment in an underlying claim where it has been given an opportunity to appear on behalf of the insured in the tort suit to protect that common interest. The court noted that an insurance defense attorney owes the insured undeviating allegiance and cannot act as an agent of the insurance company by supplying information detrimental to the insured.

A detailed discussion of the special ethical problems arising out of the insurance defense lawyer's triangular relationship can be found in Volume 53 of the *Insurance Counsel Journal.*[136]

The ABA Position circa 1996

The ABA Ethics Committee updated its 1950 opinion in 1996 with a new formal opinion on the matter: A lawyer hired by an insurer to represent an insured may represent the insured alone or, with appropriate disclosure and consultation, he may represent both the insurer and the insured with respect to all or some aspects of the matter. So long as the insured is a client,

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[134]26 Ariz. App. 17, 545 P.2d 979 (1976). *Cf.* Samson v. Transamerica Ins. Co., 30 Cal.3d 220, 636 P.2d 32, 178 Cal.Rptr. 343 (1981); Commercial Union Assur. Companies v. Safeway Stores, Inc., 26 Cal.3d 912, 610 P.2d 1038, 164 Cal.Rptr. 709 (1980); Soto v. State Farm Ins. Co., 83 N.Y.2d 718, 635 N.E.2d 1222, 613 N.Y.S.2d 352 (1994); U. S. Fidelity and Guaranty Co. v. Copfer, 48 N.Y.2d 871, 400 N.E.2d 298, 424 N.Y.S.2d 356 (1979); Maryland Insurance Company v. Head Industrial Coatings and Services, Inc., Gans & Smith Insurance Agency, 1996 WL 596632, 40 Tex. Sup. Ct. J. 49 (1996); Texas Farmers Ins. Co. v. Soriano, 881 S.W.2d 312 (Tex. 1994); Krutsinger v. Illinois Cas. Co., 10 Ill.2d 518, 141 N.E.2d 16 (1957); Shuster v. South Broward Hosp. Dist. Physicians' Professional Liability Ins. Trust, 591 So.2d 174, 17 Fla. L. Weekly S4 (1992).

[135]138 Ariz. 443, 675 P.2d 703 (1983). *Cf.* J.C. Penney Cas. Ins. Co. v. M.K., 52 Cal.3d 1009, 804 P.2d 689, 278 Cal.Rptr. 64 (1991); Garcia v. Truck Ins. Exchange, 36 Cal.3d 426, 682 P.2d 1100, 204 Cal.Rptr. 435 (1984); Allstate Ins. Co. v. Zuk, 78 N.Y.2d 41, 574 N.E.2d 1035, 571 N.Y.S.2d 429 (1991); First State Ins. Co. v. J & S United Amusement Corp., 67 N.Y.2d 1044, 495 N.E.2d 351, 504 N.Y.S.2d 88 (1986); Williams v. Madison County Mut. Auto. Ins. Co., 40 Ill.2d 404, 240 N.E.2d 602 (1968); State Farm Fire and Cas. Co. v. Gandy, 925 S.W.2d 696, 39 Tex. Sup. Ct. J. 965 (1996); Employers Cas. Co. v. Block, 744 S.W.2d 940 (Tex. 1988).

[136]Mallen, *A New Definition of Insurance Defense Counsel,* 53 INS. COUNSEL J. 108 (1986).

however, the Rules of Professional Conduct--and not the insurance company--govern the lawyer's obligations to the insured. A lawyer hired to defend an insured pursuant to an insurance policy that authorizes the insurer to control the defense and settle within policy limits in its sole discretion must communicate the limitations on his representation of the insured to the insured, preferably early in the representation. After the lawyer has communicated the necessary information to the insured, the lawyer may settle at the direction of the insurer. If a lawyer for an insured knows that the insured objects to a settlement, the lawyer may not settle the claim against the insured at the direction of the insurer, without giving the insured an opportunity to reject the defense offered by the insurer and to assume responsibility for his own defense at his own expense.[137]

CONFLICTS—WAIVER AND INFORMED CONSENT

Lawyers occasionally seek waivers from former clients to represent persons opposed to them in subsequent matters. The Maryland Ethics Committee, however, held that an attorney may represent a father in a child-custody proceeding, although the attorney had previously represented the mother in an unrelated matter and had discussed paternity proceedings against the father with the parents of the mother. The attorney would not, of course, be permitted to use information gained during the representation of the mother to her detriment in the child-custody matter. The Committee further opined that this inability to disclose confidential information acquired during representation of the mother may prevent the attorney from adequately disclosing potential conflicts of interest to the father in order to gain the father's informed consent to representation.[138]

Similarly, the Rhode Island Ethics Committee held that an attorney may represent an existing client in a personal injury case against a party whom the attorney had represented fourteen years earlier in a divorce matter. The Committee held that because the personal injury matter is not the same as or substantially related to the former divorce action, no conflict of

[137]ABA 96-403, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1101:105 (Ethics Opinions 1996).

[138]Md 96-14, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1101:4301 (Ethics Opinions 1996).

interest exists.[139] In a later opinion based upon similar facts, the Rhode Island Ethics Committee held that an attorney who formerly represented a client in a divorce action may represent a furniture company in a lawsuit for defective goods brought by the former divorce client, as long as the two proceedings are not substantially related, but cautioned that the attorney may not use information related to representation of the former client to the detriment of the former client in the present proceeding.[140]

The Bentley Doctrine

The Arizona Supreme Court considered the breadth of client waiver of conflicting interests in *In re Bentley.*[141] The court framed the issue as follows:

> Is it proper for an attorney, after representing one party against a second party and receiving the consent of both parties, to perform legal work for the second party unrelated to the former matter and then later file suit against the second party for and on behalf of the first party?[142]

The court noted that while it is usually improper for an attorney to represent opposing parties simultaneously, it is not always so. Even with full disclosure, however, not all conflicts may be waived by the consent of the parties. The *Bentley* court noted that the problems faced by the attorney illustrated the problems in accepting simultaneous employment from two parties with adverse interests, no matter how well meaning the attorney may be. The court held that the representation was improper notwithstanding the consent of both parties.

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[139]RI 96-04, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1101:7801 (Ethics Opinions 1996).
[140]RI 96-12, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1101:7803 (Ethics Opinions 1996).
[141]141 Ariz. 593, 688 P.2d 601 (1984).
[142]*Id.* at 593, 688 P.2d at 601. *Cf.* Santa Clara County Counsel Attorneys Ass'n v. Woodside, 7 Cal.4th 525, 869 P.2d 1142, 28 Cal.Rptr.2d 617 (1994); Kelly v. Greason 23 N.Y.2d 368, 244 N.E.2d 456, 296 N.Y.S.2d 937 (1968); People v. Gomberg, 38 N.Y.2d 307, 342 N.E.2d 550, 379 N.Y.S.2d 769 (1975); *In re* Barrick, 87 Ill.2d 233, 429 N.E.2d 842 (1981); Turner v. Turner, 385 S.W.2d 230 (Tex. 1964); The Florida Bar v. Ward, 472 So.2d 1159, 10 Fla. L. Weekly 359 (1985).

The Evans Doctrine

In *In re Evans,*[143] an attorney appeared to represent other parties in other matters during the same time he drafted an agreement between his clients and such other parties. The lawyer subsequently brought an action against the other parties on behalf of his clients for an alleged breach of the agreement. The court held that, while the lawyer engaged in professionally improper conduct, there was a respectable division of authority with respect to the impropriety of such conduct, and it did not warrant a censure. The *Evans* court noted that an attorney who prepares an agreement for one party and then sues on behalf of another party attacking the validity of that agreement is guilty of unprofessional conduct. The court commented that an attorney's loyalty to his client is not just a casual obligation to be turned on or off as the dictates of the moment indicate or the particular employment may demand.

CONFLICTS—LAWYER'S PERSONAL INTERESTS

The personal interests of the lawyer should not have any adverse effect on the representation of a client. Arizona Ethical Rule 1.7(b) prohibits representation where the lawyer's own interests materially limit representation of the client. The Comment to Arizona Ethical Rule 1.7 notes that the lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee.[144] If the lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give detached advice.

The general prohibition against lawyers entering into business transactions with clients is set forth in Arizona Ethical Rule 1.8. For lawyers, the more commonly presented problem deals with financial assistance to clients in connection with litigation. Arizona Ethical Rule

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[143]113 Ariz. 458, 556 P.2d 792 (1976). *Cf.* Kapelus v. State Bar of California, 44 Cal.3d 179, 745 P.2d 917, 242 Cal.Rptr. 196 (1987); Chemprene, Inc. v. X-Tyal Intern. Corp., 55 N.Y.2d 900, 433 N.E.2d 1271, 449 N.Y.S.2d 23 (1982); National Medical Enterprises, Inc. v. Godbey, 924 S.W.2d 123, 39 Tex. Sup. Ct. J. 698 (1996); Metropolitan Life Ins. Co. v. Syntek Finance Corp., 881 S.W.2d 319 (Tex. 1994); Swafford v. Dugger, 569 So.2d 1264, 15 Fla. L. Weekly S599 (1990).

[144]*See* ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.1, 1.5 (1983). *Cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101(A), 2-106, 2-107 (1981). *Cf. also* CAL. RULES OF PROFESSIONAL CONDUCT 3-110, 2-200, 4-200.

1.8(e) prohibits lawyers from providing any such financial assistance. However, the lawyer may advance court costs and expenses of litigation as long as the client remains ultimately liable for such costs.[145] An exception is made, however, wherein lawyers are allowed to provide court costs and expenses of litigation for indigent clients.[146]

Whenever a lawyer acquires a lien on a client's property, the requirements of local rules and statutes should be carefully consulted. For example, California Rules of Professional Conduct, Rule 3-300 requires that whenever a lawyer acquires an ownership, possessory, security, or other pecuniary interest adverse to a client three requirements must be met:

> (A) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client; and
> (B) The client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice, and
> (C) The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition.

CONFLICTS—MERITORIOUS CLAIMS AND CONTENTIONS

The ethical code provides a fundamental set of rules dealing with the lawyer's role as an "advocate." Arizona Ethical Rule 3.1 is entitled "meritorious claims and contentions," but it does not contain an affirmative obligation on the part of the lawyer to assert claims or contentions which are "meritorious." Rather, Arizona Ethical Rule 3.1 is phrased in the negative, prohibiting lawyers from bringing or defending proceedings or asserting or controverting issues unless there is a basis for doing so that is "not frivolous." At first glance, the rule seems to indicate that any claim or contention is ethically meritorious as long as it is "not frivolous." The Comment to Arizona Ethical Rule 3.1 notes that the lawyer's duty to use legal

[145] ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.8(e)(1) (1983). *Cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-103(B) (1981). *Cf. also* CAL. RULES OF PROFESSIONAL CONDUCT 3-300.
[146] ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.8(e)(2) (1983).

procedures for the benefit of the client is limited by the duty not to abuse legal procedures. The law, both procedural and substantive, establish the limits within which an advocate may proceed.

The "Not Frivolous" Standard

The Comment to Arizona Ethical Rule 3.1 seeks to describe actions which are "not frivolous." It suggests that the filing of an action or defense is not necessarily frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence solely through discovery. An action is not frivolous even though the lawyer may believe that the client's position ultimately will not prevail. On the other hand, frivolous actions include those which are pursued to harass or maliciously injure other persons. Frivolous actions also include those in which the lawyer is unable either to make a good faith argument on the merits or to argue in good faith for the extension, modification, or reversal of existing law.

One explanation for the lack of an affirmative statement in Arizona Ethical Rule 3.1 is the inherent difficulty in defining a workable standard. Any such affirmative language designed to bar wasteful litigation would almost certainly dampen the incentive to bring potentially worthwhile claims. Arizona Ethical Rule 3.1 avoids a formulaic test for worthwhile claims. In essence, the rule compares frivolous claims to those that are not colorable. In another context, a colorable claim has been described as one that has "some legal and factual support, considered in light of the reasonable beliefs of the individuals making the claim. The question is whether a reasonable attorney could have concluded that facts supporting the claim might be established. . . ."[147]

Questions to be asked include whether bringing the claim is what a hypothetical reasonable practitioner would do in the same circumstances or whether the lawyer's conduct in making the claim is beyond the limit of reason or the bounds of the law.[148] Arizona seems

[147]Nemeroff v. Abelson, 620 F.2d 339, 348 (2d Cir. 1980) (emphasis omitted).

