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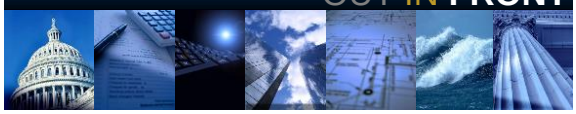


5th Annual Mid-South Agricultural & Environmental Law Conference

Accidental Clients

Lucian T. Pera
901-524-5278 | Memphis | lucian.pera@arlaw.com

Establishing an Attorney-Client Relationship

§ 14. Formation of a Client-Lawyer Relationship

A relationship of client and lawyer arises when:

(1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either

(a) the lawyer manifests to the person consent to do so; or

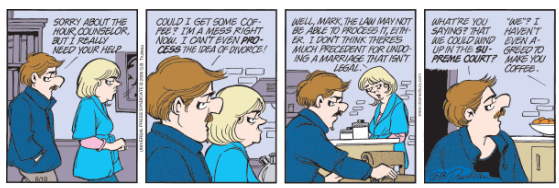
(b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; . . . .

1. Cocktail Party Chatterer

- You attend a casual cocktail party.
- Your cover is blown and INEBRIATE realizes you do bankruptcy work.
- INEBRIATE poses legal questions to you about his business' rights as a creditor in bankruptcy.

QUESTION: Is INEBRIATE a client?

1. Cocktail Party Chatterer



2. The Local Expert

- You are an expert on foreclosure law.
- CEO of OUT-OF-STATE BANK calls, and says he may need your help.
- CEO starts telling you about two problem loans, and asks you some questions about your state's law.

QUESTION: Do you have a client?

3. The Man Who Would Be Client

- POSSIBLE CLIENT wants help to purchase commercial property out of bankruptcy.
- You clear conflicts, and call POSSIBLE CLIENT with rate and retainer information.
- POSSIBLE CLIENT says he'll get back with you.

QUESTION: Do you have a client?

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4. The Man Who Would Be Client, Part Deux

- You're a part-time personal-injury lawyer.
- Potential client, INJURED GUY, hurt in work accident involving heavy machinery, has possible product liability claim.
- You decide not to take the case, and you're about to call INJURED GUY to tell him….

QUESTION: Do you have a client?

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5. Hidden Client?

- You're an expert on ag tax law.
- Lawyer COLLEAGUE retains you to assist on small part of larger deal he is handling.
- You provide detailed advice to COLLEAGUE on the ag tax angles of the deal.

QUESTION: Who's your client(s)?

ADAMS AND REESE LLP

6. The Joint Clients, or . . . Three Guys Walk into a Lawyer's Office

- You are a corporate lawyer.
- Three individuals want to start a new business, and ask you to form the business and be available to represent the new business.

QUESTION: Who's your client?

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7. I Love All My Children Equally

- You're foreclosing an $850,000 mortgage held by MEGA CORP. OF TENNESSEE.
- Your partner is asked to defend case brought by MEGA CORP. OF ALASKA, wholly-owned subsidiary of SUPER MEGA CORP.
- SUPER MEGA CORP. also wholly owns MEGA CORP. OF TENNESSEE, your client.

QUESTION: Can your partner take the case?

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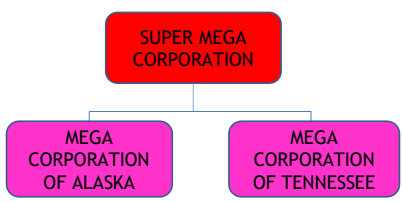
7. I Love All My Children Equally



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8. An Extended Corporate Family

- You're foreclosing an $850,000 mortgage held by MEGA CORP. OF TENNESSEE.
- Your partner is asked to defend case brought by MEGA CORP. OF ALASKA, wholly-owned subsidiary of SUPER MEGA CORP.
- You find outside counsel guidelines from MEGA CORP. OF TENN. representation….

QUESTION: Can your partner take the case?

ADAMS AND REESE LLP

9. Always the Last to Know

- You're foreclosing an $850,000 mortgage held by MEGA CORP. OF TENNESSEE.
- Your partner is defending a case brought by MEGA CORP. OF ALASKA, a wholly-owned subsidiary of SUPER MEGA CORP., *two companies unrelated to your client*.
- But then … you read that SUPER MEGA CORP. is buying MEGA CORP. OF TENNESSEE.

QUESTION: Is that a problem?

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10. The (Not-so?) Innocent Bystander

- You're hired by COMPANY to respond to government subpoena to COMPANY.
- You work with CEO, CFO, and COO on COMPANY's response to subpoena.
- CFO quietly asks you suspicious question, and you think you'd better let CEO know.

QUESTION: Any reason you shouldn't?

ADAMS AND REESE LLP

11. The Former Client

- Your partner represents SEVERAL PLAINTIFFS in discrimination case against PARENT COMPANY.
- PARENT COMPANY says your partner has conflict due to your past representation of its subsidiary, SUBSIDIARY COMPANY.
- Case for SUBSIDIARY COMPANY settled, and you've heard zero from them for more than three years, but the file is still "open."

QUESTION: Do you/your partner have a problem?

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Accidental Clients

Questions?

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5th Annual Mid-South Agricultural & Environmental Law Conference

Accidental Clients
Hypotheticals

June 8, 2018
University of Memphis Cecil C. Humphreys School of Law
Memphis, Tennessee

Lucian T. Pera
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Establishing an Attorney-Client Relationship

Restatement (Third) of the Law Governing Lawyers § 14 (2000):

§ 14. Formation of a Client-Lawyer Relationship

A relationship of client and lawyer arises when:

(1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either

(a) the lawyer manifests to the person consent to do so; or

(b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or

(2) a tribunal with power to do so appoints the lawyer to provide the services.

