Approved: 4-2-99
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Michael R. O'Neal at 3:30 p.m. on March 8, 1999 in Room 313-S of the Capitol.

All members were present except:
Representative Tom Klein - Excused
Representative Tony Powell - Excused

Committee staff present:
Jerry Ann Donaldson, Legislative Research Department
Jill Wolters, Revisor of Statutes
Cindy Wulfkuhle, Committee Secretary

Conferees appearing before the committee:
John Peterson, Raytheon Aircraft Credit Corporation
Nick Badgerow, Civil Code Advisory Committee, Kansas Judicial Council
Joseph Ledbetter, Topeka
Greg Debacker, Topeka
Ron Smith, Kansas Bar Association

Hearings on **SB 88 - UCC article 9 does not prevent the transfer of ownership of accounts**, were opened.

John Peterson, Raytheon Aircraft Credit Corporation, appeared before the committee as the sponsor of the proposed bill. He explained that the bill would clarify that provisions of Article 9 does not prevent the transfer of ownership of accounts or chattel paper. It also provides that the transfers would constitute a sale or transfer of a security interest is not governed by Article 9 of the code. (Attachment 1)

The Kansas Bankers Association did not appear before the committee but requested that their testimony be included in the committee minutes. (Attachment 2)

Hearings on **SB 88** were closed.

Hearings on **SB 87 - claims for relief set forth in a pleading**, were opened.

Nick Badgerow, Civil Code Advisory Committee, Kansas Judicial Council, appeared before the committee as a proponent of the bill. The bill would amend two sections of the Kansas Code of Civil Procedure regarding pleadings which demand damages. The bill would strike $75,000 amount and cite the Federal Code of Civil Procedures. (Attachment 3)

Hearings on **SB 87** were closed.

Hearings on **SB 81 - civil procedure relating to rules of evidence certification of lack of record**, were opened. No proponents nor opponents were signed up to testify.

Hearings on **SB 89 - attorneys at law, practice and discipline**, were opened.

Nick Badgerow, Civil Code Advisory Committee, Kansas Judicial Council, appeared before the committee in support of the bill. He stated that the bill would repeal five statutes dealing with the regulation of conduct of attorneys because the statutes are either obsolete or in conflict with the Model Rules of Professional Conduct. (Attachment 4)

Ron Smith, Kansas Bar Association, appeared before the committee in support of the proposed bill by stating that these are very old statutes and that the Model Rules of Professional Conduct is more than adequate in the regulation of attorneys. (Attachment 5)

Joseph Ledbetter, & Greg Debacker both of Topeka appeared as opponents to the bill. They were concerned that the oath that is required to practice law would be deleted if these statutes were repealed.

Hearings on **SB 89** were closed.

SB 88 - UCC article 9 does not prevent the transfer of ownership of accounts

Representative Long made the motion to report **SB 88** favorably for passage. Representative Carmody seconded the motion.

Representative Adkins made the substitute motion to amend in the short title chattel "paper". Representative Carmody seconded the motion. The motion carried.

Representative Long made the motion to report **SB 88** favorably for passage, as amended. Representative Carmody seconded the motion. The motion carried.

SB 89 - attorneys at law, practice and discipline

Representative Adkins made the motion to report **SB 89** favorably for passage. Representative Carmody seconded the motion. The motion carried.

HB 2126 - phasing in the use of the office of administrative hearings over five years

Representative Pauls made the motion to report **HB 2126** favorably for passage. Representative Ruff seconded the motion.

Representative Pauls made the substitute motion to amend in the balloon amendment (Attachment 6) that addresses the Department of Agriculture concerns. Representative Gregory seconded the motion. The motion carried.

Representative Adkins made the motion to report **HB 2126** favorably for passage. Representative Pauls seconded the motion. The motion carried.

The committee meeting adjourned at 6:00 p.m. The next meeting is scheduled for March 9, 1999.

LAW OFFICES

SHOOK, HARDY & BACON L.L.P.

OVERLAND PARK
HOUSTON
WASHINGTON, D.C.
SAN FRANCISCO
MIAMI

1010 GRAND BOULEVARD, 5TH FLOOR
POST OFFICE BOX 15607
KANSAS CITY, MISSOURI 64106-0607
TELEPHONE (816) 474-6550 ▮ FACSIMILE (816) 842-3190

LONDON
ZURICH
GENEVA
MELBOURNE
BUENOS AIRES

March 3, 1999

Rep. Mike O'Neal, Chair
House Judiciary Committee
Statehouse
Topeka, Kansas 66612

Re: S.B.88

Dear Mike:

As you know, S.B.88 recently passed the Senate. S.B.88 was introduced by Raytheon Aircraft Credit Corporation (Raytheon), which has experienced a problem in its sales of secured aircraft receivables. This problem stems from some wayward language in a 1993 Tenth Circuit decision. In order to protect Kansas transactions in which Raytheon and other sellers of receivables are involved, the best solution to the problem is amendment of the Kansas UCC, as proposed in SB88.

The Problem. From time to time, Raytheon wishes to transfer secured aircraft receivables to a separate entity that must be "bankruptcy-remote" from Raytheon in order to obtain the best ratings for investors in the receivables and the streams of payment generated by them. These transactions are a form of securitization, an important financing vehicle for the company. The transfer of the receivables from Raytheon to the separate entity is structured as an outright sale of receivables on a non-recourse basis, which under current law should preclude Raytheon's trustee in bankruptcy from claiming an interest in the receivables. See e.g., Major's Furniture Mart, Inc. v. Castle Credit Corp., 602 F2d 538 (3d Cir. 1979)(dealing with rights on default); In re Contractors Equip. Supply Co., 861 P2d 141 (9th Cir. 1988)(receivables sold outright do not remain as property of the bankrupt seller's estate, at least if UCC filing is accomplished); and In re De-Pen Line, Inc., 215 BR 947, 34 UCC Rep. 2d 502 (Bankr. ED Pa. 1997) (non-recourse is key factor in finding an "outright sale").

Unfortunately, Raytheon has been unable to get a

House Judiciary
3-8-99
Attachment 1

unqualified opinion from counsel regarding the "bankruptcy-remote" nature of the transferee entity. Within the last two years, the opinions of both the Sullivan & Worcester firm in Boston (dated March 24, 1997) and the Martin, Pringle firm in Wichita (dated May 6, 1997) have been qualified by the assumption that a Kansas court would not follow the 1993 decision of the Tenth Circuit in Octagon Gas Systems, Inc. v. Rimmer, 995 F2d 948 (10th Cir. 1993). There is as yet no Kansas case on point and Octagon Gas injects an element of uncertainty into any securitization transaction occurring within the jurisdiction of the Tenth Circuit (which includes Kansas).

The Octagon Gas Case. In Octagon, an oil patch financer named Rimmer acquired a perpetual "5% overriding royalty interest" in the revenues of a debtor that operated a natural gas gathering system. The stream of payments from this receivable came from purchasers at the wellhead. In 1988, the debtor, Meridian Reserve, filed Chapter 11 bankruptcy. As purchaser of the receivable, Rimmer had never filed an Article 9 financing statement as required by UCC § 9-102(1)(b). Nevertheless, the lower courts, relying on the "true sale" nature of the transaction, held that Rimmer's interest in the receivables was not part of Meridian's bankruptcy estate under § 541 of the Bankruptcy Code. Therefore, Rimmer's interest was not adversely affected by the bankruptcy reorganization plan that sold the gas system to a third party "free and clear of liens". The court concluded that Rimmer had previously carved out his interest when he obtained the 5% override.

In a stunning 2-1 panel decision, the Tenth Circuit reversed the lower courts. The court noted that Article 9 treats the interest of a receivables purchaser as a "security interest". Under § 9-102(1)(b), and Article 9 applies to an outright sale of receivables. Moreover, the term "security interest" includes the interest of a receivables purchaser and the term "secured party" is defined in the statute to include a person to whom receivables have been sold outright. On the basis of these statutory definitions, the appellate court reasoned broadly that purchased receivables must remain as part of the seller's bankruptcy estate in the same way that any assets subject to a security interest would. The fact that Rimmer took "title" to the receivables was irrelevant under UCC § 9-202. The fact that the transaction is structured as an outright sale without recourse does not keep the receivables from remaining

as property of the transferor's estate under § 541 of the Bankruptcy Code. In the case at hand, the 5% overriding royalty remained part of Meridian's estate and was transferred to the third party free and clear of Rimmer's interest. Therefore, the third-party transferee was within its rights to cut off royalty payments to Rimmer. The bottom line of the decision is that the outright sale of a debtor's receivables prior to bankruptcy does not place those receivables beyond the reach of the debtor's trustee in bankruptcy. The Tenth Circuit decision conflicts with the cases cited above from the Third and Ninth Circuits.

The Octagon Gas decision is clearly wrong and has been sharply criticized by the UCC commentators, including me. For purposes of § 541 of the Bankruptcy Code, a distinction should be drawn between a traditional security interest in receivables and an outright sale of those receivables without recourse. Receivables securing a loan remain assets of the borrower, just like a piece of equipment. By contrast, an outright sale of receivables without recourse should be treated like an outright sale of equipment or any other asset--the debtor no longer has an interest in the property under the jurisdiction of the bankruptcy court. Article 9 applies to the outright sale of receivables only to the limited extent that it requires the filing of a financing statement by the purchaser in order to protect creditors of the seller who would otherwise be misled by the seller's apparent continuing ownership.

The cases cited as authority by the Tenth Circuit were cases where the purchaser of receivables failed to file a financing statement and therefore lost the receivables to the seller's trustee under § 544 of the Bankruptcy Code. See, e.g., In re Cripps, 31 BR 541 (Bankr. WD Okla. 1983). There is nothing remarkable about these holdings. However, it is one thing to invoke the UCC as a basis for filing. It is quite another to invoke it as a basis for finding that receivables sold outright prior to bankruptcy remain property of the estate for all purposes when a proper filing has been made. The Tenth Circuit could simply have held that Rimmer's failure to file a UCC financing statement gave the receivables to the trustee as a lien creditor under § 544. Instead, the court went much further and stated that the receivables remain part of the seller's bankruptcy estate even when the purchaser has properly filed a financing statement. An important point here is that a Kansas court

construing Octagon Gas could easily limit it to its unique facts--Rimmer never filed a financing statement.

Although the Tenth Circuit decision is clearly wrong in its obliteration of the distinction between a "true sale" and a "secured transaction" where receivables are involved, it has thrown a cloud over transactions in the Tenth Circuit involving outright sales of receivables, including factoring and securitizations. At this writing, the Tenth Circuit has not had occasion to back away from its 1993 decision. Raytheon and other sellers of receivables in the Tenth Circuit have been prejudiced by the decision.

The PEB Commentary. In the wake of the Octagon Gas decision, the Permanent Editorial Board of the UCC (an arm of the American Law Institute) in 1994 issued a Commentary on Octagon Gas (PEB Commentary No. 14), which has been published as a supplement to the Official Comments to § 9-102 of the UCC. The PEB Commentary sharply criticizes the decision. It concludes that the application of Article 9 to the outright sale of accounts does not prevent the transfer of ownership from seller to buyer for bankruptcy purposes. The Commentary agrees that outright sales of accounts are within the scope of Article 9, that the seller is treated as the "debtor", the buyer as the "secured party", and the receivables themselves as "collateral". However, the Commentary points out that it is a fundamental principle of law that an owner of property may transfer ownership to another person. If the drafters of the UCC intended to take away that right by bringing the outright sales of receivables within the scope of Article 9, they would have said so. Yet there is no hint of such an intent. Outright sales of receivables are brought within the scope of the UCC solely to require filing as a means of protecting creditors of the seller who could otherwise be misled.

On the basis of its conclusion that Article 9's application to sales of receivables does not prevent the outright transfer of ownership for bankruptcy purposes, the PEB published Commentary No. 14 (dated June 10, 1994) which reads as follows:

> Neither Section 9-102 nor any other provision of Article 9 is intended to prevent the transfer of ownership of accounts or chattel

> paper. The determination of whether a particular transfer of accounts or chattel paper constitutes a sale or a transfer for security purposes (such as in connection with a loan) is not governed by Article 9. Article 9 applies both to sales of accounts or chattel paper and loans secured by accounts or chattel paper primarily to incorporate Article 9's perfection rules. The use of terminology such as "security interest" to include the interest of a buyer of accounts or chattel paper, "secured party" to include a buyer Of accounts or chattel paper, "debtor" to include a seller of accounts or chattel accounts or chattel paper, and "collateral" to include accounts or chattel paper that have been sold is intended solely as a drafting technique to achieve this end and is not relevant to the sale or secured transaction determination.

The language of this Commentary makes it clear that it is intended not as a change in the law, but as a clarification of the law as it has always been understood under Article 9 of the UCC.

Amending the Kansas statute. In my opinion, a Kansas court would give great weight to PEB Commentary No. 14 if it were faced with the issue of whether an outright, non-recourse pre-bankruptcy sale of receivables would render those receivables "remote" from the bankruptcy of the seller, at least if the buyer of the receivables had properly filed a UCC financing statement at the time of the transaction. However, given the brooding presence of the Octagon Gas decision, it makes sense to put the language of PEB Commentary No. 14 directly into the text of the Kansas UCC. Moreover, the statute should also expressly provide that the amendment is intended merely as a "clarification" of the law as it has always been understood under the UCC, not a "change" in the law. The amendment contained in SB88 adds a new subsection (4) to K.S.A.§ 84-9-102 to read as follows:

> (4) This article does not prevent the transfer of ownership of accounts or chattel paper. The

> determination of whether a particular transfer of accounts or chattel paper constitutes a sale or transfer for security purposes is not governed by this article. This is a declaration of the meaning of the uniform commercial code as originally adopted.

The first two sentences of the proposed amendment are a paraphrase of PEB Commentary No. 14. This is also the language used by the Oklahoma legislature in its 1996 amendment of the Oklahoma UCC. The Oklahoma amendment is particularly significant because the Octagon Gas decision applied Oklahoma law. As far as I know, no other state in the Tenth Circuit has amended its UCC. Kansas would be the second. There are no decisions to date construing the Oklahoma amendment.

The third sentence of the proposed amendment is a "curative" formulation. It is based on similar language found in K.S.A.§ 84-9-402a, which provides a strong precedent for this formulation and was a legislative response to a similar prior bad judicial decision. In In re Werth, 443 F. Supp. 738 (D. Kan. 1977), the court held that a UCC financing statement describing collateral as "all equipment now owned or hereafter acquired by debtor" was insufficient to perfect a security interest in the debtor's farm equipment because it was not specific enough. Given the broad notice-filing philosophy of the UCC, the Werth decision was clearly wrong and stood as a minority of one. The decision created great exposure for secured lenders, many of which had been making generic UCC filings for years on thousands of loans. Under Werth, these filings could always be challenged by the debtor's trustee in bankruptcy.

In response to Werth, the Kansas legislature amended UCC § 9-402(1) in 1978 to provide: "A statement of collateral in a financing statement is adequate if it generally identifies goods by one or more of the classifications listed in K.S.A § 84-9-109, or generally identifies other collateral by one or more of the following classifications: fixtures, documents, instruments, general intangibles, chattel paper or accounts." In addition, a new § 9-402a was enacted which stated that "[the 1978 amendment] is a declaration of the meaning of the uniform commercial code as

originally adopted."

In In re Grey, 29 BR 286 (Bankr. D. Kan. 1983), the Kansas bankruptcy court was faced with an attack by a trustee in bankruptcy on a UCC financing statement that was, like Werth, generic in its description of farm equipment and filed before the effective date of the 1978 amendment validating such generic descriptions. Judge Pusateri upheld the creditor's financing statement by giving "retroactive" effect to the 1978 amendment. He restated the general rule that statutes operate only prospectively, unless the legislature manifests a clear intent to have a statute apply retroactively. The court felt that the Kansas legislature's declaration of intent contained in K.S.A. § 9-402a was a clear expression of intent to clarify the original meaning of K.S.A. § 9-402(1). Moreover, it noted that the Kansas legislature was aware of the havoc created by the Werth decision, and the need to overrule it to cure "massive numbers of financing statements throughout the state" that were already on file. The court in Grey felt that retroactive overruling of the Werth decision would not adversely affect the debtor's rights in property, but simply adjust the priority of various creditors, particularly the trustee in bankruptcy.

The court in Werth also cited American State Bank v. White, 217 Kan. 78, 535 P2d 424 (1975), which involved yet a third variation of this theme. In White, the Kansas Supreme Court was dealing with a priority conflict between an Oklahoma secured creditor and a Kansas buyer of a car. The Oklahoma creditor had a security interest in the car but at that time Oklahoma did not require that a lien be noted on the certificate of title. The Kansas buyer thought he had bought an unencumbered vehicle but later learned of the Oklahoma bank's security interest. The Kansas court gave priority to the Kansas buyer on the ground that the Oklahoma lien was "absolutely perfected" for four months after the car came into Kansas, even if the Oklahoma bank failed to reperfect in Kansas within that deadline. In reaching this decision, the court was construing UCC § 9-103(3). The statute was ambiguous as to whether the lien was "absolute" for four months or invalid because the creditor failed to refile within the four-month grace period provided by the UCC. The Kansas Supreme Court, reviewing pre-UCC common law, concluded that the lien was "absolute", thereby giving

priority to the Kansas purchaser. At the time the case came down, the Kansas legislature had amended UCC § 9-103(3) to make failure to file within four months ineffective against purchasers, but the facts in the case predated the amendment. The court refused to give retroactive effect to the UCC amendment because there was no indication that the legislature intended it to have retroactive effect; moreover, prior Kansas law was clear in protecting the purchaser. In Grey, Judge Pusateri distinguished the White case on the ground that the Kansas legislature included a clear statement to have the amendment apply "retrospectively and/or curatively" in the one case but not in the other.

This prior Kansas experience with the UCC strongly suggests that the courts will give retroactive effect to a "curative" statute intended to overrule or "clarify" a bad prior judicial decision. In our case, the argument for retroactivity should be even stronger than what the court approved in the Grey case since (1) Octagon Gas applies Oklahoma law rather than Kansas law, and (2) Octagon Gas is distinguishable anyway because of Rimmer's failure to file a financing statement; in fact the bad language in Octagon Gas could be viewed as mere dicta. Therefore, a court could more easily construe an amendment of UCC § 9-102 as a "clarification" of existing law rather than a change in the law. Alternatively, it could view the amendment as a change in the law, but give it retroactive effect based on the Grey precedent. Although Grey is only a single bankruptcy court decision and not a statement of the Kansas Supreme Court, in my opinion the prior experience under Article 9 of the UCC indicates why a third sentence should be added to the amendment, giving it "retroactive" effect.

For the reasons stated above, I would urge the Senate Judiciary Committee to act favorably on 1999 Senate Bill 88. As to the text of the bill, my only suggestion would be to change the word "chattels" to "chattel paper" in the title of the bill. I would be pleased to respond to any questions which you or the members of the Committee might have.

Sincerely,

Barkley Clark

THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE

REVISED EDITION

1998 Cumulative Supplement No. 3

BARKLEY CLARK
Shook, Hardy & Bacon, LLP
Kansas City

A.S. Pratt & Sons Group

A good example is *Dupuis v. Faulk*,[97.1] where Earl Dupuis assigned to a third party, for $28,000 in cash, his rights as plaintiff in a personal injury action. This assignment was not covered by Article 9 because it was not given as security for a loan. Therefore, since Dupuis sold the intangible prior to his marital difficulties, his estranged wife had no right to attach the lawsuit's proceeds. Under the proposed revision, failure of the assignee to file a UCC-1 would leave the intangible exposed to the claims of a levying creditor, such as the estranged wife. Of course, in the facts of this case, the UCC would also have to be amended to include tort claims within its scope.

[97.1] Dupuis v. Faulk, 609 So. 2d 1190, 21 UCC Rep. 2d 747 (La. Ct. App. 1992).

Add new subsections.

[3] The *Octagon Gas* Case [New]

The law surrounding the rights of receivables purchasers when the seller goes bankrupt has always been murky. A recent Tenth Circuit decision further muddies the waters by holding that the receivables remain as property of the seller's bankruptcy estate.

[a] Facts and Holding

In *Octagon Gas Systems, Inc. v. Rimmer*,[97.2] an oil patch financer named Rimmer acquired a perpetual "5% overriding royalty interest" in the revenues of a debtor that operated a natural gas gathering system. The debtor had no interest in any mineral reserves, so the term "overriding royalty interest" was something of a misnomer. Rimmer had actually bought an interest in the accounts receivable of the debtor—monies owing by natural gas pipeline purchasers. He received royalty payments regularly from 1976 until 1990.

In 1988, the debtor, Meridian Reserve, Inc., went into Chapter 11 bankruptcy. Rimmer had never filed an Article 9 financing statement covering the receivables. Nonetheless, the lower courts, relying on the "true sale" nature of the transaction, held that Rimmer's interest in the receivables was not part of the transferor's estate under § 541 of the Bankruptcy Code. Therefore, Rimmer's interest was not affected by the bankruptcy reorganization plan that sold the gas system to a third party "free and clear of liens, claims, interests, and encumbrances." The court concluded that he had previously carved out his interest when he obtained the 5% override.

The Tenth Circuit saw it otherwise. In a 2-to-1 panel decision, the court noted that Article 9 treats the interest of a receivables purchaser as a "security interest." Under § 9-102(1)(b), Article 9 applies to an outright sale of receivables. Moreover, the term "security interest" includes the interest of a receivables purchaser, and the term "secured party" includes a person to whom receivables have been sold outright.

On the basis of these statutory definitions, the court reasoned broadly that purchased receivables must remain as part of the seller's bankruptcy estate in the same

[97.2] Octagon Gas Sys., Inc. v. Rimmer, 995 F2d 948 (10th Cir. 1993).

way that any other asset subject to a security interest § 9-202. Since the receivables remained as property of the bankruptcy estate under § 541, they were part of the Chapter 11 plan and were transferred to the third party free and clear of all encumbrances. Therefore, the third-party transferee was within its rights to cut off royalty payments to Rimmer. The bottom line was that a debtor's sale of receivables prior to bankruptcy does not necessarily place those receivables beyond the reach of the bankruptcy trustee.

[b] Critique

The Tenth Circuit decision seems wrong in its broad holding. For purposes of § 541 of the Bankruptcy Code, a distinction should be drawn between a traditional security interest in receivables and an outright sale of those receivables without recourse. Receivables securing a loan remain assets of the borrower, just like a piece of equipment or a batch of inventory. By contrast, an outright sale of receivables without recourse should be treated like an outright sale of equipment or inventory to a third party—that is, the debtor no longer has an interest in the property under the jurisdiction of the bankruptcy court. The case law has long recognized this sale/security interest distinction.[97.3]

Article 9 applies to the sale of receivables only to the limited extent that it requires the filing of a financing statement by the purchaser. The theory here is that creditors of the seller would otherwise be misled by a secret lien, just as would creditors of a borrower when the lender fails to file. The cases cited by the Tenth Circuit were cases where the purchaser of receivables failed to file a financing statement and therefore lost the property to the trustee under § 544.[97.4] There is nothing revolutionary in those cases.

It is one thing to invoke Article 9 as a basis for filing. It is quite another to invoke it as a basis for finding that receivables sold outright prior to bankruptcy remain as property of the estate for all purposes, including the automatic stay under § 362 and the trustee's rights to use or sell collateral under § 363. The Tenth Circuit could have simply held that failure of Rimmer to file under Article 9 gave the receivables to the trustee as a lien creditor under § 544 if there were no exemption from filing. Instead, the court went much further and thereby unnecessarily limited the rights of receivables purchasers.

After holding that the receivables sold to Rimmer remained as property of Meridian's estate under § 541, subject to the trustee's sale to a third party free and clear of encumbrances, the Tenth Circuit remanded to determine whether Rimmer's interest was in fact perfected even though no UCC financing statement had been filed. On that point, Rimmer had argued that his purchase of a mere 5% override was an

---

[97.3]The leading cases are Major's Furniture Mart, Inc. v. Castle Credit Corp., 602 F2d 538 (3d Cir. 1979) (dealing with rights on default); In re Contractors Equip. Supply Co., 861 P2d 241, 245 (9th Cir. 1988) (receivables sold outright do not remain as property of the bankrupt seller's estate, at least if UCC filing is accomplished).

[97.4]See, e.g., In re Cripps, 31 BR 541 (Bankr. WD Okla. 1983).

"insignificant" part of the seller's receivables, which would exempt him from filing a financing statement under UCC § 9-302(1)(e).

The Tenth Circuit recognized this argument and, in a footnote, suggested that Rimmer would be entitled to "adequate protection" of his royalty interest if no filing was required. In other words, Rimmer could recover the value of the royalty interest that had been sold. So in the long run Rimmer might still prevail, in spite of the expansive holding of the Tenth Circuit.

[c] Broad Implications

The most worrisome aspect of the Tenth Circuit decision is its obliteration of the distinction between a true sale transaction and a secured loan transaction where accounts receivable are involved. The decision severely undermines the conceptual basis for a number of widely used financing structures intended to mitigate the legal risks associated with the bankruptcy of a debtor/seller of receivables. Statements warning people of the decision are beginning to appear in "true sale" opinions in structured receivables financings.

In many structured transactions, special-purpose entities purchase receivables as a protected source of payment for newly issued securities. In evaluating the quality of such securities, rating agencies and investors alike have routinely considered the characterization of the transaction as a sale, together with perfection by UCC filing, to be sufficient protection against a claim that the receivables remain property of the seller's estate in case of a bankruptcy proceeding. The *Octagon Gas* case changes all this. Now, investors having an interest in what they thought to be property of a special purpose vehicle will find themselves instead having an interest in property of the seller. Payment of the income stream could be delayed in an open-ended way. Although investors would be entitled to "adequate protection," the content of that protection is probably not as great as being an outright owner of the receivables.

As another example, suppose a factor has purchased a block of receivables without recourse and has properly filed a UCC financing statement. The factor notifies the account debtors to begin making payments directly to it. Then the seller files bankruptcy. Under the rationale of the Tenth Circuit, the receivables would remain as property of the seller's estate, and continued collections would be subject to the automatic stay. The same problem could apply to a dealer's discounting of chattel paper.

These are some of the unfortunate implications of the *Rimmer* decision. One can only hope that its rationale is not followed by other courts and that the rating agencies see the case as an aberration of the Tenth Circuit.

[d] PEB Commentary

On January 25, 1994, the Permanent Editorial Board of the UCC (an arm of the American Law Institute) issued a Proposed Commentary on *Octagon Gas*. After final approval, it will be published as a supplement to the Official Comments to the UCC. It could have an important impact on any further cases in this area.

Not surprisingly, the proposed PEB Commentary sharply criticizes the *Octagon Gas* decision. The bottom line for the PEB is that application of Article 9 to the sale of accounts (and chattel paper) does not prevent the transfer of ownership from seller to buyer for bankruptcy purposes. The Commentary agrees that outright sales of accounts are covered by Article 9 and that the seller is treated as the "debtor," the buyer as the "secured party," and the accounts themselves as "collateral." However, the Commentary points out that it is a fundamental principle of law that an owner of property may transfer ownership to another person. If the UCC intended to take away that right by bringing the sale of accounts within the scope of Article 9, the drafters would have said so in the text of the Official Comments. Yet, there is no hint of such an intent. In fact, Comment 1 to UCC § 2-403 reaffirms the general principle of outright property transfer.

The proposed Commentary then points to UCC § 9-502(2) to show that Article 9 recognizes the basic distinction between outright sales and security interests in accounts. Under that section, if an outright sale is involved, the buyer of the receivables is entitled to any surplus from collections; if a security interest is involved, the seller gets the surplus. Moreover, Comment 4 to § 9-502 acknowledges that it is for the courts to draw the line between a true sale of accounts and a security interest.

The proposed Commentary argues that Article 9 applies to the outright sale of receivables because the line between sales and security interests is often very fuzzy and the purpose of requiring filing in both cases is to inform third parties of existing interests in a debtor's receivables. But this *limited purpose* does not mean that outright sales should be considered mere secured transactions for such *other purposes* as bankruptcy. Article 9 does have a bankruptcy impact in that failure of the buyer to file will allow the seller's trustee to grab the accounts under the strong-arm clause (i.e., § 544(a) of the Bankruptcy Code). But that impact does not affect the transfer of ownership as between seller and buyer. If the buyer properly files under Article 9 or is exempt from filing, the accounts should not be subject to any claims by the seller's trustee in bankruptcy.

On the basis of its conclusion that Article 9's application to sales of receivables does not prevent the transfer of ownership for bankruptcy purposes, the proposed Commentary suggests amending Official Comment 2 to § 9-102 to read as follows:

> Neither § 9-102 nor any other provision of Article 9 is intended to prevent the transfer of ownership of accounts or chattel paper. The determination of whether a particular transfer of accounts or chattel paper constitutes a sale or a transfer for security purposes (such as in connection with a loan) is not governed by Article 9. Article 9 applies both to sales of accounts or chattel paper and loans secured by accounts or chattel paper primarily to incorporate Article 9's perfection rules. The use of terminology such as "security interest" to include the interest of a buyer of accounts or chattel paper, "secured party" to include a buyer of accounts or chattel paper, "debtor" to include a seller of accounts or chattel paper, and "collateral" to include accounts or chattel paper that have been sold is intended solely as a drafting technique to achieve this end and is not relevant to the sale or secured transaction determination.

The KANSAS BANKERS ASSOCIATION
A Full Service Banking Association

March 8, 1999

To: House Judiciary Committee

From: Kathleen Taylor Olsen, Kansas Bankers Association

Re: SB 88

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to submit written testimony in support of **SB 88**, amending the Kansas Uniform Commercial Code, KSA 84-9-102.

As drafted, the amendments would merely clarify what we have believed the law to be. It is important to maintain the distinction between the legal treatment of an outright sale of any asset versus the holding of a security interest in such property. We support the notion that the reason Article 9 of the UCC applies to the sale of accounts is to require purchasers to file a financing statement, thereby notifying third parties of their ownership interest.

We believe adding this language would prevent future litigation of this issue and thus, offer our support. Thank you for your time and attention to the matter.

800 SW Jackson Suite 1500 • Topeka, Kansas 66612-1265 • (785) 232-3444 FAX
email kbaoffice@ink.org

JUDICIAL COUNCIL TESTIMONY
ON S.B. 87 AMENDING
K.S.A. 60-208(a) AND 60-209(g)

The Kansas Judicial Council proposes a change to K.S.A. 60-208(a) and 60-209(g), and to Kansas Supreme Court Rule 118(a). The purpose for the change would be to obviate the need for recurrent amendments as the statutory amount in controversy for federal court diversity jurisdiction changes. By referring specifically to the federal diversity statute, rather than to a specific amount in controversy, it will be unnecessary to change this statute and this rule each time the federal jurisdictional amount changes.

The required amount in controversy for federal court diversity of citizenship jurisdiction is set forth in the federal statute, 28 U.S.C. §1332. Over the past forty years, that amount has changed several times. That history is outlined as follows:

1948:	$ 3,000
1958:	$10,000
1988:	$50,000
1996:	$75,000

The Kansas pleading statute, K.S.A. 60-208, was amended to require that petitions seeking damages no longer pray for a specified amount. The purpose of this amendment was to preclude unnecessary publicity surrounding the filing of "multi-million dollar" lawsuits, until there was some showing that the case warranted such a prayer. However, while deleting reference to specific amounts in controversy, the statute also accommodated the need to determine whether the state court petition might be removable to the United States District Court. Therefore, while deleting reference to a specific amount in controversy, K.S.A. 60-208(a) also required a statement whether the amount in controversy exceeded then-current amount in controversy. If the amount sought is less than that stated amount, then a prayer for a specific amount of monetary relief could be stated.

Similarly, Supreme Court Rule 118(a) was adopted to provide for a Statement of Monetary Damages if the Petition sought an "amount in excess of $_____" --the then-current amount stated in K.S.A. 60-208(a).

Since the initial adoption of this aspect of K.S.A. 60-208(a), it has been necessary to amend the amount stated in that statute in K.S.A. 60-209(a) and in Rule 118(a) to accommodate increases in the federal diversity jurisdictional amount. However, there has been a delay between the adoption of the federal statutory change and the resulting change in the Kansas rules -- sometimes as long as a year. In such a situation, a state court petition which technically complied with the then--current iteration of K.S.A. 60-208(a) would identify the amount in controversy as being "in excess of" the amount stated in that statute, yet it would still not advise the court or the opposing parties whether the case were removable to federal court. Indeed, at the present time there is a difference between the statute and the rule, K.S.A. 60-208 referring to "$75,000," while Rule 118 refers to "$50,000."

The simple purpose for the proposed changes is to alleviate the necessity of recurrent amendment of the state court statute and rule each time the federal statute is changed. There is increasing criticism of diversity of citizenship jurisdiction in the federal courts, and of the increasing case load such cases impose on those courts. This criticism is usually addressed by increasing the amount required to be in controversy before such cases may resort to federal court. Therefore, further increases in the amount stated in 28 U.S.C. §1332 can be expected. When those changes come, it will be unnecessary again to change K.S.A. 60-208(a), 60-209(g) or Rule 118 if the proposed amendments are adopted.

The Judicial Council has requested that the Kansas Supreme Court amend Supreme Court Rule 118. A copy of the proposed rule amendment is set out below.

RULE 118. PLEADING OF UNLIQUIDATED DAMAGES.

(a) In any action in which a pleading contains a demand for money damages "in excess of ~~$50,000~~" as provided in K.S.A. 60–208(a) and amendments thereto, the party against whom relief is sought may serve on the party seeking relief a written request of the actual amount of monetary damages being sought in the action. Within ten (10) days following service of the request, the party seeking relief shall serve his adversary with a written statement of the total amount of monetary damages being sought in the action and at the same time shall cause a copy of the written statement to be filed in the action. The amount recited in the written statement may be amended downward at any time prior to the action being submitted to the trier of facts for determination. The amount recited in the written statement may be amended upward if the judge hearing a motion to amend the amount recited in the written statement is satisfied the reasons recited in the motion justify the amendment.

THE AMOUNT STATED IN 28 U.S.C. § 1332

JUDICIAL COUNCIL TESTIMONY
ON S.B. 89 RELATING TO K.S.A. CHAPTER 7

GENERAL COMMENT

In July 1997, the Kansas Judicial Council directed its Civil Code Advisory Committee to study K.S.A. Chapter 7, Article 1, dealing with the regulation of the practice of law. Many of the provisions of Chapter 7 were enacted during the early years of Kansas' statehood before the promulgation of written ethics codes. However, the Supreme Court now regulates the practice of law by rule and case law. The Model Rules of Professional Conduct, adopted in 1988, set out the general standards of conduct for Kansas attorneys. The Civil Code Advisory Committee's goal was to identify and recommend repeal of any K.S.A. Chapter 7 provision which was in conflict with, or addressed a subject fully covered by, the Model Rules of Professional Conduct or any other Supreme Court Rule. The Committee recommends that the following provisions of K.S.A. Chapter 7 be repealed:

7-104. Attorneys from other states. Any regularly admitted practicing attorney in the courts of record of another state or territory, having professional business in the courts or before any board, department, commission or other administrative tribunal or agency, of this state, may, on motion be admitted to practice for the purpose of said business only, in any of said courts, tribunals or agencies, upon taking the oath as aforesaid and upon it being made to appear by a written showing filed therein, that he or she has associated and personally appearing with him or her in the action, hearing or proceeding an attorney who is a resident of and duly and regularly admitted to practice in the courts of record of this state, upon whom service may be had in all matters connected with said action, hearing or proceeding, with the same effect as if personally made on such foreign attorney, within this state, and such foreign attorney shall thereupon be and become subject to the order of, and amenable to disciplinary action by the courts, agencies or tribunals of this state. No such court, agency or tribunal shall entertain any action, matter, hearing or proceeding while the same is begun, carried on or maintained in violation of the provisions of this section, but nothing in this section shall be construed to prohibit any party from appearing before any of said courts, tribunals or agencies, in his or her own proper person and on his or her own behalf.

History: G.S. 1868, ch. 11, § 4; R.S. 1923, § 7-104; L. 1935, ch. 69, § 1; L. 1939, ch. 83, § 1; L. 1947, ch. 94, § 1; L. 1977, ch. 26, § 1; July 1.

Comment

K.S.A. 7-104 is worded similarly to Supreme Court Rule 116, but is in conflict with the Rule as to whether a non-resident Kansas lawyer may practice in a Kansas court without associating a resident Kansas attorney. Supreme Court Rule 116 is attached. The Committee recommends repeal of this provision.

Rule 116

ADMISSION OF ATTORNEY FROM ANOTHER STATE

(a) Any attorney not admitted to the practice of law in Kansas but regularly engaged in the practice of law in another state or territory, and who is in good standing pursuant to the rules of the highest appellate court of such state or territory, who has professional business in the courts or any administrative tribunal or agency of this state, may on motion be admitted to practice law for the purpose of said business only, upon showing that he or she has associated with him or her, an attorney of record in the action, hearing or proceeding, who is a resident of Kansas, regularly engaged in the practice of law in Kansas, and who is in good standing under all of the applicable rules of the Supreme Court of Kansas. The Kansas attorney of record shall be actively engaged in the conduct of the matter or litigation, shall sign all pleadings, documents, and briefs, and shall be present throughout all court or administrative appearances. Service may be had upon the associated Kansas attorney in all matters connected with said action, hearing or proceeding, with the same effect as if personally made on the out-of-state attorney, within this state. Any out-of-state attorney admitted pursuant hereto shall be subject to the order of, and amenable to disciplinary action, by the courts, agencies, or tribunals of this state.