[148]For an illustrative case, *see* Friedman v. Dozorc, 312 N.W.2d 585 (1981). *See also* RESTATEMENT (SECOND) OF TORTS § 657 (1977). *Cf. also* People v. Ledesma, 43 Cal.3d 171, 729 P.2d 839, 233 Cal.Rptr. 404 (1987); Kirsch v. Duryea, 21 Cal.3d 303, 578 P.2d 935, 146 Cal.Rptr. 218 (1978); Greene v. Greene, 47 N.Y.2d 447, 391 N.E.2d 1355, 418 N.Y.S.2d 379 (1979); Cosgrove v. Grimes, 774 S.W.2d 662 (Tex. 1989).

to have established a "reasonable lawyer standard" in determining whether a claim is impermissibly frivolous.[149]

Other jurisdictions have defined a claim as being impermissibly frivolous if it is found, beyond doubt and under no arguable legal or factual constructions, that the claim would not entitle the claimant to relief.[150]

The "Reasonable Lawyer" Standard

Perhaps the leading state court decision in rejecting the "reasonable lawyer" standard is *Friedman v. Dozorc*,[151] in which the Michigan Supreme Court framed the question as being whether the attorney's conduct "was beyond the limits of reason or the bounds of law."[152]

A lawyer "may" refuse a case that he or she believes to be without legal merit. In *Evans v. Commonwealth Department of Public Welfare*,[153] the court held that a legal services attorney had the responsibility to refrain from asserting a fruitless and frivolous legal position. A client had requested representation with regard to a claim for a property tax rebate. She was advised that the claim was untimely and without legal merit and was, therefore, denied representation. The court, after quoting from the Code of Professional Responsibility, concluded that the attorneys were obligated to refuse to advance the client's claim.

A comprehensive presentation of the lawyer's duty to reject groundless litigation was presented in Volume 26 of the *Wayne Law Review*.[154] That presentation begins with an insightful quote from Elihu Root that "about half the practice of a decent lawyer is telling

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[149]*See* Bird v. Rothman, 128 Ariz. 599, 627 P.2d 1097 (Ariz. Ct. App. 1981). *See also* Sheldon Appel Co. v. Albert & Oliker, 47 Cal.3d 863, 765 P.2d 498, 254 Cal.Rptr. 336 (1989); Parkin v. Cornell University, Inc., 78 N.Y.2d 523, 583 N.E.2d 939, 577 N.Y.S.2d 227 (1991); Lee v. City of Mount Vernon, 49 N.Y.2d 1041, 407 N.E.2d 404, 429 N.Y.S.2d 557 (1980); Munoz v. City of New York, 18 N.Y.2d 6, 218 N.E.2d 527, 271 N.Y.S.2d 645 (1966); Freides v. Sani-Mode Mfg. Co., 33 Ill.2d 291, 211 N.E.2d 286 (1965); Fulford v. O'Connor, 3 Ill.2d 490, 121 N.E.2d 767 (1954); Akin v. Dahl, 661 S.W.2d 917 (Tex. 1983); Alamo Rent-A-Car, Inc. v. Mancusi, 632 So.2d 1352, 19 Fla. L. Weekly S20 (1994); City of Pensacola v. Owens, 369 So.2d 328 (Fla. 1979); Glass v. Parrish, 51 So.2d 717 (Fla. 1951).

[150]*See generally* Dolence v. Flynn, 628 F.2d 1280 (10th Cir. 1980); Boyce v. Alizaduh, 595 F.2d 948 (4th Cir. 1979).

[151]312 N.W.2d 585 (Mich. 1981).

[152]*Id.* at 606.

[153]447 A.2d 1119 (Pa. Comm. Ct. 1982).

[154]Pizzimenti, *A Lawyer's Duty to Reject Groundless Litigation*, 26 WAYNE L. REV. 1561 (1980).

would-be clients that they are damned fools and should stop." The above-cited law review article discusses not only the professional remedies for misuse of the legal process but the ineffectiveness of those traditional remedies.

Other writers have carefully concluded the problem of frivolous lawsuits to be the failure of lawyers to "just say no."[155] According to Wesley Cann, attorneys cannot prevent persons from bringing frivolous suits pro se; lawyers, however, must refuse to lend their professional services to promote such suits. In exercising this responsibility, the lawyer must take care to protect the plaintiff's right to his or her day in court. The lawyer must acknowledge that the act of instituting a lawsuit is one of consequence and should not be done indiscriminately. The role of an advocate is not without limitations. The determination whether to represent a particular client includes the duty to decide the tenability of the claim.

CONFLICTS—FORMER CLIENTS

Lawyers must decline a case against a former client if it is either the same or a substantially related matter in which the potential client's interests are materially adverse to the interests of the former client.[156] The lawyer may proceed, however, if the former client consents after consultation.[157] Even if the former client consents, the lawyer cannot use information relating to the representation to the disadvantage of the former client.[158] The Comment to Arizona Ethical Rule 1.9 makes clear that after termination of a client-lawyer relationship, a lawyer may not represent another client except in conformity with Arizona Ethical Rule 1.9.

The origin of ABA Model Rule 1.9 appears in *T.C. Theatre Corp. v. Warner Bros. Pictures, Inc.*[159] There, a theater operator filed a federal antitrust suit against a motion picture distributor. The operator's attorney formerly represented the defendant distributor on an appeal from a government antitrust conspiracy suit based on similar issues. The court disqualified the

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[155]*See, e.g.*, Cann, *Frivolous Lawsuits—The Lawyer's Duty to Say "No,"* 52 U. COLO. L. REV. 367 (1980).

[156]ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.9 (1983). *Cf.* CAL. RULES OF PROFESSIONAL CONDUCT 3-310.

[157]*Id.*

[158]ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.9(b) (1983).

[159]113 F. Supp. 265 (S.D.N.Y. 1953).

plaintiff's lawyer from representation. It held that where any substantial relationship exists between the subject matter of an attorney's former representation and that of a subsequent adverse representation, the latter representation is prohibited. Judge Weinfeld said:

> I hold that the former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client. The Court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation. It will not inquire into their nature and extent. Only in this matter can the lawyer's duty of absolute fidelity be enforced and the spirit of the rule relating to privileged communications be maintained.[160]

Central to post-representation ethical issues is the requirement to avoid conflicts of interest with former clients. With respect to confidential information and conflicting interests, the lawyer-client relationship is ever continuing. Stated differently, the duty to remain loyal to the client does not terminate at the end of the official lawyer-client relationship.

As with other conflict problems, no absolute rule prohibits representation against a former client's interests. Lawyer and client are free to enter into new relationships. It is, however, a freedom which finds restrictions only for weighty reasons. In striking a balance between lawyer/client freedoms and the prohibition against conflicts, Arizona Ethical Rule 1.9 presents a two-part test to guide the lawyer through potential conflict issues.

Arizona Ethical Rule 1.9 states that:

> A lawyer who has formerly represented a client in a matter shall not thereafter:
>
> (a) represent another person in the same or a *substantially related* matter in which that person's interests are *materially adverse* to the interests of the former client unless the former client consents after consultation; or

[160] *Id.* at 268-69.

> (b) use information relating to the representation to the disadvantage of the former client except as Arizona Ethical Rule 1.6 would permit with respect to a client or when the information has become generally known.[161]

Whether a conflict exists depends upon two essential factors: (i) whether the current representation is materially adverse to a former client's interests, and (ii) whether the current matter is substantially related to the former client's interests. Mere adversity with no substantial relationship to the former representation does not disqualify.

For example, nothing should prohibit a lawyer from suing a former client regarding matters entirely unrelated to the former representation. In addition, the presence of a substantial relationship does not disqualify absent material adversity. A lawyer who successfully litigated a matter on behalf of a flood victim against the City of Phoenix is not prohibited from representing another flood victim arising out of the same subject accident.

The "Substantially Similar/Materially Adverse" Test

In applying the substantially similar/materially adverse test, courts look to the factual and legal contexts of the two representations. If factual and legal issues are similar and require a posture that is adverse to the former representation, then the test is satisfied and a conflict is recognized.[162] The Seventh Circuit Court of Appeals offers more substance to the general analysis, employing a three-pronged test in determining whether matters are related and adverse. The test asks: (i) What was the scope of the prior representation? (ii) Is it reasonable to infer that confidential information would have been given to a lawyer representing a client in those matters? and (iii) Is that information relevant to the issues raised in the pending litigation?[163]

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[161]ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.9 (1983). *Cf.* CAL. RULES OF PROFESSIONAL CONDUCT 3-310.

[162]*See, e.g.,* T.C. Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265 (S.D.N.Y. 1953), *as discussed in* Alexander v. Superior Court, 141 Ariz. 157, 685 P.2d 1309 (1984); *see also* Atasi Corp. v. Seagate Technology, 847 F.2d 826, 829 (Fed. Cir. 1988) (interpreting Ninth Circuit law); Haagen-Dazs Co. v. Perche No! Gelato, Inc., 639 F. Supp. 282, 285-86 (N.D. Cal. 1986).

[163]Novo Terapeutisk Lab. A/S v. Baxter Travenol Lab., Inc., 607 F.2d 186, 190 (7th Cir. 1979).

Regardless of the test employed, where a conflict with a former client exists, representation is allowed only if the former client consents to the representation after full disclosure.[164] Not all conflicts can be waived. A lawyer cannot properly seek consent if a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances.[165] The lawyer should consider the likely prejudice the former client will face if former confidences will be used in a detrimental fashion.

Of course, if the client consents to the subsequent representation, the lawyer is strictly prohibited from using confidential information to the former client's detriment.[166] This prohibition is often missed by the inquiring lawyer, neglecting the "or" separating Arizona Ethical Rule 1.9(a) from subpart (b). If continuing in a case will tempt the lawyer to use confidential information to the former client's detriment, representation is prohibited. Arizona Ethical Rule 1.9(b) does not apply if the confidentiality has been waived or the information has become generally known.[167]

If two successive matters of representation are deemed substantially similar and materially adverse, there is a presumption that the lawyer learned material, confidential information and should not be allowed to represent a client in the related matter.[168] The lawyer may, however, rebut such a presumption. Arizona employs a sliding scale approach for analyzing potential former client conflicts where lawyers change firms.[169] The smaller the former firm and the more prominent the role of the lawyer in that firm, the more likely it is that the lawyer cannot rebut the presumption that confidences were exchanged. Conversely, the larger the firm and the smaller the lawyer's role, the more likely the lawyer can prove no confidences where shared.[170]

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[164]ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.9(a) (1983).

[165]ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.7 cmt. (1983).; *In re* Bentle 41 Ariz 93, 596, 688 P.2d 601, 604 (1984) (noting that not all conflicts can be waived by consent).

[166]ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.9(b) (1983).

[167]ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.9 cmt. (1983).

[168]*T.C. Theatre Corp.*, *supra*, as discussed in Alexander v. Superior Court, 141 Ariz. 157, 685 P.2d 1309 (1984). *See also* Flatt v. Superior Court (Daniel), 9 Cal.4th 275, 885 P.2d 950, 36 Cal.Rptr.2d 537 (1994); Santa Clara County Counsel Attorneys Ass'n v. Woodside, 7 Cal.4th 525, 869 P.2d 1142, 28 Cal.Rptr.2d 617 (1994); Solow v. W.R. Grace & Co., 83 N.Y.2d 303, 632 N.E.2d 437, 610 N.Y.S.2d 128 (1994); Greene v. Greene, 47 N.Y.2d 447, 391 N.E.2d 1355, 418 N.Y.S.2d 379 (1979); People v. Lackey, 79 Ill.2d 466, 405 N.E.2d 748 (1980); People v. Robinson, 79 Ill.2d 147, 402 N.E.2d 157 (1979); P & M Elec. Co. v. Godard, 478 S.W.2d 79 (Tex. 1972); Mandell and Wright v. Thomas, 441 S.W.2d 841 (Tex. 1969); The Florida Bar v. Moore, 194 So.2d 264 (Fla. 1966).

[169]Bicas v. Superior Court, 116 Ariz. 69, 73, 567 P.2d 1198, 1202 (Ariz. Ct. App. 1977).

[170]*Id. See also* Connor v. State Bar of California, 50 Cal.3d 1047, 791 P.2d 312, 269 Cal.Rptr. 742 (1990);

Inapplicability of the "Substantially Similar/Materiality Adverse" Test

Interestingly, Arizona and other courts have applied a twist to the application of Model Rule 1.9. If it is proved that the lawyer did not obtain any confidential information, then the "substantially similar/materially adverse" test is inapplicable and the lawyer is free to undertake the subsequent representation.[171] Hence, the entire purpose behind Arizona Ethical Rule 1.9 is the protection of confidential information. If no confidences or secrets were exchanged, it is not a conflict to represent a new client in a substantially related matter adverse to a former client.

Aside from the prohibitions contained in Arizona Ethical Rule 1.9, the lawyer is cautioned to avoid any "appearance of impropriety" when seeking to represent a client in a matter adverse to a former client.[172] Although that principle from the Code of Professional Responsibility (DR 9-101) does not appear in the "new" Arizona Ethical Rules of Professional Conduct, it has been retained, at least in conflict of interest cases. Justice Cameron characterized the "avoidance of impropriety" principle in conflict cases with the following:

> It would appear, however, that "appearance of impropriety" however weakened by case law and its omission in the new Rules of Professional Conduct, survives as a part of conflict of interest and an appearance of impropriety should be enough to cause an attorney to closely scrutinize his conduct. It does not necessarily follow that it must disqualify him in every case.

Solow v. W.R. Grace & Co., 83 N.Y.2d 303, 632 N.E.2d 437, 610 N.Y.S.2d 128 (1994); Greene v. Greene, 47 N.Y.2d 447, 391 N.E.2d 1355, 418 N.Y.S.2d 379 (1979); Cardinale v. Golinello, 43 N.Y.2d 288, 372 N.E.2d 26, 401 N.Y.S.2d 191 (1977); Phoenix Founders, Inc. v. Marshall, 887 S.W.2d 831, 38 Tex. Sup. Ct. J. 12 (1994); Castro v. State, 597 So.2d 259, 17 Fla. L. Weekly S177 (1992).