ABA Model Rule of Professional Conduct 1.18, Comment [2]:

> [2] A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. See also Comment [4]. In contrast, *a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client."* Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client."

Resources:

Susan R. Martyn, *Accidental Clients*, 33 HOFSTRA L. REV. 913 (2005), *available at:* https://pdfs.semanticscholar.org/441c/9945dc1170438778a8fe04956de3197f7b58.pdf.

State v. Jackson, 444 S.W.3d 554, 598-601 (Tenn. 2014) (attorney-client privilege question).

Stinson v. Brand, 738 S.W.2d 186 (Tenn. 1987) (malpractice decision).

Akins v. Edmondson, 207 S.W.3d 300 (Tenn. Ct. App. 2006).

State Bar of Calif. Standing Cte. On Prof. Resp. and Cond., Formal Op. 2003-161.

"Firm that Dropped Subsidiary as Client Can't Maintain Suit against Parent Company," 22 Law. Man. Prof. Cond. 450 (Sept. 20, 2006).

Order on Defendants' First Motion for Disqualification of Counsel, *Jones v. Rabanco Ltd.*, 2006 U.S. Dist. LEXIS 53766 (W.D. Wash. Aug. 3, 2006).

Lawyer Dealing with Unrepresented Person May Go Beyond Mere Advice to Seek Counsel," 25 Law. Man. Prof. Cond. 194 (April 15, 2009).

Ass'n of the Bar of the City of New York, Cte. on Prof. and Judicial Ethics Formal Op. 2009-2.

www.FreivogelOnConflicts.com

1.

COCKTAIL PARTY CHATTERER

One Saturday night, you drop by a cocktail party in honor of a friend who is moving out of town.

Late in the party, another guest, INEBRIATE, hears that you handle bankruptcy cases.

INEBRIATE starts to lay out a series of questions for you on what his rights as a creditor are in the pending bankruptcy of a customer of his business.

QUESTION: Is INEBRIATE a client?

2.

THE LOCAL EXPERT

You are an expert in foreclosure law.

One day, the CEO of OUT-OF-STATE BANK calls you, saying he has heard that you are the go-to gal on this kind of thing. He says that he may need to hire you.

He immediately starts telling you about two problem loans that OUT-OF-STATE BANK has in your city, and asks a few questions about notice requirements, costs associated with foreclosures in your state, and some other technical questions about how the law in your state.

QUESTION: Do you have a client?

3.

THE MAN WHO WOULD BE CLIENT

POSSIBLE CLIENT calls you from out of state about representation in the purchase of several large pieces of commercial property near your city's airport. He says a company now in bankruptcy owns the parcels.

You run a conflict check and call POSSIBLE CLIENT back and tell him that you are clear to take on the matter, what your hourly rate is, and that your firm will require a $5,000 retainer to be held as an advance against fees. POSSIBLE CLIENT thanks you, and tells you he will get back with you within a day or so.

QUESTION: Do you have a client?

4.

THE MAN WHO WOULD BE CLIENT, PART DEUX

Occasionally, you handle a plaintiff's personal injury case.

Last week, you met with a potential new client, INJURED GUY, who was badly hurt in a workplace accident involving a piece of heavy machinery. INJURED GUY was referred to you by his worker's compensation attorney, who thought that there might be a third-party product liability claim worth pursuing.

After spending about two or three hours investigating what is known about the accident history of the model of heavy machinery involved and reviewing the accident reports you have been able to obtain from the worker's compensation attorney, you and the firm decide *not* to take INJURED GUY's case.

You're about to call INJURED GUY and tell him the news….

QUESTION: Do you have a client?

5.

HIDDEN CLIENT?

A lawyer friend, COLLEAGUE, calls you, knowing that you are an expert on agricultural tax issues. COLLEAGUE says he does some tax work, but rarely deals with these specialized issues.

He asks to retain you to assist him in part of a large transaction on which he is working, where the ag tax issues are a small part of the deal. But he has identified an issue and needs to get it right.

COLLEAGUE retains you, and you provide him a 5-page memo on the ag tax law ramifications of the proposed transaction.

QUESTION: Who was (were) your client(s)?

6.

THE JOINT CLIENT or
THREE GUYS WALK INTO A LAWYER'S OFFICE . . .

You do a good bit of business and corporate work.

You are approached by three individuals who have a plan to launch a new product. They are, respectively:

(1) the inventor of the new product (a/k/a "Ms. Idea");

(2) a well-heeled local investor (a/k/a "Ms. Money"); and

(3) a veteran salesperson who has successfully sold similar products (a/k/a "Ms. Sales").

They want you to form a business for them, and they want you to be available to serve as the venture's lawyer.

QUESTION: Who's your client(s)?

7.

I LOVE ALL MY CHILDREN EQUALLY

You have been hired to foreclose on an $850,000 mortgage held by MEGA CORPORATION OF TENNESSEE. You have moved forward with notice, publication, and other details of the foreclosure, aiming at a sale in about thirty days.

Your partner is approached by an existing client of the firm to defend him in a case brought by MEGA CORPORATION OF ALASKA, which is a wholly-owned subsidiary of SUPER MEGA CORPORATION.

Upon asking a few questions, you and your partner figure out that SUPER MEGA CORPORATION wholly owns both MEGA CORPORATION OF TENNESSEE and MEGA CORPORATION OF ALASKA.

Thus, you and your litigation partner conclude that the parent of your client also wholly owns the company your litigation partner has been asked to be adverse to.

QUESTION: Can your partner take the case?

8.

AN EXTENDED CORPORATE FAMILY

This may sound familiar, but . . .