(b) Notwithstanding any of the provisions of the foregoing section (a), any attorney, not a resident of Kansas, who is admitted to practice law in this state and who is in good standing pursuant to the rules of the Supreme Court may appear as attorney of record in any proceeding in any court, tribunal or agency without having associated with him or her a resident Kansas attorney.

(c) No court, agency or tribunal shall entertain any action, matter, hearing or proceeding while the same is begun, carried on or maintained in violation of the provisions of this rule. Nothing in this rule shall be construed to prohibit any party from appearing personally before any of said courts, tribunals or agencies on his or her own behalf.

[**History:** Am. effective May 14, 1987.]

Case Annotations

1. Duty of local counsel discussed in attorney discipline case finding attorney in violation of professional conduct rules by her handling of post-trial motions. *In re Jackson*, 254 Kan. 573, 866 P.2d 1048 (1994).

2. Rule requires local counsel to sign pleadings and briefs, to be actively involved in the case, and to be present at all appearances; error to dismiss case with prejudice for noncompliance with rule. *Architectural & Engineered Products Co. v. Whitehead*, 19 Kan. App. 2d 378, 869 P.2d 766 (1994).

3. Arkansas attorney admitted to practice in this post-divorce action per Rule 116. *In re Marriage of Stockham*, 23 Kan. App. 2d 197, 928 P.2d 104 (1996).

4. Out-of-state counsel's misunderstanding of Kansas law and Kansas counsel's failure to get involved in all aspects of defense are noted in discussion of defendant's ineffective assistance of counsel claim. *State v. Rice*, 261 Kan. 567, 932 P.2d 981 (1997).

7-106. Deceit or collusion; suit without authority. An attorney or counselor who is guilty of deceit or collusion, or consents thereto, with intent to deceive a court or judge, or a party to an action or proceeding, or brings suit or commences proceedings without authority therefor, is liable to be disbarred, and shall forfeit to the injured party treble damages, to be recovered in a civil action.

History: G.S. 1868, ch. 11, § 6; Oct. 31; R.S. 1923, § 7-106.

Comment

K.S.A. 7-106 provides for damages against an attorney who is guilty of deceit, collusion, or bringing a lawsuit without authority. Because K.S.A. 60-211 provides for sanctions against an attorney who brings a suit without a reasonable basis in law and fact, and because current law allows punitive damages for egregious conduct by an attorney, this section is no longer needed. The Committee recommends repeal of this provision.

7-107. Proof of authority. The court may, on motion, for either party, and on the showing of reasonable grounds therefor, require the attorney for the adverse party, or for any one of several adverse parties, to produce or prove, by oath or otherwise, the authority under which he or she appears, and, until the attorney does so, may stay all proceedings by him or her on behalf of the parties for whom he or she assumes to appear.

History: G.S. 1868, ch. 11, § 7; Oct. 31; R.S. 1923, § 7-107.

Comment

K.S.A. 7-107 has not been cited by the appellate courts since 1940, and it has little current significance. The Committee recommends repeal of this provision.

7-111. Grounds for discipline or disbarment. An attorney-at-law may be disbarred or disciplined by the supreme court, for any of the following causes arising after admission to practice in this state: 1. For willful disobedience of an order of court requiring the attorney to do or forbear an act connected with or in the course of his or her profession. 2. For a willful violation of the attorney's oath, or of any duty imposed upon an attorney-at-law. 3. For neglecting or refusing, on demand, to pay over money in his or her hands, due or belonging to a client, except where such money is retained under a bona fide claim of a lien for services. 4. For destroying, secreting, fraudulently withdrawing, mutilating, or altering any paper or record belonging to the files or records in any action or proceeding.

History: L. 1913, ch. 64, § 2; R.S. 1923, § 7-111; L. 1968, ch. 303, § 2; March 27.

Comment

The Committee recommends repeal of this provision because the grounds for discipline and disbarment are fully covered by the Model Rules of Professional Conduct. The Model Rules of Professional Conduct are attached.

7-121. Legalizing admission June 1 to 15, 1903. Laws 1907, chapter 235, section 1, included by reference. [Legalizes orders made June 1 to 15, 1903, admitting to practice in district and inferior courts the same as if made prior to June 1, 1903.]

History: R.S. 1923, § 7-121.

Comment

The original purpose of K.S.A. 7-121 seems to have been lost in historical obscurity. The Committee recommends repeal of this provision with the notation that the repeal is not intended to create any substantive change, but that the provision has outlived its useful purpose.

Rule 226

MODEL RULES OF PROFESSIONAL CONDUCT

PREFATORY RULE

The Model Rules of Professional Conduct adopted by the House of Delegates of the American Bar Association on August 2, 1983, as hereinafter modified, are adopted as a Rule of this court as general standards of conduct and practice required of the legal profession in Kansas. Violation of such standards constitutes grounds for disciplinary action.

To the extent that they are not inconsistent with the rules herein adopted or the statutory or case law of Kansas, the court also adopts in principle the preamble and comments accompanying the Model Rules, except as hereinafter modified. The Canons of Professional Responsibility numbered 1 through 9, adopted as part of Supreme Court Rule 225, continue as general statements of required professional conduct.

The Model Rules of Professional Conduct as hereinafter set forth shall be effective as of the 1st day of March, 1988. All alleged ethical violations committed prior to March 1, 1988, shall be subject to and controlled by Supreme Court Rule 225 and the Code of Professional Responsibility.

Grateful recognition is due the special ad hoc committee of the Supreme Court and the Kansas Bar Association for its assistance in the modification and supplementation of the Model Rules to conform to Kansas standards and for the Kansas Comments prepared by the committee.

The Rules herein adopted may be referred to and cited as MRPC 1.1, etc.

Case Annotations

1. Adoption of Rule 226 supersedes and supplements Rule 225 Code of Professional Responsibility; Rule 225 Canons 1 through 9 preserved as "general statements of required professional conduct." *Geisler by Geisler v. Wyeth Laboratories*, 716 F. Supp. 520, 524 (D. Kan. 1989).

2. Violations committed before March 1, 1988, governed by Rule 225. *In re Keithley*, 252 Kan. 1053, 850 P.2d 227 (1993).

3. The provisions of Rule 226 supersede and supplement Rule 225; Canons 1 through 9 preserved as general statements of required conduct. *In re Estate of Koch*, 18 Kan. App. 2d 188, 212, 849 P.2d 977 (1993).

PREAMBLE: A LAWYER'S RESPONSIBILITIES

A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under

the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others.

In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to

seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these Rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

SCOPE

The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional

discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has professional discretion. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties such as that of confidentiality under Rule 1.6, that may attach when a lawyer agrees to consider whether a client-lawyer relationship shall be established. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationship. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private

clients. They also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so. These Rules do not abrogate any such authority.

Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the rules can be subverted when they are involved by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

Moreover, these Rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege. Those privileges were developed to promote compliance with law and fairness in litigation. In reliance on the attorney-client privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure. The attorney-client privilege is that of the client and not of the lawyer. The fact that in exceptional situations the lawyer under the Rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client and work product privileges.

The lawyer's exercise of discretion not to disclose information under Rule 1.6 should not be subject to reexamination. Permitting such reexamination would be incompatible with the general policy of promoting

compliance with law through assurances that communications will be protected against disclosure.

The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative. Research notes were prepared to compare counterparts in the ABA Model Code of Professional Responsibility (adopted 1969, as amended) and to provide selected references to other authorities. The notes have not been adopted, do not constitute part of the Model Rules, and are not intended to affect the application or interpretation of the Rules and Comments.

Case Annotations

1. Purpose of professional conduct rules can be subverted when they are used as procedural weapons. *LeaseAmerica Corp. v. Stewart*, 19 Kan. App. 2d 740, 876 P.2d 184 (1994).

2. Attorney's violation of ethics rules cannot create cause of action available to adverse litigants or to clients. *OMI Holdings, Inc. v. Howell*, 260 Kan. 305, 918 P.2d 1274 (1996).

TERMINOLOGY

"Belief" or "Believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

"Consult" or "Consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

"DR" refers to the disciplinary rules as found in the Model Code and as adopted by the Kansas Supreme Court in Rule 225.

"EC" refers to the Ethical Considerations adopted by the American Bar Association at the time of the adoption of the Model Code and are defined by the ABA as:

> "Ethical Considerations are not enforceable rules but are statements of policy for the guidance of lawyers when deciding upon a course of action not controlled by law or Disciplinary Rules."

"Firm" or "Law firm" denotes a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization and lawyers employed in a legal services organization. See Comment, Rule 1.10.

"Fraud" or "Fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

"Knowingly," "Known," or "Knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

"Model Code" refers to the Model Code of Professional Responsibility as adopted in Rule 225.

"Partner" denotes a member of a partnership and a shareholder in a law firm organized as a professional corporation.

"Reasonable" or "Reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

"Reasonable belief" or "Reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

"Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

"Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

CLIENT-LAWYER RELATIONSHIP

RULE 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment

Legal Knowledge and Skill

In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill considered action under emergency conditions can jeopardize the client's interest.

A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

Maintaining Competence

To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.

Case Annotations

1. Attorney's failure to represent clients in three separate cases after acceptance of retainer fees and failure to cooperate with disciplinary investigation found to violate DR 1-102, 6-101, 7-101, and 9-102; MRPC 1.1, 1.3, 1.4, 1.15 and 8.4; and Rule 207. Rule 203 disbarment. *In re Morphett*, 246 Kan. 499, 790 P.2d 402 (1990).

2. Attorney's inaction which allowed statute of limitations to run and cause of action to be dismissed with prejudice despite accepting retainer and assuring client of representation violated MRPC 1.1, 1.3, 1.4, 8.4(d), and 8.4(g); indefinite suspension. *In re Cain*, 247 Kan. 673, 801 P.2d 1325 (1990).

3. Attorney employed to probate estate failed to institute probate proceedings, failed to file inheritance tax return thereby incurring penalty and interest, and misrepresented to client that estate matters were being handled violated MRPC 1.1, 1.3, 1.4(a), and 8.4(c); indefinite suspension and Rule 218 compliance ordered. *In re McGhee*, 248 Kan. 988, 811 P.2d 884 (1991).

4. Attorney's failure to prepare journal entry is violation of MRPC 1.1, 1.3, and 1.4; attorney on probation for other matters; public censure. *In re Black*, 249 Kan. 211, 814 P.2d 447 (1991).

5. Attorney's failure to close estate for 12-year period, failure to render court-ordered accounting, failure to satisfy federal estate tax obligations, and failure to cooperate with disciplinary investigator violate MRPC 1.1, 1.3, 1.4, 3.2, 8.4(d) and (g), DR 6-101, DR 7-101, and Rule 207; disbarment and Rule 218 compliance. *In re Coleman*, 249 Kan. 218, 815 P.2d 43 (1991).

6. Attorney's acceptance of retainer to represent client in child custody and support matter, representation to client that appropriate motions had been filed and an agreement drafted, and failure to file and/or draft such documents constitutes violation of MRPC 1.1, 1.3, and 1.4(a); previous violations aggravating factor; one-year suspension and Rule 218 compliance ordered. *In re Stapleton*, 249 Kan. 524, 819 P.2d 125 (1991).

7. Attorney's mishandling of estate case, misrepresentation to client and representatives from disciplinary administrator regarding status of case, failure to withdraw as counsel and failure to cooperate with subsequent counsel, and mismanagement of estate funds violative of MRPC 1.1; 1.2; 1.3; 3.2; 1.15(b); 1.16(a)(3)(d); 8.4(g); and Rule 207(a) and (b); other violations; indefinite suspension and Rule 218 compliance ordered. *In re Stapleton*, 250 Kan. 247, 824 P.2d 205 (1992).

8. Attorney's failure to timely file petition for probate violative of MRPC 1.1 and 1.3; other violations; mitigating circumstances; Rule 203 public censure. *In re Copeland*, 250 Kan. 283, 823 P.2d 802 (1992).

9. Attorney's failure to designate record in federal appeal and failure to respond to show cause order violated MRPC 1.1, 1.3, 3.2, and 8.4(d), (g); other violations; indefinite suspension suspended and probated. *In re Jenkins*, 251 Kan. 264, 833 P.2d 1013 (1992).

10. Attorney on indefinite suspension subject of three complaints for failure to represent clients in violation of MRPC 1.1, 1.3, 1.4, and 8.4(c); failure to cooperate with investigation; disbarment and Rule 218 compliance. *In re McGhee*, 251 Kan. 584, 834 P.2d 379 (1992).

11. Attorney's failure to comply with discovery requests, misrepresentation to court, and failure to advise client, resulting in sanctions against client, violate MRPC 1.1, 1.4, 3.4(a) and (d), and 8.4(a), (c), and (d); firm failure to supervise among mitigating factors; one-year suspension. *In re Dwight*, 251 Kan. 588, 834 P.2d 382 (1992).

12. Attorney's not appearing for scheduled hearing in two cases violates MRPC 1.1 and 1.3; public censure. *In re Johnson*, 251 Kan. 826, 840 P.2d 515 (1992).

13. Attorney's mishandling of real estate matter violates MRPC 1.1, 1.3, 1.4, and 3.2; DR 6-101(A)(3); and Rule 207; other violations; imposition of discipline suspended; one-year supervised probation. *In re Meyer*, 251 Kan. 838, 840 P.2d 522 (1992).

14. Attorney's incompetence in handling bankruptcy matter violative of MRPC 1.1, 3.1, 3.3, and 8.4; public censure. *In re Ramcharan-Maharajh*, 252 Kan. 701, 847 P.2d 1307 (1993).

15. Attorney's mishandling of his mother's estate violative of MRPC 1.1, 1.3, and 1.15; public censure. *In re Scott*, 253 Kan. 192, 853 P.2d 60 (1993).

16. Attorney's mishandling bankruptcy case, failing to abide by client's decision, and failing to keep client informed violative of MRPC 1.1, 1.2, 1.3 and 1.4; previous code and Rule 207 violations; public censure. *In re Edgar-Austin*, 253 Kan. 440, 855 P.2d 960 (1993).

17. Attorney's failure to file probate petition, inform client of status of case, return unearned retainer, and communicate with client violative of MRPC 1.1, 1.3, 1.4, 1.15, 1.16, and 3.2; other violations; one-year suspension and Rule 218 compliance ordered. *In re King*, 253 Kan. 444, 855 P.2d 963 (1993).

18. Attorney's mishandling of employment discrimination class action and failure to inform clients as to status of case violative of MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.15, 3.1, and 3.2; other violations; Rule 203(a)(2) one-year suspension, Rule 203(a)(5) restitution, and Rule 218 compliance ordered. *In re King*, 253 Kan. 444, 855 P.2d 963 (1993).

19. Attorney previously censured placed on indefinite suspension for violations of MRPC 1.1, 1.3, 1.4, 1.15, 1.16, and 8.4 for neglect of two different client's cases; two other complaints found to be based on insufficient evidence although pattern of conduct cited and violations of Rule 207 established; Rule 218 compliance ordered. *In re Jackson*, 253 Kan. 810, 861 P.2d 124 (1993).

20. Attorney's actions in letting the statute of limitations run in four different cases violate DR 1-102(A)(4), 6-101(A)(1) and (3), and 7-101(A)(2), and MRPC 1.1, 1.3, 1.4(a) and (b), 3.2, and 8.4(c). Attorney's actions in failing to respond to requests for information and return of the case file in workers compensation case violate MRPC 1.3, 1.4(a) and (b), 1.16(a)(3) and (d), and 3.2. Eighteen-month suspension probated on conditions. *In re Jones*, 253 Kan. 836, 861 P.2d 1340 (1993).

21. Attorney's failure to file motion to modify sentence in criminal case violative of MRPC 1.1 and 1.3; other violations; pending complaints; imposition of discipline suspended, supervised probation ordered. *In re Jackson*, 254 Kan. 406, 867 P.2d 278 (1994).

22. Attorney's mishandling of post-trial motions as local counsel in handicap employment discrimination case violative of MRPC 1.1 and 1.3; Rule 207 violation; censure. *In re Jackson*, 254 Kan. 573, 866 P.2d 1048 (1994).

23. Attorney's failure to file personal injury claim and blaming client for delay, thereby allowing statute of limitations to run (resulting in client being granted summary judgment in subsequent malpractice claim); failure to inform client as to reduction in child support income; failure to inform client as to hearing dates; and acceptance of retainer fee from out-of-state client whom attorney knew he could not represent in divorce action violate MRPC 1.1, 1.3, 1.4(a) and (b), 1.16(d), 3.3(a)(1), and 8.4(d) and (g); Rule 207(a) and (b) violations; disbarment and Rule 218 compliance ordered. *In re Spears*, 254 Kan. 904, 869 P.2d 718 (1994).

24. Attorney's mishandling of four different probate estates and failure to timely file four different foreclosures, despite representations and billings which would indicate to the contrary, held to violate DR 1-102(A)(4), (5), and (6); 6-101(A)(3); and 7-101(A)(2) and (3); Canons 1, 6, 7, and 9; and MRPC 1.1, 1.3, 1.4, 3.2, and 8.4(c), (d), and (g); aggravating and mitigating circumstances; two-year suspension, discipline probated, and supervised probation ordered. *In re Herman*, 254 Kan. 908, 869 P.2d 721 (1994).

25. Attorney's mishandling of will and estate matter, failure to communicate with client, failure to timely handle the matter, misleading the court as to the status of the probate case, and failure to return the client's file and retainer when requested violate MRPC 1.1, 1.3, 1.4, 1.15, 1.16, 3.2, and 8.4; other violations; disbarment. *In re Jackson*, 255 Kan. 542, 874 P.2d 673 (1994).

26. Attorney's failure to timely file backruptcy petition for clients, misrepresentations to clients as to status of case, and mishandling of bankruptcy case violate MRPC 1.1, 1.3, 1.4, 1.15, and 8.4; other violations; disbarment. *In re Jackson*, 255 Kan. 542, 874 P.2d 673 (1994).

27. Attorney's dilatory handling of three federal court cases violative of MRPC 1.1, 1.3, 1.4, and 3.2; failure to respond to inquiry from disciplinary authorities violative of Rule 207; two-year supervised probation. *In re Long*, 255 Kan. 792, 877 P.2d 421 (1994).

28. Attorney found to have violated MRPC 1.1, 1.3, 1.4, 1.15, 3.2, 3.4(c), 4.3, and 8.4(d) and (g) based on conduct in seven different complaints reflecting on attorney's lack of diligence and competence, miscommunication and lack of candor, and failure to return unearned fees; failure to cooperate in disciplinary investigation; attorney currently on disability inactive status; indefinite suspension and Rule 218 compliance ordered. *In re Jenkins*, 255 Kan. 797, 877 P.2d 423 (1994).

29. Attorney's failure to communicate with clients and poor record keeping of trust account violate MRPC 1.1, 1.3, 1.4 and 1.15; 2-year supervised probation ordered. *In re Waite*, 256 Kan. 130, 883 P.2d 1176 (1994).

30. Attorney's mishandling of personal injury case violates MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.6, 1.7, 1.16, 3.2, 4.1, 8.4 and Rule 207; published censure. *In re Shultz*, 256 Kan. 196, 883 P.2d 779 (1994).

31. Attorney's failure to represent client in collection of foreign judgment in workers compensation case found to violate MRPC 1.1, 1.3, 1.4, 1.5(d), 1.16(d), 3.2, and 8.4(g); indefinite suspension and Rule 218 compliance ordered. *In re Griggs*, 256 Kan. 498, 886 P.2d 786 (1994).

32. Attorney who lied to the court and her clients and failed to appear for landlord-tenant case proceeding found to be in violation of MRPC 1.1, 1.3, 1.4, 3.3, 3.4, 3.5, 4.1, 8.2 and 8.4; one-year suspension and compliance with Rule 218 ordered. *In re Gershater*, 256 Kan. 512, 886 P.2d 343 (1994).

33. Attorney's mishandling of a breach of contract case and settlement violative of MRPC 1.1, 1.3, 1.4, 3.3, and 8.4; six-month suspension and compliance with Rule 218 ordered. *In re Norlen*, 256 Kan. 509, 886 P.2d 347 (1994).

34. Attorney's mishandling of probate matter and workers compensation case violates MRPC 1.1, 1.3, 1.4, 3.2, 4.1, 8.4 and Rule 207; imposition of discipline suspended; two-year supervised probation. *In re Whitaker*, 256 Kan. 939, 888 P.2d 829 (1995).

35. Attorney previously censured disbarred for violations of MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.15, 1.16, 3.2, 3.3, 4.1, 7.1, 7.5, 8.1, 8.4, and Rules 207 and 208; Rule 218 compliance ordered. *In re Shultz*, 257 Kan. 662, 895 P.2d 603 (1995).

36. Attorney's dilatory handling of civil case and failure to file the opening brief in criminal case violate MRPC 1.1, 1.3 and 8.4(d); two-year supervised probation. *In re Betts*, 257 Kan. 955, 895 P.2d 604 (1995).

37. Attorney's mishandling the oil and gas case violates MRPC 1.1, 1.3, 1.4 and 8.4(c); one-year probation. *In re Pilgreen*, 257 Kan. 949, 896 P.2d 389 (1995).

38. Attorney's mishandling of subrogation claims for insurance company violates MRPC 1.1, 1.3 and 1.4; published censure. *In re Morse*, 258 Kan. 248, 899 P.2d 467 (1995).

39. Attorney's failure to remit personal injury protection lien to his client's insurance company, failure to keep client informed, misrepresentation to client, and creating conflict of interest violated MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.15, 3.7, 4.1, and 8.4; aggravating circumstances; indefinite suspension. *In re Seck*, 258 Kan. 530, 905 P.2d 122 (1995).

40. Attorney's neglect of three different clients' cases violates MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 3.1, and 8.4 and Rule 207; one-year suspension. *In re Geeding*, 258 Kan. 740, 907 P.2d 124 (1995).

41. Attorney disciplined in Texas for failure to communicate with clients, neglect of client's cases, failure to cooperate in investigation, and conversion of client's funds; Texas findings and conclusions adopted per Rule 202; indefinite suspension. *In re Callahan*, 258 Kan. 770, 907 P.2d 840 (1995).

42. Attorney's mishandling of various civil and divorce cases violates MRPC 1.1, 1.2, 1.3, 1.4, 1.15, 3.2, 3.4, 4.1, 8.1, and 8.4; indefinite suspension. *In re Gordon*, 258 Kan. 784, 908 P.2d 169 (1995).

43. Attorney's handling of counterclaim and appeal in lawsuit between home buyers and construction company violates MRPC 1.1, 1.3, 1.4, 8.4(c) and (d) and Rule 207; one-year suspension. *In re Crockett*, 259 Kan. 540, 912 P.2d 176 (1996).

44. Attorney's failure to defend client in repossession action violates MRPC 1.1, 1.3, and 1.4; continued use of alcohol and drugs and four additional complaints pending hearing or investigation negate panel's recommendation of supervised probation; one-year suspension. *In re Mitchell*, 260 Kan. 560, 919 P.2d 360 (1996).

45. Attorney's mishandling of client's assets in voluntary conservatorship proceeding violates MRPC 1.1, 1.2, 1.4, 1.5, 1.7, 1.9, 1.14, 3.3, and 8.4; published censure. *In re Brantley*, 260 Kan. 605, 920 P.2d 433 (1996).

46. Attorney's mishandling of bankruptcy proceedings for his clients violates MRPC 1.1, 1.2, 1.3, 1.4, 8.1, and 8.4 and Rule 207; disbarment. *In re Gordon*, 260 Kan. 905, 925 P.2d 840 (1996).

47. Attorney's mishandling of bankruptcy case violates MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.16, 3.1, 3.3, and 8.4; published censure per Rule 203(a)(3). *In re Roy*, 261 Kan. 999, 933 P.2d 662 (1997).

48. Attorney's mishandling of matters involving (1) individualized education program for autistic child in public school, (2) personal injury, probate, and insurance claim arising from fatal car accident, and (3) probate matter involving estate of conservatee violates MRPC 1.1, 1.2, 1.3, 1.4, 1.7, 1.16, and 8.4 and Rule 207; indefinite suspension per Rule 203(a)(2). *In re Dow*, 261 Kan. 989, 933 P.2d 666 (1997).

49. Attorney's mishandling of adoption case violates MRPC 1.1, 1.3, 1.4, and 8.4 and Rule 207; indefinite suspension. *In re Johnson*, 262 Kan. 275, 936 P.2d 258 (1997).

50. Attorney's failure to file negligence action in proper court and his disappearance from his law office without notice to clients violate MRPC 1.1, 1.3, 1.4, 1.5, 3.2, and 8.4 and Rule 207; disbarment. *In re Neal*, 262 Kan. 562, 937 P.2d 1234 (1997).

51. Attorney's mishandling of child support case and his ex parte communication with judge violate MRPC 1.1, 3.3, 3.5, 4.4, 8.4(c), (d), and (g), and Rules 207 and 211; aggravating and mitigating factors; indefinite suspension. *In re Black*, 262 Kan. 825, 941 P.2d 1380 (1997).

52. Attorney's missing filing and response deadlines and failure to communicate with client violate MRPC 1.1, 1.3, and 1.4; one-year supervised probation. *In re Capps*, 262 Kan. 833, ____ P.2d ____ (1997).

RULE 1.2 Scope of Representation

(a) A lawyer shall abide by a client's decisions concerning the lawful objectives of representation, subject to paragraphs (c), (d), and (e), and shall consult with the client as to the means which the lawyer shall choose to pursue. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the objectives of the representation if the client consents after consultation.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

Comment

Scope of Representation

Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Law defining the lawyer's scope of authority in litigation varies among jurisdictions.

In a case in which the client appears to be suffering mental disability, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Services Limited in Objectives or Means

The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. 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 terms upon which representation is undertaken may exclude specific objectives or means. Such limitations may exclude objectives or means that the lawyer regards as repugnant or imprudent.

An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1, or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue.

Criminal, Fraudulent and Prohibited Transactions

A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing, except where permitted by Rule 1.6. However, the lawyer is required to avoid furthering the purpose, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. Withdrawal from the representation, therefore, may be required.

Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer should not participate in a sham transaction; for example, a transaction to effectuate criminal or fraudulent escape of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

Case Annotations

1. Attorney, under suspension at time of representation of client at trial, who fails to so inform client and who fails to pursue appeal upon client's request violates MRPC 1.2, 1.3, 1.4, and 8.4(g); indefinite suspension. *In re Vorhies*, 248 Kan. 985, 811 P.2d 1254 (1991).

2. Attorney's mishandling of estate case, misrepresentation to client and representatives from disciplinary administrator regarding status of case, failure to withdraw as counsel and failure to cooperate with subsequent counsel, and mismanagement of estate funds violative of MRPC 1.1; 1.2; 1.3; 3.2; 1.15(b); 1.16(a)(3)(d); 8.4(g); and Rule 207(a) and (b); other violations; indefinite suspension and Rule 218 compliance ordered. *In re Stapleton*, 250 Kan. 247, 824 P.2d 205 (1992).

3. Criminal defendant has ultimate authority as to plea, jury trial, and self testimony; consent to mistrial not required. *State v. Smith*, 16 Kan. App. 2d 478, 480, 825 P.2d 541 (1992).

4. Attorney's mishandling bankruptcy case, failing to abide by client's decision, and failing to keep client informed violative of MRPC 1.1, 1.2, 1.3 and 1.4; previous code and Rule 207 violations; public censure. *In re Edgar-Austin*, 253 Kan. 440, 855 P.2d 960 (1993).

5. Attorney's mishandling of employment discrimination class action and failure to inform clients as to status of case violative of MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.15, 3.1, and 3.2; other violations; Rule 203(a)(2) one-year suspension, Rule 203(a)(5) restitution, and Rule 218 compliance ordered. *In re King*, 253 Kan. 444, 855 P.2d 963 (1993).

6. Attorney's mishandling of divorce case resulting in client losing lien, failure to inform client as to status of case, mishandling of related bankruptcy case for client creditor, and failure to preserve judgment, and attorney's allegations and behavior during investigation of disciplinary complaint violate DR 6-101(A)(2), and MRPC 1.2(c), 1.3, 1.4(b), and 1.16(d); mitigating and aggravating circumstances; panel recommends unpublished censure; public censure. *In re Deeds*, 254 Kan. 309, 864 P.2d 1194 (1993).

7. Attorney's mishandling of personal injury case violates MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.6, 1.7, 1.16, 3.2, 4.1, 8.4 and Rule 207; published censure. *In re Shultz*, 256 Kan. 196, 883 P.2d 779 (1994).

8. Attorney previously censured disbarred for violations of MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.15, 1.16, 3.2, 3.3, 4.1, 7.1, 7.5, 8.1, 8.4, and Rules 207 and 208; Rule 218 compliance ordered. *In re Shultz*, 257 Kan. 662, 895 P.2d 603 (1995).

9. General counsel who reported suspected violations to an outside agency without first consulting with the head of the organization found in violation of MRPC 1.2, 1.4, 1.6(a), 1.13(b) and 1.16. *Crandon v. State*, 257 Kan. 727, 897 P.2d 92 (1995).

10. Attorney's failure to remit personal injury protection lien to his client's insurance company, failure to keep client informed, misrepresentation to client, and creating conflict of interest violated MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.15, 3.7, 4.1, and 8.4; aggravating circumstances; indefinite suspension. *In re Seck*, 258 Kan. 530, 905 P.2d 122 (1995).

11. Attorney's neglect of three different clients' cases violates MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 3.1, and 8.4 and Rule 207; one-year suspension. *In re Geeding*, 258 Kan. 740, 907 P.2d 124 (1995).

12. Attorney's mishandling of various civil and divorce cases violates MRPC 1.1, 1.2, 1.3, 1.4, 1.15, 3.2, 3.4, 4.1, 8.1, and 8.4; indefinite suspension. *In re Gordon*, 258 Kan. 784, 908 P.2d 169 (1995).

13. Attorney's mishandling of client's assets in voluntary conservatorship proceeding violates MRPC 1.1, 1.2, 1.4, 1.5, 1.7, 1.9, 1.14, 3.3, and 8.4; published censure. *In re Brantley*, 260 Kan. 605, 920 P.2d 433 (1996).

14. Attorney's mishandling of bankruptcy proceedings for his clients violates MRPC 1.1, 1.2, 1.3, 1.4, 8.1, 8.4, and Rule 207; disbarment. *In re Gordon*, 260 Kan. 905, 925 P.2d 840 (1996).

15. Attorney's mishandling of matters involving (1) individualized education program for autistic child in public school, (2) personal injury, probate, and insurance claim arising from fatal car accident, and (3) probate matter involving estate of conservatee violates MRPC

1.1, 1.2, 1.3, 1.4, 1.7, 1.16, and 8.4 and Rule 207; indefinite suspension per Rule 203(a)(2). *In re Dow*, 261 Kan. 989, 933 P.2d 666 (1997).

16. Attorney's mishandling of bankruptcy case violates MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.16, 3.1, 3.3, and 8.4; published censure per Rule 203(a)(3). *In re Roy*, 261 Kan. 999, 933 P.2d 662 (1997).

17. Rule cited in discussion of adequacy of trial counsel's preparation for trial, including defendant's choice to testify. *State v. Orr*, 262 Kan. 312, 940 P.2d 42 (1997).

18. Attorney's mishandling of civil rights case violates MRPC 1.2, 1.3, 1.4, 1.7, 1.15, 5.3, and 8.4; two-year supervised probation. *In re Baxter*, 262 Kan. 555, 940 P.2d 37 (1997).

RULE 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Comment

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. A lawyer's workload should be controlled so that each matter can be handled adequately.

Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

Case Annotations

1. Attorney's failure to represent clients in three separate cases after acceptance of retainer fees and failure to cooperate with disciplinary investigation found to violate DR 1-102, 6-101, 7-101, and 9-102; MRPC 1.1, 1.3, 1.4, 1.15 and 8.4; and Rule 207. Rule 203 disbarment. *In re Morphett*, 246 Kan. 499, 790 P.2d 402 (1990).

2. Attorney's mishandling of estate held to violate DR 6-101(A)(3) and MRPC 1.3, DR 1-102(A)(5), (6), and MRPC 8.4(d), and DR 7-101(A)(2) and MRPC 3.2 and 1.4(a); other

violations; public censure and restitution. *In re Ebersole*, 247 Kan. 670, 801 P.2d 1323 (1990).

3. Attorney's failing to file eviction action yet telling client he had done so held to violate MRPC 1.3, 1.4, 3.2, and 8.4(c) & (g); other violations; public censure and restitution. *In re Ebersole*, 247 Kan. 670, 801 P.2d 1323 (1990).

4. Attorney's inaction which allowed statute of limitations to run and cause of action to be dismissed with prejudice despite accepting retainer and assuring client of representation violated MRPC 1.1, 1.3, 1.4, 8.4(d), and 8.4(g); indefinite suspension. *In re Cain*, 247 Kan. 673, 801 P.2d 1325 (1990).

5. Attorney retained to probate estate failed to do so, failed to record transfer of mineral interest deed resulting in levy and execution thereon, and failed to cooperate in resulting disciplinary investigation. Violations of DR 9-102(B) and MRPC 1.15; DR 1-102(A), 6-101(A)(3), 7-101(A), and 9-102(B)(1), (3), (4) and MRPC 1.3, 1.4(a), 1.15, and 8.4(c); and Rule 207. Indefinite suspension with readmission without petition upon successful completion of one-year suspension; specific conditions. *In re Ehrlich*, 248 Kan. 92, 804 P.2d 958 (1991).

6. Attorney's mishandling of collection matter and failure to cooperate with resulting investigation violate Rule 207, DR 1-102(A)(6), 6-101(A)(3), 7-101(A)(2), and 9-102(B)(1), (3), and (4); after March 1, 1988, the same behavior violates MRPC 1.3, 1.4, 1.15(d)(2)(i), (iii), and (iv), and 8.4(g); 2-year suspension recommended; many mitigating factors; 2-year supervised probation. *In re Evans*, 248 Kan. 176, 804 P.2d 344 (1991).

7. Attorney currently on supervised probation found to have violated Rule 207 and MRPC 1.3, 1.4, 1.15(d)(2)(iii), (iv), and 8.4(g) in handling employment termination case; suspension recommended; supervised probation continued for additional one year. *In re Linn*, 248 Kan. 189, 804 P.2d 350 (1991).

8. Recommended disbarment based on continued neglect of client despite prior discipline for such and failure to respond to said discipline, all in violation of MRPC 1.3, 3.2, and 8.4(g); Rule 217 surrender and disbarment; Rule 218 compliance ordered. *In re Ebersole*, 248 Kan. 496, 807 P.2d 1318 (1991).

9. Attorney who agreed to provide representation, accepted retainer, but failed to perform services in 5 situations violated MRPC 1.3, 1.4, 1.15, and 8.4(a) and (d); disability inactive status, restored to active status, temporary suspension pending resolution; reinstated upon 2-year conditional supervised probation. *In re Keil*, 248 Kan. 629, 809 P.2d 531 (1991).

10. Attorney, under suspension at time of representation of client at trial, who fails to so inform client and who fails to pursue appeal upon client's request violates MRPC 1.2, 1.3, 1.4, and 8.4(g); indefinite suspension. *In re Vorhies*, 248 Kan. 985, 811 P.2d 1254 (1991).

11. Attorney employed to probate estate failed to institute probate proceedings, failed to file inheritance tax return thereby incurring penalty and interest, and misrepresented to client that estate matters were being handled violated MRPC 1.1, 1.3, 1.4(a), and 8.4(c); indefinite suspension and Rule 218 compliance ordered. *In re McGhee*, 248 Kan. 988, 811 P.2d 884 (1991).

12. Attorney's failure to pursue personal injury action on behalf of client, resulting in summary judgment for defendant, and misrepresentation to client and disciplinary investigator as to status of that case violates DR 6-101(A)(3); MRPC 1.3, 1.4(a) and (b), 8.4(c) and (g); and Rule 207; public censure. *In re Jackson*, 249 Kan. 172, 814 P.2d 958 (1991).

13. Attorney's failure to prepare journal entry is violation of MRPC 1.1, 1.3, and 1.4; attorney on probation for other matters; public censure. *In re Black*, 249 Kan. 211, 814 P.2d 447 (1991).

14. Attorney's failure to close estate for 12-year period, failure to render court-ordered accounting, failure to satisfy federal estate tax obligations, and failure to cooperate with

disciplinary investigator violate MRPC 1.1, 1.3, 1.4, 3.2, 8.4(d) and (g), DR 6-101, DR 7-101, and Rule 207; disbarment and Rule 218 compliance. *In re Coleman*, 249 Kan. 218, 815 P.2d 43 (1991).

15. Attorney's acceptance of retainer to represent client in child custody and support matter, representation to client that appropriate motions had been filed and an agreement drafted, and failure to file and/or draft such documents constitutes violation of MRPC 1.1, 1.3, and 1.4(a); previous violations aggravating factor; one-year suspension and Rule 218 compliance ordered. *In re Stapleton*, 249 Kan. 524, 819 P.2d 125 (1991).

16. Attorney's 4-year neglect of workers compensation claim, thereby preventing client recovery, and mishandling of funds violative of MRPC 1.3, 1.4, and 8.4(g); and Canons 1, 6 and 7. Attorney currently on suspension; disbarment and Rule 218 compliance ordered. *In re Cain*, 249 Kan. 578, 819 P.2d 1230 (1991).