[171]Alexander v. Superior Court, 141 Ariz. 157, 685 P.2d 1309 (1984); *see also* Christensen v. United States District Court, 844 F.2d 694, 699 (9th Cir. 1988).

[172]*Alexander*, *supra* (avoiding appearance of impropriety may be used to remove a lawyer from representation if it is a "close call" with respect to a disqualifying conflict of interest). *See also* People ex rel. Clancy v. Superior Court (Ebel), 39 Cal.3d 740, 705 P.2d 347, 218 Cal.Rptr. 24 (1985); Matter of Abrams, 62 N.Y.2d 183, 465 N.E.2d 1, 476 N.Y.S.2d 494 (1984); Schumer v. Holtzman, 60 N.Y.2d 46, 454 N.E.2d 522, 467 N.Y.S.2d 182 (1983); Henderson v. Floyd, 891 S.W.2d 252, 38 Tex. Sup. Ct. J. 166 (1995); Spears v. Fourth Court of Appeals, 797 S.W.2d 654 (Tex. 1990); Damon v. Cornett, 781 S.W.2d 597 (Tex. 1989); Ex parte Ramsey, 642 S.W.2d 483 (Tex. 1982).

> Where the conflict is so remote that there is insufficient appearance of wrongdoing, disqualification is not required.[173]

Conflicts of interest have generated an abundance of commentary and litigation all aimed at defining the meaning of "substantially related/material adverse." Unfortunately, however, such terms are doomed with inherent ambiguity and the authorities cannot adequately establish hard and fast rules for guidance. Thus, the lawyer is simply advised to consult the language of Arizona Ethical Rule 1.9 and exercise reasonable judgment. As with many areas of legal ethics, where the rule is ambiguous and the dilemma is at hand, the best resolution resides in the "cautious corner" of the lawyer's judgment.

CONFLICTS—THE "APPEARANCE OF IMPROPRIETY"

Prior to February 1, 1985, Arizona lawyers were ethically cautioned against a wide variety of activities that may have had the "appearance of impropriety." The "old" Canon 9 stated that "a lawyer should avoid even the appearance of professional impropriety." DR 9-101 of the former Arizona Code of Professional Responsibility set forth three specific situations in which lawyers were mandated to avoid "even the appearance of impropriety."

The "new" Arizona Ethical Rules of Professional Conduct deleted the references to avoiding the "appearance of impropriety" and deleted the substance of DR 9-101(B).

While the Arizona Supreme Court adopted the Arizona Ethical Rules of Professional Conduct, it has retained the concept, at least in conflict of interest cases.[174] In *Gomez*, Justice Cameron noted that the prohibition against the "appearance of impropriety" was not always strictly or evenly applied, especially when there was an absence of actual unethical conduct.[175] Justice Cameron also noted:

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[173]Gomez v. Superior Court, 149 Ariz. 223, 225, 717 P.2d 902, 904 (1986). *See, e.g., In re* Evans, 113 Ariz. 458, 556 P.2d 792 (1976) (refusing to allow a lawyer to sue a former client even though he did not receive confidential information, because a lawyer should avoid even the appearance of impropriety). *See also* Bates v. State Bar of California, 51 Cal.3d 1056, 800 P.2d 859, 275 Cal.Rptr. 381 (1990); Lefner v. State Bar, 64 Cal.2d 189, 410 P.2d 832, 49 Cal.Rptr. 296 (1966); *In re* Gottlieb, 109 Ill.2d 267, 486 N.E.2d 921 (1985); *In re* Scarnavack, 108 Ill.2d 456, 485 N.E.2d 1 (1985); Board of Law Examiners of State v. Stevens, 868 S.W.2d 773 (Tex. 1994); The Florida Bar v. Moses, 380 So.2d 412 (Fla. 1980); The Florida Bar v. Wagner, 212 So.2d 770 (Fla. 1968).

[174]*See* Gomez v. Superior Court, 149 Ariz. 223, 717 P.2d 902 (1986).

[175]*Id.* at 225, 717 P.2d at 904.

> It would appear, however, that "appearance of impropriety", however weakened by case law and its omission in the new Rules of Professional Conduct, survives as a part of conflict of interest and an appearance of impropriety should be enough to cause an attorney to closely scrutinize his conduct. It does not necessarily follow that it must disqualify him in every case. Where the conflict is so remote that there is insufficient appearance of wrongdoing, disqualification is not required.[176]

CONFLICTS—SPOUSAL OR FAMILY CONFLICTS

Prior to February 1, 1985, the "old" Code of Professional Responsibility was silent on the potential conflict created by lawyers related to one another who find themselves on opposite sides of litigation. There were many ethics opinions and court cases on the subject, all of which, for the most part, have been supplemented by Arizona Ethical Rule 1.8(i).

> A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.[177]

This rule applies to related lawyers who are in different law firms. Related lawyers in the same firm are governed by Arizona Ethical Rule 1.7, 1.9, and 1.10. The disqualification stated in Arizona Ethical Rule 1.8(i) is personal and is not imputed to members with whom the lawyers are associated.[178]

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[176]*Id. See also* Bates v. State Bar of California, 51 Cal.3d 1056, 800 P.2d 859,275 Cal.Rptr. 381 (1990); *In re* Abbamonto, 19 Ill.2d 93, 166 N.E.2d 62 (1960); *In re* Fisher, 15 Ill.2d 139, 153 N.E.2d 832 (1958); Board of Law Examiners of State v. Stevens, 868 S.W.2d 773 (Tex. 1994); The Florida Bar v. Wagner, 212 So.2d 770 (Fla. 1968); State ex rel. Florida Bar v. Calhoon, 102 So.2d 604 (Fla. 1958).

[177]ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.8(i) (1983). *Cf.* CAL. RULES OF PROFESSIONAL CONDUCT 3-320.

[178]*See* ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.10(a) (1983) for the extent of imputed disqualification for any reason. *Cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(D) (1981).

CONFLICTS—LIENS FOR FEES AND COSTS

Whether an attorney may assert a lien against a client to collect a fee is a question of law and is thus not typically addressed in the ethical rules or the opinions of Ethics Committee.[179] The Pennsylvania Ethics Committee, however, held that an attorney may levy either a charging lien or a retaining lien in appropriate circumstances. A charging/ retaining lien may be either equitable (lien attaches to fund in the court's possession to be applied only to a particular case) or legal (lien attaches to client funds under attorney's control to be applied to all outstanding debts owed to attorney). A charging lien may not be levied for an amount greater than that expected to be paid to the attorney. The Committee noted that such a charging lien creates a conflict of interest between representation of the client and collection of the legal fee. The attorney must consequently advise the client to obtain outside counsel and wait an appropriate amount of time before attempting to enforce the lien in court. A retaining lien permits the attorney, however, to retain client property that it is the attorney's possession as security for payment of the lien. The Committee noted that the potential for conflict of interest is much more acute in this situation. Although the attorney may not "substantially prejudice" the client's interests, the lien may be used to encourage or embarrass the client into paying the fee.[180]

The Alaska Ethics Committee considered the related subject of valid third-party liens against client funds in attorney's possession.[181] The Committee ruled that the attorney must withhold the funds, even against client instruction to the contrary, and unless the dispute is settled, deposit the funds with the court for disposition by a judge.

The Florida Ethics Committee opined that an attorney may not arrange loans to personal injury claimants based on the attorney being trustee for the proceeds of the claim and the attorney's agreement to repay the loan from the proceeds.[182] The Committee further noted that regular referrals by the attorney to the loan company effectively provide impermissible

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[179]Nassau County, NY 92-20, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1001:6257 (Ethics Opinions 1991-1995).

[180]Pa 94-35, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1001:7338 (Ethics Opinions 1991-1995). *See also* Pa 94-63, *id*. at 7340.

[181]Alaska 92-3, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1001:1302 (Ethics Opinions 1991-1992).

[182]Fla 92-6, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1001:2503 (Ethics Opinions 1991-1995).

financial assistance to clients. Moreover, such an arrangement could compromise the attorney/client relationship if the client's share of the proceeds were fully advanced prior to settlement of their claim--the client having less incentive to pursue the claim absent the prospect of a further award. The Committee also remarked on the possible conflict of interest that would arise for the attorney should there be a dispute between the financing company and the client.

The Illinois Ethics Committee ruled that an attorney may not advance funds for a client's personal injury surgery to a hospital requiring a deposit prior to the operation.[183] Although an attorney is permitted to advance the cost of a medical examination when necessary for litigation, an attorney is not permitted to pay living or medical expenses as litigation expenses.

Advancing Costs

The advancement of "costs" has been the subject of at least three Arizona Supreme Court decisions.[184]

The *Stewart* court outlined several justifications for the prohibition against advancing or guaranteeing financial assistance to a client in connection with contemplated or pending litigation. The court noted that advances of living costs to a disabled client are similar to advances on account of a prospective client. The court also likened the advancement of living expenses to a lawyer's acquisition of a proprietary interest in the cause of action. Such acquisitions are ethically prohibited because they may lead to the attorney placing his or her own recovery ahead of the client. The *Stewart* court noted that under such circumstances the lawyer may urge a settlement which would be to his best interest but not to the best interests of the client.

The *Carroll* court specifically dealt with a contingency fee arrangement which relieved the client of the obligation to repay the lawyer for costs and expenses advanced unless money was recovered through judgment. The court held that this violated the rule prohibiting lawyers

[183]Ill 95-6, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1001:3019 (Ethics Opinions 1991-1995). *See also* Ky E-375, *id.* at 3905.

[184]*In re* Stewart, 121 Ariz. 243, 589 P.2d 886 (1979); *In re* Carroll, 124 Ariz. 80, 602 P.2d 461 (1979); *In re* Bowen, 144 Ariz. 92, 695 P.2d 1130 (1985).

from advancing expenses of litigation unless the client remained ultimately liable for the expenses.

More recently, the *Bowen* court held that advancing financial assistance to clients in lawsuits warranted censure of the lawyer.

Retaining Liens

At the end of the lawyer-client relationship, the lawyer often has property belonging to the client. Such property may be in the form of monies collected from an adversary, personal papers, records, files, and other property used by the lawyer in effectuating representation. At all times during representation, the lawyer is charged with the duty of safekeeping this property, either on behalf of the client or on behalf of third persons.[185]

Specifically, Arizona Ethical Rule 1.15 states that the lawyer must maintain client funds and property separate from the lawyer's own property and ensure that it is properly earmarked and protected. With respect to funds belonging to the client, the lawyer must maintain a separate trust account subject to various other regulations. If requested, a lawyer is required to "promptly deliver to the client . . . any funds or other property that the client . . . is entitled to receive."[186] Finally, if there is a dispute about what property the client is entitled to, the lawyer must retain such disputed property in trust until the matter is resolved.[187]

The language of Arizona Ethical Rule 1.15 clearly states that the lawyer has a duty to return property that the client is *entitled to receive.* At the end of the representation and where a fee dispute has arisen, the client may not be legally entitled to certain property. As a general rule, the client is not entitled to any property subject to a legally valid retaining lien asserted by the lawyer.[188] This rule of law, although seemingly ethically repugnant, allows the lawyer to hold certain papers, files, and other property hostage until the client pays his or her legal

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[185]ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.15 (1983). *Cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 9-102 (1981). *Cf. also* CAL. RULES OF PROFESSIONAL CONDUCT 4-100.

[186]ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.15(b) (1983). *Cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 9-102(B)(1) (1981). *Cf. also* CAL. RULES OF PROFESSIONAL CONDUCT 4-100.

[187]ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 3.7(c) (1983). *Cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101, 5-102 (1981). *Cf. also* CAL. RULES OF PROFESSIONAL CONDUCT 5-210.

[188]National Sales & Service Co. v. Superior Court, 136 Ariz. 544, 667 P.2d 738 (1983). *See also* Hoke v. Ortiz, 83 N.Y.2d 323, 632 N.E.2d 861, 610 N.Y.S.2d 455 (1994); Lai Ling Cheng v. Modansky Leasing Co., Inc., 73 N.Y.2d 454, 539 N.E.2d 570, 541 N.Y.S.2d 742 (1989); People v. Keeffe, 50 N.Y.2d 149, 405 N.E.2d 1012, 428 N.Y.S.2d 446 (1980); Burnett v. State, 642 S.W.2d 765 (Tex. 1982).

fees.[189] The one qualifier is that the retaining lien cannot attach to property necessary in asserting the client's best interests. For example, the lawyer would be prohibited from asserting a retaining lien on papers that were necessary as trial exhibits in furthering the client's representation. Here, the lawyer's duty of zealous and loyal representation cannot be compromised, or the client's legal interests prejudiced, by asserting a lien against property inimical to the representation.[190]

At the other end of the spectrum, a retaining lien could certainly be asserted upon the lawyer's notes, briefs, files, and other documents generated in the scope of representation. Work product belongs to the lawyer and may properly support a retaining lien during a fee dispute. In addition, the lawyer may assert a retaining lien upon property in his or her possession that is not subject to the representation.[191]

Outside of the context of retaining liens and holding property that is in dispute, there are no other situations where a lawyer may ethically withhold property belonging to the client. Hence, once fees are collected and the lien dissolves, the lawyer must return retained property to the client. This includes turning over the client's file if so requested.[192] Typically, the client is entitled to pleadings, original papers belonging to the client, correspondence of the opposing counsel, and letters from the client to the lawyer.[193]

At times, the lawyer may possess client property subject to a third- party lien. Ethically, and often legally, the lawyer must comply with third-party liens and surrender such property to the third party.[194] Arizona Ethical Rule 1.15 requires the lawyer to promptly surrender

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[189]*See* Ariz. Ethics Op. 92-1 (Mar. 12, 1992) [the Committee reasoned that lawyer may ethically assert legal retaining lien, hence withholding client's property; no opinion as to legality of the lien was given]; Minn 13, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 901:5001 (Ethics Opinions 1986-1990) [attorney may charge former client costs of reproducing client papers if the charges are reasonable and the client agreed to such charges in writing prior to termination of representation, but the attorney may not condition return of client papers or property on payment of reproduction costs or payment of legal fees]; Mich RI-203, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1001:4774 (Ethics Opinions 1991-1995) [attorney may not exercise a retaining lien against return of client papers or property].