You have been hired to foreclose on an $850,000 mortgage held by MEGA CORPORATION OF TENNESSEE. The client is a wholly-owned subsidiary of SUPER MEGA CORPORATION. You have moved forward with notice, publication, and other details of the foreclosure, aiming at a sale in about thirty days.

Your partner is approached by an existing client of the firm to defend him in a case brought by MEGA OF ALASKA, LLP, which appears to be a 50/50-owned joint venture between a wholly-owned subsidiary of SUPER MEGA CORPORATION (*not* MEGA CORPORATION OF TENNESSEE) and some vaguely European-sounding unrelated company.

In an effort to be helpful after hearing you and your partner talking about this, your secretary brings you a copy of file-opening paperwork on the existing foreclosure file. She has tabbed some sort of "outside counsel guidelines" that you had signed and returned. In a provision toward the front, these guidelines say, "In taking on representation of a MEGA entity, you agree to treat all of our family of businesses as clients. A list of our businesses is attached as Exhibit A." Sure enough, there on Exhibit A to the guidelines, toward the end under "Joint Ventures," is MEGA OF ALASKA, LLP.

QUESTION: Can your partner take the case?

9.

ALWAYS THE LAST TO KNOW

This may sound familiar, but . . .

You have been hired to foreclose on an $850,000 mortgage held by MEGA CORPORATION OF TENNESSEE. You have moved forward with notice, publication, and other details of foreclosure, aiming at a sale in about thirty days.

Your litigation partner represents an existing client of the firm in defense of a case brought by MEGA CORPORATION OF ALASKA, which is a wholly-owned subsidiary of SUPER MEGA CORPORATION. Back when your partner's case came in, you and he looked carefully and determined that there was no relationship at all between MEGA CORPORATION OF TENNESSEE and his opponent in litigation. His client was just an unrelated business with a similar name.

In today's issue of *The Wall Street Journal*, you noticed a small item indicating that SUPER MEGA CORPORATION has announced that it has reached agreement to purchase a number of companies, including MEGA CORPORATION OF TENNESSEE. The deal is scheduled to close in about thirty days.

QUESTION: Is that a problem?

10.

THE (NOT-SO?) INNOCENT BYSTANDER

You are hired by COMPANY to help it respond to a government subpoena recently served. It's not clear who the target or targets of the investigation may be, but the government wants a large volume of documents, including lots of email, about a particular COMPANY division's financial relationships with one large customer.

You spend the better part of an afternoon closeted with COMPANY'S CEO, CFO, and COO, going over the subpoena, identifying the potentially responsive documents and information, and trying to figure out what the government may be looking for. As the meeting ends, you are still not sure, but you have divided up responsibility for gathering documents and data and for further internal investigation.

As the meeting breaks up, CFO hangs back a bit. When you and she are the only ones left in the conference room, she asks you a cryptic question about another COMPANY division's dealing with the same large customer whose business relationships with COMPANY appear, based on the subpoena, to interest the government. The question seems odd, the CFO seems slightly nervous, and it's clear she didn't want the COO or the CEO to hear the question. You answer as best you can.

On reflection, as you drive back to your office, you conclude that the question was strange enough that you think the CFO must be worried about the propriety of these other dealings. You worry that you should bring it up with the CEO.

QUESTION: Any reason you shouldn't?

11.

THE FORMER CLIENT

Your litigation partner represents SEVERAL PLAINTIFFS in prosecuting an employment discrimination case against PARENT COMPANY.

About a month after your partner files suit, he gets a letter from PARENT COMPANY's lawyer, asserting that your firm has a conflict of interest and threatening a motion to disqualify if he doesn't voluntarily withdraw.

After sorting out the facts, it turns out that you once represented SUBSIDIARY COMPANY, a wholly-owned subsidiary of PARENT COMPANY, in a contractual dispute unrelated to the present discrimination case. It settled in 2002, and you have heard nothing from the client contact in more than three years, even though the file remains "open" in your billing system. The settlement agreement lists you as SUBSIDIARY COMPANY's formal contact for notices, and the court's final order retained jurisdiction to itself to enforce the settlement.

QUESTION: Do you and your partner have a problem?

ADAMS AND REESE LLP

Martindale-Hubbell® LAWYER PROFILE PAGE

Best Lawyers Lawyer of the Year 2012

Lucian T. Pera

Partner

Litigation

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Memphis Partner Lucian T. Pera joined Adams and Reese in 2006 and focuses his practice on commercial litigation, media law, and legal ethics work. Lucian is a past Treasurer of the American Bar Association and the current President of the Tennessee Bar Association.

Lucian's civil litigation practice has ranged widely and includes a variety of commercial, personal injury and intellectual property litigation, as well as numerous state and federal appeals.

Lucian's extensive bar association work in the field of legal ethics and professional responsibility has resulted in local Tennessee, and national practice and leadership. He represents and advises attorneys, law firms, their clients, and businesses who deal with lawyers about all aspects of the law. Recent assignments have included defense of lawyers in disciplinary investigation, counseling clients with disciplinary and other claims against lawyers, advising law firms about loss prevention and claims, and defending and prosecuting motions to disqualify lawyers or for sanctions.

Lucian has represented many media outlets in all sorts of matters, ranging from claims and lawsuits for defamation or invasion of privacy to access to courtrooms, public records and meetings of government bodies. He has litigated several key media access cases, including a Tennessee Supreme Court case extending access under the Tennessee Public Records Act to records of private companies that are the "functional equivalent" of government (Memphis Publishing Co. v. Cherokee Children & Family Services, Inc., 87 S.W.3d 67 (Tenn. 2002)) and expressly confirming the constitutional right of public and press access to attend civil trials (King v. Jowers, 12 S.W. 3d 410 (Tenn. 1999)).