17. Attorney's failure to appear to represent client at trial and subsequent sentencing violates MRPC 1.3, 1.4, and 8.4(d) and (g); Rule 203(a)(3) public censure. *In re Gilman*, 249 Kan. 773, 821 P.2d 327 (1991).

18. Attorney's mishandling of estate case, misrepresentation to client and representatives from disciplinary administrator regarding status of case, failure to withdraw as counsel and failure to cooperate with subsequent counsel, and mismanagement of estate funds violative of MRPC 1.1; 1.2; 1.3; 3.2; 1.15(b); 1.16(a)(3)(d); 8.4(g); and Rule 207(a) and (b); other violations; indefinite suspension and Rule 218 compliance ordered. *In re Stapleton*, 250 Kan. 247, 824 P.2d 205 (1992).

19. Attorney's failure to timely file petition for probate violative of MRPC 1.1 and 1.3; other violations; mitigating circumstances; Rule 203 public censure. *In re Copeland*, 250 Kan. 283, 823 P.2d 802 (1992).

20. Attorney's failure to designate record in federal appeal and failure to respond to show cause order violated MRPC 1.1, 1.3, 3.2, and 8.4(d), (g); other violations; indefinite suspension suspended and probated. *In re Jenkins*, 251 Kan. 264, 833 P.2d 1013 (1992).

21. Attorney's failure to forward checks received from insurance companies to client's health care providers violated MRPC 1.3, 1.4(a) and (b), and 1.15(b); other violations; indefinite suspension suspended and probated. *In re Jenkins*, 251 Kan. 264, 833 P.2d 1013 (1992).

22. Attorney on indefinite suspension subject of three complaints for failure to represent clients in violation of MRPC 1.1, 1.3, 1.4, and 8.4(c); failure to cooperate with investigation; disbarment and Rule 218 compliance. *In re McGhee*, 251 Kan. 584, 834 P.2d 379 (1992).

23. Attorney's not appearing for scheduled hearing in two cases violates MRPC 1.1 and 1.3; public censure. *In re Johnson*, 251 Kan. 826, 840 P.2d 515 (1992).

24. Attorney's delay in handling bankruptcy case violative of MRPC 1.3 and 1.4; one-year suspension. *In re Wood*, 251 Kan. 832, 840 P.2d 519 (1992).

25. Attorney's mishandling of probate case violates MPRC 1.3, 1.4, and 3.2; other violations; imposition of discipline suspended; one-year supervised probation. *In re Meyer*, 251 Kan. 838, 840 P.2d 522 (1992).

26. Attorney's mishandling of real estate matter violates MRPC 1.1, 1.3, 1.4, and 3.2; DR 6-101(A)(3); and Rule 207; other violations; imposition of discipline suspended; one-year supervised probation. *In re Meyer*, 251 Kan. 838, 840 P.2d 522 (1992).

27. Attorney's failure to file divorce papers after accepting retainer and failure to return client's money violates MRPC 1.3, 1.4, 1.15; other violations; imposition of discipline suspended; one-year supervised probation. *In re Meyer*, 251 Kan. 838, 840 P.2d 522 (1992).

28. Attorney's mishandling of personal injury case violates MRPC 1.3, 1.4, 1.16, and 3.4; other violations; imposition of discipline suspended; one-year supervised probation. *In re Meyer*, 251 Kan. 838, 840 P.2d 522 (1992).

29. Attorney's failure to communicate with clients violates MRPC 1.3 and 1.4; failure to cooperate in investigation; imposition of discipline suspended; one-year supervised probation. *In re Plettner*, 251 Kan. 844, 840 P.2d 526 (1992).

30. Attorney's lack of communication, delay in filing pleadings, and failure to complete work for three clients violative of MRPC 1.3 and 1.4; failure to cooperate with investigation violative of Rule 207; attorney currently under suspension disbarred and Rule 218 compliance ordered. *In re Wood*, 252 Kan. 1074, 850 P.2d 234 (1993).

31. Attorney's mishandling of his mother's estate violative of MRPC 1.1, 1.3, and 1.15; public censure. *In re Scott*, 253 Kan. 192, 853 P.2d 60 (1993).

32. Attorney's moving to California without notifying clients, failure to return clients' files, and failure to respond to inquiries from disciplinary administrator's office violative of MRPC 1.3, 1.4, and 1.16 and Rule 207; other violations and previous suspension; disbarment and Rule 218 compliance ordered. *In re Dill*, 253 Kan. 195, 853 P.2d 696 (1993).

33. Attorney's mishandling bankruptcy case, failing to abide by client's decision, and failing to keep client informed violative of MRPC 1.1, 1.2, 1.3 and 1.4; previous code and Rule 207 violations; public censure. *In re Edgar-Austin*, 253 Kan. 440, 855 P.2d 960 (1993).

34. Attorney's failure to file probate petition, inform client of status of case, return unearned retainer, and communicate with client violative of MRPC 1.1, 1.3, 1.4, 1.15, 1.16, and 3.2; other violations; one-year suspension and Rule 218 compliance ordered. *In re King*, 253 Kan. 444, 855 P.2d 963 (1993).

35. Attorney's mishandling of employment discrimination class action and failure to inform clients as to status of case violative of MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.15, 3.1, and 3.2; other violations; Rule 203(a)(2) one-year suspension, Rule 203(a)(5) restitution, and Rule 218 compliance ordered. *In re King*, 253 Kan. 444, 855 P.2d 963 (1993).

36. Attorney previously censured placed on indefinite suspension for violations of MRPC 1.1, 1.3, 1.4, 1.15, 1.16, and 8.4 for neglect of two different client's cases; two other complaints found to be based on insufficient evidence although pattern of conduct cited and violations of Rule 207 established; Rule 218 compliance ordered. *In re Jackson*, 253 Kan. 810, 861 P.2d 124 (1993).

37. Attorney's actions in letting the statute of limitations run in four different cases violate DR 1-102(A)(4), 6-101(A)(1) and (3), and 7-101(A)(2), and MRPC 1.1, 1.3, 1.4(a) and (b), 3.2, and 8.4(c). Attorney's actions in failing to respond to requests for information and return of the case file in workers compensation case violate MRPC 1.3, 1.4(a) and (b), 1.16(a)(3) and (d), and 3.2. Eighteen-month suspension probated on conditions. *In re Jones*, 253 Kan. 836, 861 P.2d 1340 (1993).

38. Seven of nine charges based on misdemeanor convictions, dismissals, or diversions dismissed by panel due to remoteness; remaining two misdemeanor convictions violative of MRPC 8.4 (b), (d), and (g); attorney's conduct in mishandling personal injury case resulting in statute of limitations running, PIP carrier losing lien, and misrepresentation to client as to status of case violative of MRPC 1.3, 1.4, 4.1, and 8.4 (c) and (g); mitigating circumstances; one-year suspension and compliance with Rule 218 ordered. *In re Pistotnik*, 254 Kan. 294, 864 P.2d 1166 (1993).

39. Attorney's mishandling of divorce case resulting in client losing lien, failure to inform client as to status of case, mishandling of related bankruptcy case for client creditor, and failure to preserve judgment, and attorney's allegations and behavior during investigation of disciplinary complaint violate DR 6-101(A)(2), and MRPC 1.2(c), 1.3, 1.4(b), and 1.16(d); mitigating and aggravating circumstances; panel recommends unpublished censure; public censure. *In re Deeds*, 254 Kan. 309, 864 P.2d 1194 (1993).

40. Attorney's dilatory handling of estate matter violative of MRPC 1.3, 1.4, 1.16(a)(2), 3.2, and 8.4(g); Rule 207 violation; other violations; pending complaints; imposition of dis-

4-24

cipline suspended, supervised probation ordered. *In re Jackson*, 254 Kan. 406, 867 P.2d 278 (1994).

41. Attorney's failure to file motion to modify sentence in criminal case violative of MRPC 1.1 and 1.3; other violations; pending complaints; imposition of discipline suspended, supervised probation ordered. *In re Jackson*, 254 Kan. 406, 867 P.2d 278 (1994).

42. Attorney's mishandling of post-trial motions as local counsel in handicap employment discrimination case violative of MRPC 1.1 and 1.3; Rule 207 violation; censure. *In re Jackson*, 254 Kan. 573, 866 P.2d 1048 (1994).

43. Attorney's failure to remit client's portion in a collection matter, failure to keep client informed, misrepresentations to client as to status of collection efforts, and causing balance on trust account to repeatedly fall below amount due client violative of MRPC 1.3, 1.4(a), 1.5(d), 1.15(a), 4.1(a), and 8.4(c); aggravating and mitigating circumstances; one-year supervised probation with conditions. *In re Wisler*, 254 Kan. 600, 866 P.2d 1049 (1994).

44. Attorney's failure to file personal injury claim and blaming client for delay, thereby allowing statute of limitations to run (resulting in client being granted summary judgment in subsequent malpractice claim); failure to inform client as to reduction in child support income; failure to inform client as to hearing dates; and acceptance of retainer fee from out-of-state client whom attorney knew he could not represent in divorce action violate MRPC 1.1, 1.3, 1.4(a) and (b), 1.16(d), 3.3(a)(1), and 8.4(d) and (g); Rule 207(a) and (b) violations; disbarment and Rule 218 compliance ordered. *In re Spears*, 254 Kan. 904, 869 P.2d 718 (1994).

45. Attorney's mishandling of four different probate estates and failure to timely file four different foreclosures, despite representations and billings which would indicate to the contrary, held to violate DR 1-102(A)(4), (5), and (6); 6-101(A)(3); and 7-101(A)(2) and (3); Canons 1, 6, 7, and 9; and MRPC 1.1, 1.3, 1.4, 3.2, and 8.4(c), (d), and (g); aggravating and mitigating circumstances; two-year suspension, discipline probated, and supervised probation ordered. *In re Herman*, 254 Kan. 908, 869 P.2d 721 (1994).

46. Attorney's failure to file incorporation papers and retention of retainer paid to handle such matter violate MRPC 1.3, 1.4, 1.15, 1.16, and 8.4; other violations; disbarment. *In re Jackson*, 255 Kan. 542, 874 P.2d 673 (1994).

47. Attorney's mishandling of will and estate matter, failure to communicate with client, failure to timely handle the matter, misleading the court as to the status of the probate case, and failure to return the client's file and retainer when requested violate MRPC 1.1, 1.3, 1.4, 1.15, 1.16, 3.2, and 8.4; other violations; disbarment. *In re Jackson*, 255 Kan. 542, 874 P.2d 673 (1994).

48. Attorney's failure to timely file backruptcy petition for clients, misrepresentations to clients as to status of case, and mishandling of bankruptcy case violate MRPC 1.1, 1.3, 1.4, 1.15, and 8.4; other violations; disbarment. *In re Jackson*, 255 Kan. 542, 874 P.2d 673 (1994).

49. Attorney's mishandling of divorce case violates MRPC 1.3 and 1.4, and use of letterhead indicating attorney is in partnership with another when such is not the case violates MRPC 7.5(d); censure. *In re Seck*, 255 Kan. 552, 874 P.2d 678 (1994).

50. Attorney's dilatory handling of three federal court cases violative of MRPC 1.1, 1.3, 1.4, and 3.2; failure to respond to inquiry from disciplinary authorities violative of Rule 207; two-year supervised probation. *In re Long*, 255 Kan. 792, 877 P.2d 421 (1994).

51. Attorney found to have violated MRPC 1.1, 1.3, 1.4, 1.15, 3.2, 3.4(c), 4.3, and 8.4(d) and (g) based on conduct in seven different complaints reflecting on attorney's lack of diligence and competence, miscommunication and lack of candor, and failure to return unearned fees; failure to cooperate in disciplinary investigation; attorney currently on disability inactive status; indefinite suspension and Rule 218 compliance ordered. *In re Jenkins*, 255 Kan. 797, 877 P.2d 423 (1994).

4-25

52. Attorney's failure to communicate with clients and poor record keeping of trust account violate MRPC 1.1, 1.3, 1.4 and 1.15; 2-year supervised probation ordered. *In re Waite*, 256 Kan. 130, 883 P.2d 1176 (1994).

53. Attorney's mishandling of personal injury case violates MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.6, 1.7, 1.16, 3.2, 4.1, 8.4 and Rule 207; published censure. *In re Shultz*, 256 Kan. 196, 883 P.2d 779 (1994).

54. Attorney's failure to represent client in collection of foreign judgment in workers compensation case found to violate MRPC 1.1, 1.3, 1.4, 1.5(d), 1.16(d), 3.2, and 8.4(g); indefinite suspension and Rule 218 compliance ordered. *In re Griggs*, 256 Kan. 498, 886 P.2d 786 (1994).

55. Attorney who lied to the court and her clients and failed to appear for landlord-tenant case proceeding found to be in violation of MRPC 1.1, 1.3, 1.4, 3.3, 3.4, 3.5, 4.1, 8.2 and 8.4; one-year suspension and compliance with Rule 218 ordered. *In re Gershater*, 256 Kan. 512, 886 P.2d 343 (1994).

56. Attorney's mishandling of a breach of contract case and settlement violative of MRPC 1.1, 1.3, 1.4, 3.3, and 8.4; six-month suspension and compliance with Rule 218 ordered. *In re Norlen*, 256 Kan. 509, 886 P.2d 347 (1994).

57. Attorney's mishandling of probate matter and workers compensation case violates MRPC 1.1, 1.3, 1.4, 3.2, 4.1, 8.4 and Rule 207; imposition of discipline suspended; two-year supervised probation. *In re Whitaker*, 256 Kan. 939, 888 P.2d 829 (1995).

58. Attorney's mishandling collection of bad checks violate MRPC 1.3, 1.4, 1.15(b) and 1.16(d); published censure. *In re England*, 257 Kan. 312, 894 P.2d 177 (1995).

59. Attorney previously censured disbarred for violations of MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.15, 1.16, 3.2, 3.3, 4.1, 7.1, 7.5, 8.1, 8.4, and Rules 207 and 208; Rule 218 compliance ordered. *In re Shultz*, 257 Kan. 662, 895 P.2d 603 (1995).

60. Attorney's dilatory handling of civil case and failure to file the opening brief in criminal case violate MRPC 1.1, 1.3 and 8.4(d); two-year supervised probation. *In re Betts*, 257 Kan. 955, 895 P.2d 604 (1995).

61. Attorney's mishandling the oil and gas case violates MRPC 1.1, 1.3, 1.4 and 8.4(c); one-year probation. *In re Pilgreen*, 257 Kan. 949, 896 P.2d 389 (1995).

62. Attorney's mishandling of subrogation claims for insurance company violates MRPC 1.1, 1.3 and 1.4; published censure. *In re Morse*, 258 Kan. 248, 899 P.2d 467 (1995).

63. Attorney's failure to remit personal injury protection lien to his client's insurance company, failure to keep client informed, misrepresentation to client, and creating conflict of interest violated MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.15, 3.7, 4.1, and 8.4; aggravating circumstances; indefinite suspension. *In re Seck*, 258 Kan. 530, 905 P.2d 122 (1995).

64. Attorney's neglect of three different clients' cases violates MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 3.1, and 8.4 and Rule 207; one-year suspension. *In re Geeding*, 258 Kan. 740, 907 P.2d 124 (1995).

65. Attorney disciplined in Texas for failure to communicate with clients, neglect of client's cases, failure to cooperate in investigation, and conversion of client's funds; Texas findings and conclusions adopted per Rule 202; indefinite suspension. *In re Callahan*, 258 Kan. 770, 907 P.2d 840 (1995).

66. Attorney's mishandling of various civil and divorce cases violates MRPC 1.1, 1.2, 1.3, 1.4, 1.15, 3.2, 3.4, 4.1, 8.1, and 8.4; indefinite suspension. *In re Gordon*, 258 Kan. 784, 908 P.2d 169 (1995).

67. Attorney's mishandling of client funds, failure to supervise nonlawyer assistants, and other misconduct violate MRPC 1.3, 1.5, 1.15, 5.3, and 8.4; mitigating circumstances; published censure. *In re Krogh*, 259 Kan. 163, 910 P.2d 221 (1996).

4-26

68. Attorney's handling of counterclaim and appeal in lawsuit between home buyers and construction company violates MRPC 1.1, 1.3, 1.4, 8.4(c) and (d) and Rule 207; one-year suspension. *In re Crockett*, 259 Kan. 540, 912 P.2d 176 (1996).

69. Attorney self-reported cases in which he allowed the statute of limitations to expire on his clients' claims; violations of MRPC 1.3, 1.4, and 8.4; two-year suspension. *In re Hill*, 259 Kan. 877, 915 P.2d 49 (1996).

70. Attorney's failure to keep client reasonably informed and charging of excessive fee violate MRPC 1.3, 1.4, 1.5, and 1.16; published censure. *In re Scimeca*, 259 Kan. 893, 914 P.2d 948 (1996).

71. Attorney's failure to defend client in repossession action violates MRPC 1.1, 1.3, and 1.4; continued use of alcohol and drugs and four additional complaints pending hearing or investigation negate panel's recommendation of supervised probation; one-year suspension. *In re Mitchell*, 260 Kan. 560, 919 P.2d 360 (1996).

72. Attorney's breach of fiduciary duty as executor of estate, conduct involving dishonesty and fraud, and failure to cooperate with Disciplinary Administrator's office violate MRPC 1.3, 1.15, 8.4(c) and (d) and Rules 202 and 207; disbarment. *In re Williamson*, 260 Kan. 568, 918 P.2d 1302 (1996).

73. Attorney's mishandling of bankruptcy proceedings for his clients violates MRPC 1.1, 1.2, 1.3, 1.4, 8.1 and 8.4 and Rule 207; disbarment. *In re Gordon*, 260 Kan. 905, 925 P.2d 840 (1996).

74. Attorney's handling of civil action and post-divorce proceeding and his attempt to represent a criminal defendant while attorney was in inpatient drug treatment program violate MRPC 1.3, 1.4, 1.5(b), 1.15(a) and (b), 1.16(a), 3.3(a), 4.1 and 8.4(a), (b), (d), and (g); 3-year supervised probation. *In re Phillips*, 260 Kan. 909, 925 P.2d 435 (1996).

75. Attorney's mishandling of matters involving (1) individualized education program for autistic child in public school, (2) personal injury, probate, and insurance claim arising from fatal car accident, and (3) probate matter involving estate of conservatee violates MRPC 1.1, 1.2, 1.3, 1.4, 1.7, 1.16, and 8.4 and Rule 207; indefinite suspension per Rule 203(a)(2). *In re Dow*, 261 Kan. 989, 933 P.2d 666 (1997).

76. Attorney's mishandling of bankruptcy case violates MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.16, 3.1, 3.3, and 8.4; published censure per Rule 203(a)(3). *In re Roy*, 261 Kan. 999, 933 P.2d 662 (1997).

77. Attorney's mishandling of adoption case violates MRPC 1.1, 1.3, 1.4, and 8.4 and Rule 207; indefinite suspension. *In re Johnson*, 262 Kan. 275, 936 P.2d 258 (1997).

78. Attorney's mishandling of civil rights case violates MRPC 1.2, 1.3, 1.4, 1.7, 1.15, 5.3, and 8.4; two-year supervised probation. *In re Baxter*, 262 Kan. 555, 940 P.2d 37 (1997).

79. Attorney's failure to file negligence action in proper court and his disappearance from his law office without notice to clients violate MRPC 1.1, 1.3, 1.4, 1.5, 3.2, and 8.4 and Rule 207; disbarment. *In re Neal*, 262 Kan. 562, 937 P.2d 1234 (1997).

80. Attorney's missing filing and response deadlines and failure to communicate with client violate MRPC 1.1, 1.3, and 1.4; one-year supervised probation. *In re Capps*, 262 Kan. 833, ____ P.2d ____ (1997).

RULE 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment

The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps that permit the client to make a decision regarding a serious offer from another party. A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable. See Rule 1.2(a). Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter.

Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others. On the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.

Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from mental disability. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client. Practical exigency may also require a lawyer to act for a client without prior consultation.

Withholding Information

In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

Case Annotations

1. Attorney's failure to represent clients in three separate cases after acceptance of retainer fees and failure to cooperate with disciplinary investigation found to violate DR 1-102, 6-101, 7-101, and 9-102; MRPC 1.1, 1.3, 1.4, 1.15 and 8.4; and Rule 207. Rule 203 disbarment. *In re Morphett*, 246 Kan. 499, 790 P.2d 402 (1990).

2. Attorney's mishandling of estate held to violate DR 6-101(A)(3) and MRPC 1.3, DR 1-102(A)(5), (6), and MRPC 8.4(d), and DR 7-101(A)(2) and MRPC 3.2 and 1.4(a); other violations; public censure and restitution. *In re Ebersole*, 247 Kan. 670, 801 P.2d 1323 (1990).

3. Attorney's failing to file eviction action yet telling client he had done so held to violate MRPC 1.3, 1.4, 3.2, and 8.4(c) & (g); other violations; public censure and restitution. *In re Ebersole*, 247 Kan. 670, 801 P.2d 1323 (1990).

4. Attorney's inaction which allowed statute of limitations to run and cause of action to be dismissed with prejudice despite accepting retainer and assuring client of representation violated MRPC 1.1, 1.3, 1.4, 8.4(d), and 8.4(g); indefinite suspension. *In re Cain*, 247 Kan. 673, 801 P.2d 1325 (1990).

5. Attorney retained to probate estate failed to do so, failed to record transfer of mineral interest deed resulting in levy and execution thereon, and failed to cooperate in resulting disciplinary investigation. Violations of DR 9-102(B) and MRPC 1.15; DR 1-102(A), 6-101(A)(3), 7-101(A), and 9-102(B)(1), (3), (4) and MRPC 1.3, 1.4(a), 1.15, and 8.4(c); and Rule 207. Indefinite suspension with readmission without petition upon successful completion of one-year suspension; specific conditions. *In re Ehrlich*, 248 Kan. 92, 804 P.2d 958 (1991).

6. Attorney's mishandling of collection matter and failure to cooperate with resulting investigation violate Rule 207, DR 1-102(A)(6), 6-101(A)(3), 7-101(A)(2), and 9-102(B)(1), (3), and (4); after March 1, 1988, the same behavior violates MRPC 1.3, 1.4, 1.15(d)(2)(i), (iii), and (iv), and 8.4(g); 2-year suspension recommended; many mitigating factors; 2-year supervised probation. *In re Evans*, 248 Kan. 176, 804 P.2d 344 (1991).

7. Attorney currently on supervised probation found to have violated Rule 207 and MRPC 1.3, 1.4, 1.15(d)(2)(iii), (iv), and 8.4(g) in handling employment termination case; suspension recommended; supervised probation continued for additional one year. *In re Linn*, 248 Kan. 189, 804 P.2d 350 (1991).

8. Attorney who agreed to provide representation, accepted retainer, but failed to perform services in 5 situations violated MRPC 1.3, 1.4, 1.15, and 8.4(a) and (d); disability inactive status, restored to active status, temporary suspension pending resolution; reinstated upon 2-year conditional supervised probation. *In re Keil*, 248 Kan. 629, 809 P.2d 531 (1991).

9. Attorney, under suspension at time of representation of client at trial, who fails to so inform client and who fails to pursue appeal upon client's request violates MRPC 1.2, 1.3, 1.4, and 8.4(g); indefinite suspension. *In re Vorhies*, 248 Kan. 985, 811 P.2d 1254 (1991).

10. Attorney employed to probate estate failed to institute probate proceedings, failed to file inheritance tax return thereby incurring penalty and interest, and misrepresented to client that estate matters were being handled violated MRPC 1.1, 1.3, 1.4(a), and 8.4(c); indefinite suspension and Rule 218 compliance ordered. *In re McGhee*, 248 Kan. 988, 811 P.2d 884 (1991).

11. Attorney's failure to pursue personal injury action on behalf of client, resulting in summary judgment for defendant, and misrepresentation to client and disciplinary investigator as to status of that case violates DR 6-101(A)(3); MRPC 1.3, 1.4(a) and (b), 8.4(c) and (g); and Rule 207; public censure. *In re Jackson*, 249 Kan. 172, 814 P.2d 958 (1991).

12. Attorney's failure to prepare journal entry is violation of MRPC 1.1, 1.3, and 1.4; attorney on probation for other matters; public censure. *In re Black*, 249 Kan. 211, 814 P.2d 447 (1991).

13. Attorney's failure to close estate for 12-year period, failure to render court-ordered accounting, failure to satisfy federal estate tax obligations, and failure to cooperate with disciplinary investigator violate MRPC 1.1, 1.3, 1.4, 3.2, 8.4(d) and (g), DR 6-101, DR 7-101, and Rule 207; disbarment and Rule 218 compliance. *In re Coleman*, 249 Kan. 218, 815 P.2d 43 (1991).

14. Attorney's acceptance of retainer to represent client in child custody and support matter, representation to client that appropriate motions had been filed and an agreement drafted, and failure to file and/or draft such documents constitutes violation of MRPC 1.1,

1.3, and 1.4(a); previous violations aggravating factor; one-year suspension and Rule 218 compliance ordered. *In re Stapleton*, 249 Kan. 524, 819 P.2d 125 (1991).

15. Attorney's 4-year neglect of workers compensation claim, thereby preventing client recovery, and mishandling of funds violative of MRPC 1.3, 1.4, and 8.4(g); and Canons 1, 6 and 7. Attorney currently on suspension; disbarment and Rule 218 compliance ordered. *In re Cain*, 249 Kan. 578, 819 P.2d 1230 (1991).

16. Attorney's failure to appear to represent client at trial and subsequent sentencing violates MRPC 1.3, 1.4, and 8.4(d) and (g); Rule 203(a)(3) public censure. *In re Gilman*, 249 Kan. 773, 821 P.2d 327 (1991).

17. Attorney's failure to forward checks received from insurance companies to client's health care providers violated MRPC 1.3, 1.4(a) and (b), and 1.15(b); other violations; indefinite suspension suspended and probated. *In re Jenkins*, 251 Kan. 264, 833 P.2d 1013 (1992).

18. Attorney on indefinite suspension subject of three complaints for failure to represent clients in violation of MRPC 1.1, 1.3, 1.4, and 8.4(c); failure to cooperate with investigation; disbarment and Rule 218 compliance. *In re McGhee*, 251 Kan. 584, 834 P.2d 379 (1992).

19. Attorney's failure to comply with discovery requests, misrepresentation to court, and failure to advise client, resulting in sanctions against client, violate MRPC 1.1, 1.4, 3.4(a) and (d), and 8.4(a), (c), and (d); firm failure to supervise among mitigating factors; one-year suspension. *In re Dwight*, 251 Kan. 588, 834 P.2d 382 (1992).

20. Attorney's mishandling of client's funds, conversion of conservatorship funds, failure to inform client, drug possession conviction, and retention of legal fees without representing client violate MRPC 1.4(a) and (b), 1.15, and 8.4(a), (b), (c), (d), and (g); attorney appears pursuant to Rule 212(d); mitigating factors; indefinite suspension and Rule 218 compliance. *In re Morris*, 251 Kan. 592, 834 P.2d 384 (1992).

21. Attorney's mishandling of probate case violates MPRC 1.3, 1.4, and 3.2; other violations; imposition of discipline suspended; one-year supervised probation. *In re Meyer*, 251 Kan. 838, 840 P.2d 522 (1992).

22. Attorney's mishandling of real estate matter violates MRPC 1.1, 1.3, 1.4, and 3.2; DR 6-101(A)(3); and Rule 207; other violations; imposition of discipline suspended; one-year supervised probation. *In re Meyer*, 251 Kan. 838, 840 P.2d 522 (1992).

23. Attorney's failure to file divorce papers after accepting retainer and failure to return client's money violates MRPC 1.3, 1.4, 1.15; other violations; imposition of discipline suspended; one-year supervised probation. *In re Meyer*, 251 Kan. 838, 840 P.2d 522 (1992).

24. Attorney's mishandling of personal injury case violates MRPC 1.3, 1.4, 1.16, and 3.4; other violations; imposition of discipline suspended; one-year supervised probation. *In re Meyer*, 251 Kan. 838, 840 P.2d 522 (1992).

25. Attorney's failure to communicate with clients violates MRPC 1.3 and 1.4; failure to cooperate in investigation; imposition of discipline suspended; one-year supervised probation. *In re Plettner*, 251 Kan. 844, 840 P.2d 526 (1992).

26. Attorney's forging of judge's signature in probate matter resulting in felony conviction violative of MRPC 4.1; 8.4(b), (c), (d), and (g); failure to communicate with client violative of MRPC 1.4; previous violations; indefinite suspension and Rule 218 compliance ordered. *In re Pomeroy*, 252 Kan. 1044, 850 P.2d 222 (1993).

27. Attorney's lack of communication, delay in filing pleadings, and failure to complete work for three clients violative of MRPC 1.3 and 1.4; failure to cooperate with investigation violative of Rule 207; attorney currently under suspension disbarred and Rule 218 compliance ordered. *In re Wood*, 252 Kan. 1074, 850 P.2d 234 (1993).

28. Attorney's moving to California without notifying clients, failure to return clients' files, and failure to respond to inquiries from disciplinary administrator's office violative of MRPC

4-30

1.3, 1.4, and 1.16 and Rule 207; other violations and previous suspension; disbarment and Rule 218 compliance ordered. *In re Dill*, 253 Kan. 195, 853 P.2d 696 (1993).

29. Attorney's mishandling bankruptcy case, failing to abide by client's decision, and failing to keep client informed violative of MRPC 1.1, 1.2, 1.3 and 1.4; previous code and Rule 207 violations; public censure. *In re Edgar-Austin*, 253 Kan. 440, 855 P.2d 960 (1993).

30. Attorney's failure to file probate petition, inform client of status of case, return unearned retainer, and communicate with client violative of MRPC 1.1, 1.3, 1.4, 1.15, 1.16, and 3.2; other violations; one-year suspension and Rule 218 compliance ordered. *In re King*, 253 Kan. 444, 855 P.2d 963 (1993).

31. Attorney's mishandling of employment discrimination class action and failure to inform clients as to status of case violative of MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.15, 3.1, and 3.2; other violations; Rule 203(a)(2) one-year suspension, Rule 203(a)(5) restitution, and Rule 218 compliance ordered. *In re King*, 253 Kan. 444, 855 P.2d 963 (1993).

32. Attorney previously censured placed on indefinite suspension for violations of MRPC 1.1, 1.3, 1.4, 1.15, 1.16, and 8.4 for neglect of two different client's cases; two other complaints found to be based on insufficient evidence although pattern of conduct cited and violations of Rule 207 established; Rule 218 compliance ordered. *In re Jackson*, 253 Kan. 810, 861 P.2d 124 (1993).

33. Attorney's actions in letting the statute of limitations run in four different cases violate DR 1-102(A)(4), 6-101(A)(1) and (3), and 7-101(A)(2), and MRPC 1.1, 1.3, 1.4(a) and (b), 3.2, and 8.4(c). Attorney's actions in failing to respond to requests for information and return of the case file in workers compensation case violate MRPC 1.3, 1.4(a) and (b), 1.16(a)(3) and (d), and 3.2. Eighteen-month suspension probated on conditions. *In re Jones*, 253 Kan. 836, 861 P.2d 1340 (1993).

34. Rule cited in discussion of attorney's duty to keep clients informed of settlement offers and consult with clients regarding strategy. *McConwell v. FMG of Kansas City, Inc.*, 18 Kan. App. 2d 839, 861 P.2d 830 (1993).

35. Seven of nine charges based on misdemeanor convictions, dismissals, or diversions dismissed by panel due to remoteness; remaining two misdemeanor convictions violative of MRPC 8.4 (b), (d), and (g); attorney's conduct in mishandling personal injury case resulting in statute of limitations running, PIP carrier losing lien, and misrepresentation to client as to status of case violative of MRPC 1.3, 1.4, 4.1, and 8.4 (c) and (g); mitigating circumstances; one-year suspension and compliance with Rule 218 ordered. *In re Pistotnik*, 254 Kan. 294, 864 P.2d 1166 (1993).

36. Attorney's mishandling of divorce case resulting in client losing lien, failure to inform client as to status of case, mishandling of related bankruptcy case for client creditor, and failure to preserve judgment, and attorney's allegations and behavior during investigation of disciplinary complaint violate DR 6-101(A)(2), and MRPC 1.2(c), 1.3, 1.4(b), and 1.16(d); mitigating and aggravating circumstances; panel recommends unpublished censure; public censure. *In re Deeds*, 254 Kan. 309, 864 P.2d 1194 (1993).

37. Attorney's dilatory handling of estate matter violative of MRPC 1.3, 1.4, 1.16(a)(2), 3.2, and 8.4(g); Rule 207 violation; other violations; pending complaints; imposition of discipline suspended, supervised probation ordered. *In re Jackson*, 254 Kan. 406, 867 P.2d 278 (1994).

38. Attorney's failure to remit client's portion in a collection matter, failure to keep client informed, misrepresentations to client as to status of collection efforts, and causing balance on trust account to repeatedly fall below amount due client violative of MRPC 1.3, 1.4(a), 1.5(d), 1.15(a), 4.1(a), and 8.4(c); aggravating and mitigating circumstances; one-year supervised probation with conditions. *In re Wisler*, 254 Kan. 600, 866 P.2d 1049 (1994).

39. Attorney's failure to file personal injury claim and blaming client for delay, thereby allowing statute of limitations to run (resulting in client being granted summary judgment in subsequent malpractice claim); failure to inform client as to reduction in child support income; failure to inform client as to hearing dates; and acceptance of retainer fee from out-of-state client whom attorney knew he could not represent in divorce action violate MRPC 1.1, 1.3, 1.4(a) and (b), 1.16(d), 3.3(a)(1), and 8.4(d) and (g); Rule 207(a) and (b) violations; disbarment and Rule 218 compliance ordered. *In re Spears*, 254 Kan. 904, 869 P.2d 718 (1994).

40. Attorney's mishandling of four different probate estates and failure to timely file four different foreclosures, despite representations and billings which would indicate to the contrary, held to violate DR 1-102(A)(4), (5), and (6); 6-101(A)(3); and 7-101(A)(2) and (3); Canons 1, 6, 7, and 9; and MRPC 1.1, 1.3, 1.4, 3.2, and 8.4(c), (d), and (g); aggravating and mitigating circumstances; two-year suspension, discipline probated, and supervised probation ordered. *In re Herman*, 254 Kan. 908, 869 P.2d 721 (1994).

41. Attorney's failure to file incorporation papers and retention of retainer paid to handle such matter violate MRPC 1.3, 1.4, 1.15, 1.16, and 8.4; other violations; disbarment. *In re Jackson*, 255 Kan. 542, 874 P.2d 673 (1994).

42. Attorney's mishandling of will and estate matter, failure to communicate with client, failure to timely handle the matter, misleading the court as to the status of the probate case, and failure to return the client's file and retainer when requested violate MRPC 1.1, 1.3, 1.4, 1.15, 1.16, 3.2, and 8.4; other violations; disbarment. *In re Jackson*, 255 Kan. 542, 874 P.2d 673 (1994).

43. Attorney's failure to timely file backruptcy petition for clients, misrepresentations to clients as to status of case, and mishandling of bankruptcy case violate MRPC 1.1, 1.3, 1.4, 1.15, and 8.4; other violations; disbarment. *In re Jackson*, 255 Kan. 542, 874 P.2d 673 (1994).

44. Attorney's mishandling of divorce case violates MRPC 1.3 and 1.4, and use of letterhead indicating attorney is in partnership with another when such is not the case violates MRPC 7.5(d); censure. *In re Seck*, 255 Kan. 552, 874 P.2d 678 (1994).

45. Attorney's failure to notify client about the status of her case and the attorney's temporary suspension violates MRPC 1.4; other violations; indefinite suspension and Rule 218 compliance ordered. *In re Nelson*, 255 Kan. 555, 874 P.2d 1201 (1994).

46. Attorney's dilatory handling of three federal court cases violative of MRPC 1.1, 1.3, 1.4, and 3.2; failure to respond to inquiry from disciplinary authorities violative of Rule 207; two-year supervised probation. *In re Long*, 255 Kan. 792, 877 P.2d 421 (1994).

47. Attorney found to have violated MRPC 1.1, 1.3, 1.4, 1.15, 3.2, 3.4(c), 4.3, and 8.4(d) and (g) based on conduct in seven different complaints reflecting on ttorney's lack of diligence and competence, miscommunication and lack of candor, and failure to return unearned fees; failure to cooperate in disciplinary investigation; attorney currently on disability inactive status; indefinite suspension and Rule 218 compliance ordered. *In re Jenkins*, 255 Kan. 797, 877 P.2d 423 (1994).

48. Attorney's failure to communicate with clients and poor record keeping of trust account violate MRPC 1.1, 1.3, 1.4 and 1.15; 2-year supervised probation ordered. *In re Waite*, 256 Kan. 130, 883 P.2d 1176 (1994).

49. Attorney's mishandling of personal injury case violates MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.6, 1.7, 1.16, 3.2, 4.1, 8.4 and Rule 207; published censure. *In re Shultz*, 256 Kan. 196, 883 P.2d 779 (1994).

50. Attorney's failure to represent client in collection of foreign judgment in workers compensation case found to violate MRPC 1.1, 1.3, 1.4, 1.5(d), 1.16(d), 3.2, and 8.4(g); indefinite suspension and Rule 218 compliance ordered. *In re Griggs*, 256 Kan. 498, 886 P.2d 786 (1994).