[190]*See* ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.16(d) cmt. (1983).; *see also* National Sales & Service Co. v. Superior Court, 136 Ariz. 544, 667 P.2d 738 (1983).

[191]*National Sales & Service,* 136 Ariz. 544, 667 P.2d 738.

[192]Ariz. Ethics Op. 81-32 (Nov. 2, 1981) at 4 (lawyer must return client files and papers if fees are paid; the attorney's "work papers," however, need not be surrendered to the client since they are not the property of the client).

[193]STATE BAR OF ARIZONA, MANUAL ON PROFESSIONALISM 51 (1993).

[194]*See, e.g.*, United States v. Limbs, 524 F.2d 799 (9th Cir. 1975) (under Federal Employees' Compensation Act, lawyer has an explicit duty to reimburse federal government before client is paid settlement proceeds); *see also* ARIZ. REV. STAT. ANN. § 33-931 (health care provider lien statute).

property belonging to a third party. If the lawyer is convinced that a third party holds a legally valid lien interest in settlement proceeds, ethically, the lawyer should remit the portion of the funds belonging to the lienholder.[195] If the lawyer is unsure of the third-party lienholder's right to the property, the lawyer should hold the subject property in trust until the lien dispute is resolved. Moreover, if the third-party lienholder and the client cannot resolve their dispute informally, the lawyer should, after a reasonable period of time, initiate an interpleader or other formal action to resolve the dispute.[196]

The rights of a third-party lienholder and the obligations of the representing lawyer were considered by the Arizona Ethics Committee.[197] In that opinion, the inquiring attorney represented a client in a matter in which the client was previously represented by another lawyer. The previous lawyer demanded certain papers contained in the original file, which was then in the possession of the inquiring attorney. The Committee held that the inquiring attorney had no obligation to surrender property to the former lawyer because the former lawyer did not assert a valid retaining lien. The Committee reasoned in passing that, had the former lawyer asserted a valid retaining lien, the inquiring lawyer might have had an obligation to surrender property subject to the lien of the former lawyer. If the inquiring lawyer believed that the former lawyer had legal right to the property under a retaining lien, he would be obligated to surrender such property to the former lawyer.[198]

CONFLICTS—FEES PAID BY THRID PARTIES

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[195]RI 95-60, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1101:7801 (Ethics Opinions 1996) [attorney not permitted to withhold reimbursement funds from a settlement award to a client's health insurer if insurer has a legally enforceable interest in the settlement funds, even though attorney is requested to so withhold by the client and the attorney has no contractual obligation to pay the insurer].

[196]Ariz. Ethics Op. 88-06 (July 5, 1988) at 3; *but see In re* Cassidy, 432 N.E.2d 274 (Ill. 1982) (court declined to discipline lawyer for holding funds in trust that were subject to a third-party lien; lawyer held funds for over two years, hoping lienholder's rights would expire and his client would then be entitled to monies). *See also* Md 96-16, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1101:4302 (Ethics Opinions 1996) [attorney may not distribute any portion of settlement award claimed by third party under a subrogation right to the client, if client executed an Authorization and Assignment authorizing payment to the third party prior to the settlement, but now refuses to authorize the distribution. Attorney must hold funds until dispute is resolved, and may commence an interpleader action. Absent resolution to the dispute, attorney may disperse funds to the client, provided the third party has been notified of attorney's receipt of the settlement].

[197]Ariz. Ethics Op. 92-1 (Mar. 12, 1992).

[198]*Id*. at 3-4; *see also* Ariz. Ethics Op. 88-02 (Jan. 11, 1988).

Lawyers are prohibited by Arizona Ethical Rule 1.8(f) from accepting compensation for representing clients from anyone other than the client unless (i) the client consents after consultation; (ii) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (iii) information relating to representation of a client is protected as required by Arizona Ethical Rule 1.6, Confidentiality of Information.

In one of its earliest opinions, the ABA Ethics Committee dealt with the problem presented when the employer's lawyer was asked to prepare settlement papers resolving a dispute between the employer and an employee in a personal injury claim.[199] The lawyer proposed to submit a joint petition for approval of the settlement to the court in spite of the fact that the employee was not represented by counsel. The ABA held that it would be professionally proper for the lawyer to submit the joint petition as long as he advised the court that he represented the employer, that the employee was not represented, and that the employee was present in court *in propria persona*.

The New Hampshire Ethics Committee opined that an attorney may arrange with an insurance company to defend a number of insureds for a fixed fee per case to be paid by the insurer. Consent by the insured to such an arrangement is either not required or is implicitly provided by the terms of the insurance policy. If there is a material possibility that this fee arrangement might have a financial impact on the insured, however, the insurer may be obliged to disclose it to the insured.[200]

CONFLICTS—LAW REFORM ACTIVITY

One of the most common ethical dilemmas presented to the lawyer is the request to represent multiple clients in litigation. Joint representation presents an ethical dilemma only where the multiple clients will or may take differing positions in the lawsuit. According to the Comment to Arizona Ethical Rule 1.7, the touchstone must be client loyalty.[201] If a conflict of interest clearly exists before representation, the representation should be declined.[202] If an

[199]ABA Comm. on professional Ethics and Grievances, Formal Op. 102 (1933).
[200]NH 1990-91/5, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1001:5701 (Ethics Opinions 1991-1995).
[201]ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.7 cmt. (1983).
[202]*Id.*

impermissible conflict arises after representation has been undertaken, the lawyer should withdraw from the representation.[203] Where multiple representation has been accepted and the lawyer determines that withdrawal is necessary as to one of the clients, Arizona Ethical Rule 1.9 helps determine whether the lawyer may continue to represent one or more of the remaining clients.

A broad exception to the multiple client conflict of interest rule stated in Arizona Ethical Rule 1.7 is the "law reform activity" of Arizona Ethical Rule 6.4. Lawyers may serve as directors, officers, or members of organizations involved in reforming the law or its administration even where such reform may affect the interests of a particular client.[204] When the lawyer knows that the interests of one client may be materially benefited by a decision in which the lawyer participates, the lawyer must disclose that fact but need not identify the client.[205]

CONFLICTS—WITHDRAWAL FROM REPRESENTATION

It is axiomatic that a lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest, and to completion.[206] There are three interrelated ethical issues inherent in a lawyer's withdrawal from a case or disqualification in a pending case: (i) discharge by the client; (ii) permissive withdrawal by the lawyer; and (iii) mandatory withdrawal.

Discharge By Client

The inherent right of the litigation client to discharge the lawyer is obliquely stated in Arizona Ethical Rule 1.16(a)(3). In accordance with this rule, lawyers should not represent clients in any manner where the lawyer has been discharged by the client. A lawyer may limit the scope of the representation in a litigation matter under Arizona Ethical Rule 1.2. However,

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[203]*See* ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.16 (1983). *Cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-109, 2-110 (1981). *Cf. also* CAL. RULES OF PROFESSIONAL CONDUCT 3-700.

[204]ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 6.4 (1983).

[205]*Id.*

[206]ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.16 cmt. (1983).

a lawyer may not ask that a litigation client surrender his or her right to terminate the lawyer's services.[207] The client's right to discharge the lawyer at any time, with or without cause, is expressly set forth in the Comment to Arizona Ethical Rule 1.16. Nevertheless, the client may be held liable to pay for the lawyer's services.[208] Where a future dispute about the client discharge may be anticipated, it is advisable to prepare a written statement reciting the circumstances.[209]

Whether a client can discharge an appointed counsel may depend on applicable law.[210] Clients seeking discharge of appointed counsel should be given a full explanation of the consequences by the lawyer.[211] "These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring the client to represent himself."[212]

Disqualification by Opponent

Ever present is the problem of an opponent's effort to disqualify the adversary's chosen trial counsel. In *Alexander v. Superior Court,*[213] the lawyer had undertaken the representation of both the buyers and sellers of greyhound racing dogs in a tax court case. The substance of the case challenged the Internal Revenue Service decision to deny various investment credits and deductions claimed by the dogs' purchasers.

Subsequently, the State of Arizona filed an action against the seller of the dogs, alleging various violations of the Arizona Securities Act, the Arizona Consumer Fraud Act, and the Arizona Racketeering Act. The State of Arizona moved to disqualify the sellers' lawyers because the lawyers represented both the buyers and the sellers in the tax court case. The trial court granted the state's motion for disqualification and the sellers petitioned the Arizona Supreme Court by special action. The Arizona Supreme Court held that the lawyers could no

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[207] ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.2 cmt. (1983).
[208] ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.16 cmt. (1983).
[209] *See* ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.16 cmt. (1983).
[210] *Id.*
[211] *Id.*
[212] *Id.*
[213] 141 Ariz. 157, 685 P.2d 1309 (1984).

longer represent the purchasers in the tax court case, but that there was no conflict of interest to warrant disqualification of continued representation of the sellers in the state court action.

The *Alexander* court reasoned that "[o]nly in extreme circumstances should a party to a lawsuit be allowed to interfere with the attorney-client relationship of his opponent."[214] The burden should be upon the moving party to show sufficient reason why an attorney should be disqualified from representing a client, and, wherever possible, the courts should endeavor to reach a solution that is least burdensome to the client.[215]

The court noted also that the state was not entitled to disqualification of trial counsel based solely upon the "appearance of impropriety."[216]

> We believe that the court, when considering a motion for disqualification based upon the appearance of impropriety, should consider the following: (1) whether the motion is being made for the purposes of harassing the defendant, (2) whether the party bringing the motion will be damaged in some way if the motion is not granted, (3) whether there are any alternative solutions, or is the proposed solution the least damaging possible under the circumstances, and (4) whether the possibility of public suspicion will outweigh any benefits that might accrue due to continued representation. After answering these questions, we do not believe the State's motion should be granted.[217]

Two earlier Arizona cases, when casually reviewed, appear to conflict with the decision in *Alexander v. Superior Court*. The *Alexander* court distinguished both *In re Evans*[218] and *Bicas v. Superior Court*.[219] It noted that *Evans* was a disciplinary case, not a disqualification

[214]*Id.* at 161, 685 P.2d at 1313.
[215]*Id.*
[216]*Id.* at 165, 685 P.2d at 1317.
[217]*Id. See generally*: People ex rel. Clancy v. Superior Court (Ebel), 39 Cal.3d 740, 705 P.2d 347, 218 Cal.Rptr. 24 (1985); Matter of Abrams, 62 N.Y.2d 183, 465 N.E.2d 1, 476 N.Y.S.2d 494 (1984); Schumer v. Holtzman, 60 N.Y.2d 46, 454 N.E.2d 522, 467 N.Y.S.2d 182 (1983); Henderson v. Floyd, 891 S.W.2d 252, 38 Tex. Sup. Ct. J. 166 (1995); Spears v. Fourth Court of Appeals, 797 S.W.2d 654 (Tex. 1990); Damon v. Cornett, 781 S.W.2d 597 (Tex. 1989); Ex parte Ramsey, 642 S.W.2d 483 (Tex. 1982).
[218]113 Ariz. 458, 556 P.2d 792 (1976).
[219]116 Ariz. 69, 567 P.2d 1198 (Ariz. Ct. App. 1977).

case.[220] Further, the *Evans* case involved "confusion concerning the existence of an attorney-client relationship,"[221] an impairment the *Alexander* case did not suffer.

Bicas arose from a disqualification action which centered upon the possible revelation of client confidences, an issue not present in *Alexander*. The *Bicas* court noted that an "attorney must avoid not only the fact, but even the appearance of representing conflicting interests."[222] Because the lawyer "might" have acquired information from the former representation which related to the action in question, the *Bicas* court upheld disqualification of the lawyer. Since that was not the case in *Alexander,* the court declined to apply *Bicas.*[223]

Permissive Withdrawal

The relationship between a lawyer and a litigation client is, of course, consensual. The relationship is grounded in the law of both contract and agency, and is fiduciary in nature. The lawyer's fiduciary obligations regarding permissive withdrawal are found in Arizona Ethical Rule 1.16(b). Permissive withdrawal from representing a litigation client is allowed only if it can be accomplished without material, adverse effect to the interest of the client.[224] The lawyer is also permitted to withdraw under the following six circumstances: (i) the client persists in actions thought to be criminal or fraudulent;[225] (ii) the client is using the lawyer's services to

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[220]*Alexander*, 141 Ariz. at 166, 685 P.2d at 1318.