Other significant accomplishments include:

- Active involved in the most recent complete revision of the American Bar Association Model Rules of Professional Conduct, which are now the model for the lawyer ethics rules in virtually every American jurisdiction, serving as the youngest member of the ABA "Ethics 2000" Commission. Since his Ethics 2000 experience, Lucian has been deeply involved in the ABA House of Delegates' consideration of every other significant change to the ABA Model Rules. He currently chairs the governing committee of the ABA Center for Professional Responsibility, the home of the ABA's standing

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- **Commercial Dispute Resolution**
- **Ethics**
- **First Amendment / Media Law**
- **Lawyer Professional Liability**
- **Appellate**

INDUSTRIES

- **Media**

EDUCATION

- Princeton University, A.B., 1982
- Vanderbilt University School of Law, J.D., 1985

BAR ADMISSIONS

- Tennessee

COURT ADMISSIONS

- Tennessee
- United States District Court for the Western District of Tennessee
- United States District Court for the Middle District of Tennessee
- United States District Court for the Eastern District of Arkansas
- United States Court of Appeals for the Sixth Circuit
- United States Court of Appeals for the Second Circuit

PROFESSIONAL MEMBERSHIPS / AFFILIATIONS

ethics, discipline, and professionalism committees.

- Served as ABA Treasurer (2011-2014), including service on the ABA Board of Governors and Executive Committee. Prior service on the ABA Board of Governors as a young lawyer from 1994-1997, including chairing its Finance Committee and serving on its Executive Committee. Membership in the ABA House of Delegates, primarily representing the TBA, for all but three years since 1991. View video of his August 2013, February 2014, and August 2014 reports to the ABA House of Delegates.
- Served as ABA Treasurer (2011-2014), including service on the ABA Board of Governors and Executive Committee. Prior service on the ABA Board of Governors as a young lawyer from 1994-1997, including chairing its Finance Committee and serving on its Executive Committee. Membership in the ABA House of Delegates, primarily representing the TBA, for all but three years since 1991. View video of his August 2013, February 2014, and August 2014 reports to the ABA House of Delegates.
- Served as President of the Association of Professional Responsibility Lawyers (APRL), the national membership organization of lawyers who work in the legal ethics arena.
- Leadership of the Tennessee Bar Association ethics committee from 1995 through 2009, including spearheading the TBA's petitions to the Tennessee Supreme Court seeking ethics rules revisions. These included the TBA's successful petition that led to Tennessee adopting in 2002 its own version of the ABA Model Rules of Professional Conduct to replace Tennessee's prior ethics rules, which had been in place since 1970.
- Active involvement in the Media Law Resource Center, the national organization of media entities and their lawyers, including as a contributor to several of its annual national surveys on media law. He also currently serves as Vice President of the Tennessee Coalition for Open Government, an alliance of media and citizen groups advocating for transparency in government at all levels.
- Assisted in creation of the TBA and ABA websites and chairing the ABA Standing Committee on Technology and Information Systems.
- Serves as Vice President of the Tennessee Bar Association and will become President in June 2017.
- Lucian regularly provides expert witness testimony in matters concerning legal ethics, professional responsibility and the standard of care for lawyers and law firms. He also advises businesses seeking to do business with lawyers about how they may do so legally and ethically.

Lucian also writes and speaks frequently, both nationally and in Tennessee, on legal ethics and professional responsibility and media law. In addition, he routinely conducts presentations and seminars for national audiences.

- American Bar Association - Former Treasurer (2011-2014); Member of Board of Governors, Executive Committee; House of Delegates; Task Force on the Financing of Legal Education
- Tennessee Bar Association, Vice President, President Elect (2016), President (2017)
- Media Law Resource Center
- Memphis Bar Foundation - Fellow; Member, Board of Directors
- Miller-Becker Institute for Professional Responsibility - Advisory Board
- Memphis Bar Association
- Association of Professional Responsibility Lawyers - Past President
- American Law Institute - Fellow
- Tennessee Bar Foundation, Fellow
- College of Law Practice Management, Fellow
- Tennessee Coalition for Open Government, Vice President; Member, Board of Directors American Bar Endowment, Member, Board of Directors
- American Bar Retirement Funds, Liaison to Board of Directors

OTHER DISTINCTIONS

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- Best Lawyers® Lawyer of the Year – Litigation - First Amendment Law, 2012
- Mid-South Super Lawyers® - Business Litigation
- Best of the Bar - *Nashville Business Journal*
- "Top Rated Lawyer in Commercial Litigation" - *American Lawyer Media*, Martindale-Hubbell™, 2013
- Best 150 Lawyers in Tennessee - *BusinessTN Magazine*
- The Power Players - Business Litigation - *Memphis Business Quarterly Magazine*, 2010-2015
- Who's Who in American Law 1992-Present
- Justice Joseph W. Henry Award for Outstanding Legal Writing 1992
- Sam A. Myar, Jr. Memorial Award - Memphis Bar Association 1997
- President's Award - Tennessee Bar Association 2000, 2003

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Hypotheticals

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June 8, 2018

Accidental Clients
Resource Materials

1. Susan R. Martyn, *Accidental Clients*, 33 HOFSTRA L. REV. 913 (2005).

2. State v. Jackson, 444 S.W.3d 554, 598-601 (Tenn. 2014).

3. Stinson v. Brand, 738 S.W.2d 186 (Tenn. 1987).

4. Akins v. Edmondson, 207 S.W.3d 300 (Tenn. Ct. App. 2006).

5. State Bar of Calif. Standing Cte. On Prof. Resp. and Cond., Formal Op. 2003-161.

6. "Firm That Never Dropped Subsidiary as Client Can't Maintain Suit Against Parent Company," 22 Law. Man. Prof. Cond. 450 (Sept. 20, 2006).