51. Attorney who lied to the court and her clients and failed to appear for landlord-tenant case proceeding found to be in violation of MRPC 1.1, 1.3, 1.4, 3.3, 3.4, 3.5, 4.1, 8.2 and 8.4; one-year suspension and compliance with Rule 218 ordered. *In re Gershater*, 256 Kan. 512, 886 P.2d 343 (1994).

52. Attorney's mishandling of a breach of contract case and settlement violative of MRPC 1.1, 1.3, 1.4, 3.3, and 8.4; six-month suspension and compliance with Rule 218 ordered. *In re Norlen*, 256 Kan. 509, 886 P.2d 347 (1994).

53. Attorney's mishandling of probate matter and workers compensation case violates MRPC 1.1, 1.3, 1.4, 3.2, 4.1, 8.4 and Rule 207; imposition of discipline suspended; two-year supervised probation. *In re Whitaker*, 256 Kan. 939, 888 P.2d 829 (1995).

54. Attorney's mishandling collection of bad checks violate MRPC 1.3, 1.4, 1.15(b) and 1.16(d); published censure. *In re England*, 257 Kan. 312, 894 P.2d 177 (1995).

55. Attorney previously censured disbarred for violations of MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.15, 1.16, 3.2, 3.3, 4.1, 7.1, 7.5, 8.1, 8.4, and Rules 207 and 208; Rule 218 compliance ordered. *In re Shultz*, 257 Kan. 662, 895 P.2d 603 (1995).

56. Attorney's mishandling the oil and gas case violates MRPC 1.1, 1.3, 1.4 and 8.4(c); one-year probation. *In re Pilgreen*, 257 Kan. 949, 896 P.2d 389 (1995).

57. General counsel who reported suspected violations to an outside agency without first consulting with the head of the organization found in violation of MRPC 1.2, 1.4, 1.6(a), 1.13(b) and 1.16. *Crandon v. State*, 257 Kan. 727, 897 P.2d 92 (1995).

58. Attorney's mishandling of subrogation claims for insurance company violates MRPC 1.1, 1.3 and 1.4; published censure. *In re Morse*, 258 Kan. 248, 899 P.2d 467 (1995).

59. Attorney's forging a client's signature on affidavit and filing it in court violate MRPC 1.4, 3.3, 3.4 and 8.4(c), (d) and (g); published censure. *In re Caller*, 258 Kan. 250, 899 P.2d 468 (1995).

60. Attorney's failure to remit personal injury protection lien to his client's insurance company, failure to keep client informed, misrepresentation to client, and creating conflict of interest violated MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.15, 3.7, 4.1, and 8.4; aggravating circumstances; indefinite suspension. *In re Seck*, 258 Kan. 530, 905 P.2d 122 (1995).

61. Attorney's neglect of three different clients' cases violates MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 3.1, and 8.4 and Rule 207; one-year suspension. *In re Geeding*, 258 Kan. 740, 907 P.2d 124 (1995).

62. Attorney disciplined in Texas for failure to communicate with clients, neglect of client's cases, failure to cooperate in investigation, and conversion of client's funds; Texas findings and conclusions adopted per Rule 202; indefinite suspension. *In re Callahan*, 258 Kan. 770, 907 P.2d 840 (1995).

63. Attorney's mishandling of various civil and divorce cases violates MRPC 1.1, 1.2, 1.3, 1.4, 1.15, 3.2, 3.4, 4.1, 8.1, and 8.4; indefinite suspension. *In re Gordon*, 258 Kan. 784, 908 P.2d 169 (1995).

64. Attorney's handling of counterclaim and appeal in lawsuit between home buyers and construction company violates MRPC 1.1, 1.3, 1.4, 8.4(c) and (d) and Rule 207; one-year suspension. *In re Crockett*, 259 Kan. 540, 912 P.2d 176 (1996).

65. Attorney self-reported cases in which he allowed the statute of limitations to expire on his clients' claims; violations of MRPC 1.3, 1.4, and 8.4; two-year suspension. *In re Hill*, 259 Kan. 877, 915 P.2d 49 (1996).

66. Attorney's failure to keep client reasonably informed and charging of excessive fee violate MRPC 1.3, 1.4, 1.5, and 1.16; published censure. *In re Scimeca*, 259 Kan. 893, 914 P.2d 948 (1996).

67. Attorney's failure to defend client in repossession action violates MRPC 1.1, 1.3, and 1.4; continued use of alcohol and drugs and four additional complaints pending hearing or

investigation negate panel's recommendation of supervised probation; one-year suspension. *In re Mitchell*, 260 Kan. 560, 919 P.2d 360 (1996).

68. Attorney's mishandling of client's assets in voluntary conservatorship proceeding violates MRPC 1.1, 1.2, 1.4, 1.5, 1.7, 1.9, 1.14, 3.3, and 8.4; published censure. *In re Brantley*, 260 Kan. 605, 920 P.2d 433 (1996).

69. Attorney's mishandling of bankruptcy proceedings for his clients violates MRPC 1.1, 1.2, 1.3, 1.4, 8.1 and 8.4 and Rule 207; disbarment. *In re Gordon*, 260 Kan. 905, 925 P.2d 840 (1996).

70. Attorney's handling of civil action and post-divorce proceeding and his attempt to represent a criminal defendant while attorney was in inpatient drug treatment program violate MRPC 1.3, 1.4, 1.5(b), 1.15(a) and (b), 1.16(a), 3.3(a), 4.1, and 8.4(a), (b), (d), and (g); three-year supervised probation. *In re Phillips*, 260 Kan. 909, 925 P.2d 435 (1996).

71. Attorney's failure to act with reasonable diligence and promptness in an eviction case, commingling of clients' funds with his own, and failure to cooperate with disciplinary administrator's office violate MRPC 1.4, 1.5, 1.9, 1.15, 1.16, 8.1 and 8.4 and Rule 207; one-year suspension. *In re Howlett*, 261 Kan. 167, 928 P.2d 52 (1996).

72. Attorney's mishandling of matters involving (1) individualized education program for autistic child in public school, (2) personal injury, probate, and insurance claim arising from fatal car accident, and (3) probate matter involving estate of conservatee violates MRPC 1.1, 1.2, 1.3,1.4, 1.7, 1.16, and 8.4 and Rule 207; indefinite suspension per Rule 203(a)(2). *In re Dow*, 261 Kan. 989, 933 P.2d 666 (1997).

73. Attorney's mishandling of bankruptcy case violates MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.16, 3.1, 3.3, and 8.4; published censure per Rule 203(a)(3). *In re Roy*, 261 Kan. 999, 933 P.2d 662 (1997).

74. Attorney's mishandling of personal injury case, removing disputed fee funds from his trustee account, failure to communicate with client, delaying notification to insurance company of his termination, and charging unreasonable fee violate MRPC 1.15, 1.4, 1.16(a)(3) and (d), and 1.5(a); two-year probation and restitution ordered. *Gerhardt v. Harris*, 261 Kan. 1007, 934 P.2d 976 (1997); *In re Harris*, 261 Kan. 1063, 934 P.2d 965 (1997).

75. Attorney's mishandling of adoption case violates MRPC 1.1, 1.3, 1.4, and 8.4 and Rule 207; indefinite suspension. *In re Johnson*, 262 Kan. 275, 936 P.2d 258 (1997).

76. Attorney's mishandling of civil rights case violates MRPC 1.2, 1.3, 1.4, 1.7, 1.15, 5.3, and 8.4; two-year supervised probation. *In re Baxter*, 262 Kan. 555, 940 P.2d 37 (1997).

77. Attorney's failure to file negligence action in proper court and his disappearance from his law office without notice to clients violate MRPC 1.1, 1.3, 1.4, 1.5, 3.2, and 8.4 and Rule 207; disbarment. *In re Neal*, 262 Kan. 562, 937 P.2d 1234 (1997).

78. Attorney's missing filing and response deadlines and failure to communicate with client violate MRPC 1.1, 1.3, and 1.4; one-year supervised probation. *In re Capps*, 262 Kan. 833, ____ P.2d ____ (1997).

RULE 1.5 Fees

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;
(4) the amount involved and the results obtained;
(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) whether the fee is fixed or contingent.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(c) A lawyer's fee shall be reasonable but a court determination that a fee is not reasonable shall not be presumptive evidence of a violation that requires discipline of the attorney.

(d) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (f) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, and the litigation and other expenses to be deducted from the recovery. All such expenses shall be deducted before the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the client's share and amount and the method of its determination. The statement shall advise the client of the right to have the fee reviewed as provided in subsection (e).

(e) Upon application by the client, all fee contracts shall be subject to review and approval by the appropriate court having jurisdiction of the matter and the court shall have the authority to determine whether the contract is reasonable. If the court finds the contract is not reasonable, it shall set and allow a reasonable fee.

(f) A lawyer shall not enter into an arrangement for, charge, or collect:
(1) Any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony, support, or property settlement; or
(2) a contingent fee for representing a defendant in a criminal case; or

(3) a contingent fee in any other matter in which such a fee is precluded by statute.

(g) A division of fee between lawyers who are not in the same firm may be made if the client is advised of and does not object to the participation of all the lawyers involved, and the total fee is reasonable.

(h) This rule does not prohibit payments to former partners or associates or their estates pursuant to a separation or retirement agreement.

Kansas Comment

Origin

Rule 1.5 as adopted contains 1.5(a) and (b) as promulgated in the Model Rules. (c), (d) and (e) have been modified. The Kansas Committee recommended adoption of Model Rule 1.5 with no changes. Rule 1.5 as adopted followed a study of attorney fees by a special committee of the Kansas Judicial Council formed pursuant to Concurrent Resolution 5053 of the Kansas House of Representatives adopted April 8, 1986. The rule as finally adopted took into consideration Model Rule 1.5, the Kansas Committee recommendations and the recommendations of the special committee of the Kansas Judicial Council.

Basis or Rate of Fee

When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. In a new client-lawyer relationship, however, an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth.

Terms of Payment

A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(j). However, a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property.

An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures. When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and

explain their implications. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage.

Division of Fee

A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist, or when a lawyer refers a matter to a lawyer in another jurisdiction. Paragraph (g) permits the lawyers to divide a fee by agreement between the participating lawyers if the client is advised, does not object, and the total fee is reasonable. It does not require disclosure to the client of the share that each lawyer is to receive.

Disputes over Fees

If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure. The fact that a fee may be lower than the customary fee charged in the locality for similar service shall not be a basis for finding the fee to be unreasonable.

Case Annotations

1. Attorney referral fee permitted under MRPC 1.5(g) without regard to services rendered. DR 2-107(A) no longer applicable. *Ryder v. Farmland Mut. Ins. Co.*, 248 Kan. 352, 807 P.2d 109 (1991).

2. Rule 1.5(e) provides a vehicle for clients to seek court intervention in attorney fee contract disputes. *Ryder v. Farmland Mut. Ins. Co.*, 248 Kan. 352, 807 P.2d 109 (1991).

3. Rule cited in appeal of contingent fee award in condemnation case. *Board of Sedgwick County Comm'rs v. Kiser Living Trust*, 250 Kan. 84, 107, 825 P.2d 130 (1992).

4. Court lists eight factors found in MRPC 1.5(a) in determining reasonableness of attorney fees in eminent domain case. *City of Wichita v. BG Products, Inc.*, 252 Kan. 367, 374, 845 P.2d 649 (1993).

5. Attorney's mishandling of employment discrimination class action and failure to inform clients as to status of case violative of MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.15, 3.1, and 3.2; other violations; Rule 203(a)(2) one-year suspension, Rule 203(a)(5) restitution, and Rule 218 compliance ordered. *In re King*, 253 Kan. 444, 855 P.2d 963 (1993).

6. Attorney's failure to remit client's portion in a collection matter, failure to keep client informed, misrepresentations to client as to status of collection efforts, and causing balance on trust account to repeatedly fall below amount due client violative of MRPC 1.3, 1.4(a), 1.5(d), 1.15(a), 4.1(a), and 8.4(c); aggravating and mitigating circumstances; one-year supervised probation with conditions. *In re Wisler*, 254 Kan. 600, 866 P.2d 1049 (1994).

7. Attorney fees contingent on amount of maintenance received in divorce action violative of MRPC 1.5(f)(1); censure. *In re Jarvis*, 254 Kan. 829, 869 P.2d 671 (1994).

8. Attorney's mishandling of personal injury case violates MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.6, 1.7, 1.16, 3.2, 4.1, 8.4 and Rule 207; published censure. *In re Shultz*, 256 Kan. 196, 883 P.2d 779 (1994).

9. Attorney's failure to represent client in collection of foreign judgment in workers compensation case found to violate MRPC 1.1, 1.3, 1.4, 1.5(d), 1.16(d), 3.2, and 8.4(g); indefinite suspension and Rule 218 compliance ordered. *In re Griggs*, 256 Kan. 498, 886 P.2d 786 (1994).

10. Attorney previously censured disbarred for violations of MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.15, 1.16, 3.2, 3.3, 4.1, 7.1, 7.5, 8.1, 8.4, and Rules 207 and 208; Rule 218 compliance ordered. *In re Shultz*, 257 Kan. 662, 895 P.2d 603 (1995).

11. Rules of determining reasonableness of fees under MRPC 1.5(a) discussed; trial court has authority to set reasonable fees under 1.5(e), but that authority does not make the fees unliquidated for the purposes of prejudgment interest. *Miller v. Botwin*, 258 Kan. 108, 899 P.2d 1004 (1995).

12. Attorney's failure to remit personal injury protection lien to his client's insurance company, failure to keep client informed, misrepresentation to client, and creating conflict of interest violated MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.15, 3.7, 4.1, and 8.4; aggravating circumstances; indefinite suspension. *In re Seck*, 258 Kan. 530, 905 P.2d 122 (1995).

13. Attorney's neglect of three different clients' cases violates MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 3.1, and 8.4 and Rule 207; one-year suspension. *In re Geeding*, 258 Kan. 740, 907 P.2d 124 (1995).

14. Attorney's charging unreasonable fees in an estate matter violates MRPC 1.5; ordered to abide by his agreement to repay; published censure. *In re Tuley*, 258 Kan. 762, 907 P.2d 844 (1995).

15. Attorney's mishandling of client funds, failure to supervise nonlawyer assistants, and other misconduct violate MRPC 1.3, 1.5, 1.15, 5.3, and 8.4; mitigating circumstances; published censure. *In re Krogh*, 259 Kan. 163, 910 P.2d 221 (1996).

16. Attorney's failure to keep client reasonably informed and charging of excessive fee violate MRPC 1.3, 1.4, 1.5, and 1.16; published censure. *In re Scimeca*, 259 Kan. 893, 914 P.2d 948 (1996).

17. Attorney's mishandling of client's assets in voluntary conservatorship proceeding violates MRPC 1.1, 1.2, 1.4, 1.5, 1.7, 1.9, 1.14, 3.3, and 8.4; published censure. *In re Brantley*, 260 Kan. 605, 920 P.2d 433 (1996).

18. Attorney's handling of civil action and post-divorce proceeding and his attempt to represent a criminal defendant while attorney was in inpatient drug treatment program violate MRPC 1.3, 1.4, 1.5(b), 1.15(a) and (b), 1.16(a), 3.3(a), 4.1, and 8.4(a), (b), (d), and (g); three-year supervised probation. *In re Phillips*, 260 Kan. 909, 925 P.2d 435 (1996).

19. Attorney's failure to act with reasonable diligence and promptness in an eviction case, commingling of clients' funds with his own, and failure to cooperate with disciplinary administrator's office violate MRPC 1.4, 1.5, 1.9, 1.15, 1.16, 8.1 and 8.4 and Rule 207; one-year suspension. *In re Howlett*, 261 Kan. 167, 928 P.2d 52 (1996).

20. Attorney's mishandling of bankruptcy case violates MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.16, 3.1, 3.3, and 8.4; published censure per Rule 203(a)(3). *In re Roy*, 261 Kan. 999, 933 P.2d 662 (1997).

21. Client not required to follow MRPC 1.5(e) procedure in attorney fee dispute case. *Gerhardt v. Harris*, 261 Kan. 1007, 934 P.2d 976 (1997).

22. Attorney's mishandling of personal injury case, removing disputed fee funds from his trustee account, failure to communicate with client, delaying notification to insurance company of his termination, and charging unreasonable fee violate MRPC 1.15, 1.4, 1.16(a)(3) and (d), and 1.5(a); two-year probation and restitution ordered. *Gerhardt v. Harris*, 261 Kan. 1007, 934 P.2d 976 (1997); *In re Harris*, 261 Kan. 1063, 934 P.2d 965 (1997).

23. Attorney's failure to file negligence action in proper court and his disappearance from his law office without notice to clients violate MRPC 1.1, 1.3, 1.4, 1.5, 3.2, and 8.4 and Rule 207; disbarment. *In re Neal*, 262 Kan. 562, 937 P.2d 1234 (1997).

24. The graduated contingency fee rates to Workers Compensation Act do not interfere with court's inherent power to regulate practice of law or unconstitutionally violate sepa-

ration of powers doctrine. *Injured Workers of Kansas v. Franklin*, 262 Kan. 840, 920 P.2d 433 (1997).

RULE 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) To prevent the client from committing a crime; or

(2) to comply with requirements of law or orders of any tribunal; or

(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Kansas Comment

The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client's confidences must be protected from disclosure. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in all situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

Authorized Disclosure

A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited.

Several situations must be distinguished:

First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.2(d). Similarly, a lawyer has a duty under Rule 3.3(a)(4) not to use false evidence. This duty is essentially a special instance of the duty prescribed in Rule 1.2(d) to avoid assisting a client in criminal or fraudulent conduct.

Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(d), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.

Third, the lawyer may learn that a client intends prospective conduct that is criminal. As stated in paragraph (b)(1), the lawyer has professional discretion to reveal such information. Where practical, the lawyer should seek to dissuade the client from illegal action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to take preventive action permitted by paragraph (b)(1) does not violate this Rule.

Fourth, the attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, Rule 1.6(a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with valid final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client. When the court or other tribunal erroneously denies the claim of privilege, however, the lawyer is faced with a dilemma: refuse to reveal and incur contempt charges or reveal the information and bring often unfortunate consequences to the client. If the first option is chosen, a test of the validity of the denial is usually made through habeas corpus proceedings. The latter permits usual appellate relief. The provisions of paragraph (b) state that it is the lawyer's discretion which avenue to pursue. Both are permitted and circumstances, such as serious harm to the client upon revelation, often dictate the choice.

The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.

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, as stated in Rule 1.16(a)(1).

After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in Rule 1.6. Neither this rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer should make inquiry within the organization as indicated in Rule 1.13(b).

Dispute Concerning Lawyer's Conduct

Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(3) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be not greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by paragraph (b)(3) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

Former Client

The duty of confidentiality continues after the client-lawyer relationship has terminated.

The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

Case Annotations

1. Acquiring information protected by MRPC 1.6 and 1.9(b) prerequisite to 1.10(b) disqualification; irrebuttable presumption created by ABA Code of Professional Responsibility contrasted to specific requirements and findings mandated by Model Rules of Professional Conduct. *Lansing-Delaware Water District v. Oak Lane Park, Inc.*, 248 Kan. 563, 808 P.2d 1369 (1991).

2. Circumstances when disclosure of confidential information is permitted discussed. *Lansing-Delaware Water District v. Oak Lane Park, Inc.*, 248 Kan. 563, 808 P.2d 1369 (1991).

3. On appeal in suit for payment of legal services, trial court order to produce documents is upheld, finding no attorney-client privilege existed as to fee matter; MRPC 1.7(b)(1), (2). *Wallace, Saunders, Austin, Brown & Enochs, Chtd. v. Louisburg Grain Co.*, 16 Kan. App. 2d 30, 37-38, 818 P.2d 805 (1991). On review, the Supreme Court modifies order to produce and orders in camera trial court inspection to limit discovery of documents to those related only to the case at bar, citing Kansas comment to MRPC 1.6. *Wallace, Saunders, Austin, Brown & Enochs, Chtd. v. Louisburg Grain Co.*, 250 Kan. 54, 62-63, 824 P.2d 933 (1991).

4. Attorney's mishandling of personal injury case violates MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.6, 1.7, 1.16, 3.2, 4.1, 8.4 and Rule 207; published censure. *In re Shultz*, 256 Kan. 196, 883 P.2d 779 (1994).

5. General counsel who reported suspected violations to an outside agency without first consulting with the head of the organization found in violation of MRPC 1.2, 1.4, 1.6(a), 1.13(b) and 1.16. *Crandon v. State*, 257 Kan. 727, 897 P.2d 92 (1995).

RULE 1.7 Conflict of Interest: General Rule

(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.

Comment

Loyalty to a Client

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. If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See Rule 1.16. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. See also Rule 2.2(c). As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as

competing economic enterprises, does not require consent of the respective clients. Paragraph (a) applies only when the representation of one client would be directly adverse to the other.

Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out 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. Paragraph (b) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

Consultation and Consent

A client may consent to representation notwithstanding a conflict. However, as indicated in paragraph (a)(1) with respect to representation directly adverse to a client, and paragraph (b)(1) with respect to material limitations on representation of a client, 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.

Lawyer's Interests

The lawyer's own interests should not be permitted to have adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See Rules 1.1 and 1.5. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Conflicts in Litigation

Paragraph (a) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (b). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met. Compare Rule 2.2 involving intermediation between clients.

Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an 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. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

Interest of Person Paying for a Lawyer's Service

A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See Rule 1.8(f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

Other Conflict Situations

Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved.

A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

Conflict Charged by an Opposing Party

Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See Scope.

Case Annotations

1. Comment to Rule cited in habeas corpus proceeding to review trial court's disqualification, on conflict of interest grounds, of public defender whose office had represented prosecution witness; disqualification and mistrial upheld; writ denied; see also Rules 1.9, 1.10. *In re Habeas Corpus Petition of Hoang*, 245 Kan. 560, 566, 781 P.2d 731 (1989).

2. On appeal in suit for payment of legal services, trial court order to produce documents is upheld, finding no attorney-client privilege existed as to fee matter; MRPC 1.7(b)(1), (2). *Wallace, Saunders, Austin, Brown & Enochs, Chtd. v. Louisburg Grain Co.*, 16 Kan. App. 2d 30, 37-38, 818 P.2d 805 (1991). On review, the Supreme Court modifies order to produce and orders in camera trial court inspection to limit discovery of documents to those related only to the case at bar, citing Kansas comment to MRPC 1.6. *Wallace, Saunders, Austin, Brown & Enochs, Chtd. v. Louisburg Grain Co.*, 250 Kan. 54, 62-63, 824 P.2d 933 (1991).

3. Attorney's borrowing a total of $117,000 in five unsecured interest-free loans, with no certain due date, from mother who had retained attorney to represent her son in pending criminal matter violative of DR 5-104(a), DR 7-101(A)(3), DR 1-102(A)(1) and (6), MRPC 1.7, MRPC 1.8(a), MRPC 1.15(d)(2)(iii) and (iv), MRPC 8.4(a) and (g), and Rule 704 oath; other violations; indefinite suspension and Rule 218 compliance ordered. *In re Norwood*, 252 Kan. 711, 847 P.2d 1314 (1993).

4. Attorney's borrowing $15,000 from client violates MRPC 1.7, MRPC 1.8(a), MRPC 1.15(d)(2)(iii) and (iv), MRPC 8.4(a) and (g), and Rule 704 oath; other violations; indefinite suspension and Rule 218 compliance ordered. *In re Norwood*, 252 Kan. 711, 847 P.2d 1314 (1993).

5. Scrivener of will revision who also represented 2 beneficiaries in unrelated action against other beneficiaries held to have no conflict under MRPC 1.7(a) or (b). *In re Estate of Koch*, 18 Kan. App. 2d 188, 210-28, 849 P.2d 977 (1993).

6. Canon 9 "appearance of impropriety" standard is general statement; MRPC 1.7 deals with specific issue at bar. *In re Estate of Koch*, 18 Kan. App. 2d 188, 216, 849 P.2d 977 (1993).

7. Client may waive conflict of interest Rules 1.7 and 1.9 and consent to attorney's representation despite anticipated adverse testimony. *LeaseAmerica Corp. v. Stewart*, 19 Kan. App. 2d 740, 876 P.2d 184 (1994).

8. Attorney's mishandling of personal injury case violates MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.6, 1.7, 1.16, 3.2, 4.1, 8.4 and Rule 207; published censure. *In re Shultz*, 256 Kan. 196, 883 P.2d 779 (1994).

9. Subordinate attorneys are not relieved of their responsibility for a violation of the rules of professional conduct simply because they acted at the direction of their supervisor, if they know beforehand that their conduct will be a violation of MRPC 1.7 and 1.16. *McCurdy v. Kansas Dept. of Transportation*, 21 Kan. App. 2d 262, 898 P.2d 650 (1995).

10. Conflict of interest under MRPC 1.7 discussed in regard to criminal defendant's constitutional right to effective assistance of counsel. *State v. Wallace*, 258 Kan. 639, 908 P.2d 1267 (1995).

11. County attorney found to have had conflict of interest in representing client investigated for neglect of her children, engaged in undignified or discourteous conduct degrading to tribunal, and engaged in conduct adversely reflecting o his fitness to practice law; two-year probation; participation in ethics programs and personal apology to judge in open court ordered. *In re Kraushaar*, 258 Kan. 772, 907 P.2d 836 (1995).

12. Attorney's mishandling of client's assets in voluntary conservatorship proceeding violates MRPC 1.1, 1.2, 1.4, 1.5, 1.7, 1.9, 1.14, 3.3, and 8.4; published censure. *In re Brantley*, 260 Kan. 605, 920 P.2d 433 (1996).

13. Attorney's mishandling of matters involving (1) individualized education program for autistic child in public school, (2) personal injury, probate, and insurance claim arising from fatal car accident, and (3) probate matter involving estate of conservatee violates MRPC 1.1, 1.2, 1.3, 1.4, 1.7, 1.16, and 8.4 and Rule 207; indefinite suspension per Rule 203(a)(2). *In re Dow*, 261 Kan. 989, 933 P.2d 666 (1997).

14. Attorney's mishandling of civil rights case violates MRPC 1.2, 1.3, 1.4, 1.7, 1.15, 5.3, and 8.4; two-year supervised probation. *In re Baxter*, 262 Kan. 555, 940 P.2d 37 (1997).

RULE 1.8 Conflict of Interest: Prohibited Transactions

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) 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; and

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

(3) the client consents in writing thereto.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation.

(c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client consents after consultation;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

(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.

(j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien granted by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

Comment

Transactions Between Client and Lawyer

As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. For example, a lawyer who had learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment. Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others,

for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer can provide. Paragraph (c) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

Literary Rights

An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraph (j).

Persons Paying for Lawyer's Services

Rule 1.8(f) requires disclosure of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 1.6 concerning confidentiality and Rule 1.7 concerning conflict of interest. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure.

Family Relationships Between Lawyers

Rule 1.8(i) applies to related lawyers who are in different firms. Related lawyers in the same firm are governed by Rules 1.7, 1.9, and 1.10. The disqualification stated in Rule 1.8(i) is personal and is not imputed to members of firms with whom the lawyers are associated.

Acquisition of Interest in Litigation

Paragraph (j) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. This general rule, which has its basis in common law champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these rules, such as the exception for reasonable contingent fees set forth in Rule 1.5 and the exception for certain advances of the costs of litigation set forth in paragraph (e).

This Rule is not intended to apply to customary qualification and limitations in legal opinions and memoranda.

Case Annotations

1. Attorney's borrowing a total of $117,000 in five unsecured interest-free loans, with no certain due date, from mother who had retained attorney to represent her son in pending criminal matter violative of DR 5-104(a), DR 7-101(A)(3), DR 1-102(A)(1) and (6), MRPC 1.7, MRPC 1.8(a), MRPC 1.15(d)(2)(iii) and (iv), MRPC 8.4(a) and (g), and Rule 704 oath; other violations; indefinite suspension and Rule 218 compliance ordered. *In re Norwood*, 252 Kan. 711, 847 P.2d 1314 (1993).

2. Attorney's borrowing $15,000 from client violates MRPC 1.7, MRPC 1.8(a), MRPC 1.15(d)(2)(iii) and (iv), MRPC 8.4(a) and (g), and Rule 704 oath; other violations; indefinite suspension and Rule 218 compliance ordered. *In re Norwood*, 252 Kan. 711, 847 P.2d 1314 (1993).

3. MRPC 1.8(g) cited in trust dispute in issue regarding representation of multiple clients with conflicting interests. *Giblin v. Giblin*, 253 Kan. 240, 854 P.2d 816 (1993).

4. Loans to attorneys from clients must be in writing and clients must be advised to seek independent advice with regard to same, pursuant to MRPC 1.8(a); indefinite suspension and compliance with Rule 218 ordered. *In re Jancich*, 255 Kan. 787, 877 P.2d 417 (1994).

5. Attorney's transfer of assets as bank trust officer from a trust to another without consent of a bank violates MRPC 1.8 and 8.4; his representation of two sons whose position was directly opposite of his former client, their mother, violates MRPC 1.9; published censure. *In re Whalen*, 256 Kan. 944, 888 P.2d 395 (1995).

RULE 1.9 Conflict of Interest: Former Client

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

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

Comment

After termination of a client-lawyer relationship, a lawyer may not represent another client except in conformity with this Rule. The principles in Rule 1.7 determine whether the interests of the present and former client are adverse. Thus, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction.

The scope of a "matter" for purposes of Rule 1.9(a) may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdiction. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

Information acquired by the lawyer in the course of representing a client may not subsequently be used by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

Disqualification from subsequent representation is for the protection of clients and can be waived by them. A waiver is effective only if there is disclosure of the circumstances, including the lawyer's intended role in behalf of the new client.

With regard to an opposing party's raising a question of conflict of interest, see Comment to Rule 1.7. With regard to disqualification of a firm with which a lawyer is associated, see Rule 1.10.

Case Annotations

1. Rule applied in habeas corpus proceeding to review trial court's disqualification, on conflict of interest grounds, of public defender whose office had represented prosecution witness; disqualification and mistrial upheld; writ denied; see also Rules 1.7 and 1.10. *In re Habeas Corpus Petition of Hoang,* 245 Kan. 560, 566, 781 P.2d 731 (1989).

2. Disqualification of attorney based on a conflict of interest owing to previous representation of opposing client; "substantially related matter" same test as in Rule 225, Canon 4. *Geisler by Geisler v. Wyeth Laboratories,* 716 F. Supp. 520, 524 (D. Kan. 1989).

3. Acquiring information protected by MRPC 1.6 and 1.9(b) prerequisite to 1.10(b) disqualification; irrebuttable presumption created by ABA Code of Professional Responsibility contrasted to specific requirements and findings mandated by Model Rules of Professional Conduct. *Lansing-Delaware Water District v. Oak Lane Park, Inc.*, 248 Kan. 563, 808 P.2d 1369 (1991).

4. Application of MRPC 1.9 to circumstances occasioned by attorney's changing law firms is discussed; Rule 1.10(b) disqualification affirmed. *Lansing-Delaware Water District v. Oak Lane Park, Inc.*, 248 Kan. 563, 808 P.2d 1369 (1991).

5. Attorney disqualified pursuant to MRPC 1.9(a) from representing estate of decedent who was major shareholder of corporation for which attorney drafted stock repurchase agreement in the event of stockholder disability, retirement, or death; attorney's involvement made him material witness, requiring disqualification under MRPC 3.7(a) and DR 5-102; right to appeal attorney disqualification rests with client, not attorney. *Miller v. Insurance Management Assocs., Inc.*, 249 Kan. 102, 815 P.2d 89 (1991).

6. On appeal of DUI conviction, hearing required to determine whether prosecutor acquired confidential or privileged information in defendant's initial consultation with prosecutor who had originally been appointed to represent defendant. *City of Hutchinson v. Gilmore,* 16 Kan. App. 2d 646, 827 P.2d 784 (1992).

7. Client may waive conflict of interest Rules 1.7 and 1.9 and consent to attorney's representation despite anticipated adverse testimony. *LeaseAmerica Corp. v. Stewart,* 19 Kan. App. 2d 740, 876 P.2d 184 (1994).

8. Attorney's transfer of assets as bank trust officer from a trust to another without consent of a bank violates MRPC 1.8 and 8.4; his representation of two sons whose position was directly opposite of his former client, their mother, violates MRPC 1.9; published censure. *In re Whalen*, 256 Kan. 944, 888 P.2d 395 (1995).

9. Disqualification of attorney under MRPC 1.9(a) discussed; burden of proof; irrebuttable presumption; no hearing should be held. *Chrispens v. Coastal Refining & Mktg, Inc.*, 257 Kan. 745, 897 P.2d 104 (1995).

10. When disqualification is sought under both 1.9(a) and 1.10(b), evidentiary hearing is required; no irrebuttable presumption exists; specific factual findings required. *Chrispens v. Coastal Refining & Mktg, Inc.*, 257 Kan. 745, 897 P.2d 104 (1995).

11. Attorney's mishandling of client's assets in voluntary conservatorship proceeding violates MRPC 1.1, 1.2, 1.4, 1.5, 1.7, 1.9, 1.14, 3.3, and 8.4; published censure. *In re Brantley,* 260 Kan. 605, 920 P.2d 433 (1996).

12. Attorney's failure to act with reasonable diligence and promptness in an eviction case, commingling of clients' funds with his own, and failure to cooperate with disciplinary administrator's office violate MRPC 1.4, 1.5, 1.9, 1.15, 1.16, 8.1 and 8.4 and Rule 207; one-year suspension. *In re Howlett*, 261 Kan. 167, 928 P.2d 52 (1996).

RULE 1.10 Imputed Disqualification: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9, or 2.2.

(b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(b) that is material to the matter.

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

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

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

(d) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

Comment

Definition of "Firm"

For purposes of the Rules of Professional Conduct, the term "firm" includes lawyers in a private firm, and lawyers employed in the legal department of a corporation or other organization, or in a legal services organization. Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers, are relevant in determining whether they are a firm, as is the fact that they have mutual access to confidential information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved. A group of lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by one lawyer is attributed to another.

With respect to the law department of an organization, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. However, there can be uncertainty as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

Similar questions can also arise with respect to lawyers in legal aid. Lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular rule that is involved, and on the specific facts of the situation.

Where a lawyer has joined a private firm after having represented the government, the situation is governed by Rule 1.11(a) and (b); where a lawyer represents the government

after having served private clients, the situation is governed by Rule 1.11(c)(1). The individual lawyer involved is bound by the Rules generally, including Rules 1.6, 1.7, and 1.9.

Different provisions are thus made for movement of a lawyer from one private firm to another and for movement of a lawyer between a private firm and the government. The government is entitled to protection of its client confidences, and therefore to the protections provided in Rules 1.6, 1.9, and 1.11. However, if the more extensive disqualification in Rule 1.10 were applied to former government lawyers, the potential effect on the government would be unduly burdensome. The government deals with all private citizens and organizations, and thus has a much wider circle of adverse legal interests than does any private law firm. In these circumstances, the government's recruitment of lawyers would be seriously impaired if Rule 1.10 were applied to the government. On balance, therefore, the government is better served in the long run by the protections stated in Rule 1.11.

Principles of Imputed Disqualification

The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by paragraphs (b) and (c).

Lawyers Moving Between Firms

When lawyers have been associated in a firm but then end their association, however, the problem is more complicated. The fiction that the law firm is the same as a single lawyer is no longer wholly realistic. There are several competing considerations. First, the client previously represented must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule of disqualification should not be so broadly cast to preclude other persons from having reasonable choice of legal counsel. Third, the rule of disqualification should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputed disqualification were defined with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

Reconciliation of these competing principles in the past has been attempted under two rubrics. One approach has been to seek per se rules of disqualification. For example, it has been held that a partner in a law firm is conclusively presumed to have access to all confidences concerning all clients of the firm. Under this analysis, if a lawyer has been a partner in one law firm and then becomes a partner in another law firm, there is a presumption that all confidences known by a partner in the first firm are known to all partners in the second firm. This presumption might properly be applied in some circumstances, especially where the client has been extensively represented, but may be unrealistic where the client was represented only for limited purposes. Furthermore, such a rigid rule exaggerates the difference between a partner and an associate in modern law firms.

The other rubric formerly used for dealing with vicarious disqualification is the appearance of impropriety proscribed in Canon 9 or the ABA Model Code of Professional Responsibility. This rubric has a two-fold problem. First, the appearance of impropriety can

be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since "impropriety" is undefined, the term "appearance of impropriety" is question-begging. It therefore has to be recognized that the problem of imputed disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety.

A rule based on a functional analysis is more appropriate for determining the question of vicarious disqualification. Two functions are involved: Preserving confidentiality and avoiding positions adverse to a client.

Confidentiality

Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in particular circumstances, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussion of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients.

Application of paragraphs (b) and (c) depends on a situation's particular facts. In any such inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

Paragraphs (b) and (c) operate to disqualify the firm only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(b). Thus, if a lawyer while with one firm acquired no knowledge of information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict.

Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9.

Case Annotations

1. Public defender's office is legal services organization; hence, is "firm" and subject to conflict of interest rules. *In re Habeas Corpus Petition of Hoang*, 245 Kan. 560, 566, 781 P.2d 731 (1989).