[221]*Id*.

[222]*Bicas*, 116 Ariz. at 73, 567 P.2d at 1202. *See also* Flatt v. Superior Court (Daniel), 9 Cal.4th 275, 885 P.2d 950, 36 Cal.Rptr.2d 537 (1994); Santa Clara County Counsel Attorneys Ass'n v. Woodside, 7 Cal.4th 525, 869 P.2d 1142, 28 Cal.Rptr.2d 617 (1994); People v. Davis, 48 Cal.2d 241, 309 P.2d 1 (1957); Solow v. W.R. Grace & Co., 83 N.Y.2d 303, 632 N.E.2d 437, 610 N.Y.S.2d 128 (1994); Greene v. Greene, 47 N.Y.2d 447, 391 N.E.2d 1355, 418 N.Y.S.2d 379 (1979); People v. Lackey, 79 Ill.2d 466, 405 N.E.2d 748 (1980); People v. Robinson, 79 Ill.2d 147, 402 N.E.2d 157 (1979); *In re* LaPinska, 72 Ill.2d 461, 381 N.E.2d 700 (1978); Employers Cas. Co. v. Tilley, 496 S.W.2d 552 (Tex. 1973); The Florida Bar v. Moore, 194 So.2d 264 (Fla. 1966).

[223]*Alexander*, 141 Ariz. at 166, 685 P.2d at 1318.

[224]ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.16(b) (1983). *Cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(C) (1981). *Cf. also* CAL. BUS. & PROF. CODE §6217.

[225]ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.16(b)(1) (1983). *See, e.g.,* State Bar of Ariz., Comm. on Rules of Professional Conduct, Ariz. Ethics Opinions, Op. 78-16 (Apr. 13, 1978) (if lawyer was assured of collusion between the insured and the plaintiff to defraud the insurer, then lawyer should withdraw); Willy v. Coastal Corp., 647 F. Supp. 116 (S.D. Tex. 1986) (lawyer need only believe that client intends to commit illegal act); *In re* Austern, 524 A.2d 680 (D.C. Ct. App. 1987) (client funded escrow account, established to induce settlement, with worthless check); *see also* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 9.5.2 (1986) (withdrawal because of client's fraud permits lawyer to protect his or her professional and personal reputation).

perpetrate a crime or fraud;[226] (iii) the client insists upon pursuing actions the lawyer deems repugnant;[227] (iv) after warning, the client fails to fulfill obligations essential to the representation;[228] (v) representation will result in an unreasonable financial burden on the lawyer;[229] and (vi) other good cause for withdrawal exists.[230]

Notwithstanding the existence of good cause for permissive withdrawal, a lawyer must continue the representation when ordered to do so by a tribunal.[231] Arizona Ethical Rule 1.16(c) allows for court rules which, in many instances, condition withdrawal by any counsel of record on court approval.[232] A lawyer may not withdraw from representation simply because he or she disagrees with the client's decision regarding the objectives of the representation. For example, a lawyer must abide by a client's decision whether to accept an

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[226]ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.16(b)(2) (1983); *id.*

[227]ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.16(b)(3) (1983). *See generally* Bellow & Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U.L. REV. 337, 372-78 (1978); Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Arizona Ethical Rules*, 46 OHIO ST. L.J. 243, 260 (1985) (subsection 1.16(b)(3) allows for professional independence of lawyers); Hyman, *Trial Advocacy and Methods of Negotiation*, 34 CAL. L. REV. 863, 919 (1987) (subsection requires lawyer to be concerned with the legitimate interests of the community even where the lawyer also supports the client's objectives and does not find them repugnant).

[228]ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.16(b)(4) (1983). This enumeration is often implicated when the client refuses to accept the lawyer's settlement advice. Usually such an occurrence does not merit withdrawal. *See, e.g.*, Singleton v. Foreman, 435 F.2d 962 (5th Cir. 1970) (lawyer never has right to force settlement upon client); Vann v. Shilleh, 126 Cal. Rptr. 401 (Cal. Ct. App. 1975) (settlement rejection by client insufficient ground upon which to justify withdrawal of counsel). *But see* Spero v. Abbott Laboratories, 396 F. Supp. 321 (N.D. Ill. 1975) (withdrawal arguably justified for failure to accept settlement recommendation); *cf.* Goldsmith v. Pyramid Communications, 362 F. Supp. 694 (S.D.N.Y. 1973) (failure to accept settlement can lead to breakdown of lawyer-client relationship, allowing withdrawal).

[229]ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.16(b)(5) (1983). *See, e.g.,* Allison v. State, 436 So. 2d 792 (Miss. 1983) (withdrawal permissible where no acceptable fee arrangement could be reached regarding appeal); Hancock v. Mutual of Omaha Ins. Co., 472 A.2d 867 (D.C. Ct. App. 1984) (where client fails to make arrangements to pay lawyer for past services, lawyer should not be forced to proceed with case); Fitzpatrick v. State Bar, 569 P.2d 763 (Cal. 1977) (while withdrawal from representation may be based upon client's failure to pay fee, court permission required once litigation commences). *See also* Kriegsman v. Kriegsman, 375 A.2d 1253 (N.J. Super. Ct. App. Div. 1977) (improper to withdraw because retainer becomes less profitable or case becomes too complicated or arduous).

[230]ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.16(b)(6) (1983). Much of the case law relating to this enumeration involves antagonism between the lawyer and client. For an excellent description of antagonism between the lawyer and client and the issue of withdrawal, *see* State v. Lee, 142 Ariz. 210, 689 P.2d 153 (1984) (court considered motion to withdraw due to antagonistic relationship existing between lawyer and client stemming from differing opinions about how trial was to proceed). *See also* Sobol v. District Court, 619 P.2d 765 (Colo. 1980) (mutual antagonism so intense as to render it unreasonably difficult for lawyer to carry out employment effectively); Genrow v. Flynn, 131 N.W. 1115 (Mich. 1911) (withdrawal proper after lawyer received telegram from client accusing lawyer of deception and neglect of case); Legal Aid Soc'y v. Rothwax, 69 A.2d 801 (N.Y. App. Div. 1979) (client threatened lawyer with physical violence).

[231]ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.16(c) (1983).

[232]*See, e.g.*, UNIF. R. PRACTICE FOR ARIZ. SUPERIOR CT. 12(c) (counsel of record must have court permission to withdrawal).

offer of settlement in any litigated case.[233] Likewise, the lawyer must abide by the client's decision in a criminal case with respect to the plea to be entered, the waiver of trial by a jury, and the fundamental decision whether or not the client will testify in a criminal case.[234]

Of course, this does not mean that a lawyer may not seek permissive withdrawal where the stated objective of the client is to bring or defend a proceeding that lacks merit under Arizona Ethical Rule 3.1. There is an important distinction in criminal proceedings under Arizona Ethical Rule 3.1, dealing with non-meritorious claims or contentions. Arizona Ethical Rule 3.1, while prohibiting lawyers from defending "frivolous" cases, also states: "A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established."

On occasion, the question of collusion between the insured defendant and the plaintiff arises. The Alabama Ethics Committee considered the situation of an attorney representing both the insurance company and the insured who learns that the insured is perpetrating a fraud against the insurer.[235] The Committee ruled that the attorney must advise the client to permit the attorney to disclose the fraud to the insurance company. Disclosure, however, should be restricted to a statement that a coverage question exists and a request that independent counsel be obtained by the insured. Absent client consent to this disclosure, the attorney must withdraw from representing both the insured and the insurer.

A lawyer must have the trust and confidence of the client in any litigated matter. The Rhode Island Ethics Committee opined that an attorney who filed suit on behalf of a now deceased client whose surviving spouse refuses to cooperate in the suit may withdraw from representation.[236] The Tennessee Ethics Committee similarly held that an attorney who

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[233]ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.2 (1983). *Cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B)(1), 102 (A)(7) (1981). *Cf. also* CAL. RULES OF PROFESSIONAL CONDUCT 3-210.

[234]*Id.*

[235]Ala 90-99, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1001:1001 (Ethics Opinions 1991-1995). *See also* Calif 1995-139, *id*. at 1604 [attorney who learns of fraud on part of insured against the insurer must withdraw from representation]; Md 91-45, *id*. at 4303 [attorney who learns of fraud on part of insured against insurer must withdraw from representation of either insured or insurer, should advise insured of possible legal consequences, and must notify insurer of conflict between insured and insurer and advise each to obtain counsel. The attorney is required to disclose the potential fraud neither to the court nor to the insurer, and may not disclose such suspicions].

[236]RI 94-73, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1001:7837 (Ethics Opinions 1991-1995).

represents by appointment a minor petitioning the juvenile court for a waiver of parental consent in order to obtain an abortion, may seek court permission to withdraw if the attorney's strongly held religious/moral convictions will impair representation.[237]

Withdrawal due to Client Perjury

The interrelated problems of client perjury and mandatory withdrawal in criminal cases are complicated by two important constitutional considerations. First, if counsel prevents the perjurious client from testifying, counsel may be infringing on the defendant's right to testify. In *Harris v. New York,*[238] the United States Supreme Court held that a criminal defendant is privileged to testify in his or her own behalf. That right was confirmed in *United States v. Bifield.*[239] On the other hand, a defendant does not have a constitutional right to present perjured testimony.[240]

The second constitutional consideration concerns a defendant's sixth amendment right to effective assistance of counsel, which protects the defendant's fundamental right to a fair trial. When considering withdrawal based upon perjured testimony, courts must consider whether a defendant's sixth amendment right has been violated. In this context, the court must consider whether counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[241]

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[237]Tenn 93-F-140, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1101:8101 (Ethics Opinions 1996).

[238]401 U.S. 222 (1971). *See also* State v. Gulbrandson, 184 Ariz. 46, 906 P.2d 579 (1995); State v. Lee, 142 Ariz. 210, 689 P.2d 153 (1984); State v. Rodriguez, 126 Ariz. 28, 612 P.2d 484 (1980); People v. Lucas, 12 Cal.4th 415, 12 Cal.4th 825A, 907 P.2d 373, 48 Cal.Rptr.2d 525 (1995); People v. Alcala, 4 Cal.4th 742, 842 P.2d 1192, 15 Cal.Rptr.2d 432 (1992); People v. Guzman, 45 Cal.3d 915, 755 P.2d 917, 248 Cal.Rptr. 467 (1988); People v. Fratta, 83 N.Y.2d 771, 632 N.E.2d 1270, 610 N.Y.S.2d 947 (1994); People v. Shapiro, 308 N.Y. 453, 126 N.E.2d 559 (1955); People v. Erickson, 161 Ill.2d 82, 641 N.E.2d 455 (1994); People v. Thompkins, 161 Ill.2d 148, 641 N.E.2d 371 (1994); Nelson v. State, 765 S.W.2d 401 (Tex. 1989); Riojas v. State, 530 S.W.2d 298 (Tex. 1975); Bowden v. State, 588 So.2d 225, 16 Fla. L. Weekly S614 (1991); Torres-Arboledo v. State, 524 So.2d 403, 13 Fla. L. Weekly 229 (1988).

[239]702 F.2d 342 (2d Cir. 1983), *cert denied*, 461 U.S. 931 (1983).

[240]United States v. Curtis, 742 F.2d 1070 (7th Cir. 1984), *cert. denied*, 475 U.S. 1064 (1986).

[241]Strickland v. Washington, 466 U.S. 668, 686 (1984). *See also* State v. Mata, 185 Ariz. 319, 916 P.2d 1035 (1996); State v. Krum, 183 Ariz. 288, 903 P.2d 596 (1995); People v. Osband, 13 Cal.4th 622, 14 Cal.4th 38A, 919 P.2d 640, 55 Cal.Rptr.2d 26 (1996); *In re* Jones, 13 Cal.4th 552, 917 P.2d 1175, 54 Cal.Rptr.2d 52 (1996); People v. Hobot, 84 N.Y.2d 1021, 646 N.E.2d 1102, 622 N.Y.S.2d 675 (1995); Matter of Jeffrey V., 82 N.Y.2d 121, 623 N.E.2d 1150, 603 N.Y.S.2d 800 (1993); People v. Alvine, 173 Ill.2d 273, 671 N.E.2d 713 (1996); People v. Brown, 172 Ill.2d 1, 665 N.E.2d 1290 (1996); McFarland v. State, 928 S.W.2d 482 (Tex. 1996); Chambers v.