7. Order on Defendants' First Motion for Disqualification of Counsel, Jones v. Rabanco Ltd., 2006 U.S. Dist. LEXIS 53766 (W.D. Wash. Aug. 3, 2006).

8. Ass'n of the Bar of the City of New York, Cte. on Prof. and Judicial Ethics Formal Op. 2009-2.

9. "Lawyer Dealing with Unrepresented Person May Go Beyond Mere Advice to Seek Counsel," 25 Law. Man. Prof. Cond. 194 (April 15, 2009).

THE UNIVERSITY OF TOLEDO COLLEGE OF LAW

Accidental Clients

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ACCIDENTAL CLIENTS

*Susan R. Martyn**

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* Stoepler Professor of Law and Values, University of Toledo College of Law. Portions of this article appear in and were inspired by my work on two projects with co-author, Lawrence J. Fox of Drinker Biddle & Reath, a previous Lichtenstein Lecturer. This Article began as a continuing theme in our casebook, TRAVERSING THE ETHICAL MINEFIELD: PROBLEMS, LAW & ETHICS (2004) and continued its development as the first chapter in our book RED FLAGS: A LAWYER'S HANDBOOK ON LEGAL ETHICS (2005). Larry and I met as advisors for the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS and continued to work and argue together as members of the ABA's Ethics 2000 Commission. A version of this Article was delivered as the 2004-2005 Howard Lichtenstein Distinguished Professorship of Legal Ethics Lecture on March 23, 2005, at Hofstra University School of Law.

I. WHY "ACCIDENTAL" CLIENTS?

Imagine any legal ethics issue, perhaps one you have read about, seen in a movie, or witnessed in person. What do all of these issues have in common? A client.

Thirty years ago, philosopher Richard Wasserstrom wrote an article exploring "role-differentiated behavior" in lawyers.[1] He began by observing that we all engage in this behavior when we favor the interests of some persons, for example, our children, over the general interests of others, for example, the children of our community, nation or world.[2] Like parents, lawyers rightly favor the interests of clients over the interests of others. The significance of choosing such a personal relationship brings with it obligations we do not otherwise recognize. For parents, nurture and support; for clients, fiduciary duties to stay focused on the clients' best interests as articulated by the client. In fact, some legal ethics issues arise because we owe these fiduciary duties to clients, which we may not properly intuit on our own. Once a client-lawyer relationship is formed, the law governing lawyers recognizes that the lawyer has assumed four core fiduciary obligations (the "4 C's"):

- Competence,[3]
- Communication,[4]
- Confidentiality,[5]
- Conflict of interest resolution.[6]

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1. Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5. HUM. RTS. 1, 3 (1975).
2. *See id.* at 4.
3. *See* MODEL RULES OF PROF'L CONDUCT R. 1.1, 1.3 (2003) [hereinafter MODEL RULES].
4. *See id.* at R. 1.4.
5. *See id.* at R. 1.6, 1.8(b), 1.9(c).

Legal remedies[7] for breach of the 4 C's, such as professional discipline,[8] malpractice,[9] breach of fiduciary duty,[10] fee forfeiture[11] and disqualification[12] also belong primarily, but not exclusively, to "clients."[13]

At the same time, lawyers may be consulted, and even paid, but not serve as "lawyers" for clients. Examples abound. Lawyers may be sought out by others because they are friends, escrow agents, corporate officers or other agents, rather than primarily for the purpose of obtaining legal assistance.[14] When this occurs, the attorney-client privilege and work product doctrine do not protect their communications in subsequent litigation.[15] Lawyers also act as expert witnesses, which usually limits some of the fiduciary duties they might otherwise owe.[16] And, of course, lawyers may also be clients, which raises intriguing questions about the relationship between the lawyer's lawyer and the client-lawyer's clients.[17]

Another group of legal ethics issues arises because in representing clients, lawyers assume other obligations to non-clients and to courts that can conflict with client loyalties. For example, lawyers have affirmative obligations not to assist client crimes and frauds and, on occasion, to disclose client confidences to prevent them.[18] Similarly,

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6. *See id.* at R. 1.7-1.8, 1.11-1.12.

7. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 5-6 (2000) [hereinafter RLGL].

8. *See id.* at § 5.

9. *See id.* at §§ 48, 50, 52-54.

10. *See id.* at § 49.

11. *See id.* at § 37.

12. *See id.* at § 6 cmt. i.

13. For example, in representing an organization, the "client" envisioned by Model Rule 1.13 will not be the same as the "client" for purposes of the prohibition against sexual relationships with "client" in Model Rule 1.8(j) and Comment 19. MODEL RULES, *supra* note 3, at R. 1.13, 1.8(j), 1.8 cmt. 19.

14. *See generally* Hughes v. Meade, 453 S.W.2d 538 (Ky. 1970) (holding that a lawyer retained by a person who sought to return stolen property primarily because of lawyer's good relationship with the police was required to reveal client's identity); *cf.* Dean v. Dean, 607 So. 2d 494, 495 (Fla. Dist. Ct. App. 1992) (holding that a lawyer retained to return stolen property who asked client whether client sought legal advice and whether the provision of legal advice included a condition precedent that the lawyer not disclose the client's identity was protected by the attorney-client privilege from revealing client's name).

15. RLGL, *supra* note 7, at §§ 72, 87.

16. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 97-407 (1997) (discussing a lawyer as an expert witness or expert consultant).

17. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 97-406 (1997) (discussing conflicts of interest in regard to representing opposing counsel in unrelated matter).

18. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-366 (1992) (discussing withdrawal when a lawyer's services will otherwise be used to perpetrate a fraud); ABA Comm. on

lawyers must be able to identify whether opposing parties or witnesses are "represented persons" to avoid prohibited ex parte contacts.[19]

In most situations, parents know who their children are, and lawyers know their clients. They dutifully and proudly enter each new client's identity in a law firm conflicts data base, check for conflicts with current and former clients, and proceed only if no conflict is revealed, or if proper informed consent to the conflict has been obtained.[20] But increasingly, the law governing lawyers has identified "accidental" clients, those clients that lawyers had little or no idea existed. This Article considers legally recognized client-lawyer relationships, many of which can be created accidentally from a lawyer's point of view, and often when a lawyer least expects it. Some of these may seem obvious, but others probably will surprise many lawyers and law students. So here, with apologies to David Letterman[21] and Anne Tyler,[22] is the Top Ten List of Accidental Clients.

II. THE TOP TEN ACCIDENTAL CLIENTS

10. Court Appointments

Client-lawyer relationships can be established by court order, regardless of lawyer consent.[23] In criminal cases, courts have recognized a constitutional right to counsel for over seventy years.[24] This right to defense representation was recognized first in some,[25] and then in all felony cases, on the ground that defense lawyers "are necessities, not

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Ethics and Prof'l Responsibility, Formal Op. 98-412 (1998) (discussing disclosure obligations of a lawyer who discovers that her client has violated a court order during litigation).

19. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 97-408 (1997) (discussing communication with government agency represented by counsel); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-396 (1995) (discussing communication with represented persons); 93-378 (1993) (discussing ex parte contacts with expert witnesses); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 91-359 (1991) (discussing a lawyer's contact with former employees of an adverse corporate party).

20. N.Y. CODE OF PROF'L RESPONSIBILITY DR 5-105(E) (2000) (requiring lawyers to maintain such a conflicts record keeping system, and to check it before taking on a new client).

21. David Letterman, Top Ten List, Late Show with David Letterman, *available at* http://www.cbs.com/latenight/lateshow/top_ten/ (last visited May 20, 2005).

22. *See generally* ANNE TYLER, THE ACCIDENTAL TOURIST (1985).

23. Powell v. Alabama, 287 U.S. 45, 73 (1932).

24. *See* Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389, 1448-60 (1992) (giving a history of the American tradition of an independent criminal defense bar).

25. *Powell*, 287 U.S. at 70 (stating that the Sixth Amendment requires counsel if fundamental unfairness would result); *see* Johnson v. Zerbst, 304 U.S. 458, 468 (1938) (holding that the Sixth Amendment requires counsel in all federal criminal proceedings).

luxuries," both to protect against the risk of wrongful conviction and to provide due process of law.[26] Rights to counsel in juvenile and certain misdemeanor cases followed in the 1960s.[27] Today, a person accused of a crime has a right to retained or appointed counsel in all "critical stages"[28] of criminal felony prosecutions and in misdemeanor cases where the defendant is sentenced to a term of imprisonment.[29] In addition, a person convicted of a crime has a Fourteenth Amendment right to counsel for capital sentencing hearings and for the first appeal of right.[30]

Courts have inherent power to appoint counsel to preserve this constitutional right in criminal cases.[31] For related reasons, courts recognize their inherent power in civil cases to preserve access to public dispute resolution for individual litigants and to maintain public respect for the courts as a politically legitimate arm of the justice system. Thus, where indigency prevents equal access to the civil justice system, courts can and will use statutory or inherent powers to request[32] or conscript[33] unwilling lawyers to represent clients when counsel is reasonably necessary to pursue a relatively complex case. Constitutional challenges to this inherent power have not succeeded unless clients' constitutional

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26. Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (holding that the Sixth Amendment requires right to counsel in all felony cases).

27. *In re* Gault, 387 U.S. 1, 34-42 (1966) (holding that the Sixth Amendment requires counsel for juvenile proceedings that may lead to commitment in state institutions); Argersinger v. Hamlin, 407 U.S. 25, 36-37 (1972) (holding that the Sixth Amendment requires counsel in misdemeanor cases where defendant is imprisoned); Alabama. v. Shelton, 535 U.S. 654, 674 (2002) (holding that the Sixth Amendment requires counsel in misdemeanor cases where defendant receives a suspended sentence).

28. Critical stages include preliminary hearings, some pretrial identification proceedings, and questioning by prosecutor or police designed to elicit inculpatory statements. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 569 (3d ed. 2000).

29. Scott v. Illinois, 440 U.S. 367, 373-74 (1979) (holding that counsel is not required in misdemeanor cases where the defendant is fined but not imprisoned); Nichols v. United States, 511 U.S. 738, 746-47 (1994) (holding that the defendant can receive an enhanced term of incarceration under federal sentencing guidelines even if a prior misdemeanor conviction resulted in a fine where no counsel was provided).

30. Douglas v. California, 372 U.S. 353, 357-58 (1963); Ross v. Moffit, 417 U.S. 600, 610 (1974) (holding that no right to counsel exists for discretionary state appeals); Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) (holding that no right to counsel exists in state habeas corpus proceedings).

31. *In re* Amendments to Rules, 573 So. 2d 800, 803-04 (Fla. 1990).

32. Mallard v. U.S. Dist. Ct. 490 U.S. 296, 301-02 (1989) (holding that 28 U.S.C. § 1915(d) allows federal judges to request that counsel serve pro bono in a civil case, but does not grant them the power to appoint unwilling lawyers).