2. Rule 1.10(a) is per se rule of imputed disqualification, regardless of whether client confidences shared intra-firm; "Chinese Wall" exception. *Geisler by Geisler v. Wyeth Laboratories*, 716 F. Supp. 520, 524 (D. Kan. 1989).

3. Attorney who had been a director and shareholder in defense firm, and whose wife was legal assistant in same firm and assigned to case at bar, left firm and 15 months later joined plaintiff's firm; trial court granted defense motion to disqualify plaintiff's counsel, denied continuance; MRPC 1.10(b), (d) and Confidentiality Comment construed to mandate hearing to determine whether attorney acquired material and confidential information during former employment; Rule 225 presumption noted; "Chinese Wall" screening per MRPC 1.11 inappropriate. *Parker v. Volkswagenwerk Aktiengesellschaft*, 245 Kan. 580, 585, 781 P.2d 1099 (1989).

4. Sections (a), (b), and (c) of rule apply different analyses to different situations, following *Parker v. Volkswagenwerk Aktiengesellschaft*, 245 Kan. 580, 781 P.2d 1099 (1989). Section

(b) requires specific factual findings of actual knowledge of material and confidential information. *Graham v. Wyeth Laboratories*, 906 F.2d 1419 (10th Cir. 1990).

5. Evidentiary hearing required to determine motion to disqualify under MRPC 1.10(b); specific findings required for disqualification. *Lansing-Delaware Water District v. Oak Lane Park, Inc.*, 248 Kan. 563, 808 P.2d 1369 (1991).

6. Acquiring information protected by MRPC 1.6 and 1.9(b) prerequisite to 1.10(b) disqualification; irrebuttable presumption created by ABA Code of Professional Responsibility contrasted to specific requirements and findings mandated by Model Rules of Professional Conduct. *Lansing-Delaware Water District v. Oak Lane Park, Inc.*, 248 Kan. 563, 808 P.2d 1369 (1991).

7. Use of screening devices or "Chinese Wall" to prevent knowledge of incoming attorney from tainting other firm members not provided for in ABA Model Rules or model rules as adopted in Kansas; Supreme Court rejects use of screening devices. *Lansing-Delaware Water District v. Oak Lane Park, Inc.*, 248 Kan. 563, 808 P.2d 1369 (1991).

8. On appeal of DUI conviction, hearing required to determine whether prosecutor acquired confidential or privileged information in defendant's initial consultation with prosecutor who had originally been appointed to represent defendant. *City of Hutchinson v. Gilmore*, 16 Kan. App. 2d 646, 827 P.2d 784 (1992).

9. "Appearance of impropriety" standard rejected in favor of "function approach" in determining attorney disqualification issues. *In re Estate of Koch*, 18 Kan. App. 2d 188, 212-13, 849 P.2d 977 (1993).

10. Disqualification of attorney under MRPC 1.9(a) discussed; burden of proof; irrebuttable presumption; no hearing should be held. *Chrispens v. Coastal Refining & Mktg, Inc.*, 257 Kan. 745, 897 P.2d 104 (1995).

11. When disqualification is sought under both 1.9(a) and 1.10(b), evidentiary hearing is required; no irrebuttable presumption exists; specific factual findings required. *Chrispens v. Coastal Refining & Mktg, Inc.*, 257 Kan. 745, 897 P.2d 104 (1995).

RULE 1.11 Successive Government and Private Employment

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.

(b) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the

material disadvantage of that person. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

(c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially.

(d) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

(e) As used in this Rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

Comment

This rule prevents a lawyer from exploiting public office for the advantage of a private client. It is a counterpart of Rule 1.10(b), which applies to lawyers moving from one firm to another.

A lawyer representing a government agency, whether employed or specially retained by the government, is subject to the Rules of Professional Conduct, including the prohibition against representing adverse interests stated in Rule 1.7 and the protections afforded former clients in Rule 1.9. In addition, such a lawyer is subject to Rule 1.11 and to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule.

Where the successive clients are a public agency and a private client, the risk exists that power or discretion vested in public authority might be used for the special benefit of a private client. A lawyer should not be in a position where benefit to a private client might affect performance of the lawyer's professional functions on behalf of public authority. Also, unfair advantage could accrue to the private client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. However, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to

and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. The provisions for screening and waiver are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service.

When the client is an agency of one government, that agency should be treated as a private client for purposes of this Rule if the lawyer thereafter represents an agency of another government, as when a lawyer represents a city and subsequently is employed by a federal agency.

Paragraphs (a)(1) and (b) do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement. They prohibit directly relating the attorney's compensation to the fee in the matter in which the lawyer is disqualified.

Paragraph (a)(2) does not require that a lawyer give notice to the government agency at a time when premature disclosure would injure the client; a requirement for premature disclosure might preclude engagement of the lawyer. Such notice is however, required to be given as soon as practicable in order that the government agency will have a reasonable opportunity to ascertain that the lawyer is complying with Rule 1.11 and to take appropriate action if it believes the lawyer is not complying.

Paragraph (b) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

Paragraphs (a) and (c) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

Paragraph (c) does not disqualify other lawyers in the agency with which the lawyer in question has become associated.

Case Annotations

1. Attorney who had been a director and shareholder in defense firm, and whose wife was legal assistant in same firm and assigned to case at bar, left firm and 15 months later joined plaintiff's firm; trial court granted defense motion to disqualify plaintiff's counsel, denied continuance; MRPC 1.10(b), (d) and Confidentiality Comment construed to mandate hearing to determine whether attorney acquired material and confidential information during former employment; Rule 225 presumption noted; "Chinese Wall" screening per MRPC 1.11 inappropriate. *Parker v. Volkswagenwerk Aktiengesellschaft*, 245 Kan. 580, 585, 781 P.2d 1099 (1989).

2. Attorney, serving as part-time hearing officer for Kansas Department of Revenue, dismissed eight cases of persons who had employed him as attorney in their DUI cases; violation of MRPC 1.11 and 8.4(c) and (d); indefinite suspension and Rules 218 and 219 compliance ordered. *In re Gribble*, 261 Kan. 985, 933 P.2d 672 (1997).

RULE 1.12 Former Judge, Arbitrator or Law Clerk

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator or law clerk to such a person, unless all parties to the proceeding consent after disclosure.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially as a judge or other

adjudicative officer or arbitrator. A lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for employment with a party or attorney involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge, other adjudicative officer or arbitrator.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate tribunal to enable it to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multi-member arbitration panel is not prohibited from subsequently representing that party.

Comment

This Rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a multi-member court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges. Compliance Canons A(2), B(2) and C of the Model Code of Judicial Conduct provide that a part-time judge, judge pro tempore or retired judge recalled to active service, may not "act as a lawyer in any proceeding in which he served as a judge or in any other proceeding related thereto." Although phrased differently from this Rule, those Rules correspond in meaning.

RULE 1.13 Organization as Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the

seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer shall follow Rule 1.16.

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall 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.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Comment

The Entity as the Client

An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents.

Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to inves-

tigate allegations of wrong-doing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, the constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of a constituent that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

In an extreme case, it may be reasonably necessary for the lawyer to refer the matter to the organization's highest authority. Ordinarily, that is the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions highest authority reposes elsewhere; for example, in the independent directors of a corporation.

Relation to Other Rules

The authority and responsibility provided in paragraph (b) are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.6, 1.8, and 1.16, 3.3 or 4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(d) can be applicable.

Government Agency

The duty defined in this Rule applies to governmental organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it is generally the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the government as a whole may be the client for purpose of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This Rule does not limit that authority. See note on Scope.

4-59

Clarifying the Lawyer's Role

There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity or interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

Paragraph (e) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative Actions

Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

Case Annotations

1. General counsel who reported suspected violations to an outside agency without first consulting with the head of the organization found in violation of MRPC 1.2, 1.4, 1.6(a), 1.13(b) and 1.16. *Crandon v. State*, 257 Kan. 727, 897 P.2d 92 (1995).

RULE 1.14 Client Under a Disability

(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

Comment

The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a mental disorder or disability, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, an

incapacitated person may have no power to make legally binding decisions. Nevertheless, a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. If the person has no guardian or legal representative, the lawyer often must act as de facto guardian. Even if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. If a legal representative has not been appointed, the lawyer should see to such an appointment where it would serve the client's best interests. Thus, if a disabled client has substantial property that should be sold for the client's benefit, effective completion of the transaction ordinarily requires appointment of a legal representative. In many circumstances, however, appointment of a legal representative may be expensive or traumatic for the client. Evaluation of these considerations is a matter of professional judgment on the lawyer's part.

If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Disclosure of the Client's Condition

Rules of procedure in litigation generally provide that minors or persons suffering mental disability shall be represented by a guardian or next friend if they do not have a general guardian. However, disclosure of the client's disability can adversely affect the client's interest. For example, raising the question of disability could, in some circumstances, lead to proceedings for involuntary commitment. The lawyer's position in such cases is an unavoidably difficult one. The lawyer may seek guidance from an appropriate diagnostician.

Case Annotations

1. Attorney's mishandling of client's assets in voluntary conservatorship proceeding violates MRPC 1.1, 1.2, 1.4, 1.5, 1.7, 1.9, 1.14, 3.3, and 8.4; published censure. *In re Brantley*, 260 Kan. 605, 920 P.2d 433 (1996).

RULE 1.15 Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state of Kansas. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third

person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

(d) Preserving identity of funds and property of a client.

(1) All funds of clients paid to a lawyer or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable accounts maintained in the State of Kansas with a federal or state chartered or licensed financial institution and insured by an agency of the federal or state government, and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(i) Funds reasonably sufficient to pay bank charges may be deposited therein.

(ii) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(2) The lawyer shall:

(i) Promptly notify a client of the receipt of the client's funds, securities, or other properties.

(ii) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.

(iii) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accountings to the client regarding them.

(iv) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

(3) Except as provided in subsection (3)(iv), any lawyer or law firm that creates or maintains an account for funds of clients or third persons, that are nominal in amount or that are expected to be held for a short period of time and on which interest is not paid to the clients or third persons shall comply with the following provisions:

(i) Such an account shall be established and maintained with a federal or state chartered or licensed financial institution located in Kansas and insured by an agency of the federal or state government. Funds shall be subject to withdrawal upon request and without delay.

(ii) If the account bears interest, the rate of interest payable shall not be less than the rate paid by the institution to regular, non-attorney depositors. Higher rates offered by the institution to customers whose deposits exceed certain time or quantity minima, such as those offered in the form of certificates of deposit, may be obtained by a lawyer or law firm so long as there is no impairment of the right to withdraw or transfer principal immediately.

(iii) If the account bears interest, lawyers or law firms that deposit client funds in such an account shall direct the depository institution:

(aa) to remit at least quarterly, to the Kansas Bar Foundation, Inc., interest or dividends, as the case may be, on the average monthly balance in the account or as otherwise computed in accordance with the institution's standard accounting practice; and

(bb) to transmit with each remittance to the Foundation a statement showing the name of the lawyer or law firm for whom the remittance is sent and the rate of the interest applied; and

(cc) to transmit to the depositing lawyer or law firm at the same time a report showing the amount paid to the Foundation, the rate of interest applied, and the average account balance of the period for which the report is made.

(iv) A lawyer or law firm that elects not to comply with Rule 1.15(d)(3)(iii):

(aa) shall file a Notice of Declination with the Clerk of the Appellate Courts on or before the begin-

ning of the next annual registration period under Supreme Court Rule 208; or

(bb) Notwithstanding the foregoing, may file a Notice of Declination with the Clerk of the Appellate Courts at such other time, after July 1, 1992, that a decision to decline is effected.

(v) Every lawyer who has not previously registered or who is required to register under Supreme Court Rule 208 shall be provided the opportunity, at the time of initially registering, to elect or decline to comply with Rule 1.15(d)(3)(iii) (the IOLTA program) on such forms as the Clerk of the Appellate Courts may prescribe.

(e) Every Kansas lawyer engaged in the private practice of law in Kansas shall, as a part of his or her annual registration, certify to the following:

"I am familiar with and have read Kansas Supreme Court Rule 226, MRPC 1.15, and I and/or my law firm comply/complies with MRPC 1.15 pertaining to preserving the identity of funds and property of a client."

[**History:** Am. effective June 1, 1992; Am. effective April 30, 1993.]

Comment

A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property which is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Rule 1.15(a) requires that trust funds be deposited in an account separate and apart from the lawyer's, at a financial institution in the State of Kansas. Interest earned on client's funds shall not be retained by an attorney. The lawyer or law firm must deposit trust funds in one or more of the following insured accounts:

1. a separate interest-bearing account for each matter, on which the interest will be paid to the client or a third party; or
2. a pooled noninterest-bearing account for the deposit of all trust funds that are not invested for the benefit of the client or third person if the lawyer or law firm elects to decline under Rule 1.15(d)(3)(iv); or
3. a pooled interest-bearing account for the deposit of all trust funds that are nominal in amount or that are expected to be held for a short period of time, with interest earnings paid to the Kansas Bar Foundation under the IOLTA program (Interest on Lawyer Trust Account); or
4. a pooled interest-bearing account for the deposit of all trust funds that are nominal in amount or expected to be held for a short period of time, with interest earnings credited proportionately to the client or third party for the benefit of whom the funds are held.

Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion

of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client and accordingly, may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.

The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.

A "client's security fund" provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer should participate.

Rule 1.15 of the Model Rules of Professional Conduct requires that lawyers in the practice of law who are entrusted with the property of law clients and third persons must hold that property with the care required of a professional fiduciary. The basis for Rule 1.15 is the lawyer's fiduciary obligation to safeguard trust property and to segregate it from the lawyer's own property, and not to benefit personally from the possession of the property.

Model Rule 1.15 specifically requires a lawyer to preserve "complete records" concerning the law firm's trust accounts. It also obligates a lawyer to "promptly render a full accounting" for the receipt and distribution of trust property. A violation of Model Rule 1.15 subjects a lawyer to professional discipline.

Paragraph (e) requires lawyers who are engaged in private practice, as a part of their annual lawyer registration, to certify compliance with Rule 1.15 concerning their trust account(s).

Case Annotations

1. Attorney's failure to represent clients in three separate cases after acceptance of retainer fees and failure to cooperate with disciplinary investigation found to violate DR 1-102, 6-101, 7-101, and 9-102; MRPC 1.1, 1.3, 1.4, 1.15 and 8.4; and Rule 207. Rule 203 disbarment. *In re Morphett*, 246 Kan. 499, 790 P.2d 402 (1990).

2. Attorney retained to probate estate failed to do so, failed to record transfer of mineral interest deed resulting in levy and execution thereon, and failed to cooperate in resulting disciplinary investigation. Violations of DR 9-102(B) and MRPC 1.15; DR 1-102(A), 6-101(A)(3), 7-101(A), and 9-102(B)(1), (3), (4) and MRPC 1.3, 1.4(a), 1.15, and 8.4(c); and Rule 207. Indefinite suspension with readmission without petition upon successful completion of one-year suspension; specific conditions. *In re Ehrlich*, 248 Kan. 92, 804 P.2d 958 (1991).

3. Attorney's mishandling of collection matter and failure to cooperate with resulting investigation violate Rule 207, DR 1-102(A)(6), 6-101(A)(3), 7-101(A)(2), and 9-102(B)(1), (3), and (4); after March 1, 1988, the same behavior violates MRPC 1.3, 1.4, 1.15(d)(2)(i), (iii), and (iv), and 8.4(g); 2-year suspension recommended; many mitigating factors; 2-year supervised probation. *In re Evans*, 248 Kan. 176, 804 P.2d 344 (1991).

4. Attorney retained by collection agency to collect on student loan in default failed to forward payments made; subsequent IRS setoff; violations of DR 1-102(A)(3), 9-102(B)(1), (3), and (4), and 7-101(A)(2); also MRPC (c) and 1.15(d)(2)(i), (iii), and (iv). Two-year conditional probation and restitution. *In re Stephens*, 248 Kan. 186, 804 P.2d 1005 (1991).

5. Attorney currently on supervised probation found to have violated Rule 207 and MRPC 1.3, 1.4, 1.15(d)(2)(iii), (iv), and 8.4(g) in handling employment termination case; suspension recommended; supervised probation continued for additional one year. *In re Linn*, 248 Kan. 189, 804 P.2d 350 (1991).

6. Attorney who agreed to provide representation, accepted retainer, but failed to perform services in 5 situations violated MRPC 1.3, 1.4, 1.15, and 8.4(a) and (d); disability inactive status, restored to active status, temporary suspension pending resolution; reinstated upon 2-year conditional supervised probation. *In re Keil*, 248 Kan. 629, 809 P.2d 531 (1991).

7. Attorney's check kiting operation with her personal bank accounts and attorney trust account violates MRPC 1.15 and 8.4; 1-year conditional probation, supervised. *In re Heaven*, 249 Kan. 224, 813 P.2d 928 (1991).

8. Attorney's mishandling of estate case, misrepresentation to client and representatives from disciplinary administrator regarding status of case, failure to withdraw as counsel and failure to cooperate with subsequent counsel, and mismanagement of estate funds violative of MRPC 1.1; 1.2; 1.3; 3.2; 1.15(b); 1.16(a)(3)(d); 8.4(g); and Rule 207(a) and (b); other violations; indefinite suspension and Rule 218 compliance ordered. *In re Stapleton*, 250 Kan. 247, 824 P.2d 205 (1992).

9. Attorney's failure to maintain estate funds in trust account, misrepresentations at disciplinary hearings as to the balance in the account, and failure to respond to inquiries from the disciplinary administrator regarding the account violative of MRPC 1.15(a), (d); 8.4(c), (d); and Rule 207. Indefinite suspension and Rule 218 compliance ordered. *In re Stapleton*, 250 Kan. 247, 824 P.2d 205 (1992).

10. Attorney's failure to forward checks received from insurance companies to client's health care providers violated MRPC 1.3, 1.4(a) and (b), and 1.15(b); other violations; indefinite suspension suspended and probated. *In re Jenkins*, 251 Kan. 264, 833 P.2d 1013 (1992).

11. Attorney's mishandling of client's funds, conversion of conservatorship funds, failure to inform client, drug possession conviction, and retention of legal fees without representing client violate MRPC 1.4(a) and (b), 1.15, and 8.4(a), (b), (c), (d), and (g); attorney appears pursuant to Rule 212(d); mitigating factors; indefinite suspension and Rule 218 compliance. *In re Morris*, 251 Kan. 592, 834 P.2d 382 (1992).

12. Attorney's recordkeeping of time spent and case preparation violated MRPC 1.15(d)(2)(iii) and (iv); public censure. *In re Seck*, 251 Kan. 829, 840 P.2d 516 (1992).

13. Attorney's failure to file divorce papers after accepting retainer and failure to return client's money violates MRPC 1.3, 1.4, 1.15; other violations; imposition of discipline suspended; one-year supervised probation. *In re Meyer*, 251 Kan. 838, 840 P.2d 522 (1992).

14. Attorney's borrowing a total of $117,000 in five unsecured interest-free loans, with no certain due date, from mother who had retained attorney to represent her son in pending criminal matter violative of DR 5-104(a), DR 7-101(A)(3), DR 1-102(A)(1) and (6), MRPC 1.7, MRPC 1.8(a), MRPC 1.15(d)(2)(iii) and (iv), MRPC 8.4(a) and (g), and Rule 704 oath; other violations; indefinite suspension and Rule 218 compliance ordered. *In re Norwood*, 252 Kan. 711, 847 P.2d 1314 (1993).

15. Attorney's borrowing $15,000 from client violates MRPC 1.7, MRPC 1.8(a), MRPC 1.15(d)(2)(iii) and (iv), MRPC 8.4(a) and (g), and Rule 704 oath; other violations; indefinite suspension and Rule 218 compliance ordered. *In re Norwood*, 252 Kan. 711, 847 P.2d 1314 (1993).

16. Attorney's mishandling of his mother's estate violative of MRPC 1.1, 1.3, and 1.15; public censure. *In re Scott*, 253 Kan. 192, 853 P.2d 60 (1993).

17. Attorney's failure to file probate petition, inform client of status of case, return unearned retainer, and communicate with client violative of MRPC 1.1, 1.3, 1.4, 1.15, 1.16,

4-606

and 3.2; other violations; one-year suspension and Rule 218 compliance ordered. *In re King*, 253 Kan. 444, 855 P.2d 963 (1993).

18. Attorney's mishandling of employment discrimination class action and failure to inform clients as to status of case violative of MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.15, 3.1, and 3.2; other violations; Rule 203(a)(2) one-year suspension, Rule 203(a)(5) restitution, and Rule 218 compliance ordered. *In re King*, 253 Kan. 444, 855 P.2d 963 (1993).

19. Attorney previously censured placed on indefinite suspension for violations of MRPC 1.1, 1.3, 1.4, 1.15, 1.16, and 8.4 for neglect of two different client's cases; two other complaints found to be based on insufficient evidence although pattern of conduct cited and violations of Rule 207 established; Rule 218 compliance ordered. *In re Jackson*, 253 Kan. 810, 861 P.2d 124 (1993).

20. Commingling client funds and personal funds in trust account, using trust account funds for personal expenses, and allowing trust account balance to fall below amount due clients violative of MRPC 1.15(a), (b), and (d)(2)(iv), and MRPC 8.4(g); Rule 207 violation; other violations; pending complaints; imposition of discipline suspended, supervised probation ordered. *In re Jackson*, 254 Kan. 406, 867 P.2d 278 (1994).

21. Attorney not required to place minimum fee in trust account; charge under MRPC 1.15 dismissed; other violations; pending complaints; imposition of discipline suspended, supervised probation ordered. *In re Jackson*, 254 Kan. 406, 867 P.2d 278 (1994).

22. Attorney's failure to remit client's portion in a collection matter, failure to keep client informed, misrepresentations to client as to status of collection efforts, and causing balance on trust account to repeatedly fall below amount due client violative of MRPC 1.3, 1.4(a), 1.5(d), 1.15(a), 4.1(a), and 8.4(c); aggravating and mitigating circumstances; one-year supervised probation with conditions. *In re Wisler*, 254 Kan. 600, 866 P.2d 1049 (1994).

23. Attorney's misappropriation of funds from trust accounts violative of Canons 1 and 9 and MRPC 1.15 and 8.4; indefinite suspension and Rule 218 compliance ordered. *In re Lunt*, 255 Kan. 529, 874 P.2d 1198 (1994).

24. Attorney's repeated refusal to provide court-ordered accountings of a conservatorship of which she is the named conservator, refusal to reveal the names of the financial institution where the conservatorship funds are deposited, and refusal to answer questions concerning the topic or invoke the Fifth Amendment at district court hearings and before the disciplinary hearing panel violate MRPC 1.15, 3.4, and 8.4; other violations; disbarment. *In re Jackson*, 255 Kan. 542, 874 P.2d 673 (1994).

25. Attorney's failure to file incorporation papers and retention of retainer paid to handle such matter violate MRPC 1.3, 1.4, 1.15, 1.16, and 8.4; other violations; disbarment. *In re Jackson*, 255 Kan. 542, 874 P.2d 673 (1994).

26. Attorney's mishandling of will and estate matter, failure to communicate with client, failure to timely handle the matter, misleading the court as to the status of the probate case, and failure to return the client's file and retainer when requested violate MRPC 1.1, 1.3, 1.4, 1.15, 1.16, 3.2, and 8.4; other violations; disbarment. *In re Jackson*, 255 Kan. 542, 874 P.2d 673 (1994).

27. Attorney's failure to timely file backruptcy petition for clients, misrepresentations to clients as to status of case, and mishandling of bankruptcy case violate MRPC 1.1, 1.3, 1.4, 1.15, and 8.4; other violations; disbarment. *In re Jackson*, 255 Kan. 542, 874 P.2d 673 (1994).

28. Violations of MRPC 1.15 and 8.1 and Rule 207 found based on attorney's receiving money from client, not placing it in trust account, and making false statements to disciplinary investigators; other violations charged; indefinite suspension and compliance with Rule 218 ordered. *In re Jancich*, 255 Kan. 787, 877 P.2d 417 (1994).

29. Attorney found to have violated MRPC 1.1, 1.3, 1.4, 1.15, 3.2, 3.4(c), 4.3, and 8.4(d) and (g) based on conduct in seven different complaints reflecting on attorney's lack of

diligence and competence, miscommunication and lack of candor, and failure to return unearned fees; failure to cooperate in disciplinary investigation; attorney currently on disability inactive status; indefinite suspension and Rule 218 compliance ordered. *In re Jenkins*, 255 Kan. 797, 877 P.2d 423 (1994).

30. Attorney's failure to communicate with clients and poor record keeping of trust account violate MRPC 1.1, 1.3, 1.4 and 1.15; 2-year supervised probation ordered. *In re Waite*, 256 Kan. 130, 883 P.2d 1176 (1994).

31. Attorney found to have violated MRPC 1.15 and 8.4 in dealing with settlement of client's case while on supervised probation for other violations; three-year supervised probation. *In re Jackson*, 256 Kan. 492, 885 P.2d 1259 (1994).

32. Attorney's mishandling collection of bad checks violate MRPC 1.3, 1.4, 1.15(b) and 1.16(d); published censure. *In re England*, 257 Kan. 312, 894 P.2d 177 (1995).

33. Attorney previously censured disbarred for violations of MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.15, 1.16, 3.2, 3.3, 4.1, 7.1, 7.5, 8.1, 8.4, and Rules 207 and 208; Rule 218 compliance ordered. *In re Shultz*, 257 Kan. 662, 895 P.2d 603 (1995).

34. Attorney found in violation of MRPC 1.15(a), (b), (c) and (d), 8.4(d) and Rule 207; two-year probation. *In re Johnson*, 257 Kan. 946, 895 P.2d 1256 (1995).

35. Attorney's failure to remit personal injury protection lien to his client's insurance company, failure to keep client informed, misrepresentation to client, and creating conflict of interest violated MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.15, 3.7, 4.1, and 8.4; aggravating circumstances; indefinite suspension. *In re Seck*, 258 Kan. 530, 905 P.2d 122 (1995).

36. Attorney disciplined in Texas for failure to communicate with clients, neglect of client's cases, failure to cooperate in investigation, and conversion of client's funds; Texas findings and conclusions adopted per Rule 202; indefinite suspension. *In re Callahan*, 258 Kan. 770, 907 P.2d 840 (1995).

37. Attorney formerly suspended indefinitely found to have violated MRPC 1.15 for failure to perform his legal duties and maintain communication with client in regard to safekeeping of client's property; indefinite suspension concurrent with his present indefinite suspension. Application to tangible personal property discussed. *In re Jenkins*, 258 Kan. 779, 907 P.2d 825 (1995).

38. Attorney's mishandling of various civil and divorce cases violates MRPC 1.1, 1.2, 1.3, 1.4, 1.15, 3.2, 3.4, 4.1, 8.1, and 8.4; indefinite suspension. *In re Gordon*, 258 Kan. 784, 908 P.2d 169 (1995).

39. Attorney's mishandling of client funds, failure to supervise nonlawyer assistants, and other misconduct violate MRPC 1.3, 1.5, 1.15, 5.3, and 8.4; mitigating circumstances; published censure. *In re Krogh*, 259 Kan. 163, 910 P.2d 221 (1996).

40. Attorney's handling of insurance drafts violates MRPC 1.15(b) and Rule 207; published censure. *In re McIntosh*, 259 Kan. 532, 912 P.2d 182 (1995).

41. Attorney's improper accounting and failure to safeguard clients' funds violate MRPC 1.15 and 8.4, and Rule 207; indefinite suspension. *In re Munyon*, 259 Kan. 889, 914 P.2d 574 (1996).

42. Attorney's breach of fiduciary duty as executor of estate, conduct involving dishonesty and fraud, and failure to cooperate with Disciplinary Administrator's office violate MRPC 1.3, 1.15, 8.4(c) and (d) and Rules 202 and 207; disbarment. *In re Williamson*, 260 Kan. 568, 918 P.2d 1302 (1996).

43. Attorney's handling of civil action and post-divorce proceeding and his attempt to represent a criminal defendant while attorney was in inpatient drug treatment program violate MRPC 1.3, 1.4, 1.5(b), 1.15(a) and (b), 1.16(a), 3.3(a), 4.1, and 8.4(a), (b), (d), and (g); three-year supervised probation. *In re Phillips*, 260 Kan. 909, 925 P.2d 435 (1996).

44. Attorney's failure to act with reasonable diligence and promptness in an eviction case, commingling of clients' funds with his own, and failure to cooperate with disciplinary administrator's office violate MRPC 1.4, 1.5, 1.9, 1.15, 1.16, 8.1 and 8.4 and Rule 207; one-year suspension. *In re Howlett*, 261 Kan. 167, 928 P.2d 52 (1996).

45. Attorney's mishandling of personal injury case, removing disputed fee funds from histrustee account, failure to communicate with client, delaying notification to insurance company of his termination, and charging unreasonable fee violate MRPC 1.15, 1.4, 1.16(a)(3) and (d), and 1.5(a); two-year probation and restitution ordered. *Gerhardt v. Harris*, 261 Kan. 1007, 934 P.2d 976 (1997); *In re Harris*, 261 Kan. 1063, 934 P.2d 965 (1997).

46. Attorney's mishandling of civil rights case violates MRPC 1.2, 1.3, 1.4, 1.7, 1.15, 5.3, and 8.4; two-year supervised probation. *In re Baxter*, 262 Kan. 555, 940 P.2d 37 (1997).

RULE 1.16 Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client;

(3) the lawyer is discharged; or

(4) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) the client has used the lawyer's services to perpetrate a crime or fraud;

(2) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

(3) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(4) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(5) other good cause for withdrawal exists.

(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

Comment

A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.

Mandatory Withdrawal

A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may wish an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.

Discharge

A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring the client to represent himself.

If the client is mentally incompetent, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and, in an extreme case, may initiate proceedings for a conservatorship or similar protection of the client. See Rule 1.14.

Optional Withdrawal

A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is required if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer should not be associated with such conduct even if the lawyer does not further it. Withdrawal is permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer also may withdraw where the client insists on a repugnant or imprudent objective.

A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client Upon Withdrawal

Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law.

Whether or not a lawyer for an organization may under certain unusual circumstances have a legal obligation to the organization after withdrawing or being discharged by the organization's highest authority is beyond the scope of these Rules.

Case Annotations

1. Attorney's mishandling of estate case, misrepresentation to client and representatives from disciplinary administrator regarding status of case, failure to withdraw as counsel and failure to cooperate with subsequent counsel, and mismanagement of estate funds violative of MRPC 1.1; 1.2; 1.3; 3.2; 1.15(b); 1.16(a)(3)(d); 8.4(g); and Rule 207(a) and (b); other violations; indefinite suspension and Rule 218 compliance ordered. *In re Stapleton*, 250 Kan. 247, 824 P.2d 205 (1992).

2. Attorney's mishandling of personal injury case violates MRPC 1.3, 1.4, 1.16, and 3.4; other violations; imposition of discipline suspended; one-year supervised probation. *In re Meyer*, 251 Kan. 838, 840 P.2d 522 (1992).

3. Attorney's moving to California without notifying clients, failure to return clients' files, and failure to respond to inquiries from disciplinary administrator's office violative of MRPC 1.3, 1.4, and 1.16 and Rule 207; other violations and previous suspension; disbarment and Rule 218 compliance ordered. *In re Dill*, 253 Kan. 195, 853 P.2d 696 (1993).

4. Attorney's failure to file probate petition, inform client of status of case, return unearned retainer, and communicate with client violative of MRPC 1.1, 1.3, 1.4, 1.15, 1.16, and 3.2; other violations; one-year suspension and Rule 218 compliance ordered. *In re King*, 253 Kan. 444, 855 P.2d 963 (1993).

5. Attorney previously censured placed on indefinite suspension for violations of MRPC 1.1, 1.3, 1.4, 1.15, 1.16, and 8.4 for neglect of two different client's cases; two other complaints found to be based on insufficient evidence although pattern of conduct cited and violations of Rule 207 established; Rule 218 compliance ordered. *In re Jackson*, 253 Kan. 810, 861 P.2d 124 (1993).

6. Attorney's mishandling of divorce case resulting in client losing lien, failure to inform client as to status of case, mishandling of related bankruptcy case for client creditor, and failure to preserve judgment, and attorney's allegations and behavior during investigation of disciplinary complaint violate DR 6-101(A)(2), and MRPC 1.2(c), 1.3, 1.4(b), and 1.16(d); mitigating and aggravating circumstances; panel recommends unpublished censure; public censure. *In re Deeds*, 254 Kan. 309, 864 P.2d 1194 (1993).

7. Attorney's dilatory handling of estate matter violative of MRPC 1.3, 1.4, 1.16(a)(2), 3.2, and 8.4(g); Rule 207 violation; other violations; pending complaints; imposition of discipline suspended, supervised probation ordered. *In re Jackson*, 254 Kan. 406, 867 P.2d 278 (1994).

8. Attorney's failure to file personal injury claim and blaming client for delay, thereby allowing statute of limitations to run (resulting in client being granted summary judgment in subsequent malpractice claim); failure to inform client as to reduction in child support income; failure to inform client as to hearing dates; and acceptance of retainer fee from out-of-state client whom attorney knew he could not represent in divorce action violate MRPC 1.1, 1.3, 1.4(a) and (b), 1.16(d), 3.3(a)(1), and 8.4(d) and (g); Rule 207(a) and (b)

violations; disbarment and Rule 218 compliance ordered. *In re Spears*, 254 Kan. 904, 869 P.2d 718 (1994).

9. Attorney's failure to file incorporation papers and retention of retainer paid to handle such matter violate MRPC 1.3, 1.4, 1.15, 1.16, and 8.4; other violations; disbarment. *In re Jackson*, 255 Kan. 542, 874 P.2d 673 (1994).

10. Attorney's mishandling of will and estate matter, failure to communicate with client, failure to timely handle the matter, misleading the court as to the status of the probate case, and failure to return the client's file and retainer when requested violate MRPC 1.1, 1.3, 1.4, 1.15, 1.16, 3.2, and 8.4; other violations; disbarment. *In re Jackson*, 255 Kan. 542, 874 P.2d 673 (1994).

11. Attorney's retention of retainer fee after being temporarily suspended from practice violates MRPC 1.16(d); other violations; indefinite suspension and Rule 218 compliance ordered. *In re Nelson*, 255 Kan. 555, 874 P.2d 1201 (1994).

12. Attorney's mishandling of personal injury case violates MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.6, 1.7, 1.16, 3.2, 4.1, 8.4 and Rule 207; published censure. *In re Shultz*, 256 Kan. 196, 883 P.2d 779 (1994).

13. Attorney's failure to represent client in collection of foreign judgment in workers compensation case found to violate MRPC 1.1, 1.3, 1.4, 1.5(d), 1.16(d), 3.2, and 8.4(g); indefinite suspension and Rule 218 compliance ordered. *In re Griggs*, 256 Kan. 498, 886 P.2d 786 (1994).

14. Attorney's mishandling collection of bad checks violate MRPC 1.3, 1.4, 1.15(b) and 1.16(d); published censure. *In re England*, 257 Kan. 312, 894 P.2d 177 (1995).

15. Attorney previously censured disbarred for violations of MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.15, 1.16, 3.2, 3.3, 4.1, 7.1, 7.5, 8.1, 8.4, and Rules 207 and 208; Rule 218 compliance ordered. *In re Shultz*, 257 Kan. 662, 895 P.2d 603 (1995).

16. General counsel who reported suspected violations to an outside agency without first consulting with the head of the organization found in violation of MRPC 1.2, 1.4, 1.6(a), 1.13(b) and 1.16. *Crandon v. State*, 257 Kan. 727, 897 P.2d 92 (1995).

17. Subordinate attorneys are not relieved of their responsibility for a violation of the rules of professional conduct simply because they acted at the direction of their supervisor, if they know beforehand that their conduct will be a violation of MRPC 1.7 and 1.16. *McCurdy v. Kansas Dept. of Transportation*, 21 Kan. App. 2d 262, 898 P.2d 650 (1995).

18. Attorney's failure to keep client reasonably informed and charging of excessive fee violate MRPC 1.3, 1.4, 1.5, and 1.16; published censure. *In re Scimeca*, 259 Kan. 893, 914 P.2d 948 (1996).

19. Attorney's handling of civil action and post-divorce proceeding and his attempt to represent a criminal defendant while attorney was in inpatient drug treatment program violate MRPC 1.3, 1.4, 1.5(b), 1.15(a) and (b), 1.16(a), 3.3(a), 4.1, and 8.4(a), (b), (d), and (g); three-year supervised probation. *In re Phillips*, 260 Kan. 909, 925 P.2d 435 (1996).

20. Attorney's failure to act with reasonable diligence and promptness in an eviction case, commingling of clients' funds with his own, and failure to cooperate with disciplinary administrator's office violate MRPC 1.4, 1.5, 1.9, 1.15, 1.16, 8.1 and 8.4 and Rule 207; one-year suspension. *In re Howlett*, 261 Kan. 167, 928 P.2d 52 (1996).

21. Attorney's mishandling of matters involving (1) individualized education program for autistic child in public school, (2) personal injury, probate, and insurance claim arising from fatal car accident, and (3) probate matter involving estate of conservatee violates MRPC 1.1, 1.2, 1.3, 1.4, 1.7, 1.16, and 8.4 and Rule 207; indefinite suspension per Rule 203(a)(2). *In re Dow*, 261 Kan. 989, 933 P.2d 666 (1997).