Perhaps the most important case involving a criminal defense lawyer's threat to withdraw from representation based upon client perjury is *Nix v. Whiteside.*[242] In *Nix*, the United States Supreme Court held that a criminal defense lawyer's threat to withdraw from representation and to disclose to the Court if the client persisted in his intention to perjure himself did not deprive the defendant of the effective assistance of counsel guaranteed by the sixth amendment. The Court reasoned that a criminal defendant had no right to expect a lawyer to assist the client's perjury and found that the defendant suffered no prejudice in having been dissuaded from offering false testimony to the Court. The *Nix* majority opinion noted that a lawyer who threatens to withdraw or to disclose a client's intention to commit perjury does so in compliance with accepted standards of professional conduct as represented in the ABA Arizona Ethical Rules and the ABA Model Code. Where a lawyer cannot dissuade a client from committing perjury, the *Nix* decision advocates that the lawyer seek to withdraw from the case.

The most instructive ethics committee opinion on this point is ABA Informal Opinion 1314,[243] holding that mandatory withdrawal arises where a criminal defendant proposes to commit perjury. This was confirmed in ABA Informal Opinion 1318,[244] and both informal opinions were reconsidered in ABA Formal Opinion 87-353.[245] In Formal Opinion 87-353, the ABA Committee noted that the lawyer must base his opinion that the client intends to commit perjury from the client's "stated intention" and not on the basis of mere suspicion.

The author of a law review article entitled *Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues*[246] recommends that lawyers must be convinced "beyond a reasonable doubt" that the client's testimony will be perjurious before seeking withdrawal. There is at least one Arizona criminal case wherein the defense counsel stated no reason for withdrawal other than "irreconcilable conflict" and referred to no provisions of the professional ethics codes.[247]

State, 903 S.W.2d 21 (Tex. 1995); Rose v. State, 675 So.2d 567, 21 Fla. L. Weekly S109 (1996); Cherry v. State, 659 So.2d 1069, 20 Fla. L. Weekly S451 (1995).

[242]475 U.S. 157 (1986).

[243]ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1314 (1975).

[244]ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1318 (1975).

[245]ABA Comm. on Ethics and Professional Responsibility, Formal Op. 87-353 (1987).

[246]Rieger, *Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues,* 70 MINN. L. REV. 121 (1985).

[247]*See* State v. Lee, 142 Ariz. 210, 689 P.2d 153 (1984). *See also* People v. Smith, 6 Cal.4th 684, 863 P.2d 192, 25 Cal.Rptr.2d 122 (1993); People v. Fierro, 1 Cal.4th 173, 821 P.2d 1302, 3 Cal.Rptr.2d 426 (1991); People v.

The New York County Ethics Committee opined that an attorney who learns that a client has committed perjury may continue to represent the client as long as the attorney does not knowingly use any of the perjured testimony. If, however, the perjury is sufficiently critical to the case so as to render the attorney unable effectively to represent the client absent its use, the attorney must withdraw.[248]

The Connecticut Ethics Committee held that a criminal defense attorney who reasonably believes a client intends to commit perjury is permitted to refuse to offer such false evidence. If the client insists on a perjurious course of action, the attorney must attempt to withdraw from representation. If this is not allowed, the attorney must allow the client to testify in narrative form and should advise the court of the attorney's inability to conduct an examination.[249]

New York's Nassau County Ethics Committee considered the situation of an attorney who reasonably believes that a child client was switched for deposition purposes with a cousin who was non compos *mentis*.[250] The Committee ruled that the attorney must first determine whether the fraud is actually known to have occurred, is sufficiently material to constitute fraud upon the opposing party, and if the information is confidential. If the attorney would be required to disclose the fraud but for its confidentiality, the attorney must not present for court approval any settlement obtained by virtue of the fraud. If the client will not rectify the fraud, the attorney may be required to withdraw.

The Tennessee Ethics Committee held that an attorney whose client refuses to rectify admitted perjury must attempt to make the fraud known and may make a "noisy" withdrawal. Should the withdrawal fail to reveal the perjury, the attorney must make full disclosure to the

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Ortiz, 51 Cal.3d 975, 800 P.2d 547, 275 Cal.Rptr. 191 (1990); People v. Sides, 75 N.Y.2d 822, 551 N.E.2d 1233, 552 N.Y.S.2d 555 (1990); People v. Rosa, 65 N.Y.2d 380, 482 N.E.2d 21, 492 N.Y.S.2d 542 (1985); People v. Tineo, 64 N.Y.2d 531, 479 N.E.2d 795, 490 N.Y.S.2d 159 (1985); People v. Bowman, 138 Ill.2d 131, 561 N.E.2d 633 (1990); People v. Kubat, 94 Ill.2d 437, 447 N.E.2d 247 (1983); White v. Reiter, 640 S.W.2d 586 (Tex. 1982); Scull v. State, 533 So.2d 1137, 13 Fla. L. Weekly 545 (1988).

[248]NY County 712, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1101:6501 (Ethics Opinions 1996).

[249]Conn 42, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1001:2001 (Ethics Opinions 1991-1995). *See also* DC 234, *id*. at 2304; Maine 140, *id*. at 4205.

[250]Nassau County, NY 94-21, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL Conduct 1001:6268 (Ethics Opinions 1991-1995).

court. Should the attorney be prevented from withdrawing, the attorney must disclose the perjury and may not argue from or use the perjured testimony.[251]

In 1985, the Arizona Supreme Court adopted the Arizona Ethical Rules of Professional Conduct and modified Rule 1.6, regarding confidentiality of information. In its modified form, Arizona Ethics Rule 1.6 permits lawyers to reveal information confidentially acquired to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act. That rule must be read in conjunction with Arizona Ethical Rule 3.3, dealing with candor toward the tribunal. Under Arizona Ethical Rule 3.3(a)(4), lawyers cannot offer evidence known to be false and must take reasonable remedial measures if the false evidence has been offered and the lawyer "comes to know of its falsity." Importantly, Arizona Ethical Rule 3.3(b) carries the obligation of "reasonable remedial measures" regarding false evidence "to the conclusion of the proceeding and appl[ies] even if compliance requires disclosure of information otherwise protected by [the client confidentiality rule]."[252]

Thus, it can be argued that permissive withdrawal is available to the lawyer whose client has or will commit probable perjury notwithstanding the suggestion to the contrary in Arizona Ethics Committee[253]

Cases where the litigation client seeks to exert political pressure on the court or to bribe trial witnesses are rare. The Arizona Ethics Committee considered the situation of an attorney who learned that friends of his juvenile client's parents had threatened to exert political pressure on the trial judge and to bribe witnesses.[254] The Committee held that the lawyer had fully satisfied his professional ethical obligations by warning the juvenile's parents against such attempts and by later formally withdrawing from further representation in the case. On the specific facts presented, the lawyer was held to have no further obligation to report the threats to the court.

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[251]Tenn 93-F-133, ABA/BNA LAWYERS'MANUAL ON PROFESSIONAL CONDUCT 1001:8102 (Ethics Opinions 1991-1995).

[252]ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 3.3(b) (1983) (referring to 1.6). *Cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102 (1981). *Cf. also* CAL. RULES OF PROFESSIONAL CONDUCT 5-200.

[253]Ariz. Ethics Op. 80-27 (Dec. 12, 1980).

[254]Ariz. Ethics Op. 244 (May 16, 1968).

Withdrawal Due to Former Representation of Trial Judge

The Arizona Ethics Committee was also asked to consider another somewhat unusual case where a lawyer was retained to prepare and try a lawsuit that had been in progress for two years. The lawyer was retained in addition to, rather than instead of, the plaintiff's original lawyer. The second lawyer had represented the judge to whom the case was assigned in a civil action involving the judge in his personal, unofficial capacity five years prior. This representation involved a contested domestic relations matter. This fact was generally known to members of the local bar, including the counsel and the parties involved in the case. The ethical question presented was whether it was ethically permissible for a lawyer in an adversary proceeding to represent a client before a judge whom the lawyer had personally represented in a prior action.[255] The Committee suggested to the lawyer that the better course of action would be for him to withdraw. The Committee said that the lawyer should first take steps to refer the case to another judge. Failing that, the lawyer was advised to withdraw. The Committee declined to answer the related question of whether the trial judge should disqualify himself in the event that the lawyer elected to continue representing his clients in the case.[256]

Mandatory Withdrawal

Mandatory withdrawal is governed by Arizona Ethical Rule 1.16(a). Lawyers must withdraw from representation if: (i) the representation will result in violation of the Rules of Professional Conduct or other law; (ii) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or (iii) the lawyer is discharged.

If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw.[257] The ABA Ethics Committee has

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[255]Ariz. Ethics Op. 80-2 (Jan. 28, 1980).

[256]The Committee pointed out that its advice was not based on a strict application of the disciplinary rules but rather an application of the ethical norms expressed in the canons of ethics. The Committee also noted that, at a time when the legal profession was the object of increasingly frequent accusations of incompetence and lack of integrity, it is critically important that lawyers remember that justice rather than personal victory is the ultimate goal.

[257]ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.6 cmt. (1983).

offered a formal opinion on the matter: A lawyer who knows or with reason believes that her services or work product are being used or are intended to be used by a client to perpetrate a fraud must withdraw from further representation of the client, and may disaffirm documents prepared in the course of the representation that are being, or will be, used in furtherance of the fraud, even though such a "noisy" withdrawal may have the collateral effect of inferentially revealing client confidences.[258] Likewise, the lawyer must withdraw by reason of an impermissible conflict of interest under either Arizona Ethical Rule 1.7 or Arizona Ethical Rule 1.8 (conflicts of interest or prohibited transactions). Mandatory withdrawal is clearly indicated where the client engages in jury tampering in a criminal case, particularly where the jury tampering occasions a mistrial.[259]

Another example of mandatory withdrawal arises where the lawyer must be called as a witness in the case. As a general proposition, lawyers may not act as advocates where the lawyer is likely to be a necessary witness regarding the merits of the case.[260] This disqualification is not imputed to other lawyers in the trial advocate's firm.[261] The Texas Ethics Committee, for example, would preclude an attorney from continued representation of a client if the attorney is called as a witness unless the attorney is called by a party other than the client, the attorney's testimony is not necessary to establish essential facts for the client's case, and the testimony will not be adverse to the client.[262]

The Pennsylvania Ethics Committee considered the situation of a plaintiff's attorney in a personal injury action who was subsequently unable to communicate a settlement offer to the

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[258]ABA 92-366, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1001:134 (Ethics Opinions 1991-1995). *Cf.* Dallas 1991-08, *id.* at 8402; NYC 1994-8, *id.* at 6403; Pa 94-65, *id.* at 7340; RI 93-10, *id.* at 7818; SD 92-13, *id.* at 8003.

[259]Ala 89-41, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 901:1065 (Ethics Opinions 1986-1990); Ariz. Ethics Op. 144 (Feb. 27, 1964).

[260]ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 3.7(a) (1983). *Cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(B)(1), (2), 5-102(A), (B) (1981). *Cf. also* CAL. RULES OF PROFESSIONAL CONDUCT 5-210.

[261]ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 3.7(b) (1983).*Cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(B)(1), (2), 5-102(A), (B) (1981). *Cf. also* CAL. RULES OF PROFESSIONAL CONDUCT 5-210.

[262]Tx 475, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1001:8302 (Ethics Opinions 1991-1995). *See also* Ala 91-07, *id.* at 1003 [attorney having durable power of attorney to act for a client and who files suit in this capacity against the client's partner, making several material allegations, must withdraw from the respresentation because of the likelihood of being called as a witness]; Ore 91-8, *id.* at 7101 [attorney may not be a witness for a client, although the lawyer's partner may be a witness as long as the testimony is not adverse to the client]; Pa 92-79, *id.* at 7317 [attorney representing two brothers in their role as executors of their mother's estate may not represent one brother in an action to remove the other as executor, because both the conflict of interest as well as the prospect of the attorney being called as a witness precludes such individual representation].

client.[263] The Committee opined that the attorney must continue representation until such time as withdrawal would not adversely affect the interests of the client. Although the attorney has a duty to exhaust all reasonable avenues of contacting the client, the attorney must petition the court to withdraw if the client cannot be found.

Another example of mandatory withdrawal is found where the lawyer hires an associate attorney who had previously been employed by counsel for the adverse party. The Connecticut Ethics Committee, for example, held that a law firm which hires an attorney who previously represented the opposing party in a matter now on appeal may not continue representation, even if the attorney is screened from the case.[264] Other jurisdictions, however, allow continued representation in the event a law firm is joined by an attorney for the adverse party in a pending suit. The South Carolina Ethics Committee, for example, permits this as long as the attorney reasonably believes continued representation will not adversely affect the opposing party, all parties consent, the formerly adverse attorney does not use or reveal any information relating to the former representation, and receives no fee from the firm's representation.[265]

Mandatory withdrawal in criminal cases presents unique problems. The Virginia Ethics Committee considered the situation of a criminal defense attorney who incidentally overheard the arresting officer's account of a prospective client's arrest, another police officer's impression of the client, as well as the client's story.[266] The Committee held that because the attorney would likely be called as an impeachment witness against the police testimony, the attorney may not represent the client in the matter. The Alabama Ethics Committee, however, opined that a criminal defense attorney may continue representation if the attorney's partner is called as a witness as long as the testimony is not about a matter in dispute, will not adversely affect representation of the client, and the client grants informed consent.[267]

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[263]Pa 93-21, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1001:7325 (Ethics Opinions 1991-1995). *But see* RI 92-64, *id*. at 7814 [attorney who is not able to locate client may seek to withdraw]; SD 93-11, *id*. at 8004 [withdrawal permissive if unable to locate client].