33. Bothwell v. Republic Tobacco Co., 912 F. Supp. 1221, 1227 (D. Neb. 1995).

rights are at stake,[34] or the appointment prevents a lawyer from otherwise earning a "decent living."[35]

As officers of the courts, lawyers have a concomitant duty to accept court appointments.[36] The Model Rules reflect this understanding by obligating a lawyer to serve when appointed by a court unless that lawyer convinces the judge that a particular appointment would violate some other provision of the lawyer code, such as a duty of competence, confidentiality, or loyalty.[37]

For example, a lawyer who represents the other side in litigation would be faced with a nonconsentable conflict of interest.[38] A more common excuse is lack of competence, but courts put the burden on lawyers to establish their own lack of ability, and they assume that lawyers can become competent through study and mentoring.[39] Lawyers also have argued that taking on a representation will create an "unreasonable financial burden," but most courts refuse to accept this excuse unless accepting a court appointment would result in near total loss of the lawyer's current employment.[40] The same rule permits lawyers to plead that the client or cause is so personally repugnant that it would interfere with a client-lawyer relationship, but that too can be difficult to establish.[41] So if the judge orders a lawyer to serve, the lawyer should sit back and enjoy the learning experience. That lawyer might even be proud of the fact that he or she is serving in a system that does not consign people to jail without due process.

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34. *E.g.*, Zarabia v. Bradshaw, 912 P.2d 5, 7-8 (Ariz. 1996) (holding that a rotating system for appointing private lawyers for criminal defense in a county that refused to establish a public defender office presents too great a risk of ineffective assistance of counsel).

35. Jewell v. Maynard, 383 S.E.2d 536, 547 (W. Va. 1989) (holding that no lawyer should be required to devote more than ten percent of his time per year to court-appointed cases); Arnold v. Kemp, 813 S.W.2d 770, 776-77 (Ark. 1991) (holding that statutory fee cap of $1000 in capital cases constitutes an unconstitutional burden on appointed counsel).

36. MODEL RULES, *supra* note 3, at R. 6.2; RLGL, *supra* note 7, at § 14(2); Hawkins v. Comm'n. for Lawyer Discipline, 988 S.W.2d 927, 931, 940-41 (Tex. App. 1999), *cert. denied*, 529 U.S. 1022 (2000) (estate planning lawyer who intentionally violated a court appointment order and told HIV positive defendant he was not entitled to counsel, suspended from practice for one year).

37. MODEL RULES, *supra* note 3, at R. 6.2; RLGL, *supra* note 7, at § 14(2).

38. MODEL RULES, *supra* note 3, at R. 1.7(b)(3); RLGL, *supra* note 7, at § 122.

39. *E.g.*, Stern v. Grand, 773 P.2d 1074, 1080 (Colo. 1989) (holding that lawyer appointed to represent felony defendant did not meet his burden of establishing incompetence where he was a competent civil practitioner and could educate himself and associate with co-counsel).

40. Cunningham v. Sommerville, 388 S.E.2d 301, 304-05, 307 (W. Va. 1989) (holding that lawyer employed full time as corporate counsel not required to take criminal defense appointment, if employer's prohibition on taking outside employment meant she would lose her job).

41. United States v. Travers, 996 F. Supp 6, 14-16 (Fla. 1998).

9. *Accidental Consensual Client-Lawyer Relationships: Of Reasonable Reliance*

Nearly all lawyer code provisions assume that a professional relationship has been established, but do not explain how that occurs. General legal principles found in contract and tort law fill this gap.

Courts find that a consensual client-lawyer relationship has been formed if a prospective client requests legal assistance or advice (offer), a lawyer provides the service or agrees to provide it (acceptance), and the client pays for the service or agrees to pay for it (consideration).[42] The typical case that comes to mind involves a prospective client who sits down with a lawyer, discusses a legal matter, and hires the lawyer to proceed.

Courts also recognize implied client-lawyer relationships that can create accidental clients. They have found that a prospective client's reasonable reliance on a lawyer's advice or assistance suffices as an alternative for consideration (promissory estoppel).[43] Some courts prefer a torts analysis, which leads to similar results: A lawyer who renders legal service or advice to a person under circumstances which make it reasonably foreseeable that harm will occur to that person if the services are rendered negligently will be accountable to that person, even in the absence of any overt agreement to provide services or promise to pay.[44]

For example, a lawyer who tells a prospective client "I don't want to take your case" and "You don't have a case" may find that the prospective client reasonably relies on the second statement as legal advice. If the statute of limitations runs before this person finds out she may have a case, the lawyer who remembers only telling her he was not interested may find himself with an accidental client who can successfully assert malpractice against him.[45] Further, a lawyer who allows a non-lawyer employee to advise putative clients to notify potential defendants of an injury on the premises, arranges for a medical exam with the defendant's insurer, and instructs them to write the lawyer requesting legal assistance may have bound the lawyer by actual or apparent authority to an accidental client-lawyer relationship as well.[46]

These cases illustrate that courts impose a pre-contractual duty of good faith on lawyers by looking back on the matter from the

42. Bd. of Overseers of the Bar v. Mangan, 763 A.2d 1189, 1192 (Me. 2001).
43. Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686, 693 (Minn. 1980).
44. *Id.* at 693.
45. *Id.* at 690-91.
46. DeVaux v. Am. Home Assurance Co., 444 N.E.2d 355, 356-57, 359 (Mass. 1983).

perspective of a reasonable client. As a result, a lawyer's memory of who said what when may not be the version that ultimately prevails. An engagement or nonengagement letter will clarify the meaning of an initial consult, as well as plant the seeds of good will for future potential retainers.