22. Attorney's mishandling of bankruptcy case violates MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.16, 3.1, 3.3, and 8.4; published censure per Rule 203(a)(3). *In re Roy*, 261 Kan. 999, 933 P.2d 662 (1997).

4-72

23. Attorney's mishandling of personal injury case, removing disputed fee funds from his trustee account, failure to communicate with client, delaying notification to insurance company of his termination, and charging unreasonable fee violate MRPC 1.15, 1.4, 1.16(a)(3) and (d), and 1.5(a); two-year probation and restitution ordered. *Gerhardt v. Harris*, 261 Kan. 1007, 934 P.2d 976 (1997); *In re Harris*, 261 Kan. 1063, 934 P.2d 965 (1997).

COUNSELOR

RULE 2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Comment

Scope of Advice

A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client under Rule 1.4 may require that the lawyer act if the client's course of action is related to the representation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice

that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

RULE 2.2 Intermediary

(a) A lawyer may act as intermediary between clients if:

(1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risk involved, and the effect on the attorney-client privileges, and obtains each client's consent to the common representation;

(2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

(3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

Comment

A lawyer acts as intermediary under this Rule when the lawyer represents two or more parties with potentially conflicting interests. A key factor in defining the relationship is whether the parties share responsibility for the lawyer's fee, but the common representation may be inferred from other circumstances. Because confusion can arise as to the lawyer's role where each party is not separately represented, it is important that the lawyer make clear the relationship.

The Rule does not apply to a lawyer acting as arbitrator or mediator between or among parties who are not clients of the lawyer, even where the lawyer has been appointed with the concurrence of the parties. In performing such a role the lawyer may be subject to applicable codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint Committee of the American Bar Association and the American Arbitration Association.

A lawyer acts as intermediary in seeking to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reor-

ganization of an enterprise in which two or more clients have an interest, arranging a property distribution in settlement of an estate or mediating a dispute between clients. The lawyer seeks to resolve potentially conflicting interests by developing the parties' mutual interests. The alternative can be that each party may have to obtain separate representation, with the possibility in some situations of incurring additional cost, complication or even litigation. Given these and other relevant factors, all the clients may prefer that the lawyer act as intermediary.

In considering whether to act as intermediary between clients, a lawyer should be mindful that if the intermediation fails the result can be additional cost, embarrassment and recrimination. In some situations the risk of failure is so great that intermediation is plainly impossible. For example, a lawyer cannot undertake common representation of clients between whom contentious litigation is imminent or who contemplate contentious negotiations. More generally, if the relationship between the parties has already assumed definite antagonism, the possibility that the clients' interests can be adjusted by intermediation ordinarily is not very good.

The appropriateness of intermediation can depend on its form. Forms of intermediation range from informal arbitration, where each client's case is presented by the respective client and the lawyer decides the outcome, to mediation, to common representation where the clients' interests are substantially though not entirely compatible. One form may be appropriate in circumstances where another would not. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating a relationship between the parties or terminating one.

Confidentiality and Privilege

A particularly important factor in determining the appropriateness of intermediation is the effect on client-lawyer confidentiality and the attorney-client privilege. In a common representation, the lawyer is still required both to keep each client adequately informed and to maintain confidentiality of information relating to the representation. See Rules 1.4 and 1.6. Complying with both requirements while acting as intermediary requires a delicate balance. If the balance cannot be maintained, the common representation is improper. With regard to the attorney-client privilege, the prevailing rule is that as between commonly represented clients the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

Since the lawyer is required to be impartial between commonly represented clients, intermediation is improper when the impartiality cannot be maintained. For example, a lawyer who has represented one of the clients for a long period and in a variety of matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced.

Consultation

In acting as intermediary between clients, the lawyer is required to consult with the clients on the implications of doing so, and proceed only upon consent based on such a consultation. The consultation should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances.

Paragraph (b) is an application of the principle expressed in Rule 1.4. Where the lawyer is intermediary, the clients ordinarily must assume greater responsibility for decisions than when each client is independently represented.

Withdrawal

Common representation does not diminish the rights of each client in the client-lawyer relationship. Each has the right to loyal and diligent representation, the right to discharge

4-75

the lawyer as stated in Rule 1.16, and the protection of Rule 1.9 concerning obligations to a former client.

RULE 2.3 Evaluation for Use by Third Persons

(a) A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:

(1) the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and

(2) the client consents after consultation.

(b) Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

Comment

Definition

An evaluation may be performed at the client's direction but for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

Lawyers for the government may be called upon to give a formal opinion on the legality of contemplated government agency action. In making such an evaluation, the government lawyer acts at the behest of the government as the client but for the purpose of establishing the limits of the agency's authorized activity. Such an opinion is to be distinguished from confidential legal advice given agency officials. The critical question is whether the opinion is to be made public.

A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor's title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person's affairs by a government lawyer, or by special counsel employed by the government, is not an evaluation as that term is used in this Rule. The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

Duty to Third Person

When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this Rule. However, since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client. For example, if the lawyer is acting as advocate in

H-960

defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

Access to and Disclosure of Information

The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations which are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances.

Financial Auditors' Requests for Information

When a question concerning the legal situation of a client arises at the instance of the client's financial auditor and the question is referred to the lawyer, the lawyer's response may be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

Case Annotations

1. MRPC 2.3 and comment discussed in nonclient third-party lender's legal malpractice claim against borrower's attorney; duty to third person dependent on direct representation or intended reliance. *Bank IV Wichita v. Arn, Mullins, Unruh, Kuhn & Wilson*, 250 Kan. 490, 827 P.2d 758 (1992).

ADVOCATE

RULE 3.1 Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. 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.

Comment

The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Such action is not frivolous even though the lawyer

believes that the client's position ultimately will not prevail. The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

Case Annotations

1. Attorney's right to advocate his position limited by rule. *In re Anderson*, 247 Kan. 208, 795 P.2d 64 (1990).

2. Attorney's failure to obey bankruptcy court orders, failure to pay court-ordered sanctions, persisting to file proceedings prohibited under the bankruptcy code, and failure to appear, all of which resulted in attorney's being barred from appearing in U.S. Bankruptcy Court for District of Kansas, held to violate DR 1-102(A)(5) and (6), DR 7-101(A)(1), DR 7-102(A)(2), MRPC 8.4(d) and (g), and MRPC 3.1; attorney's failure to modify debtors' reorganization plan to accurately reflect creditors, failure to appear, and failure to relinquish client files upon termination of services held to violate MRPC 1.1, 1.3, and 1.4; mitigating circumstances; imposition of discipline suspended pending one-year conditional probation. *In re Black*, 247 Kan. 664, 801 P.2d 1319 (1990).

3. Attorney's false statement in probate petition that there was a lost will violative of MRPC 3.1 and 3.3; other violations; mitigating circumstances; Rule 203(a)(3) public censure. *In re Copeland*, 250 Kan. 283, 823 P.2d 802 (1992).

4. Attorney's incompetence in handling bankruptcy matter violative of MRPC 1.1, 3.1, 3.3, and 8.4; public censure. *In re Ramcharan-Maharajh*, 252 Kan. 701, 847 P.2d 1307 (1993).

5. Attorney's mishandling of employment discrimination class action and failure to inform clients as to status of case violative of MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.15, 3.1, and 3.2; other violations; Rule 203(a)(2) one-year suspension, Rule 203(a)(5) restitution, and Rule 218 compliance ordered. *In re King*, 253 Kan. 444, 855 P.2d 963 (1993).

6. Rule cited in discussion of negligence against attorney case. *OMI Holdings, Inc. v. Howell*, 260 Kan. 305, 918 P.2d 1274 (1996).

7. Attorney's mishandling of bankruptcy case violates MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.16, 3.1, 3.3, and 8.4; published censure per Rule 203(a)(3). *In re Roy*, 261 Kan. 999, 933 P.2d 662 (1997).

RULE 3.2 Expediting Litigation

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Comment

Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

Case Annotations

1. Attorney's mishandling of estate held to violate DR 6-101(A)(3) and MRPC 1.3, DR 1-102(A)(5) & (6) and MRPC 8.4(d), and DR 7-101(A)(2) and MRPC 3.2 and 1.4(a); other

violations; public censure and restitution. *In re Ebersole,* 247 Kan. 670, 801 P.2d 1323 (1990).

2. Attorney's failing to file eviction action yet telling client he had done so held to violate MRPC 1.3, 1.4, 3.2, and 8.4(c) & (g); other violations; public censure and restitution. *In re Ebersole,* 247 Kan. 670, 801 P.2d 1323 (1990).

3. Recommended disbarment based on continued neglect of client despite prior discipline for such and failure to respond to said discipline, all in violation of MRPC 1.3, 3.2, and 8.4(g); Rule 217 surrender and disbarment; Rule 218 compliance ordered. *In re Ebersole,* 248 Kan. 496, 807 P.2d 1318 (1991).

4. Attorney's failure to close estate for 12-year period, failure to render court-ordered accounting, failure to satisfy federal estate tax obligations, and failure to cooperate with disciplinary investigator violate MRPC 1.1, 1.3, 1.4, 3.2, 8.4(d) and (g), DR 6-101, DR 7-101, and Rule 207; disbarment and Rule 218 compliance. *In re Coleman,* 249 Kan. 218, 315 P.2d 43 (1991).

5. Attorney's mishandling of estate case, misrepresentation to client and representatives from disciplinary administrator regarding status of case, failure to withdraw as counsel and failure to cooperate with subsequent counsel, and mismanagement of estate funds violative of MRPC 1.1; 1.2; 1.3; 3.2; 1.15(b); 1.16(a)(3)(d); 8.4(g); and Rule 207(a) and (b); other violations; indefinite suspension and Rule 218 compliance ordered. *In re Stapleton,* 250 Kan. 247, 824 P.2d 205 (1992).

6. Attorney's failure to designate record in federal appeal and failure to respond to show cause order violated MRPC 1.1, 1.3, 3.2, and 8.4(d), (g); other violations; indefinite suspension suspended and probated. *In re Jenkins,* 251 Kan. 264, 833 P.2d 1013 (1992).

7. Attorney's mishandling of probate case violates MPRC 1.3, 1.4, and 3.2; other violations; imposition of discipline suspended; one-year supervised probation. *In re Meyer,* 251 Kan. 838, 840 P.2d 522 (1992).

8. Attorney's mishandling of real estate matter violates MRPC 1.1, 1.3, 1.4, and 3.2; DR 6-101(A)(3); and Rule 207; other violations; imposition of discipline suspended; one-year supervised probation. *In re Meyer,* 251 Kan. 838, 840 P.2d 522 (1992).

9. Attorney's failure to file probate petition, inform client of status of case, return unearned retainer, and communicate with client violative of MRPC 1.1, 1.3, 1.4, 1.15, 1.16, and 3.2; other violations; one-year suspension and Rule 218 compliance ordered. *In re King,* 253 Kan. 444, 855 P.2d 963 (1993).

10. Attorney's mishandling of employment discrimination class action and failure to inform clients as to status of case violative of MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.15, 3.1, and 3.2; other violations; Rule 203(a)(2) one-year suspension, Rule 203(a)(5) restitution, and Rule 218 compliance ordered. *In re King,* 253 Kan. 444, 855 P.2d 963 (1993).

11. Attorney's actions in letting the statute of limitations run in four different cases violate DR 1-102(A)(4), 6-101(A)(1) and (3), and 7-101(A)(2), and MRPC 1.1, 1.3, 1.4(a) and (b), 3.2, and 8.4(c). Attorney's actions in failing to respond to requests for information and return of the case file in workers compensation case violate MRPC 1.3, 1.4(a) and (b), 1.16(a)(3) and (d), and 3.2. Eighteen-month suspension probated on conditions. *In re Jones,* 253 Kan. 836, 861 P.2d 1340 (1993).

12. Attorney's dilatory handling of estate matter violative of MRPC 1.3, 1.4, 1.16(a)(2), 3.2, and 8.4(g); Rule 207 violation; other violations; pending complaints; imposition of discipline suspended, supervised probation ordered. *In re Jackson,* 254 Kan. 406, 867 P.2d 278 (1994).

13. Attorney's mishandling of four different probate estates and failure to timely file four different foreclosures, despite representations and billings which would indicate to the contrary, held to violate DR 1-102(A)(4), (5), and (6); 6-101(A)(3); and 7-101(A)(2) and (3);

Canons 1, 6, 7, and 9; and MRPC 1.1, 1.3, 1.4, 3.2, and 8.4(c), (d), and (g); aggravating and mitigating circumstances; two-year suspension, discipline probated, and supervised probation ordered. *In re Herman*, 254 Kan. 908, 869 P.2d 721 (1994).

14. Attorney's mishandling of will and estate matter, failure to communicate with client, failure to timely handle the matter, misleading the court as to the status of the probate case, and failure to return the client's file and retainer when requested violate MRPC 1.1, 1.3, 1.4, 1.15, 1.16, 3.2, and 8.4; other violations; disbarment. *In re Jackson*, 255 Kan. 542, 874 P.2d 673 (1994).

15. Attorney's dilatory handling of three federal court cases violative of MRPC 1.1, 1.3, 1.4, and 3.2; failure to respond to inquiry from disciplinary authorities violative of Rule 207; two-year supervised probation. *In re Long*, 255 Kan. 792, 877 P.2d 421 (1994).

16. Attorney found to have violated MRPC 1.1, 1.3, 1.4, 1.15, 3.2, 3.4(c), 4.3, and 8.4(d) and (g) based on conduct in seven different complaints reflecting on attorney's lack of diligence and competence, miscommunication and lack of candor, and failure to return unearned fees; failure to cooperate in disciplinary investigation; attorney currently on disability inactive status; indefinite suspension and Rule 218 compliance ordered. *In re Jenkins*, 255 Kan. 797, 877 P.2d 423 (1994).

17. Attorney's mishandling of personal injury case violates MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.6, 1.7, 1.16, 3.2, 4.1, 8.4 and Rule 207; published censure. *In re Shultz*, 256 Kan. 196, 883 P.2d 779 (1994).

18. Attorney's failure to represent client in collection of foreign judgment in workers compensation case found to violate MRPC 1.1, 1.3, 1.4, 1.5(d), 1.16(d), 3.2, and 8.4(g); indefinite suspension and Rule 218 compliance ordered. *In re Griggs*, 256 Kan. 498, 886 P.2d 786 (1994).

19. Attorney's mishandling of probate matter and workers compensation case violates MRPC 1.1, 1.3, 1.4, 3.2, 4.1, 8.4 and Rule 207; imposition of discipline suspended; two-year supervised probation. *In re Whitaker*, 256 Kan. 939, 888 P.2d 829 (1995).

20. Attorney previously censured disbarred for violations of MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.15, 1.16, 3.2, 3.3, 4.1, 7.1, 7.5, 8.1, 8.4, and Rules 207 and 208; Rule 218 compliance ordered. *In re Shultz*, 257 Kan. 662, 895 P.2d 603 (1995).

21. Attorney's neglect of three different clients' cases violates MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 3.1, and 8.4 and Rule 207; one-year suspension. *In re Geeding*, 258 Kan. 740, 907 P.2d 124 (1995).

22. Attorney's mishandling of various civil and divorce cases violates MRPC 1.1, 1.2, 1.3, 1.4, 1.15, 3.2, 3.4, 4.1, 8.1, and 8.4; indefinite suspension. *In re Gordon*, 258 Kan. 784, 908 P.2d 169 (1995).

23. Attorney's failure to file negligence action in proper court and his disappearance from his law office without notice to clients violate MRPC 1.1, 1.3, 1.4, 1.5, 3.2, and 8.4 and Rule 207; disbarment. *In re Neal*, 262 Kan. 562, 937 P.2d 1234 (1997).

RULE 3.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:
  (1) make a false statement of material fact or law to a tribunal;
  (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
  (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the

position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comment

The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.

Representations by a Lawyer

An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Misleading Legal Argument

Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(3), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

False Evidence

When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes.

When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character

should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Perjury by a Criminal Defendant

Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that the lawyer should seek to persuade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer's duty when the persuasion fails. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, either because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available.

The most difficult situation, therefore, arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer's efforts to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.

Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution, of relatively recent origin, is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This is a coherent solution but makes the advocate a knowing instrument of perjury.

The other resolution of the dilemma is that the lawyer must reveal the client's perjury if necessary to rectify the situation. A criminal accused has a right to the assistance of an advocate, a right to testify and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence. See Rule 1.2(d).

Remedial Measures

If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate should make disclosure to the court. It is for the court then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing. If the false testimony was that of the client, the client may controvert the lawyer's version of their communication when the lawyer discloses

4-82

the situation to the court. If there is an issue whether the client has committed perjury, the lawyer cannot represent the client in resolution of the issue, and a mistrial may be unavoidable. An unscrupulous client might in this way attempt to produce a series of mistrials and thus escape prosecution. However, a second such encounter could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation.

Constitutional Requirements

The general rule—that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client—applies to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. In some jurisdictions these provisions have been construed to require that counsel present an accused as a witness if the accused wishes to testify, even if counsel knows the testimony will be false. The obligation of the advocate under these Rules is subordinate to such a constitutional requirement.

Duration of Obligation

A practical time limit on the obligation to rectify the presentation of false evidence has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation.

Refusing to Offer Proof Believed to be False

Generally speaking, a lawyer has authority to refuse to offer testimony or other proof that the lawyer believes is untrustworthy. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. In criminal cases, however, a lawyer may, in some jurisdictions, be denied this authority by constitutional requirements governing the right to counsel.

Ex Parte Proceedings

Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Case Annotations

1. Attorney charged with *inter alia* violation of MRPC 3.3 and 8.2; suspended on other grounds. *In re Anderson*, 247 Kan. 208, 795 P.2d 64 (1990).

2. Attorney who used a handgun "to demonstrate a point" to complainant who was preparing to name attorney's friend as father of complainant's child, and who prepared and submitted false affidavits to disciplinary administrator regarding the incident, violated Rules 8.1 and 8.4(c); insufficient evidence to find charged violations of Rules 3.3; 3.4; 3.5; 4.1; 4.4; 8.4(a), (b), (d), (g); or Rule 207. One-year suspension. *In re Wood*, 247 Kan. 219, 794 P.2d 660 (1990).

3. Attorney's false statement in probate petition that there was a lost will violative of MRPC 3.1 and 3.3; other violations; mitigating circumstances; Rule 203(a)(3) public censure. *In re Copeland*, 250 Kan. 283, 823 P.2d 802 (1992).

4. Attorney's incompetence in handling bankruptcy matter violative of MRPC 1.1, 3.1, 3.3, and 8.4; public censure. *In re Ramcharan-Maharajh*, 252 Kan. 701, 847 P.2d 1307 (1993).

5. Attorney who lied to the court and her clients and failed to appear for landlord-tenant case proceeding found to be in violation of MRPC 1.1, 1.3, 1.4, 3.3, 3.4, 3.5, 4.1, 8.2 and 8.4; one-year suspension and compliance with Rule 218 ordered. *In re Gershater*, 256 Kan. 512, 886 P.2d 343 (1994).

6. Attorney's mishandling of a breach of contract case and settlement violative of MRPC 1.1, 1.3, 1.4, 3.3, and 8.4; six-month suspension and compliance with Rule 218 ordered. *In re Norlen*, 256 Kan. 509, 886 P.2d 347 (1994).

7. Attorney previously censured disbarred for violations of MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.15, 1.16, 3.2, 3.3, 4.1, 7.1, 7.5, 8.1, 8.4, and Rules 207 and 208; Rule 218 compliance ordered. *In re Shultz*, 257 Kan. 662, 895 P.2d 603 (1995).

8. Attorney's forging a client's signature on affidavit and filing it in court violate MRPC 1.4, 3.3, 3.4 and 8.4(c), (d) and (g); published censure. *In re Caller*, 258 Kan. 250, 899 P.2d 468 (1995).

9. Attorney's mishandling of client's assets in voluntary conservatorship proceeding violates MRPC 1.1, 1.2, 1.4, 1.5, 1.7, 1.9, 1.14, 3.3, and 8.4; published censure. *In re Brantley*, 260 Kan. 605, 920 P.2d 433 (1996).

10. MRPC 3.3(d) cited as ground for party's request for attorney fees in child support case. *In re Marriage of Patterson*, 22 Kan. App. 2d 522, 920 P.2d 450 (1996).

11. Attorney's handling of civil action and post-divorce proceeding and his attempt to represent a criminal defendant while attorney was in inpatient drug treatment program violate MRPC 1.3, 1.4, 1.5(b), 1.15(a) and (b), 1.16(a), 3.3(a), 4.1, and 8.4(a), (b), (d), and (g); three-year supervised probation. *In re Phillips*, 260 Kan. 909, 925 P.2d 435 (1996).

12. Attorney's mishandling of bankruptcy case violates MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.16, 3.1, 3.3, and 8.4; published censure per Rule 203(a)(3). *In re Roy*, 261 Kan. 999, 933 P.2d 662 (1997).

13. Attorney's presenting an altered will for probate violates MRPC 3.3(a)(1) and 8.4(c) and (d); published censure per Rule 203(a)(3). *In re Grant*, 262 Kan. 269, 936 P.2d 1360 (1997).

14. Attorney's mishandling of child support case and his ex parte communication with judge violate MRPC 1.1, 3.3, 3.5, 4.4, 8.4(c), (d), and (g), and Rules 207 and 211; aggravating and mitigating factors; indefinite suspension. *In re Black*, 262 Kan. 825, 941 P.2d 1380 (1997).

RULE 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Comment

The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information.

With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

Case Annotations

1. Attorney who used a handgun "to demonstrate a point" to complainant who was preparing to name attorney's friend as father of complainant's child, and who prepared and submitted false affidavits to disciplinary administrator regarding the incident, violated Rules 8.1 and 8.4(c); insufficient evidence to find charged violations of Rules 3.3; 3.4; 3.5; 4.1; 4.4; 8.4(a), (b), (d), (g); or Rule 207. One-year suspension. *In re Wood*, 247 Kan. 219, 794 P.2d 660 (1990).

2. Defendant's conviction reversed, in part, due to prosecutorial misconduct in violation of MRPC 3.4(e), the counterpart of Rule 225 DR 7-106(c)(1), (2), (3), and (4). *State v. Zamora*, 247 Kan. 684, 803 P.2d 568 (1990).

4-85

3. Closing argument comment held to violate MRPC 3.4(e); reference to matters not in evidence. *Glynos v. Jagoda*, 249 Kan. 473, 481, 819 P.2d 1202 (1991).

4. Prosecutor's comment in closing argument is violative of Model Rules of Professional Conduct. *State v. Jordan*, 250 Kan. 180, 196, 825 P.2d 157 (1992).

5. Attorney's failure to comply with discovery requests, misrepresentation to court, and failure to advise client, resulting in sanctions against client, violate MRPC 1.1, 1.4, 3.4(a) and (d), and 8.4(a), (c), and (d); firm failure to supervise among mitigating factors; one-year suspension. *In re Dwight*, 251 Kan. 588, 834 P.2d 382 (1992).

6. Attorney's mishandling of personal injury case violates MRPC 1.3, 1.4, 1.16, and 3.4; other violations; imposition of discipline suspended; one-year supervised probation. *In re Meyer*, 251 Kan. 838, 840 P.2d 522 (1992).

7. In reversing criminal conviction due to prosecutorial misconduct in closing argument, MRPC 3.4(e) held to replace and incorporate DR 7-106(C)(1), (2), (3), and (4). *State v. Ruff*, 252 Kan. 625, 847 P.2d 1258 (1993).

8. Attorney's repeated refusal to provide court-ordered accountings of a conservatorship of which she is the named conservator, refusal to reveal the names of the financial institution where the conservatorship funds are deposited, and refusal to answer questions concerning the topic or invoke the Fifth Amendment at district court hearings and before the disciplinary hearing panel violate MRPC 1.15, 3.4, and 8.4; other violations; disbarment. *In re Jackson*, 255 Kan. 542, 874 P.2d 673 (1994).

9. Attorney found to have violated MRPC 1.1, 1.3, 1.4, 1.15, 3.2, 3.4(c), 4.3, and 8.4(d) and (g) based on conduct in seven different complaints reflecting on attorney's lack of diligence and competence, miscommunication and lack of candor, and failure to return unearned fees; failure to cooperate in disciplinary investigation; attorney currently on disability inactive status; indefinite suspension and Rule 218 compliance ordered. *In re Jenkins*, 255 Kan. 797, 877 P.2d 423 (1994).

10. Attorney who lied to the court and her clients and failed to appear for landlord-tenant case proceeding found to be in violation of MRPC 1.1, 1.3, 1.4, 3.3, 3.4, 3.5, 4.1, 8.2 and 8.4; one-year suspension and compliance with Rule 218 ordered. *In re Gershater*, 256 Kan. 512, 886 P.2d 343 (1994).

11. Prosecutor's comment in closing argument is not violative of MRPC 3.4(e). *State v. Duke*, 256 Kan. 703, 887 P.2d 110 (1994).

12. Attorney's forging a client's signature on affidavit and filing it in court violate MRPC 1.4, 3.3, 3.4 and 8.4(c), (d) and (g); published censure. *In re Caller*, 258 Kan. 250, 899 P.2d 468 (1995).

13. Attorney may not make assertions of fact in the form of questions to a witness absent a good faith basis for believing the asserted matters to be true. *State v. Marble*, 21 Kan. App. 2d 509, 901 P.2d 521 (1995).

14. MRPC 3.4 is noted in discussion of defendant's claim that prosecutor made comments to appeal to the jury's religious fervor. *State v. Smith*, 258 Kan. 321, 904 P.2d 999 (1995).

15. Attorney's mishandling of various civil and divorce cases violates MRPC 1.1, 1.2, 1.3, 1.4, 1.15, 3.2, 3.4, 4.1, 8.1, and 8.4; indefinite suspension. *In re Gordon*, 258 Kan. 784, 908 P.2d 169 (1995).

RULE 3.5. Impartiality and Decorum of the Tribunal

A lawyer shall not:

(a) give or lend anything of value to a judge, official, or employee of a tribunal except as permitted by Section C(4) of Canon 5 of the Code of Judicial Conduct as it may, from time to time be adopted in Kansas, nor

may a lawyer attempt to improperly influence a judge, official or employee of a tribunal, but a lawyer may make a contribution to the campaign fund of a candidate for judicial office in conformity with Section B(2) under Canon 7 of the Code of Judicial Conduct;

(b) communicate or cause another to communicate with a member of a jury or the venire from which the jury will be selected about the matters under consideration other than in the course of official proceedings until after the discharge of the jury from further consideration of the case;

(c) communicate or cause another to communicate as to the merits of a cause with a judge or official before whom an adversary proceeding is pending except:

(1) in the course of official proceedings in the cause;

(2) in writing, if the lawyer promptly delivers a copy of the writing to opposing counsel or to the adverse party if unrepresented;

(3) orally upon adequate notice to opposing counsel or the adverse party if unrepresented;

(4) as otherwise authorized by law or court rule;

(d) engage in undignified or discourteous conduct degrading to a tribunal.

Kansas Comment

Rule 3.5 in the proposed Model Rules as adopted by the ABA has been substantially modified to include more specific guidelines and prohibitions such as were included in the Model Code. The reason for this is that the Kansas committee felt that existing disciplinary rules, 7.106(C)(6), 7.108, 7.109, 7.110 were more specific and preferable in many respects to the proposed model rule. Model Rule 3.5 prohibits a lawyer from seeking to influence a judge, juror, prospective juror or other official by means prohibited by law. The Kansas committee felt that this is too narrow a prohibition and would permit some things that should not be permitted. The committee has reimposed the absolute prohibition of DR 7-110(A) upon a lawyer giving or lending anything of value to a judge or official; except as permitted by the Canons of Judicial Ethics. In other words, a lawyer may ethically give what a judge may ethically receive. It was felt that such a *per se* rule is preferable to one that would require proof that the gift or loan was prompted by an attempt to influence the official.

Similarly, it was felt by the Kansas committee that the more specific provisions found in DR 7-108 regarding communication with jurors was preferable in that they give more guidance to the lawyer as to what communications are permitted and what communications are not permitted and further would give more guidance to the disciplinary authority as to when a violation had been committed.

Section (c) of the Model Rule prohibited conduct intended to disrupt a tribunal and, therefore, impliedly would authorize undignified or discourteous conduct degrading to a tribunal, prohibited under DR 7-106(C)(6), unless the intent to disrupt is established. The Kansas committee is of the opinion that standards of lawyer conduct in the courtroom should not be lowered as the model rule would appear to do.

Case Annotations

1. Attorney who used a handgun "to demonstrate a point" to complainant who was preparing to name attorney's friend as father of complainant's child, and who prepared and

submitted false affidavits to disciplinary administrator regarding the incident, violated Rules 8.1 and 8.4(c); insufficient evidence to find charged violations of Rules 3.3; 3.4; 3.5; 4.1; 4.4; 8.4(a), (b), (d), (g); or Rule 207. One-year suspension. *In re Wood*, 247 Kan. 219, 794 P.2d 660 (1990).

2. Lawyers' communication with judge regarding possible juror misconduct, without informing opposing counsel of same, violated MRPC 3.5(c). *State v. Cady*, 248 Kan. 743, 811 P.2d 1130 (1991).

3. Attorney who lied to the court and her clients and failed to appear for landlord-tenant case proceeding found to be in violation of MRPC 1.1, 1.3, 1.4, 3.3, 3.4, 3.5, 4.1, 8.2 and 8.4; one-year suspension and compliance with Rule 218 ordered. *In re Gershater*, 256 Kan. 512, 886 P.2d 343 (1994).

4. County attorney found to have had conflict of interest in representing client investigated for neglect of her children, engaged in undignified or discourteous conduct degrading to tribunal and engaged in conduct unfit to practice law; two-year probation; participation in ethics programs and personal apology to judge in open court ordered. *In re Kraushaar*, 258 Kan. 772, 907 P.2d 836 (1995).

5. Rule cited in discussion of attorney's duty as witness. *OMI Holdings, Inc. v. Howell*, 260 Kan. 305, 918 P.2d 1274 (1996).

6. Attorney's mishandling of child support case and his ex parte communication with judge violate MRPC 1.1, 3.3, 3.5, 4.4, 8.4(c), (d), and (g), and Rules 207 and 211; aggravating and mitigating factors; indefinite suspension. *In re Black*, 262 Kan. 825, 941 P.2d 1380 (1997).

RULE 3.6 Trial Publicity

(a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

(b) A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or

test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

(c) Notwithstanding paragraph (a) and (b)(1-5), a lawyer involved in the investigation or litigation of a matter may state without elaboration:

(1) the general nature of the claim or defense;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case:

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

Comment

It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the

4-89

exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

No body of rules can simultaneously satisfy all interests of fair trial and all those of free expression. The formula in this Rule is based upon the ABA Model Code of Professional Responsibility and the ABA Standards Relating to Fair Trial and Free Press, as amended in 1978.

Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such Rules.

Case Annotations

1. Identical rule held void for vagueness as applied by Nevada Supreme Court. *Gentile v. State Bar of Nevada,* 501 U.S. 1030, 115 L. Ed. 2d 888, 111 S. Ct. 2720 (1991).

RULE 3.7 Lawyer as Witness

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as 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 Rule 1.7 or Rule 1.9.

Comment

Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client.

The opposing party has proper objection where the combination of roles may prejudice that party's right in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has first hand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the opposing party. Whether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and

4-90

probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The principle of imputed disqualification stated in Rule 1.10 has no application to this aspect of the problem.

Whether the combination of roles involves an improper conflict of interest with respect to the client is determined by Rule 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer or a member of the lawyer's firm, the representation is improper. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. See Comment to Rule 1.7. If a lawyer who is a member of a firm may not act as both advocate and witness by reason of conflict of interest, Rule 1.10 disqualifies the firm also.

Case Annotations

1. Attorney disqualified pursuant to MRPC 1.9(a) from representing estate of decedent who was major shareholder of corporation for which attorney drafted stock repurchase agreement in the event of stockholder disability, retirement, or death; attorney's involvement made him material witness, requiring disqualification under MRPC 3.7(a) and DR 5-102; right to appeal attorney disqualification rests with client, not attorney. *Miller v. Insurance Management Assocs., Inc.*, 249 Kan. 102, 815 P.2d 89 (1991).

2. The "likely to be called as a witness" language in MRPC 3.7 is more restrictive than the "ought to be called as a witness" language of DR 5-101(B) and 5-102(A), placing a greater burden on the party seeking disqualification of an attorney. *LeaseAmerica Corp. v. Stewart*, 19 Kan. App. 2d 740, 876 P.2d 184 (1994).

3. Motion for disqualification of attorney likely to be a witness should not be granted absent a showing attorney will give evidence material to litigated issues, evidence cannot be obtained elsewhere, and testimony is prejudicial or potentially so to testifying attorney's client. *LeaseAmerica Corp. v. Stewart*, 19 Kan. App. 2d 740, 876 P.2d 184 (1994).

4. Client may waive conflict of interest Rules 1.7 and 1.9 and consent to attorney's representation despite anticipated adverse testimony. *LeaseAmerica Corp. v. Stewart*, 19 Kan. App. 2d 740, 876 P.2d 184 (1994).

5. Attorney's failure to remit personal injury protection lien to his client's insurance company, failure to keep client informed, misrepresentation to client, and creating conflict of interest violated MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.15, 3.7, 4.1, and 8.4; aggravating circumstances; indefinite suspension. *In re Seck*, 258 Kan. 530, 905 P.2d 122 (1995).

6. MRPC 3.7 does not prevent deputy disciplinary administrator from prosecuting a case in which another deputy disciplinary administrator is a material witness. *In re Harris*, 261 Kan. 1063, 934 P.2d 965 (1997).

RULE 3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

(e) exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.

Comment

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. See also Rule 3.3(d), governing ex parte proceedings, among which grand jury proceedings are included. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

Paragraph (c) does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and silence.

The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

RULE 3.9 Advocate in Nonadjudicative Proceedings

A lawyer representing a client before a legislative or administrative tribunal in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.

Comment

In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body should deal with the tribunal honestly and in conformity with applicable rules of procedure.

Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inap-

plicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

This Rule does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency; representation in such a transaction is governed by Rules 4.1 through 4.4.

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

RULE 4.1 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by or made discretionary under Rule 1.6.

Comment

Misrepresentation

A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act.

Statements of Fact

This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

Fraud by Client

Paragraph (b) recognizes that substantive law may require a lawyer to disclose certain information to avoid being deemed to have assisted the client's crime or fraud. The requirement of disclosure created by this paragraph is, however, subject to the obligations created by Rule 1.6.

Case Annotations

1. Attorney who used a handgun "to demonstrate a point" to complainant who was preparing to name attorney's friend as father of complainant's child, and who prepared and submitted false affidavits to disciplinary administrator regarding the incident, violated Rules 8.1 and 8.4(c); insufficient evidence to find charged violations of Rules 3.3; 3.4; 3.5; 4.1; 4.4; 8.4(a), (b), (d), (g); or Rule 207. One-year suspension. *In re Wood*, 247 Kan. 219, 794 P.2d 660 (1990).

2. Attorney's forging of judge's signature in probate matter resulting in felony conviction violative of MRPC 4.1; 8.4(b), (c), (d), and (g); failure to communicate with client violative of MRPC 1.4; previous violations; indefinite suspension and Rule 218 compliance ordered. *In re Pomeroy*, 252 Kan. 1044, 850 P.2d 222 (1993).

3. Seven of nine charges based on misdemeanor convictions, dismissals, or diversions dismissed by panel due to remoteness; remaining two misdemeanor convictions violative of

MRPC 8.4 (b), (d), and (g); attorney's conduct in mishandling personal injury case resulting in statute of limitations running, PIP carrier losing lien, and misrepresentation to client as to status of case violative of MRPC 1.3, 1.4, 4.1, and 8.4 (c) and (g); mitigating circumstances; one-year suspension and compliance with Rule 218 ordered. *In re Pistotnik*, 254 Kan. 294, 864 P.2d 1166 (1993).

4. Attorney's failure to remit client's portion in a collection matter, failure to keep client informed, misrepresentations to client as to status of collection efforts, and causing balance on trust account to repeatedly fall below amount due client violative of MRPC 1.3, 1.4(a), 1.5(d), 1.15(a), 4.1(a), and 8.4(c); aggravating and mitigating circumstances; one-year supervised probation with conditions. *In re Wisler*, 254 Kan. 600, 866 P.2d 1049 (1994).

5. Attorney's mishandling of personal injury case violates MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.6, 1.7, 1.16, 3.2, 4.1, 8.4 and Rule 207; published censure. *In re Shultz*, 256 Kan. 196, 883 P.2d 779 (1994).

6. Attorney who lied to the court and her clients and failed to appear for landlord-tenant case proceeding found to be in violation of MRPC 1.1, 1.3, 1.4, 3.3, 3.4, 3.5, 4.1, 8.2 and 8.4; one-year suspension and compliance with Rule 218 ordered. *In re Gershater*, 256 Kan. 512, 886 P.2d 343 (1994).

7. Attorney's mishandling of probate matter and workers compensation case violates MRPC 1.1, 1.3, 1.4, 3.2, 4.1, 8.4 and Rule 207; imposition of discipline suspended; two-year supervised probation. *In re Whitaker*, 256 Kan. 939, 888 P.2d 829 (1995).