[264]Conn 89-9, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 901:2062 (Ethics Opinions 1985-1990).

[265]SC 92-23, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1001:7910 (Ethics Opinions 1991-1995). *See also* Md 86-58, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 901:4302 (Ethics Opinions 1985-1990) [law firm which hires an attorney who previously represented the opposing party to the firm's client in the same matter, may continue representation if client consents after full disclosure].

[266]Va 1539, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1001:8722 (Ethics Opinions 1991-1995).

[267]Ala 91-27, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1001:1006 (Ethics Opinions 1991-1995).

The Pennsylvania Ethics Committee considered the situation of a criminal defense attorney appointed to represent a client charged with murder, but whose partner was consulted by a suspect in the same murder.[268] The Committee held that the attorney may not represent the client because implication of the client would likely be a part of the partner's client's defense. The Committee further held that all partners in the firm would thus be precluded from representing the client. The Oregon Ethics Committee stipulated that a criminal defense attorney may not represent multiple defendants where an actual conflict of interest exists, even with client consent.[269]

Under Rule 6.3 of the Arizona Rules of Criminal Procedure, a criminal defense lawyer, whether privately retained or appointed by the court, must file a notice of appearance on behalf of the defendant client.[270] Once that notice is filed, the lawyer must continue to represent the defendant in all further proceedings in the trial court, including filing of notice of appeal, unless the court permits withdrawal.[271]

Impermissible Withdrawal

There are several situations, however, where withdrawal is not permitted. The Alabama Ethics Committee considered the case of an attorney whose client refused to accept a settlement offer that the attorney believed was appropriate both to the client's injuries and the defendant's liabilities. The Committee ruled that the attorney may withdraw and request a percentage of the rejected settlement offer. If the client denies the attorney's request, the attorney must continue representation.[272] The Rhode Island Ethics Committee opined that an attorney who is owed legal fees by a client and whose motions to withdraw from continued

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[268]Pa 94-89, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1001:7341 (Ethics Opinions 1991-1995). *Cf.* Pa 93-27, *id*. at 7325 [attorney who represented one spouse in a criminal matter--resulting in a plea bargain--may subsequently represent the other spouse who had received a more severe sentence at trial, as long as there exists no possibility of appeal from the former representation].

[269]Ore 91-82, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1001:7111 (Ethics Opinions 1991-1995).

[270]ARIZ. R. CRIM. P. 6.3(a).

[271]ARIZ. R. CRIM. P. 6.3(b).

[272]Ala 86-56, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 901:1011 (Ethics Opinions 1986-1990). *But see* SC 86-1, *id*. at 7901 [attorney may withdraw from representation after client has refused to accept a settlement offer if continued representation would be difficult. Attorney fees earned to date may be billed]; Iowa 80-45, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 801:3603 (Ethics Opinions 1980-1985) [attorney whose client refuses to accept a settlement previously agreed to should seek permission to withdraw from the court].

representation have been denied must ignore the client's direction to cease representation and heed the court's directive to continue representation.[273]

In cases where the lawyer is appointed to represent an indigent criminal defendant, the lawyer cannot file a motion to withdraw solely because the petition for compensation for extraordinary services was denied by the trial judge.[274]

MECHANICS OF WITHDRAWAL

Many court rules provide that no attorney shall be permitted to withdraw in any pending action except by order of the court, supported by written application setting forth the reasons therefor.[275] If the court declines to permit withdrawal, the lawyer must continue representation notwithstanding good cause for terminating the representation.[276]

Subsequent to withdrawal, a lawyer may not ethically charge the client for the cost of making photocopies of the client's papers and documents in the absence of a prior agreement to that effect with the client.[277] When the lawyer withdraws because of the possible appearance of impropriety resulting from the opposing party's allegation that the attorney had previously represented both parties to the underlying transaction, the lawyer may ethically communicate with the new attorney of the former client.

Upon termination of the representation, the lawyer's ethical obligation is to take whatever steps are reasonably necessary and practicable to protect the client's interests.[278] This includes giving reasonable notice to the client, allowing time for employment of other counsel, surrendering the papers and property to which the client is entitled, and refunding any advance payment of fees that have not been earned.[279] A lawyer may retain papers relating to the client

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[273]RI 92-49, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1001:7812 (Ethics Opinions 1991-1995).

[274]Ariz. Ethics Op. 83-12 (June 28, 1983).

[275]*E.g.*, UNIF. R. PRACTICE FOR ARIZ. SUPERIOR CT. 12(c)(2).

[276]ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.16(c) (1983).*Cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(A)(1) (1981). *Cf. also* CAL. RULES OF PROFESSIONAL CONDUCT 3-700.

[277]*See* Ill 94-14, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1001:3016 (Ethics Opinions 1991-1995); Maine 120, *id*. at 4202; NC 178, *id*. at 6611.

[278]ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.16(d) (1983).*Cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(A)(2), (3) (1981). *Cf. also* CAL. RULES OF PROFESSIONAL CONDUCT 3-700.

[279]*Id*.

to the extent permitted by the law.[280] After termination of the client-lawyer relationship, a lawyer may not represent another client whose interests may be adverse to the former client except in conformity with Arizona Ethical Rule 1.9.[281] Of course, the duty of confidentiality remains even after termination of the representation.[282]

The Maryland Ethics Committee held that upon termination of representation, an attorney must return to the client all contents of the client's file to which the client is entitled. Such contents may not be withheld because of the costs of reproduction.[283] The Montana Ethics Committee opined that an attorney may keep all contents of a client's file personal to the attorney intended for the attorney's use (e.g., notes taken by the attorney while interviewing witnesses, conducting investigations, preparing depositions, trials or meetings, and notes by the attorney to the file or to other office members). All correspondence with the client or with third parties hired by the attorney to work on the case, however, as well as all materials furnished by the client, finished briefs (whether filed or not), pleadings and other papers filed in court which have become part of the public record, research memoranda, all drafts of litigation materials intended to have legal effect, and any document generated for the strategic benefit of the client, must be provided to the client. The

Committee further held that close questions on what may be retained by the attorney should be decided in favor of the client.[284]

There are a number of disciplinary cases which are instructive on how "not" to terminate the relationship.[285]

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[280]*Id.*

[281]ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.9 (1983). *Cf.* CAL. RULES OF PROFESSIONAL CONDUCT 3-310.

[282]*See* ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.6 (1983).*Cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1981). *Cf. also* CAL. BUS. & PROF. CODE §6217.

[283]Md 93-31, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1001:4311 (Ethics Opinions 1991-1995).

[284]Mont 950221, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1001:5403 (Ethics Opinions 1991-1995),

[285]*See, e.g., In re* Nefstead, 163 Ariz. 518, 789 P.2d 385 (1990) (disbarment for failing to return client's papers and property after discontinuing active practice of law, among other violations); *In re* Blankenburg, 143 Ariz. 365, 694 P.2d 195 (1984) (failure to return documents hindering clients' ability to receive adequate legal assistance and failure to take actions requested by state bar to return legal files warranted disbarment); *In re* Farrison, 159 Ariz. 417, 768 P.2d 149 (1989) (five-year suspension for failure to represent client, eventual abandonment, and refusal to refund fees paid, among other violations); *In re* Everidge, 147 Ariz. 104, 708 P.2d 1295 (1985) (lawyer disbarred for abandoning client without notice and making demand for additional monies).

CONFLICTS—WIRETAPS

Wiretaps in criminal cases occasionally result in the "inadvertent" capturing of phone calls between lawyers and their clients. A 1994 case, *State v. Fodor*, provides a good illustration of both the legal and practical issues.[286] There, the defendant was suspected of being involved in an ongoing criminal investigation. The court authorized the state to intercept the defendant's telephone conversations during a particular period of time. The state captured a conversation between the defendant and a lawyer. During the course of the conversation the defendant specifically asked the lawyer to be her lawyer and to give her advice about the efforts of the state to interview her. In upholding the privilege and disallowing the wiretap conversation, the court relied on the premise in a recent Arizona Supreme Court decision regarding the purpose of the privilege "[It] is intended to encourage the client in need of legal advice to tell the lawyer the truth."[287] The court also noted that the privilege is central to the delivery of legal services in this country.[288]

In *Fodor*, the opponent of the privilege argued that the defendant could not have an attorney privilege with the lawyer because the lawyer was already representing the primary defendant in the case under investigation. The state believed that the lawyer in the conversation with the defendant had a conflict of interest and that, therefore, the privilege did not apply. The court disposed of that argument with the following language

> [A] lawyer's potential ethical conflict has nothing to do with whether a client communication with a lawyer is protected by the attorney-client privilege. As we observe above, the purpose of the attorney-client privilege is to encourage full disclosure to a legal adviser by one seeking legal services. For that reason,

[286]156 Ariz. Adv. Rep. 20 (Ariz. Ct. App. 1994).

[287]*Id*. at 22 (quoting Samaritan Found. v. Goodfarb, 176 Ariz. 497, 862 P.2d 870 (1993)).

[288]*Id. Cf*. People v. Chapman, 36 Cal.3d 98, 679 P.2d 62, 201 Cal.Rptr. 628 (1984); D. I. Chadbourne, Inc. v. Superior Court of City and County of San Francisco, 60 Cal.2d 723, 388 P.2d 700, 36 Cal.Rptr. 468 (1964); Brunner v. Superior Court of Orange County, 51 Cal.2d 616, 335 P.2d 484 (1959); Priest v. Hennessy, 51 N.Y.2d 62, 409 N.E.2d 983, 431 N.Y.S.2d 511 (1980); Waste Management, Inc. v. International Surplus Lines Ins. Co., 144 Ill.2d 178, 579 N.E.2d 322 (1991); Consolidation Coal Co. v. Bucyrus-Erie Co., 89 Ill.2d 103, 432 N.E.2d 250 (1982); Huie v. DeShazo, 922 S.W.2d 920, 64 USLW 2540, 39 Tex. Sup. Ct. J. 288 (1996); Ford Motor Co. v. Leggat, 904 S.W.2d 643, 38 Tex. Sup. Ct. J. 920 (1995); National Tank Co. v. Brotherton, 851 S.W.2d 193 (Tex. 1993); Strong v. State, 773 S.W.2d 543 (Tex. 1989).

> one who seeks legal advice is entitled to claim the privilege for confidences disclosed during the initial consultation even if the lawyer later declines the representation.[289]

CONFLICTS—ORGANIZATIONAL CLIENTS

The ethical issue unique to the "organizational" client is the matter of client identity. It is so axiomatic as to need no citation to say that the organization is the client, not the people who make up the ownership or management of the organization. The ethical rule unique to this issue is Arizona Ethical Rule 1.13. Its fundamental predicate is that, although the entity can act only through its duly authorized constituents, such as directors and officers, the organization's lawyer owes his or her professional duty to the entity. The rule makes clear the fact that the lawyer does not represent the owners or the managers individually.[290] Consequently, lawyers who take on corporate litigation must take care to ensure that the officers are not misled to the contrary.[291]

The entity concept may not be applicable to all forms of business organizations. For example, in partnerships or closely held corporations, the corporate entity is indistinguishable from the constituents. In those cases, the lawyer must exercise great care to avoid picking sides where the owners are in disagreement.[292]

The entity concept is rooted in both corporate law and agency law. Under corporate legal principles, an organization is a separate juristic person capable of entering into a variety of

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[289]State v. Fodor, 156 Ariz. Adv. Rep. 20 at 23 ((Ariz. Ct. App. 1994).

[290]*See* ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.13 (1983). A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents. *Cf*. CAL. RULES OF PROFESSIONAL CONDUCT 3-600.

[291]*See* Comment to ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.13 (1983); W.T. Grant v. Haines, 531 F.2d 671 (2d Cir. 1976).

[292]*See* RICHARD UNDERWOOD & WILLIAM FORTUNE, TRIAL ETHICS §3.5.4 (1988).

legally recognized relationships.[293] Under agency principles, the lawyer is an agent of the corporation, not its owners or managers.[294]

Care must be taken to ensure clarity in the relationship. Since the entity is normally the client, a director or employee who communicates with corporate counsel must understand that everything he or she tells the lawyer is "known" by the corporation.[295] For that reason, Arizona Ethical Rule 1.13 requires lawyers to explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.[296]

One of the most challenging ethical problems involving corporate representation was presented to the Arizona Ethics Committee by a member of both the Arizona State Bar and the Navajo Nation Bar who had been appointed to represent an indigent Navajo criminal defendant. The prosecutor was the defense lawyer's employer, *i.e.*, the Navajo Nation. If Arizona Ethical Rule 1.13 controlled, the lawyer would have been excused from the appointment since the rule provides that, when the lawyer is retained or employed by a governmental organization, the lawyer's client is the organization—here, the Navajo Nation. If the lawyer simultaneously undertook to represent the citizen charged by his employer and the Navajo Nation, he would have had an impermissible conflict.[297] The Committee held that Arizona Ethical Rule 1.13 did not control, based on the unique "choice of law" factors involved.[298] The Committee held that a lawyer who is a member of both the Arizona and Navajo Nation Bars, and who is appointed by the Navajo Nation Court to represent an indigent

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[293]Krivo Indus. Supply Co. v. National Distillers & Chem. Corp., 483 F.2d 1098 (5th Cir. 1973). *Cf.* Merco Const. Engineers, Inc. v. Municipal Court for Long Beach Judicial Dist. of Los Angeles County, 21 Cal.3d 724, 581 P.2d 636, 147 Cal.Rptr. 631 (1978); Billy v. Consolidated Mach. Tool Corp., 51 N.Y.2d 152, 412 N.E.2d 934, 432 N.Y.S.2d 879 (1980); *In re* Rehabilitation of Centaur Ins. Co., 158 Ill.2d 166, 632 N.E.2d 1015 (1994); Main Bank of Chicago v. Baker, 86 Ill.2d 188, 427 N.E.2d 94 (1981); Roberts' Fish Farm v. Spencer, 153 So.2d 718 (Fla. 1963).