8. Attorney previously censured disbarred for violations of MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.15, 1.16, 3.2, 3.3, 4.1, 7.1, 7.5, 8.1, 8.4, and Rules 207 and 208; Rule 218 compliance ordered. *In re Shultz*, 257 Kan. 662, 895 P.2d 603 (1995).

9. Attorney's failure to remit personal injury protection lien to his client's insurance company, failure to keep client informed, misrepresentation to client, and creating conflict of interest violated MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.15, 3.7, 4.1, and 8.4; aggravating circumstances; indefinite suspension. *In re Seck*, 258 Kan. 530, 905 P.2d 122 (1995).

10. Attorney's mishandling of various civil and divorce cases violates MRPC 1.1, 1.2, 1.3, 1.4, 1.15, 3.2, 3.4, 4.1, 8.1, and 8.4; indefinite suspension. *In re Gordon*, 258 Kan. 784, 908 P.2d 169 (1995).

11. Attorney's handling of civil action and post-divorce proceeding and his attempt to represent a criminal defendant while attorney was in inpatient drug treatment program violate MRPC 1.3, 1.4, 1.5(b), 1.15(a) and (b), 1.16(a), 3.3(a), 4.1, and 8.4(a), (b), (d), and (g); three-year supervised probation. *In re Phillips*, 260 Kan. 909, 925 P.2d 435 (1996).

RULE 4.2 Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Comment

This Rule does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so. Communications authorized by law include, for example,

4-94

the right of a party to a controversy with a government agency to speak with government officials about the matter.

In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter of representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f).

This Rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.

Case Annotations

1. When corporate employee is a party; adoption of "managing-speaking" agent test. *Chancellor v. Boeing Co.*, 678 F. Supp. 250 (D. Kan. 1988).

RULE 4.3 Dealing with Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Comment

An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel.

Case Annotations

1. Attorney found to have violated MRPC 1.1, 1.3, 1.4, 1.15, 3.2, 3.4(c), 4.3, and 8.4(d) and (g) based on conduct in seven different complaints reflecting on attorney's lack of diligence and competence, miscommunication and lack of candor, and failure to return unearned fees; failure to cooperate in disciplinary investigation; attorney currently on disability inactive status; indefinite suspension and Rule 218 compliance ordered. *In re Jenkins*, 255 Kan. 797, 877 P.2d 423 (1994).

RULE 4.4 Respect for Rights of Third Persons

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

Comment

Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons.

4-95

Case Annotations

1. Attorney who used a handgun "to demonstrate a point" to complainant who was preparing to name attorney's friend as father of complainant's child, and who prepared and submitted false affidavits to disciplinary administrator regarding the incident, violated Rules 8.1 and 8.4(c); insufficient evidence to find charged violations of Rules 3.3; 3.4; 3.5; 4.1; 4.4; 8.4(a), (b), (d), (g); or Rule 207. One-year suspension. *In re Wood*, 247 Kan. 219, 794 P.2d 660 (1990).

2. Attorney's mishandling of child support case and his ex parte communication with judge violate MRPC 1.1, 3.3, 3.5, 4.4, 8.4(c), (d), and (g), and Rules 207 and 211; aggravating and mitigating factors; indefinite suspension. *In re Black*, 262 Kan. 825, 941 P.2d 1380 (1997).

LAW FIRMS AND ASSOCIATIONS

RULE 5.1 Responsibilities of a Partner or Supervisory Lawyer

(a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the rules of professional conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the rules of professional conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the rules of professional conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment

Paragraphs (a) and (b) refer to lawyers who have supervisory authority over the professional work of a firm or legal department of a government agency. This includes members of a partnership and the shareholders in a law firm organized as a professional corporation; lawyers having supervisory authority in the law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm.

The measures required to fulfill the responsibility prescribed in paragraphs (a) and (b) can depend on the firm's structure and the nature of its practice. In a small firm, informal supervision and occasional admonition ordinarily might be sufficient. In a large firm, or in practice situations in which intensely difficult ethical problems frequently arise, more elaborate procedures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and a lawyer having authority over

the work of another may not assume that the subordinate lawyer will inevitably conform to the Rules.

Paragraph (c)(1) expresses a general principle of responsibility for acts of another. See also Rule 8.4(a).

Paragraph (c)(2) defines the duty of a lawyer having direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has such supervisory authority in particular circumstances is a question of fact. Partners of a private firm have at least indirect responsibility for all work being done by the firm, while a partner in charge of a particular matter ordinarily has direct authority over other firm lawyers engaged in the matter. Appropriate remedial action by a partner would depend on the immediacy of the partner's involvement and the seriousness of the misconduct. The supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

RULE 5.2 Responsibilities of a Subordinate Lawyer

(a) A lawyer is bound by the rules of professional conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the rules of professional conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Comment

Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

Case Annotations

1. Subordinate attorneys are not relieved of their responsibility for a violation of the rules of professional conduct simply because they acted at the direction of their supervisor, if they

know beforehand that their conduct will be a violation of MRPC 1.7 and 1.16. *McCurdy v. Kansas Dept. of Transportation*, 21 Kan. App. 2d 262, 898 P.2d 650 (1995).

RULE 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the rules of professional conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment

Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer should give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

Case Annotations

1. Rule applicable to suspended attorney; client contact prohibition. *In re Wilkinson*, 251 Kan. 546, 834 P.2d 1356 (1992).

2. Attorney's mishandling of client funds, failure to supervise nonlawyer assistants, and other misconduct violate MRPC 1.3, 1.5, 1.15, 5.3, and 8.4; mitigating circumstances; published censure. *In re Krogh*, 259 Kan. 163, 910 P.2d 221 (1996).

3. Attorney's mishandling of civil rights case violates MRPC 1.2, 1.3, 1.4, 1.7, 1.15, 5.3, and 8.4; two-year supervised probation. *In re Baxter*, 262 Kan. 555, 940 P.2d 37 (1997).

RULE 5.4 Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer; and

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Comment

The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

Case Annotations

1. Medical profession's Board of Healing Arts prohibition on fee splitting compared to MRPC 5.4. *Early Detection Center, Inc. v. Wilson*, 248 Kan. 869, 877, 811 P.2d 860 (1991).

RULE 5.5 Unauthorized Practice of Law

A lawyer shall not:

(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

Comment

The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. Paragraph (b) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3. Likewise, it does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

Case Annotations

1. Rule does not prohibit use of paraprofessionals, so long as attorney supervises and retains responsibility; suspended attorney as paralegal. *In re Wilkinson*, 251 Kan. 546, 834 P.2d 1356 (1992).

RULE 5.6 Restrictions on Right to Practice

A lawyer shall not participate in offering or making:

(a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.

Comment

An agreement restricting the right of partners or associates to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

Case Annotations

1. Parties' agreement in divorce proceedings which prohibited wife from retaining specific named attorney violates public policy; rule cited; agreement void. *Jarvis v. Jarvis*, 12 Kan. App. 2d 799, 758 P.2d 244 (1988).

PUBLIC SERVICE

RULE 6.1 Pro Bono Publico Service

A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the

law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

Comment

The ABA House of Delegates has formally acknowledged "the basic responsibility of each lawyer engaged in the practice of law to provide public interest legal services" without fee, or at a substantially reduced fee, in one or more of the following areas: poverty law, civil rights law, public rights law, charitable organization representation and the administration of justice. The Rule expresses that policy but is not intended to be enforced through disciplinary process.

The rights and responsibilities of individuals and organizations in the United States are increasingly defined in legal terms. As a consequence, legal assistance in coping with the web of statutes, rules and regulations is imperative for persons of modest and limited means, as well as for the relatively well-to-do.

The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged. The provision of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer as well as the profession generally, but the efforts of individual lawyers are often not enough to meet the needs. Thus, it has been necessary for the profession and government to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services and other related programs have been developed, and others will be developed by the profession and government. Every lawyer should support all proper efforts to meet this need for legal services.

RULE 6.2 Accepting Appointments

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) representing the client is likely to result in violation of the rules of professional conduct or other law;

(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

Comment

A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.

Appointed Counsel

For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer

could not handle the matter competently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.

An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules.

RULE 6.3 Membership in Legal Services Organization

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision would be incompatible with the lawyer's obligations to a client under Rule 1.7; or

(b) where the decision could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

Comment

Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.

RULE 6.4 Law Reform Activities Affecting Client Interests

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefited by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

Comment

Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See

also Rule 1.2(b). For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefited.

INFORMATION ABOUT LEGAL SERVICES

RULE 7.1 Communications Concerning a Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law; or

(c) compares the lawyer's services with other lawyer's services, unless the comparison can be factually substantiated.

Comment

This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them should be truthful. The prohibition in paragraph (b) of statements that may create "unjustified expectations" would ordinarily preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements. Such information may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances.

Case Annotations

1. Rule 7.1(b) prohibits guaranteeing the outcome of legal representation. *Pizel v. Zuspann*, 247 Kan. 699, 803 P.2d 205 (1990).

2. Attorney previously censured disbarred for violations of MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.15, 1.16, 3.2, 3.3, 4.1, 7.1, 7.5, 8.1, 8.4, and Rules 207 and 208; Rule 218 compliance ordered. *In re Shultz*, 257 Kan. 662, 895 P.2d 603 (1995).

RULE 7.2 Advertising

(a) Subject to the requirements of Rule 7.1, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor sign, radio or television, or through written communication not involving solicitation as defined in Rule 7.3.

(b) A copy or recording of an advertisement or written communication shall be kept for two years after its last dissemination along with a record of when and where it was used.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written communication permitted by this rule and may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.

(d) Any communication made pursuant to this rule shall include the name of at least one lawyer responsible for its content.

Comment

To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant.

Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Record of Advertising

Paragraph (b) requires that a record of the content and use of advertising be kept in order to facilitate enforcement of this Rule. It does not require that advertising be subject to review prior to dissemination. Such a requirement would be burdensome and expensive relative to its possible benefits, and may be of doubtful constitutionality.

Paying Others to Recommend a Lawyer

A lawyer is allowed to pay for advertising permitted by this Rule, but otherwise is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency or prepaid legal services plan may pay to

advertise legal services provided under its auspices. Likewise, a lawyer may participate in not-for-profit lawyer referral programs and pay the usual fees charged by such programs. Paragraph (c) does not prohibit paying regular compensation to an assistant, such as a secretary, to prepare communications permitted by this Rule.

RULE 7.3 Direct Contact with Prospective Clients

A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in-person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "solicit" includes contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.

The term "solicit" does not include

(a) Speaking or writing publicly or writing for publication so long as the lawyer does not emphasize his own professional experience or reputation and does not undertake to give individual advice; or

(b) Seeking the joinder of additional parties to a lawsuit pursuant to the Rules of Civil Procedure, local Court Rule or procedures approved by the Court pursuant to class action litigation.

Comment

There is a potential for abuse inherent in direct solicitation by a lawyer of prospective clients known to need legal services. It subjects the lay person to the private importuning of a trained advocate, in a direct interpersonal encounter. A prospective client often feels overwhelmed by the situation giving rise to the need for legal services, and may have an impaired capacity for reason, judgment and protective self-interest. Furthermore, the lawyer seeking the retainer is faced with a conflict stemming from the lawyer's own interest, which may color the advice and representation offered the vulnerable prospect.

The situation is therefore fraught with the possibility of undue influence, intimidation, and over-reaching. This potential for abuse inherent in direct solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising permitted under Rule 7.2 offers an alternative means of communicating necessary information to those who may be in need of legal services.

Advertising makes it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct personal persuasion that may overwhelm the client's judgment.

The use of general advertising to transmit information from lawyer to prospective client, rather than direct private contact, will help to assure that the information flows cleanly as well as freely. Advertising is out in public view, thus subject to scrutiny by those who know the lawyer. This informal review is itself likely to help guard against statements and claims that might constitute false or misleading communications, in violation of Rule 7.1. Direct, private communications from a lawyer to a prospective client are not subject to such

third-party scrutiny and consequently are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

These dangers attend direct solicitation whether in-person or by mail. Direct mail solicitation cannot be effectively regulated by means less drastic than outright prohibition. One proposed safeguard is to require that the designation "Advertising" be stamped on any envelope containing a solicitation letter. This would do nothing to assure the accuracy and reliability of the contents. Another suggestion is that solicitation letters be filed with a state regulatory agency. This would be ineffective as a practical matter. State lawyer discipline agencies struggle for resources to investigate specific complaints, much less for those necessary to screen lawyers' mail solicitation material. Even if they could examine such materials, agency staff members are unlikely to know anything about the lawyer or about the prospective client's underlying problem. Without such knowledge they cannot determine whether the lawyer's representations are misleading. In any event, such review would be after the fact, potentially too late to avert the undesirable consequences of disseminating false and misleading material.

General mailings not speaking to a specific matter do not pose the same danger of abuse as targeted mailings, and therefore are not prohibited by this Rule. The representations made in such mailings are necessarily general rather than tailored, less importuning than informative. They are addressed to recipients unlikely to be specifically vulnerable at the time, hence who are likely to be more skeptical about unsubstantiated claims. General mailings not addressed to recipients involved in a specific legal matter or incident, therefore, more closely resemble permissible advertising rather than prohibited solicitation.

Similarly, this Rule would not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for its members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which he or his firm is willing to offer. This form of communication is not directed to a specific prospective client known to need legal services related to a particular matter. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

Kansas Comment

The Kansas Committee adds two important exceptions to the term "solicit". These exceptions contained in Rule 7.3(a) and (b), found previous expression as DR 2-104(A)(4) and (5). The Committee felt that Model Rule 7.3 did not adequately provide exemption for otherwise legitimate conduct by lawyers.

Case Annotations

1. Rule constitutionally invalid as a violation of First and Fourteenth Amendments. *Shapero v. Kentucky Bar Association*, 486 U.S. 466, 100 L. Ed. 2d 475, 108 S. Ct. 1916 (1988).

2. Attorney's contacting mother of deceased before and at funeral, in an effort to obtain information leading to legal representation of deceased's alleged son, violated MRPC 8.4(g); contacting mother of deceased's alleged son to solicit employment violated MRPC 7.3; other violations; public censure. *In re Roth*, 248 Kan. 194, 803 P.2d 1028 (1991).

RULE 7.4 Communication of Fields of Practice

A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

Comment

This Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services; for example, in a telephone directory or other advertising. If a lawyer practices only in certain fields, or will not accept matters except in such fields, the lawyer is permitted so to indicate. However, stating that the lawyer is a "specialist" or that the lawyer's practice "is limited to" or "concentrated in" particular fields is not permitted. These terms have acquired a secondary meaning implying formal recognition as a specialist. Hence, use of these terms may be misleading unless the lawyer is certified or recognized in accordance with procedures in the state where the lawyer is licensed to practice.

Recognition of specialization in patent matters is a matter of long-established policy of the Patent and Trademark Office. Designation of admiralty practice has a long historical tradition associated with maritime commerce and federal courts.

Kansas Comment

This rule simplifies the provisions of Model Rule 7.4 and permits a lawyer to indicate areas of practice in communications about the lawyer's services; for example, in a telephone directory or other advertising. If a lawyer practices only in certain fields, or will not accept matters except in such fields, the lawyer is permitted to so indicate.

The provisions in Model Rule 7.4 dealing with designation as a specialist have been omitted. If the Supreme Court adopts provisions pertaining to designation of specialization, this rule may be amended to reflect those provisions. It is the view of the Committee that while some regulation concerning specialization is permissible and perhaps desirable, a blanket prohibition of designation of specialization pending adoption of specific provisions would be unenforceable.

RULE 7.5 Firm Names and Letterheads

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

Comment

A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice,

use of such names in law practice is acceptable as long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm.

With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact partners, may not denominate themselves as, for example, "Smith and Jones," for that title suggests partnership in the practice of law.

Case Annotations

1. Attorney's mishandling of divorce case violates MRPC 1.3 and 1.4, and use of letterhead indicating attorney is in partnership with another when such is not the case violates MRPC 7.5(d); censure. *In re Seck*, 255 Kan. 552, 874 P.2d 678 (1994).

2. Attorney previously censured disbarred for violations of MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.15, 1.16, 3.2, 3.3, 4.1, 7.1, 7.5, 8.1, 8.4, and Rules 207 and 208; Rule 218 compliance ordered. *In re Shultz*, 257 Kan. 662, 895 P.2d 603 (1995).

MAINTAINING THE INTEGRITY OF THE PROFESSION

RULE 8.1 Bar Admission and Disciplinary Matters

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

Comment

The duty imposed by this Rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. This Rule also requires affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.

This Rule is subject to the provisions of the Fifth Amendment of the United States Constitution and corresponding provisions of state constitutions. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.

A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship.

Case Annotations

1. Attorney's truthfulness and adequacy of information disclosed on Kansas bar application questioned; insufficient evidence. *In re Anderson*, 247 Kan. 208, 795 P.2d 64 (1990).

2. Attorney who used a handgun "to demonstrate a point" to complainant who was preparing to name attorney's friend as father of complainant's child, and who prepared and submitted false affidavits to disciplinary administrator regarding the incident, violated Rules 8.1 and 8.4(c); insufficient evidence to find charged violations of Rules 3.3; 3.4; 3.5; 4.1; 4.4; 8.4(a), (b), (d), (g); or Rule 207. One-year suspension. *In re Wood*, 247 Kan. 219, 794 P.2d 660 (1990).

3. Violations of MRPC 1.15 and 8.1 and Rule 207 found based on attorney's receiving money from client, not placing it in trust account, and making false statements to disciplinary investigators; other violations charged; indefinite suspension and compliance with Rule 218 ordered. *In re Jancich*, 255 Kan. 787, 877 P.2d 417 (1994).

4. Attorney previously censured disbarred for violations of MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.15, 1.16, 3.2, 3.3, 4.1, 7.1, 7.5, 8.1, 8.4, and Rules 207 and 208; Rule 218 compliance ordered. *In re Shultz*, 257 Kan. 662, 895 P.2d 603 (1995).

5. Attorney's mishandling of various civil and divorce cases violates MRPC 1.1, 1.2, 1.3, 1.4, 1.15, 3.2, 3.4, 4.1, 8.1, and 8.4; indefinite suspension. *In re Gordon*, 258 Kan. 784, 908 P.2d 169 (1995).

6. Attorney's mishandling of bankruptcy proceedings for his clients violates MRPC 1.1, 1.2, 1.3, 1.4, 8.1 and 8.4 and Rule 207; disbarment. *In re Gordon*, 260 Kan. 905, 925 P.2d 840 (1996).

7. Attorney's failure to act with reasonable diligence and promptness in an eviction case, commingling of clients' funds with his own, and failure to cooperate with disciplinary administrator's office violate MRPC 1.4, 1.5, 1.9, 1.15, 1.16, 8.1 and 8.4 and Rule 207; one-year suspension. *In re Howlett*, 261 Kan. 167, 928 P.2d 52 (1996).

RULE 8.2 Judicial and Legal Officials

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the code of judicial conduct.

Comment

Assessment by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

Case Annotations

1. Attorney charged with *inter alia* violation of MRPC 3.3 and 8.2; suspended on other grounds. *In re Anderson*, 247 Kan. 208, 795 P.2d 64 (1990).

2. Attorney who lied to the court and her clients and failed to appear for landlord-tenant case proceeding found to be in violation of MRPC 1.1, 1.3, 1.4, 3.3, 3.4, 3.5, 4.1, 8.2 and 8.4; one-year suspension and compliance with Rule 218 ordered. *In re Gershater*, 256 Kan. 512, 886 P.2d 343 (1994).

RULE 8.3 Reporting Professional Misconduct

(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This rule does not require disclosure of information otherwise protected by Rule 1.6. In addition, a lawyer is not required to disclose information concerning any such violation which is discovered through participation in a Substance Abuse Committee, Service to the Bar Committee or similar committee sponsored by a state or local bar association, or by participation in a self-help organization such as Alcoholics Anonymous, through which aid is rendered to another lawyer who may be impaired in the practice of law.

Comment

Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where it would not substantially prejudice the client's interests.

If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. If it is questionable whether the possible violation is "substantial" the violation should be reported. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship.

Kansas Comment

Substance Abuse Committees have earned an important position in the organization of bar association activities and render a valuable and important service to the profession and the public. As such, these committees and other recognized self-help organizations, and the lawyers who serve on them should be allowed to function without fear of the requirement to report every violation which might be uncovered during the course of their service. To provide otherwise might inhibit free and open communication by the incapacitated lawyer and result in neglected matters remaining so. In this instance, the Kansas Committee feels that the public is better served by providing a measure of confidentiality to the incapacitated lawyer's communications with those who would help the lawyer in serving clients.

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) Violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.

Comment

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, or breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith chal-

enge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

Case Annotations

1. Attorney's failure to represent clients in three separate cases after acceptance of retainer fees and failure to cooperate with disciplinary investigation found to violate DR 1-102, 6-101, 7-101, and 9-102; MRPC 1.1, 1.3, 1.4, 1.15 and 8.4; and Rule 207. Rule 203 disbarment. *In re Morphett*, 246 Kan. 499, 790 P.2d 402 (1990).

2. Attorney who refused to obey child support and custody orders, resigned from employment to avoid garnishment based on same, and is subsequently jailed for contempt violates MRPC 8.4(d); rule not vague and is identical to Rule 225 (DR 1-102[A][5]); suspension. *In re Anderson*, 247 Kan. 208, 795 P.2d 64 (1990).

3. Attorney's statements to media following resignation from employment to avoid garnishment for failure to pay child support insufficient to violate 8.4(d); suspension on other grounds. *In re Anderson*, 247 Kan. 208, 795 P.2d 64 (1990).

4. Attorney who used a handgun "to demonstrate a point" to complainant who was preparing to name attorney's friend as father of complainant's child, and who prepared and submitted false affidavits to disciplinary administrator regarding the incident, violated Rules 3.1 and 8.4(c); insufficient evidence to find charged violations of Rules 3.3; 3.4; 3.5; 4.1; 4.4; 8.4(a), (b), (d), (g); or Rule 207. One-year suspension. *In re Wood*, 247 Kan. 219, 794 P.2d 660 (1990).

5. Attorney's failure to obey bankruptcy court orders, failure to pay court-ordered sanctions, persisting to file proceedings prohibited under the bankruptcy code, and failure to appear, all of which resulted in attorney's being barred from appearing in U.S. Bankruptcy Court for District of Kansas, held to violate DR 1-102(A)(5) and (6), DR 7-101(A)(1), DR 7-102(A)(2), MRPC 8.4(d) and (g), and MRPC 3.1; attorney's failure to modify debtors' reorganization plan to accurately reflect creditors, failure to appear, and failure to relinquish client files upon termination of services held to violate MRPC 1.1, 1.3, and 1.4; mitigating circumstances; imposition of discipline suspended pending one-year conditional probation. *In re Black*, 247 Kan. 664, 801 P.2d 1319 (1990).

6. Attorney's mishandling of estate held to violate DR 6-101(A)(3) and MRPC 1.3, DR 1-102(A)(5), (6), and MRPC 8.4(d), and DR 7-101(A)(2) and MRPC 3.2 and 1.4(a); other violations; public censure and restitution. *In re Ebersole*, 247 Kan. 670, 801 P.2d 1323 (1990).

7. Attorney's failing to file eviction action yet telling client he had done so held to violate MRPC 1.3, 1.4, 3.2, and 8.4(c) & (g); other violations; public censure and restitution. *In re Ebersole*, 247 Kan. 670, 801 P.2d 1323 (1990).

8. Attorney's inaction which allowed statute of limitations to run and cause of action to be dismissed with prejudice despite accepting retainer and assuring client of representation violated MRPC 1.1, 1.3, 1.4, 8.4(d), and 8.4(g); indefinite suspension. *In re Cain*, 247 Kan. 673, 801 P.2d 1325 (1990).

9. Attorney retained to probate estate failed to do so, failed to record transfer of mineral interest deed resulting in levy and execution thereon, and failed to cooperate in resulting disciplinary investigation. Violations of DR 9-102(B) and MRPC 1.15; DR 1-102(A), 6-101(A)(3), 7-101(A), and 9-102(B)(1), (3), (4) and MRPC 1.3, 1.4(a), 1.15, and 8.4(c); and

Rule 207. Indefinite suspension with readmission without petition upon successful completion of one-year suspension; specific conditions. *In re Ehrlich*, 248 Kan. 92, 804 P.2d 958 (1991).

10. Attorney's mishandling of collection matter and failure to cooperate with resulting investigation violate Rule 207, DR 1-102(A)(6), 6-101(A)(3), 7-101(A)(2), and 9-102(B)(1), (3), and (4); after March 1, 1988, the same behavior violates MRPC 1.3, 1.4, 1.15(d)(2)(i), (iii), and (iv), and 8.4(g); 2-year suspension recommended; many mitigating factors; 2-year supervised probation. *In re Evans*, 248 Kan. 176, 804 P.2d 344 (1991).

11. Attorney retained by collection agency to collect on student loan in default failed to forward payments made; subsequent IRS setoff; violations of DR 1-102(A)(3), 9-102(B)(1), (3), and (4), and 7-101(A)(2); also MRPC 8.4(c) and 1.15(d)(2)(i), (iii), and (iv). Two-year conditional probation and restitution. *In re Stephens*, 248 Kan. 186, 804 P.2d 1005 (1991).

12. Attorney currently on supervised probation found to have violated Rule 207 and MRPC 1.3, 1.4, 1.15(d)(2)(iii), (iv), and 8.4(g) in handling employment termination case; suspension recommended; supervised probation continued for additional one year. *In re Linn*, 248 Kan. 189, 804 P.2d 350 (1991).

13. Attorney's contacting mother of deceased before and at funeral, in an effort to obtain information leading to legal representation of deceased's alleged son, violated MRPC 8.4(g); contacting mother of deceased's alleged son to solicit employment violated MRPC 7.3; other violations; public censure. *In re Roth*, 248 Kan. 194, 803 P.2d 1028 (1991).

14. Attorney's behavior toward reluctant witness constituted violation of MRPC 8.4(g); other violations; public censure. *In re Roth*, 248 Kan. 194, 803 P.2d 1028 (1991).

15. Recommended disbarment based on continued neglect of client despite prior discipline for such and failure to respond to said discipline, all in violation of MRPC 1.3, 3.2, and 8.4(g); Rule 217 surrender and disbarment; Rule 218 compliance ordered. *In re Ebersole*, 248 Kan. 496, 807 P.2d 1318 (1991).

16. Attorney who agreed to provide representation, accepted retainer, but failed to perform services in 5 situations violated MRPC 1.3, 1.4, 1.15, and 8.4(a) and (d); disability inactive status, restored to active status, temporary suspension pending resolution; reinstated upon 2-year conditional supervised probation. *In re Keil*, 248 Kan. 629, 809 P.2d 531 (1991).

17. Attorney, under suspension at time of representation of client at trial, who fails to so inform client and who fails to pursue appeal upon client's request violates MRPC 1.2, 1.3, 1.4, and 8.4(g); indefinite suspension. *In re Vorhies*, 248 Kan. 985, 811 P.2d 1254 (1991).

18. Attorney employed to probate estate failed to institute probate proceedings, failed to file inheritance tax return thereby incurring penalty and interest, and misrepresented to client that estate matters were being handled violated MRPC 1.1, 1.3, 1.4(a), and 8.4(c); indefinite suspension and Rule 218 compliance ordered. *In re McGhee*, 248 Kan. 988, 811 P.2d 884 (1991).

19. Authenticated copy of court file reflecting attorney's conviction for misdemeanor theft introduced at disciplinary hearing; conviction conclusive evidence of MRPC 8.4(b), (c); attorney currently on suspension; disbarment. *In re Matney*, 248 Kan. 990, 811 P.2d 885 (1991).

20. Attorney's failure to pursue personal injury action on behalf of client, resulting in summary judgment for defendant, and misrepresentation to client and disciplinary investigator as to status of that case violates DR 6-101(A)(3); MRPC 1.3, 1.4(a) and (b), 8.4(c) and (g); and Rule 207; public censure. *In re Jackson*, 249 Kan. 172, 814 P.2d 958 (1991).

21. Attorney's plea bargain resulting in conviction of misdemeanor drug charge evidences violation of MRPC 8.4(d) and (g); one-year conditional probation. *In re McKenna*, 249 Kan. 215, 813 P.2d 929 (1991).

22. Attorney's failure to close estate for 12-year period, failure to render court-ordered accounting, failure to satisfy federal estate tax obligations, and failure to cooperate with disciplinary investigator violate MRPC 1.1, 1.3, 1.4, 3.2, 8.4(d) and (g), DR 6-101, DR 7-101, and Rule 207; disbarment and Rule 218 compliance. *In re Coleman*, 249 Kan. 218, 815 P.2d 43 (1991).

23. Attorney's check kiting operation with her personal bank accounts and attorney trust account violates MRPC 1.15 and 8.4; 1-year conditional probation, supervised. *In re Heaven*, 249 Kan. 224, 813 P.2d 928 (1991).

24. Attorney's conversion of clients' funds and firm's funds violates MRPC 8.4(c), (d), and (g) and DR 1-102(A)(4); suspension recommended; disbarment and Rule 218 compliance ordered. *In re Smith*, 249 Kan. 227, 814 P.2d 445 (1991).

25. Attorney's 4-year neglect of workers compensation claim, thereby preventing client recovery, and mishandling of funds violative of MRPC 1.3, 1.4, and 8.4(g); and Canons 1, 6 and 7. Attorney currently on suspension; disbarment and Rule 218 compliance ordered. *In re Cain*, 249 Kan. 578, 819 P.2d 1230 (1991).

26. Attorney's failure to appear to represent client at trial and subsequent sentencing violates MRPC 1.3, 1.4, and 8.4(d) and (g); Rule 203(a)(3) public censure. *In re Gilman*, 249 Kan. 773, 821 P.2d 327 (1991).

27. Attorney's mishandling of estate case, misrepresentation to client and representatives from disciplinary administrator regarding status of case, failure to withdraw as counsel and failure to cooperate with subsequent counsel, and mismanagement of estate funds violative of MRPC 1.1; 1.2; 1.3; 3.2; 1.15(b); 1.16(a)(3)(d); 8.4(g); and Rule 207(a) and (b); other violations; indefinite suspension and Rule 218 compliance ordered. *In re Stapleton*, 250 Kan. 247, 824 P.2d 205 (1992).

28. Attorney's failure to maintain estate funds in trust account, misrepresentations at disciplinary hearings as to the balance in the account, and failure to respond to inquiries from the disciplinary administrator regarding the account violative of MRPC 1.15(a), (d); 8.4(c), (d); and Rule 207. Indefinite suspension and Rule 218 compliance ordered. *In re Stapleton*, 250 Kan. 247, 824 P.2d 205 (1992).

29. Attorney not active in practice convicted of four felony securities violations and who failed to pay attorney registration fees, cooperate with subsequent investigation, and appear at disciplinary hearing violated Canon 1 and MRPC 8.4(b), (c), and (g); mitigating factors; public censure. *In re Kershner*, 250 Kan. 383, 827 P.2d 1189 (1992).

30. Attorney convicted of felony indecent liberties with a child; criminal acts violate MRPC 8.4(b), (g); indefinite suspension and Rule 218 compliance ordered. *In re Wilson*, 251 Kan. 252, 832 P.2d 347 (1992).

31. Attorney's failure to designate record in federal appeal and failure to respond to show cause order violated MRPC 1.1, 1.3, 3.2, and 8.4(d), (g); other violations; indefinite suspension suspended and probated. *In re Jenkins*, 251 Kan. 264, 833 P.2d 1013 (1992).

32. Attorney on indefinite suspension subject of three complaints for failure to represent clients in violation of MRPC 1.1, 1.3, 1.4, and 8.4(c); failure to cooperate with investigation; disbarment and Rule 218 compliance. *In re McGhee*, 251 Kan. 584, 834 P.2d 379 (1992).

33. Attorney's failure to comply with discovery requests, misrepresentation to court, and failure to advise client, resulting in sanctions against client, violate MRPC 1.1, 1.4, 3.4(a) and (d), and 8.4(a), (c), and (d); firm failure to supervise among mitigating factors; one-year suspension. *In re Dwight*, 251 Kan. 588, 834 P.2d 382 (1992).

34. Attorney's mishandling of client's funds, conversion of conservatorship funds, failure to inform client, drug possession conviction, and retention of legal fees without representing client violate MRPC 1.4(a) and (b), 1.15, and 8.4(a), (b), (c), (d), and (g); attorney appears

pursuant to Rule 212(d); mitigating factors; indefinite suspension and Rule 218 compliance. *In re Morris*, 251 Kan. 592, 834 P.2d 384 (1992).

35. Complaint alleges DUI constitutes violation of MRPC 8.4(d) and (g); panel declines to extend disciplinary rules to traffic offense; count dismissed. *In re Morris*, 251 Kan. 592, 834 P.2d 384 (1992).

36. Attorney's participation in demonstration culminating in arrest and convictions violates MRPC 8.4(b), (d), and (g); public censure. *In re Graham*, 251 Kan. 835, 840 P.2d 521 (1992).

37. Attorney's misappropriation of legal fees from law firm to his own account violative of MRPC 8.4(c); failure to cooperate in investigation; disbarment and Rule 218 compliance ordered. *In re Ford*. 252 Kan. 231, 843 P.2d 264 (1992).

38. Attorney stipulated to violations of MRPC 8.4(b), (c), and (g) for misappropriating money from his employer to finance his cocaine use; cocaine addiction seen as aggravating factor, recovery from addiction as mitigating; disbarment and Rule 218 compliance ordered. *In re Jones*, 252 Kan. 236, 843 P.2d 709 (1992).

39. Attorney under investigation for fraud, mispresentation, deceit, and diversion of law firm funds in violation of MRPC 8.4(b), (c), (d) surrenders license per Rule 217; disbarment and Rule 218 compliance ordered. *In re Johnson*, 252 Kan. 493, 852 P.2d 510 (1993).

40. Attorney's incompetence in handling bankruptcy matter violative of MRPC 1.1, 3.1, 3.3, and 8.4; public censure. *In re Ramcharan-Maharajh*, 252 Kan. 701, 847 P.2d 1307 (1993).

41. Attorney's borrowing a total of $117,000 in five unsecured interest-free loans, with no certain due date, from mother who had retained attorney to represent her son in pending criminal matter violative of DR 5-104(a), DR 7-101(A)(3), DR 1-102(A)(1) and (6), MRPC 1.7, MRPC 1.8(a), MRPC 1.15(d)(2)(iii) and (iv), MRPC 8.4(a) and (g), and Rule 704 oath; other violations; indefinite suspension and Rule 218 compliance ordered. *In re Norwood*, 252 Kan. 711, 847 P.2d 1314 (1993).

42. Attorney's borrowing $15,000 from client violates MRPC 1.7, MRPC 1.8(a), MRPC 1.15(d)(2)(iii) and (iv), MRPC 8.4(a) and (g), and Rule 704 oath; other violations; indefinite suspension and Rule 218 compliance ordered. *In re Norwood*, 252 Kan. 711, 847 P.2d 1314 (1993).

43. Attorney's forging of judge's signature in probate matter resulting in felony conviction violative of MRPC 4.1; 8.4(b), (c), (d), and (g); failure to communicate with client violative of MRPC 1.4; previous violations; indefinite suspension and Rule 218 compliance ordered. *In re Pomeroy*, 252 Kan. 1044, 850 P.2d 222 (1993).

44. Attorney previously censured placed on indefinite suspension for violations of MRPC 1.1, 1.3, 1.4, 1.15, 1.16, and 8.4 for neglect of two different client's cases; two other complaints found to be based on insufficient evidence although pattern of conduct cited and violations of Rule 207 established; Rule 218 compliance ordered. *In re Jackson*, 253 Kan. 810, 861 P.2d 124 (1993).

45. Attorney's actions in letting the statute of limitations run in four different cases violate DR 1-102(A)(4), 6-101(A)(1) and (3), and 7-101(A)(2), and MRPC 1.1, 1.3, 1.4(a) and (b), 3.2, and 8.4(c). Attorney's actions in failing to respond to requests for information and return of the case file in workers compensation case violate MRPC 1.3, 1.4(a) and (b), 1.16(a)(3) and (d), and 3.2. Eighteen-month suspension probated on conditions. *In re Jones*, 253 Kan. 836, 861 P.2d 1340 (1993).

46. Seven of nine charges based on misdemeanor convictions, dismissals, or diversions dismissed by panel due to remoteness; remaining two misdemeanor convictions violative of MRPC 8.4 (b), (d), and (g); attorney's conduct in mishandling personal injury case resulting in statute of limitations running, PIP carrier losing lien, and misrepresentation to client as

to status of case violative of MRPC 1.3, 1.4, 4.1, and 8.4 (c) and (g); mitigating circumstances; one-year suspension and compliance with Rule 218 ordered. *In re Pistotnik*, 254 Kan. 294, 864 P.2d 1166 (1993).

47. Commingling client funds and personal funds in trust account, using trust account funds for personal expenses, and allowing trust account balance to fall below amount due clients violative of MRPC 1.15(a), (b), and (d)(2)(iv), and MRPC 8.4(g); Rule 207 violation; other violations; pending complaints; imposition of discipline suspended, supervised probation ordered. *In re Jackson*, 254 Kan. 406, 867 P.2d 278 (1994).

48. Attorney's dilatory handling of estate matter violative of MRPC 1.3, 1.4, 1.16(a)(2), 3.2, and 8.4(g); Rule 207 violation; other violations; pending complaints; imposition of discipline suspended, supervised probation ordered. *In re Jackson*, 254 Kan. 406, 867 P.2d 278 (1994).

49. Attorney's failure to remit client's portion in a collection matter, failure to keep client informed, misrepresentations to client as to status of collection efforts, and causing balance on trust account to repeatedly fall below amount due client violative of MRPC 1.3, 1.4(a), 1.5(d), 1.15(a), 4.1(a), and 8.4(c); aggravating and mitigating circumstances; one-year supervised probation with conditions. *In re Wisler*, 254 Kan. 600, 866 P.2d 1049 (1994).

50. Attorney's failure to file personal injury claim and blaming client for delay, thereby allowing statute of limitations to run (resulting in client being granted summary judgment in subsequent malpractice claim); failure to inform client as to reduction in child support income; failure to inform client as to hearing dates; and acceptance of retainer fee from out-of-state client whom attorney knew he could not represent in divorce action violate MRPC 1.1, 1.3, 1.4(a) and (b), 1.16(d), 3.3(a)(1), and 8.4(d) and (g); Rule 207(a) and (b) violations; disbarment and Rule 218 compliance ordered. *In re Spears*, 254 Kan. 904, 869 P.2d 718 (1994).

51. Attorney's mishandling of four different probate estates and failure to timely file four different foreclosures, despite representations and billings which would indicate to the contrary, held to violate DR 1-102(A)(4), (5), and (6); 6-101(A)(3); and 7-101(A)(2) and (3); Canons 1, 6, 7, and 9; and MRPC 1.1, 1.3, 1.4, 3.2, and 8.4(c), (d), and (g); aggravating and mitigating circumstances; two-year suspension, discipline probated, and supervised probation ordered. *In re Herman*, 254 Kan. 908, 869 P.2d 721 (1994).

52. Attorney pleads to six counts of attempted indecent liberties with a child; violation of MRPC 8.4(b) and (g) established; indefinite suspension and Rule 218 compliance ordered. *In re Fierro*, 254 Kan. 919, 869 P.2d 728 (1994).

53. Attorney's misappropriation of funds from trust accounts violative of Canons 1 and 9 and MRPC 1.15 and 8.4; indefinite suspension and Rule 218 compliance ordered. *In re Lunt*, 255 Kan. 529, 874 P.2d 1198 (1994).

54. Attorney's repeated refusal to provide court-ordered accountings of a conservatorship of which she is the named conservator, refusal to reveal the names of the financial institution where the conservatorship funds are deposited, and refusal to answer questions concerning the topic or invoke the Fifth Amendment at district court hearings and before the disciplinary hearing panel violate MRPC 1.15, 3.4, and 8.4; other violations; disbarment. *In re Jackson*, 255 Kan. 542, 874 P.2d 673 (1994).

55. Attorney's failure to file incorporation papers and retention of retainer paid to handle such matter violate MRPC 1.3, 1.4, 1.15, 1.16, and 8.4; other violations; disbarment. *In re Jackson*, 255 Kan. 542, 874 P.2d 673 (1994).

56. Attorney's mishandling of will and estate matter, failure to communicate with client, failure to timely handle the matter, misleading the court as to the status of the probate case, and failure to return the client's file and retainer when requested violate MRPC 1.1, 1.3,

1.4, 1.15, 1.16, 3.2, and 8.4; other violations; disbarment. *In re Jackson*, 255 Kan. 542, 874 P.2d 673 (1994).

57. Attorney's failure to timely file backruptcy petition for clients, misrepresentations to clients as to status of case, and mishandling of bankruptcy case violate MRPC 1.1, 1.3, 1.4, 1.15, and 8.4; other violations; disbarment. *In re Jackson*, 255 Kan. 542, 874 P.2d 673 (1994).

58. Attorney's conviction of attempted possession of cocaine violates MRPC 8.4(b), (d), and (g), and false allegations regarding the behavior of law enforcement personnel by the attorney made during the course of the criminal prosecution violate MRPC 8.4(c), (d), and (g); other violations; indefinite suspension and Rule 218 compliance ordered. *In re Nelson*, 255 Kan. 555, 874 P.2d 1201 (1994).

59. Attorney found to have violated MRPC 1.1, 1.3, 1.4, 1.15, 3.2, 3.4(c), 4.3, and 8.4(d) and (g) based on conduct in seven different complaints reflecting on attorney's lack of diligence and competence, miscommunication and lack of candor, and failure to return unearned fees; failure to cooperate in disciplinary investigation; attorney currently on disability inactive status; indefinite suspension and Rule 218 compliance ordered. *In re Jenkins*, 255 Kan. 797, 255 P.2d 423 (1994).

60. Attorney convicted of felony possession of controlled substance with intent to distribute; criminal acts violate MRPC 8.4(b), (d) and (g); disbarment and Rule 218 compliance ordered. *In re Diggs*, 256 Kan. 193, 883 P.2d 1182 (1994).

61. Attorney's mishandling of personal injury case violates MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.6, 1.7, 1.16, 3.2, 4.1, 8.4 and Rule 207; published censure. *In re Shultz*, 256 Kan. 196, 883 P.2d 779 (1994).

62. Attorney found to have violated MRPC 1.15 and 8.4 in dealing with settlement of client's case while on supervised probation for other violations; three-year supervised probation. *In re Jackson*, 256 Kan. 492, 885 P.2d 1259 (1994).

63. Attorney's failure to represent client in collection of foreign judgment in workers compensation case found to violate MRPC 1.1, 1.3, 1.4, 1.5(d), 1.16(d), 3.2, and 8.4(g); indefinite suspension and Rule 218 compliance ordered. *In re Griggs*, 256 Kan. 498, 886 P.2d 786 (1994).

64. Attorney convicted of 30 counts of giving a worthless check; violation of MRPC 8.4(b), (c), (d) and (g); indefinite suspension and Rule 218 compliance ordered; Rule 219 application for reinstatement contingent on restitution. *In re Phelps-Griffin*, 256 Kan. 503, 886 P.2d 788 (1994).

65. Attorney charged with purchasing cocaine and found not guilty by jury; found violation of MRPC 8.4(b), (d), and (g) and Rule 704(i); published censure. *In re Robertson*, 256 Kan. 505, 886 P.2d 806 (1994).

66. Attorney who lied to the court and her clients and failed to appear for landlord-tenant case proceeding found to be in violation of MRPC 1.1, 1.3, 1.4, 3.3, 3.4, 3.5, 4.1, 8.2 and 8.4; one-year suspension and compliance with Rule 218 ordered. *In re Gershater*, 256 Kan. 512, 886 P.2d 343 (1994).

67. Attorney's mishandling of a breach of contract case and settlement violative of MRPC 1.1, 1.3, 1.4, 3.3, and 8.4; six-month suspension and compliance with Rule 218 ordered. *In re Norlen*, 256 Kan. 509, 886 P.2d 347 (1994).

68. Attorney's mishandling of probate matter and workers compensation case violates MRPC 1.1, 1.3, 1.4, 3.2, 4.1, 8.4 and Rule 207; imposition of discipline suspended; two-year supervised probation. *In re Whitaker*, 256 Kan. 939, 888 P.2d 829 (1995).

69. Attorney's transfer of assets as bank trust officer from a trust to another without consent of a bank violates MRPC 1.8 and 8.4; his representation of two sons whose position was directly opposite of his former client, their mother, violates MRPC 1.9; published censure. *In re Whalen*, 256 Kan. 944, 888 P.2d 395 (1995).

70. Attorney previously censured disbarred for violations of MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.15, 1.16, 3.2, 3.3, 4.1, 7.1, 7.5, 8.1, 8.4, and Rules 207 and 208; Rule 218 compliance ordered. *In re Shultz*, 257 Kan. 662, 895 P.2d 603 (1995).

71. Attorney's dilatory handling of civil case and failure to file the opening brief in criminal case violate MRPC 1.1, 1.3 and 8.4(d); two-year supervised probation. *In re Betts*, 257 Kan. 955, 895 P.2d 604 (1995).

72. Attorney's mishandling the oil and gas case violates MRPC 1.1, 1.3, 1.4 and 8.4(c); one-year probation. *In re Pilgreen*, 257 Kan. 949, 896 P.2d 389 (1995).

73. Attorney found in violation of MRPC 1.15(a), (b), (c) and (d), 8.4(d) and Rule 207; two-year probation. *In re Johnson*, 257 Kan. 946, 895 P.2d 1256 (1995).

74. Attorney pleaded no contest to aggravated sexual battery; his original conviction of rape and sexual battery reversed because of trial errors; violation of MRPC 8.4(b) and (g) found; disbarment and Rule 218 compliance ordered. *In re Myers*, 257 Kan. 959, 895 P.2d 1252 (1995).

75. Attorney's forging a client's signature on affidavit and filing it in court violate MRPC 1.4, 3.3, 3.4 and 8.4(c), (d) and (g); published censure. *In re Caller*, 258 Kan. 250, 899 P.2d 468 (1995).

76. Attorney's failure to remit personal injury protection lien to his client's insurance company, failure to keep client informed, misrepresentation to client, and creating conflict of interest violated MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.15, 3.7, 4.1, and 8.4; aggravating circumstances; indefinite suspension. *In re Seck*, 258 Kan. 530, 905 P.2d 122 (1995).

77. Attorney who was temporarily suspended from practice and in federal prison was afforded opportunity to appear in person and present evidence of mitigating circumstances. *In re Brown*, 258 Kan. 731, 907 P.2d 132 (1995).

78. Attorney's neglect of three different clients' cases violates MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 3.1, and 8.4 and Rule 207; one-year suspension. *In re Geeding*, 258 Kan. 740, 907 P.2d 124 (1995).

79. Attorney disciplined in Texas for failure to communicate with clients, neglect of client's cases, failure to cooperate in investigation, and conversion of client's funds; Texas findings and conclusions adopted per Rule 202; indefinite suspension. *In re Callahan*, 258 Kan. 770, 907 P.2d 840 (1995).

80. County attorney found to have had conflict of interest in representing client investigated for neglect of her children, engaged in undignified or discourteous conduct degrading to tribunal and engaged in conduct unfit to practice law; two-year probation; participation in ethics programs and personal apology to judge in open court ordered. *In re Kraushaar*, 258 Kan. 772, 907 P.2d 836 (1995).

81. Attorney's mishandling of various civil and divorce cases violates MRPC 1.1, 1.2, 1.3, 1.4, 1.15, 3.2, 3.4, 4.1, 8.1, and 8.4; indefinite suspension. *In re Gordon*, 258 Kan. 784, 908 P.2d 169 (1995).

82. Attorney's mishandling of client funds, failure to supervise nonlawyer assistants, and other misconduct violate MRPC 1.3, 1.5, 1.15, 5.3, and 8.4; mitigating circumstances; published censure. *In re Krogh*, 259 Kan. 163, 910 P.2d 221 (1996).

83. Attorney's handling of counterclaim and appeal in lawsuit between home buyers and construction company violates MRPC 1.1, 1.3, 1.4, 8.4(c) and (d) and Rule 207; one-year suspension. *In re Crockett*, 259 Kan. 540, 912 P.2d 176 (1996).

84. Attorney self-reported cases in which he allowed the statute of limitations to expire on his clients' claims; violations of MRPC 1.3, 1.4, and 8.4; two-year suspension. *In re Hill*, 259 Kan. 877, 915 P.2d 49 (1996).

85. Attorney's improper accounting and failure to safeguard clients' funds violate MRPC 1.15 and 8.4, and Rule 207; indefinite suspension. *In re Munyon*, 259 Kan. 889, 914 P.2d 574 (1996).

86. Attorney covicted of possession of cocaine later acquitted on double jeopardy ground; violations of MRPC 8.4(b), (d) and (g); extensive mitigating factors; two-year probation. *In re Gooding*, 260 Kan. 199, 917 P.2d 414 (1996).

87. Attorney tried for two counts of illegal check-kiting scheme in federal court and charges later dismissed; violation of MRPC 8.4(c); published censure. *In re Blase*, 260 Kan. 351, 920 P.2d 931 (1996).

88. Attorney's breach of fiduciary duty as executor of estate, conduct involving dishonesty and fraud, and failure to cooperate with Disciplinary Administrator's office violate MRPC 1.3, 1.15, 8.4(c) and (d) and Rules 202 and 207; disbarment. *In re Williamson*, 260 Kan. 568, 918 P.2d 1302 (1996).

89. Attorney's mishandling of client's assets in voluntary conservatorship proceeding violates MRPC 1.1, 1.2, 1.4, 1.5, 1.7, 1.9, 1.14, 3.3, and 8.4; published censure. *In re Brantley*, 260 Kan. 605, 920 P.2d 433 (1996).

90. Attorney's mishandling of bankruptcy proceedings for his clients violates MRPC 1.1, 1.2, 1.3, 1.4, 8.1 and 8.4 and Rule 207; disbarment. *In re Gordon*, 260 Kan. 905, 925 P.2d 840 (1996).

91. Attorney's handling of civil action and post-divorce proceeding and his attempt to represent a criminal defendant while attorney was in inpatient drug treatment program violate MRPC 1.3, 1.4, 1.5(b), 1.15(a) and (b), 1.16(a), 3.3(a), 4.1, and 8.4(a), (b), (d), and (g); three-year supervised probation. *In re Phillips*, 260 Kan. 909, 925 P.2d 435 (1996).

92. Attorney's failure to act with reasonable diligence and promptness in an eviction case, commingling of clients' funds with his own, and failure to cooperate with disciplinary administrator's office violate MRPC 1.4, 1.5, 1.9, 1.15, 1.16, 8.1 and 8.4 and Rule 207; one-year suspension. *In re Howlett*, 261 Kan. 167, 928 P.2d 52 (1996).

93. Attorney, serving as part-time hearing officer for Kansas Department of Revenue, dismissed eight cases of persons who had employed him as attorney in their DUI cases; violation of MRPC 1.11 and 8.4(c) and (d); indefinite suspension and Rules 218 and 219 compliance ordered. *In re Gribble*, 261 Kan. 985, 933 P.2d 672 (1997).

94. Attorney's mishandling of matters involving (1) individualized education program for autistic child in public school, (2) personal injury, probate, and insurance claim arising from fatal car accident, and (3) probate matter involving estate of conservatee violates MRPC 1.1, 1.2, 1.3, 1.4, 1.7, 1.16, and 8.4 and Rule 207; indefinite suspension per Rule 203(a)(2). *In re Dow*, 261 Kan. 989, 933 P.2d 666 (1997).

95. Attorney's mishandling of bankruptcy case violates MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.16, 3.1, 3.3, and 8.4; published censure per Rule 203(a)(3). *In re Roy*, 261 Kan. 999, 933 P.2d 662 (1997).

96. Attorney's presenting an altered will for probate violates MRPC 3.3(a)(1) and 8.4(c) and (d); published censure per Rule 203(a)(3). *In re Grant*, 262 Kan. 269, 936 P.2d 1360 (1997).

97. Attorney's mishandling of adoption case violates MRPC 1.1, 1.3, 1.4, and 8.4 and Rule 207; indefinite suspension. *In re Johnson*, 262 Kan. 275, 936 P.2d 258 (1997).

98. Attorney's mishandling of civil rights case violates MRPC 1.2, 1.3, 1.4, 1.7, 1.15, 5.3, and 8.4; two-year supervised probation. *In re Baxter*, 262 Kan. 555, 940 P.2d 37 (1997).

99. Attorney's failure to file negligence action in proper court and his disappearance from his law office without notice to clients violate MRPC 1.1, 1.3, 1.4, 1.5, 3.2, and 8.4 and Rule 207; disbarment. *In re Neal*, 262 Kan. 562, 937 P.2d 1234 (1997).

100. Attorney's mishandling of child support case and his ex parte communication with judge violate MRPC 1.1, 3.3, 3.5, 4.4, 8.4(c), (d), and (g), and Rules 207 and 211; aggravating and mitigating factors; indefinite suspension. *In re Black*, 262 Kan. 825, 941 P.2d 1380 (1997).

RULE 8.5 Jurisdiction

A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere.

Comment

In modern practice lawyers frequently act outside the territorial limits of the jurisdiction in which they are licensed to practice, either in another state or outside the United States. In doing so, they remain subject to the governing authority of the jurisdiction in which they are licensed to practice. If their activity in another jurisdiction is substantial and continuous, it may constitute practice of law in that jurisdiction. See Rule 5.5.

If the rules of professional conduct in the two jurisdictions differ, principles of conflict of laws may apply. Similar problems can arise when a lawyer is licensed to practice in more than one jurisdiction.

Where the lawyer is licensed to practice law in two jurisdictions which impose conflicting obligations, applicable rules of choice of law may govern the situation. A related problem arises with respect to practice before a federal tribunal, where the general authority of the states to regulate the practice of law must be reconciled with such authority as federal tribunals may have to regulate practice before them.

Rule 227

RULES RELATING TO THE LAWYERS' FUND FOR CLIENT PROTECTION

RULE 1. PURPOSE AND SCOPE

A. The purpose of the Lawyers' Fund for Client Protection (LFCP or the Fund) is to promote public confidence in the administration of justice and the integrity of the legal profession by reimbursing losses to clients caused by the dishonest conduct of lawyers admitted and licensed to practice law in the courts of this State, occurring in the course of a lawyer-client relationship between the lawyer and the claimant.

B. The Kansas Supreme Court, in the exercise of its inherent power to oversee the administration of justice and to regulate the practice of law and the attorneys at law in this State in the exercise of their professional responsibility, finds the need to participate in collective efforts of the bar to reimburse and to protect, insofar as reasonably possible, those persons who may be injured by the dishonest conduct of lawyers. Therefore, the Supreme Court adopts this Rule for such purpose.

C. The Fund is not a guarantor of honesty in the practice of law. Dishonest conduct by a member of the bar imposes no separate legal obligation on the profession collectively, or on the Fund, to compensate for the lawyer's misconduct. The Fund is a lawyer-financed public service, and the payment of reimbursement is a matter of grace and discretion by the Commission.

CIVIL CODE ADVISORY COMMITTEE

J. Nick Badgerow, Chairman
700/40 Corporate Woods
9401 Indian Creek Pkwy
Overland Park, KS 66225-5407
(913) 345-8100
(913) 345-0736 FAX

Susan S. Baker
P.O. Box 25625
Overland Park, KS 66225
(913) 469-4100
(913) 469-8182 FAX

Hon. Barry Bennington
P.O. Box 608
209 - 215 North Broadway
St. John, KS 67576
(316) 549-3370
(316) 549-3298 FAX

Hon. Terry L. Bullock
Shawnee County Courthouse
200 SE 7th st., Rm. 410
Topeka, KS 66603
(785) 233-8200, ext. 4375
(785) 291-4911 FAX

Professor Robert C. Casad
K.U. Law School
Lawrence, KS 66045
(785) 864-4550
(785) 864-5054 FAX

Hon. Jerry G. Elliott
301 S.W. 10th, Rm. 324
Topeka, KS 66612
(785) 296-5405
(785) 296-7079 FAX

Joseph W. Jeter
P.O. Box 128
Hays, KS 67601
(785) 628-8226
(785) 628-1376 FAX

Phillip Mellor
125 N. Market, Ste. 1600
Wichita, KS 67202
(316) 267-7361
(316) 267-1754 FAX

David Prager
5604 S.W. Hawick Lane
Topeka, KS 66614
(785) 271-6835

David M. Rapp
2000 Epic Center
301 N. Main
Wichita, KS 67202-4820
(316) 267-2000
(316) 264-1518 FAX

Justice Fred N. Six
301 S.W. 10th Street
Topeka, KS 66612
(785) 296-5364
(785) 296-7079 FAX

Donald W. Vasos
4400 Shawnee Mission Pkwy #100
Fairway, KS 66205-2518
(913) 362-4400
(913) 362-4244 FAX

(Revised 01/99)

KANSAS BAR ASSOCIATION

1200 SW Harrison St.
P.O. Box 1037
Topeka, Kansas 66601-1037
Telephone (785) 234-5696
FAX (785) 234-3813
Email: ksbar@ink.org

Legislative Testimony

TO: House Judiciary Committee

FROM: Ron Smith, General Counsel
Kansas Bar Association

SUBJ: SB 89

DATE: March 8,1999

SB 89 repeals very old statutory law that was necessary during the formative days of the state of Kansas, but now is contrary to the judicial article of the Kansas Constitution.

In 1960, in *Martin v. Davis*, the court ruled

> "[The constitution of Kansas distinctly distributes the powers of the government to the executive, legislative and judicial departments. Under Article 3, Section 1 the judicial power is vested in a supreme court, . . . and such other courts, inferior to the supreme court, as may be provided by law. Under that provision of the constitution, the supreme court stands at the head of the judicial department ...(case cites omitted) and is invested with inherent power arising from its creation, or from the fact that it is a court. Inherent power is essential to its being and dignity, and does not require an express grant to confer it ....
>
> * * *
>
> "It is unnecessary here to explore the limits of judicial power conferred by that provision, but suffice it to say the practice of law is so intimately connected and bound up with the exercise of judicial power in the administration of justice that the right to regulate the practice naturally and logically belongs to the judicial department of the government . . . (case cites omitted) Included in that power is the supreme court's inherent right to prescribe conditions for admission to the Bar, to define, supervise, regulate and control the practice of law, whether in or out of court, and *this is so notwithstanding acts of the legislature in the exercise of its police power to protect the public interest and welfare . . .*" [1]

These statutes originated in the territorial legislature of 1857 when there was no Supreme Court of Kansas, and judicial power was vested with federal judges appointed by the Presidents Pierce and Buchanan. The bar was regulated in the early days by having each district court have its own role of members of the "local bar." Whatever utility these statutes had before, during and after the civil war, they are no longer valid, since the Court has promulgated its own rules and case law covering admission to the bar and regulating the practice of law. Lawyers will still be regulated by the Court. The KBA joins the Judicial Council in urging the repeal of these statutes.

Thank you.

---

[1] *Martin v. Davis,* 187 Kan. 473, 357 P.2d 782, 787-788 (1960)

Session of 1999

HOUSE BILL No. 2126

By Committee on Judiciary

1-26

AN ACT concerning administrative procedure; concerning presiding officers; amending K.S.A. 2-1208a, 2-3311, 8-2426, 21-3110, 31-140, 36-509, 40-2,137, 44-322a, 49-606, 65-163a, 65-673, 65-720a, 65-747, 65-753, 65-2305, 65-3483, 65-3488, 65-3490, 66-1,117, 75-37,121, 75-37,121, as amended by section 34 of this act, 75-37,121, as amended by section 35 of this act, 75-37,121, as amended by section 36 of this act, 75-37,121, as amended by section 37 of this act, 75-37,122, 75-6207, 76-3110, 77-505, 77-549, 77-550, 77-551, 77-551, as amended by section 47 of this act, 79-3313, 82a-1405, 82a-1501a, 82a-1502, 82a-1503 and 82a-1504 and K.S.A. 1998 Supp. 44-1005, 65-163, 65-525, 65-526, 74-4904, 74-8804, 74-8816, 74-8817, 74-8837, 77-514 and 77-514 as amended by section 43 of this act and repealing the existing sections; also repealing K.S.A. 75-5611a.

Be it enacted by the Legislature of the State of Kansas:

New Section 1. On and after July 1, 2003: (a) Except as otherwise provided by this act, all of the powers, duties and functions of the office of administrative hearings within the department of administration and the secretary of administration concerning adjudicative proceedings of the Kansas administrative procedure act are hereby transferred to and conferred and imposed upon the office of administrative hearings and the director established by this act.

(b) Except as otherwise provided by this act, the office of administrative hearings and the director established by this act shall be the successor in every way to the powers, duties and functions of the office of administrative hearings within the department of administration and the secretary of administration concerning adjudicative proceedings of the Kansas administrative procedure act in which the same were vested prior to the effective date of this section. Every act performed in the exercise of such powers, duties and functions by or under the authority of the office of administrative hearings and the director concerning adjudicative proceedings of the Kansas administrative procedure act established by this act shall be deemed to have the same force and effect as if performed by the office of administrative hearings within the department of administration and the secretary of administration, respectively, in which such

PROPOSED AMENDMENTS
3/8/99

House Judiciary
3-8-99
Attachment 6

assessed and collected under this section shall be remitted promptly to the state treasurer. Upon receipt thereof, the state treasurer shall deposit the entire amount in the state treasury and credit it to the state general fund.

Sec. 20. On and after July 1, 2001, K.S.A. 65-673 is hereby amended to read as follows: 65-673. (a) The authority to promulgate rules and regulations for the efficient enforcement of this act is hereby vested in the secretary. The secretary is hereby authorized to make the regulations promulgated under this act conform, insofar as practicable, with those promulgated under the federal act.

(b) Hearings authorized or required by this act shall be conducted by the secretary or by a ~~hearing officer designated by the secretary~~ *presiding officer from the office of administrative hearings* for this purpose. The secretary shall prescribe by rule and regulation the procedure for conducting hearings. The ~~hearing~~ *presiding* officer shall have the same powers in conducting a hearing as the secretary. In conducting a hearing the secretary or the ~~hearing~~ *presiding* officer may issue subpoenas to compel the attendance of witnesses, administer oaths, take testimony, require the production of books, papers, records, correspondence or other documents which the secretary or the ~~hearing~~ *presiding* officer deems relevant and render decisions. In case of the refusal of any person to comply with any subpoena issued under this section or to testify with respect to any matter which the person may be lawfully questioned, the district court of any county on application of the secretary may issue an order requiring such person to comply with the subpoena and to testify, and any failure to obey the order of the court may be punished by the court as a contempt thereof. Notwithstanding the foregoing provisions of this subsection, hearings on an order, as defined in subsection (d) of K.S.A. 77-502 and amendments thereto, shall be conducted in accordance with the provisions of the Kansas administrative procedure act.

(c) Before promulgating any rules and regulations contemplated by K.S.A. 65-663, 65-665, 65-666, 65-669, or 65-672, and amendments thereto, the secretary shall give appropriate notice of the proposal and of the time and place for a hearing as provided in this act. Such rules and regulations may be amended or revoked in the same manner as is provided by law for adoption.

Sec. 21. On and after July 1, 2002, K.S.A. 65-720a is hereby amended to read as follows: 65-720a. (a) The term "frozen dairy dessert" means and includes products containing milk or cream and other ingredients which are frozen or semi-frozen prior to consumption, such as ice cream, ice milk or sherbet, including frozen dairy desserts for special dietary purposes.

(b) It shall be the duty of the ~~state board~~ *secretary* of agriculture, and

it is hereby authorized, to prescribe and adopt rules and regulations establishing definitions and standards of identity and quality for frozen dairy desserts. Prior to the adoption of any rules and regulations establishing definitions and standards for these products, the ~~board or its authorized representative~~ *secretary* shall give notice to all known interested persons of the time and place of a hearing, at which time any interested person may appear and present such person's views. The ~~board may appoint a hearing officer to~~ *secretary ~~or a presiding officer from the office of administrative hearings~~ shall* conduct such hearing and make recommendations.

(c) The ~~board~~ *secretary*, in adopting rules and regulations establishing such definitions and standards, shall take into consideration the following as guidelines for establishment of such standards: (a) Ingredients; (b) pasteurization; (c) acidity; (d) butterfat, milk solids and total food solids content; (e) weight per unit of measurement; (f) flavor; and flavor labeling; (g) coloring, and (h) the standards of other states and those adopted under the federal food, drug and cosmetic act, for the sake of uniformity.

(d) Nothing in this section or in any rules and regulations adopted pursuant to this section shall prohibit a licensed food service establishment from preparing ice cream for sale to customers of the food service establishment so long as the ice cream mix or mixture is cooked, and if such ice cream mix or mixture contains eggs is cooked according to federal food and drug administration general provisions for making frozen desserts using a high temperature, short-term method, all dairy products used in such mixture are pasteurized and the bacteria and coliform quality standards for the ice cream are within the limits established under K.S.A. 65-720f and amendments thereto.

Sec. 22. On and after July 1, 2003, K.S.A. 65-747 is hereby amended to read as follows: 65-747. It shall be unlawful for any person required to pay or remit a fee under this act to sell, offer for sale, receive or distribute grade A raw milk for pasteurization, grade A pasteurized milk or grade A pasteurized milk products within this state without holding a valid permit to do so from the state dairy commissioner. Such permit shall be issued upon application to the dairy commissioner, and no fee shall be charged therefor. Whenever the dairy commissioner shall determine that any person holding such permit has failed to pay or remit any required fee or fees, or any part thereof, or has failed to submit a required report, or has submitted a false report, the commissioner may, upon due notice and a hearing thereon, revoke or suspend such permit. Any such hearing shall be held by the ~~state board of agriculture through the~~ dairy commissioner or ~~the dairy commissioner's authorized representative or by a hearing officer, duly appointed by the board through the dairy commissioner or the dairy commissioner's authorized representative~~ *a presiding officer*

secretary of agriculture through

9-3

from the office of administrative hearings. The required notice and hearing shall be in accordance with the provisions of the Kansas administrative procedure act.

Sec. 23. On and after July 1, 2003, K.S.A. 65-753 is hereby amended to read as follows: 65-753. (a) If the ~~state board of agriculture through the~~ dairy commissioner ~~or the dairy commissioner's authorized representative~~ determines after notice and opportunity for a hearing that any person has engaged in or is engaging in any act or practice constituting a violation of any provision of this act or any rule and regulation or order issued thereunder, the ~~state board of agriculture through the~~ dairy commissioner by written order, may require that such person cease and desist from the unlawful act or practice and take such affirmative action as in the judgment of the ~~state board of agriculture through the~~ dairy commissioner will carry out the purposes of the violated or potentially violated provision of this act or rule and regulation or order issued thereunder.

(b) If the ~~state board of agriculture through the~~ dairy commissioner makes written findings of fact that there is a situation involving an immediate danger to the public health, safety or welfare or that the public interest will be irreparably harmed by delay in issuing an order under subsection (a), the ~~state board of agriculture through the~~ dairy commissioner may issue an emergency temporary cease and desist order. Such order, even when not an order within the meaning of K.S.A. 77-502, and amendments thereto, shall be subject to the same procedures as an emergency order issued under K.S.A. 77-536, and amendments thereto. Upon the entry of such an order, the ~~state board of agriculture through the~~ dairy commissioner shall promptly notify the person subject to the order that: (1) It has been entered; (2) the reasons therefor; and (3) that upon written request within 15 days after service of the order the matter will be set for a hearing which shall be conducted in accordance with the provisions of the Kansas administrative procedure act. If no hearing is requested and none is ordered by the dairy commissioner, the order will remain in effect until it is modified or vacated by the ~~state board of agriculture through the~~ dairy commissioner. If a hearing is requested or ordered, the ~~state board of agriculture through the~~ dairy commissioner after giving notice of and opportunity for hearing to the person subject to the order, shall by written findings of fact and conclusions of law vacate, modify or make permanent the order.

Sec. 24. On and after July 1, 2001, K.S.A. 65-2305 is hereby amended to read as follows: 65-2305. (a) The secretary of health and environment shall have the power and authority and is hereby charged with the duty of enforcing the provisions of this act, and the secretary is hereby authorized and directed to make, amend or revoke rules and regulations and orders for the efficient enforcement of this act.

secretary of agriculture through

H-9

that are required to be conducted in accordance with the provisions of the Kansas administrative procedure act, the presiding officer shall be the agency head, one or more members of the agency head or a presiding officer assigned by the office of administrative hearings.

(b) The provisions of this section shall not apply to the employment security law, pursuant to K.S.A. 44-701 *et seq.*, and amendments thereto or article 5 of chapter 44 and amendments thereto, except K.S.A. 44-532 and 44-5,120 and amendments thereto, concerning the workers compensation act.

(c) This section shall be part of and supplemental to the Kansas administrative procedure act.

Sec. 49. On and after July 1, 2000, K.S.A. 79-3313 is hereby amended to read as follows: 79-3313. All cigarettes sold in this state shall be in packages, and each of the packages shall bear evidence of payment of the tax thereon except that any railroad or sleeping car company licensed as a retailer is hereby authorized to sell cigarettes upon its cars without affixing stamps to the packages of cigarettes provided that monthly reports and payment of the tax due is made directly to the director in the manner and under the terms provided for by the director. In addition, manufacturers are hereby authorized to distribute in the state, through their authorized representatives or wholesale dealers, free sample packages of cigarettes containing less than 20 cigarettes without affixing stamps to the packages provided that monthly reports and payment of a tax at the rates prescribed by law are made directly to the director. No wholesale dealer or manufacturers' authorized representatives shall sell or distribute cigarettes, except free sample packages, to any person in the state of Kansas not holding a dealer's license as provided in this act. Such packages of sample cigarettes shall bear the word "sample" or "not for sale" and "state tax paid" in letters easily read.

Whenever the director shall have reason to believe that any manufacturer has violated the provisions of this section or the conditions provided by the director, the director shall conduct a hearing thereon in accordance with the provisions of the Kansas administrative procedure act ~~in the office of the director at Topeka~~. If upon the basis of such hearing it appears to the satisfaction of the director that such manufacturer has violated any of the provisions of this section or the conditions provided by the director, the director is hereby authorized to suspend or revoke the authorization to the manufacturer for such period as the director determines is necessary but in no case for more than one year.

Sec. 50. On and after July 1, 2002, K.S.A. 82a-1405 is hereby amended to read as follows: 82a-1405. (a) At the direction of the authority, the director may issue licenses for weather modification activities, as provided for in this act, but any licensee shall be limited in the exercise of

activities under the license to the specified method or methods of weather modification activity within the area of expertise of the licensee.

(b) At the direction of the authority, the director may issue a permit for each specific weather modification project or program, which may be comprised of one or more weather modification activities. Every such permit shall describe:

(1) The geographic area within which such activities are to be carried out;

(2) the geographic area to be affected; and

(3) the duration of the weather modification activities of the project or program, which period may be noncontinuous but which may not have a total duration exceeding one calendar year from the day of its issuance.

The director shall issue a permit only after it has been established that the project or program, as conceived, will provide substantial benefits or that it will advance scientific knowledge.

(c) The director shall make any studies or investigations, obtain any information and hold any hearings that the director considers necessary or proper to assist in exercising the powers or administering or enforcing the provisions of this act.

[~~The director may appoint a hearing officer~~ *use a presiding officer from the office of administrative hearings* ~~to conduct any hearings required by this act.~~] The hearings shall be conducted under the provisions and within any limitations of rules and regulations adopted by the authority.

(d) In order to assist in expanding the theoretical and practical knowledge of weather modification, the authority, to the extent that funds are available therefor, may cooperate with, support, participate in and promote research, development and operational programs in:

(1) The theory and development of weather modification, including those aspects relating to procedures, materials, ecological effects and the attendant legal and social problems;

(2) the utilization of weather modification for domestic, municipal, agricultural, industrial, recreational and other beneficial purposes; and

(3) the protection of life, health, property and the general environment.

(e) Subject to any limitations imposed by law, to further the purposes of this act, the authority may utilize available funds from the state and may accept federal grants, private gifts and donations from any source. Except as otherwise provided by law, the authority may use any such moneys:

(1) For the administration of this act;

(2) to encourage research and development projects by public or private agencies through grants, contracts or cooperative arrangements;

(3) to contract for and support local efforts in weather modification

activities to seek relief from or to avoid droughts, hail, storms, fires, fog or other naturally undesirable conditions.

(f) Under the direction of the authority, the director shall represent the state in matters pertaining to plans, procedures, or negotiations for cooperative agreements, or intergovernmental arrangements relating to weather modification.

Sec. 51. On and after July 1, 2002, K.S.A. 82a-1501a is hereby amended to read as follows: 82a-1501a. (a) The water transfer hearing panel shall consist of the chief engineer, the director and the secretary. The chief engineer shall serve as chairperson of the panel. All actions of the panel shall be taken by a majority of the members. The panel shall have all powers necessary to implement the provisions of this act.

(b) The panel shall ~~select a hearing officer~~ *request a presiding officer from the office of administrative hearings* to conduct a hearing in accordance with this act when: (1) An application for a water transfer is complete; or (2) the chief engineer, or the panel by a majority vote which includes the vote of the chief engineer, determines it to be in the best interest of the state to conduct a water transfer hearing on an application for a permit to appropriate water or an application for a change to an existing water right pursuant to the Kansas water appropriation act or on a proposed contract for the sale of water from the state's conservation storage water supply capacity, even though the appropriation or sale would not be a water transfer as defined by K.S.A. 82a-1501 and amendments thereto.

~~(c) The hearing officer shall be an independent person knowledgeable in water law, water issues and hearing procedures. The hearing officer shall be a presiding officer for the purposes of the Kansas administrative procedure act. Subject to approval by the panel, the hearing officer, on behalf of the state, may employ such personnel and contract for such services and facilities as necessary to carry out the hearing officer's duties under this act.~~

Sec. 52. On and after July 1, 2002, K.S.A. 82a-1502 is hereby amended to read as follows: 82a-1502. (a) No person shall make a water transfer in this state unless and until the transfer is approved pursuant to the provisions of this act. No water transfer shall be approved which would reduce the amount of water required to meet the present or any reasonably foreseeable future beneficial use of water by present or future users in the area from which the water is to be taken for transfer unless: (1) The panel determines that the benefits to the state for approving the transfer outweigh the benefits to the state for not approving the transfer; (2) the chief engineer recommends to the panel and the panel concurs that an emergency exists which affects the public health, safety or welfare; or (3) the governor has declared that an emergency exists which affects