[294]Prate v. Freedman, 583 F.2d 42 (2d Cir. 1978). *Cf.* Gagnon Co. v. Nevada Desert Inn, 45 Cal.2d 448, 289 P.2d 466 (1955); Bianca v. Frank, 43 N.Y.2d 168, 371 N.E.2d 792, 401 N.Y.S.2d 29 (1977); Beasley v. Girten, 61 So.2d 179 (Fla. 1952).

[295]Bobbit v. Victorian House, Inc., 545 F. Supp. 1124, 1126 (N.D. Ill. 1982).

[296]*See* ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.13(d) (1983).

[297]*See* ARIZONA ETHICAL RULES OF PROFESSIONAL CONDUCT 1.7(a) (1983) in combination with ER 6.2. *Cf. also* CAL. RULES OF PROFESSIONAL CONDUCT 3-310.

[298]*See* Ariz. Ethics Opinion 90-19 (Dec. 28, 1990) at 4.

Navajo citizen, is not subject to disciplinary action by the State Bar of Arizona if the lawyer complies with the Navajo Nation's ethical rules and court directives.[299]

CONFLICTS—THE APPELLATE PRACTICE

As noted, the appellate process is, in a sense, a microcosm of trial litigation. Hence, much that has been said about trial litigation ethics applies to appellate procedure. Ethical appellate issues range from prohibitions against frivolous appeals, to obligations to communicate with the client contained in Arizona Ethical Rule 1.4, to duties of candor toward a tribunal as codified in Arizona Ethical Rule 3.3.[300]

Some ethical issues deserve particular attention because they are unique to the appellate process. For example, it is a prohibited conflict of interest to represent a client in a matter directly adverse to another client.[301] In trial practice, such conflicts are usually readily identifiable and avoidance is straightforward. In appellate practice, however, where success often depends upon forging broad-based attacks upon legal doctrines and their applications, conflicts may not be as readily identifiable. A disguised conflict is still a conflict and may require appropriate remedial measures.

In Arizona Ethics Opinion 87-15,[302] Lawyer *X* of a firm represented an employee in a federal action relating to a dispute over employment. At the same time, Lawyer *Y* of the same firm represented an employer in an unrelated action involving a similar factual situation. Both cases were on appeal in the Ninth Circuit Court of Appeals, having been resolved at the trial court level on identical issues of law. The sole issue on appeal was whether the rule of law had been correctly applied. Both clients consented to the continued representation after full disclosure of the conflict.

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[299] *Id.* at 9.

[300] *See In re* Palmer, 110 Ariz. 414, 519 P.2d 1155 (1974)(lawyer disbarred for failing to prepare and file client's opening brief and falsely testifying before court of appeals); *In re* Weinberg, 119 Ill.2d 309, 518 N.E.2d 1037 (1988); The Florida Bar v. Morrison, 496 So.2d 820, 11 Fla. L. Weekly 564 (1986).

[301] ARIZONA ETHICAL RULES OF PROFESSIONAL RESPONSIBILITY 1.2(a) (1983). *Cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(A) (1981). *Cf. also* CAL. RULES OF PROFESSIONAL CONDUCT 3-210.

[302] State Bar of Ariz. Comm. on Rules of Professional Conduct, Ariz. Ethics Opinions, Opinion 87-15 (July 27, 1987).

The Committee had no trouble finding that a conflict of interest was clearly implicated under Arizona Ethical Rule 1.7. The law firm was involved in a situation where a position taken by one of its lawyers would have adverse consequences upon pending representation of another client. In spite of the conflict, the Committee determined that the representation could continue because each client consented after full disclosure. The Committee further found the representation not to be prohibited by Arizona Ethical Rule 1.7 because a disinterested lawyer could not conclude that the client should not agree to representation under the particular circumstances. Although the Committee opined that the representation could continue, it warned against future involvement in similar circumstances. The Committee also did not address whether representation could continue if the two cases were consolidated by the Ninth Circuit Court of Appeals.

Another ethical issue unique to appellate practice is a specie of the prohibition against ex parte communications. Arizona Ethical Rule 3.5 prohibits ex parte contact with judges, jurors, or officials of a tribunal unless permitted by law. In appellate practice, it is not uncommon for a lawyer to contact the judge's law clerk. The appellate lawyer may be tempted to contact a clerk, perhaps feeling that he did not adequately respond to questioning at oral argument or that an argument was not clearly stated in a brief. Although there are no reported ethical decisions addressing this issue, the lawyer is warned that to discuss the merits of the case violates Arizona Ethical Rule 3.5. Certainly, a law clerk is a tribunal official and ex parte contact with such a person about the merits of a disputed matter is prohibited.

Criminal Appeals

Unlike civil appeals, a criminal defendant has a constitutional right to the effective assistance of counsel. In an effort to respect these rights, courts afford the criminal defendant more leeway in the appellate process.

For example, in *Anders v. California*[303] the Supreme Court advised that an appointed criminal defense attorney's motion to withdraw must be accompanied by appellate brief presenting any arguable question for reversal, even though the appeal may not appear to be substantially meritorious. The appointed defense counsel is therefore not permitted to

[303]386 U.S. 738 (1967).

withdraw from representation because he or she thinks an appeal is without merit. The requirement forces the court to decide whether there are any tenable arguments for appeal. The lawyer can withdraw if the court agrees that the case is wholly fraudulent after seeing the brief.

Although still the practice in Arizona,[304] the "Anders" brief has faced stiff criticism. According to one commentator, such a "schizophrenic" requirement puts counsel in the position of choosing whether to file a motion to withdraw and then a brief opposing the motion or staying in the case and arguing a frivolous appeal.[305] Moreover, the rule in *Anders* often provides an incentive for defense counsel to withdraw when issues are substantial and forces the court to assume the role of appointed counsel by having the court decide whether an appeal is viable.[306]

The Anders Brief

The *Anders* rule was complicated by the United States Supreme Court's divided ruling in *Jones v. Barnes,*[307] holding that assigned counsel did not have a per se duty to raise every non-frivolous issue requested by the defendant-appellant. The effect of this holding upon the *Anders* requirement in Arizona has not yet been addressed.

In an effort to protect further the criminal defendant's constitutional rights of appeal, Rule 6.3(b) of the Arizona Rules of Criminal Procedure provides that "[c]ounsel representing a defendant at any stage shall continue to represent him or her in all further proceedings in the trial court, including filing of notice of appeal, unless the court permits him or her to withdraw." In keeping with this rule, the criminal defense lawyer must see a criminal matter through the appellate process once a notice of appearance is filed. Due to the gravity of this

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[304]State v. Smith, 171 Ariz. 501, 831 P.2d 877 (Ariz. Ct. App. 1992); State v. Van Dorn, 8 Ariz. App. 228, 445 P.2d 176 (Ariz. Ct. App. 1968). *See also In re* Sade C., 13 Cal.4th 952, 920 P.2d 716, 55 Cal.Rptr.2d 771 (1996); People v. Casiano, 67 N.Y.2d 906, 492 N.E.2d 1224, 501 N.Y.S.2d 808 (1986); Stafford v. State, 813 S.W.2d 503 (Tex. 1991); *In re* Anders Briefs, 581 So.2d 149, 16 Fla. L. Weekly S399 (1991); *In re* Order of the First Dist. Court of Appeal Regarding Brief Filed in Murray v. State, 559 So.2d 1125, 15 Fla. L. Weekly S188 (1990); *In re* Order of First Dist. Court of Appeal Regarding Brief Filed in Forrester v. State, 556 So.2d 1114, 15 Fla. L. Weekly S71 (1990).

[305]Doherty, *Wolf! Wolf!—The Ramifications of Frivolous Appeals,* 59 J. CRIM. LAW, CRIMINOLOGY AND POLICE SCIENCE 1, 2 (1968).

[306]PAUL D. CARRINGTON, JUSTICE ON APPEAL 77-78 (1976); *see also* Huguley v. State, 324 S.E.2d 729 (Ga. 1985) (court abolished the Anders rule in the state).

[307]463 U.S. 745 (1983).

constitutional right, abandonment of the accused-appellant requires more severe disciplinary penalties than in the civil context.[308]

CONFLICTS—THE INTERNET AND THE WORLD WIDE WEB

As expected, there are no disciplinary cases reported by appellate courts that deal with the broad subject of giving "on-line" legal advice. However, the ethics panel in South Carolina has favorably considered a request from a physically disabled lawyer to conduct a law practice in an on-line format.[309] That opinion holds that operating an "electronic law office" does not, by itself, violate the rules of ethics. However, the committee pointed out several areas of concern. These include:

> The rules regarding advertising and solicitation must be observed. Advertisements that reach potential clients must state the geographical limitations on the lawyer's ability to practice. The lawyer must make a **proper conflicts** inquiry and analysis. The lawyer must ensure that electronic communications remain confidential. To the extent that electronic communications are not confidential, the lawyer must secure an appropriate waiver from the client. A related issue arises when lawyers participate in on-line "chat" groups and engage in discussions regarding legal issues. Typically, the participants key in their comments using commercial browsers. Newsgroups and their technological antecedents (bulletin boards) and Listservs all pose financial opportunity and ethical risk to the computer lawyer. At least in Tennessee, the ethics rules regarding advertising and solicitation do not apply to lawyers who respond to a private e-mail request for legal information.[310] However, the committee did warn the inquiring lawyer that other Tennessee ethics rules might apply to on-line advice. If the advice is general in nature the lawyer must take care to when speaking or writing publicly that he not emphasize his

[308]*See In re* Hall, 447 N.E.2d 805 (Ill. 1983) (failure to prosecute an appeal causes the client to lose constitutional rights to appeal, and in order to deter neglect, more severe discipline is appropriate in criminal cases than in civil cases); *see also In re* Hegstrom, 153 Ariz. 286, 736 P.2d 370 (1987) (lawyer disbarred for failing to prosecute criminal client's appeal).

[309]South Carolina Ethics Opinion 94-27 (1995).

[310]*See*, Tenn. Advisory Ethics Opinion 95-A-576 (1995). Note, this is an unpublished opinion by the Tennessee Supreme Court Board of Professional Responsibility.

> own professional experience or reputation. Most importantly, the lawyer cannot undertake to give individual advice in this format.[311] The reason for limiting the advice to general legal subjects is that specific advice is given the person making the inquiry might believe that an attorney-client relationship has been established (even if no fees are paid). If the "caller" and the "Net-lawyer" have established an attorney-client relationship (as opposed to merely chatting on-line) then the lawyer is obligated to preserve the confidence and to deal with the "client" in a fiduciary capacity.

There is some analogy in the cases and opinions dealing with the ethical propriety of lawyer's participation in educational television or radio shows. As a general matter these cases deal with solicitation, specialization, conflicts, confidentiality and forming a lawyer-client relationship.[312]

Sites on the Internet that provide on-line legal information without forming an attorney client relationship might not be subject to ethical inquiry.[313]

CONCLUSION

The intellectual connection between the study of philosophy and practicing law ethically is easily forgotten. But, when remembered, that connection often helps one arrive at the correct ethical address by studying the philosophical route. My favorite philosopher is Sir Francis Bacon and he wrote an essay entitled *Of Counsel.* That essay speaks to the issue so voluminously covered in the pages you have just read. Sir Francis said:

> The greatest trust between man and man is the trust of giving counsel; for in other confidences men commit the parts of life, their lands, their goods, their children, their credit, some

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[311]Tennessee is governed by the ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY and DR 2-104 (A)(4).

[312]*See*, Ohio Ethics Opinion 94-13 and 92-10; Iowa Ethics Opinion 91-50 (1992); New Hampshire Ethics Opinion 1992-93/11 (1992).

[313]The Oregon Ethics Committee allowed a non-lawyer to form a joint venture with a lawyer to offer legal information but not advice. The joint venture used decision-software to generate answers to consumer inquiries. No live interaction was involved. Oregon Ethics Opinion 1944-137.

> particular affair; but to such as they make their counsellors they commit the whole; by how much the more they are obliged to all faith and integrity. The wisest princes need not think it any diminution to their greatness, or derogation to their sufficiency to rely upon counsel.[314]

Sir Francis said it all so I need say no more.

Gary L. Stuart

June 1, 1999

[314] Francis Bacon, *Essays and New Atlantis,* p. 84, Walter J. Black Publishing, New York 1942.