Except in a few jurisdictions, the rules of professional conduct—for matters other than contingent fee agreements (a quite important exception)—do not require retainer or engagement letters. New York is the exception to this rule, recently enacting a new rule that requires engagement letters in all cases except those where the lawyer charges less than $3,000 or the "attorney's services are of the same general kind as previously rendered to and paid for by the client."[47] The New York rule illustrates why the use of engagement letters is such a good idea. It requires lawyers to address matters that have been the greatest source of misunderstanding between clients and lawyers: (1) an explanation of the scope of the legal services to be provided; (2) an explanation of attorney's fees to be charged, expenses and billing practices; and (3) information about the client's right to arbitrate fee disputes.[48] Taking the time to craft such an effective engagement letter is the best insurance policy against an unhappy, confused or cantankerous client.

Beyond these basic requirements, lawyers also can use engagement letters to prevent misunderstandings by clarifying other issues that might arise during the course of the matter, such as:

- Identifying the client and related parties;
- Identifying the goals of the representation;
- Defining the scope of the engagement;
- Identifying proposed staffing as well as agents of client or lawyer;
- Identifying third-party neutrals;
- Identifying and providing consents to actual or potential conflicts of interest;
- Determining confidentiality ground rules in multiple representations;
- Describing responsibilities of lawyer and client;
- Describing the fee agreement and billing schedule;
- Describing law firm policy about file retention;
- Specifying methods of communication;

47. N.Y. CT. R. §§ 1215.1, 1215.2. In domestic relations matters, New York requires lawyers to provide clients with both a Statement of Client's Rights and Responsibilities and a written retainer agreement, regardless of the fee charged. *Id.* at §§ 1400.2, 1400.3.

48. *Id.* at § 1215.1(b).

• Specifying grounds for withdrawal or termination;
• Specifying methods of dispute resolution between lawyer and client.[49]

8. *Prospective Clients*

When prospective clients discuss the possibility of obtaining legal services with lawyers, implied client-lawyer relationships can develop. Though prospective clients may not always become full-fledged clients, they become clients to the extent that they reasonably rely on a lawyer's legal advice.[50] Even when lawyers make it clear that they will not take on a representation, to the extent a lawyer offers legal advice and gains information from such a person, two duties, however limited, attach to such an encounter: competence in any advice offered and confidentiality that cloaks anything the lawyer learns.[51]

In fact, anytime a lawyer banishes a prospective client from his or her office, the lawyer should confirm the rejection of the client in writing in a nonengagement letter, lest the client assert later she thought the lawyer agreed to handle her matter. Nonengagement letters can be used to decline a specific request for representation, to clarify that a lawyer represents some, but not all of the parties to a matter, to prevent reliance by unrepresented third parties, who may or may not be beneficiaries of a client, or to prevent a claim for negligent misrepresentation.[52]

With respect to the duty of competence, lawyers should be careful to say what they mean. "You have no case" is legal advice, and if offered to a prospective client it means that the lawyer has accepted that person's offer or request for legal services. Add consideration (any payment for the consult) or detrimental reliance and courts will find a client-lawyer relationship, complete with the 4 C's appropriate to the scope of the representation. If a lawyer means, "I don't want to waste my time determining whether you have a case," or "I don't ever handle matters like this one," or "I can't take your case because I currently represent the other side," the lawyer should make that clear, or run the

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49. RONALD E. MALLEN & JEFFREY M. SMITH, PREVENTING LEGAL MALPRACTICE § 2.12 (5th ed. 2000 & Supp. 2003); GARY A. MUNNEKE & ANTHONY E. DAVIS, THE ESSENTIAL FORMBOOK: COMPREHENSIVE MANAGEMENT TOOLS FOR LAWYERS 141-144 (2000); *see also* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 02-425 (2002) (discussing retainer agreements requiring the arbitration of fee disputes and malpractice claims).

50. Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1319-20 (7th Cir. 1978).

51. MODEL RULES, *supra* note 3, at R. 1.18; RLGL, supra note 7, at § 15.

52. MUNNEKE & DAVIS, *supra* note 49, at 280.

risk that a prospective client will remember the conversation differently after the statute of limitations expires.[53]

Determining whether to retain a lawyer requires a prospective client to disclose some information.[54] To facilitate this exchange, the law governing lawyers cloaks the initial prospective client consult with the same confidentiality protection clients receive.[55] If a lawyer decides not to represent the prospective client, that person or entity becomes a "former client" for purposes of the confidentiality rules.[56] The result: Even if a lawyer never opens a client file, the lawyer must enter the prospective client's identity in the law firm's conflicts database, and refrain from using or disclosing the information shared in the discussion.[57]

In addition to the formal prospective client-lawyer meeting, prospective clients lurk in at least ten circumstances that have trapped unwary lawyers in accidental client-lawyer relationships that they never intended to create.

A. Beauty Contests

Increasingly, prospective clients want to audition lawyers. Some seek a lawyer for a personal matter, such as a divorce, and want to personally assess the style as well as the skills of the lawyer. Others face large-scale litigation and want to find the best lawyers before other parties to the matter engage them.

Model Rule 1.18 parallels case law and reminds lawyers of their confidentiality obligations to their prospective clients.[58] It also provides that learning confidential information from another party to the matter need not necessarily conflict out a law firm, as long as two conditions are met. First, the firm has to have taken steps to avoid gaining no more than the minimum information required to learn if it can take on the matter.[59] Second, the lawyer or lawyers who learned the information have to be screened from working on the new matter.[60]

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53. Flatt v. Super. Ct. of Sonoma City, 885 P.2d 950, 951 (Cal. 1994) (holding that lawyer who informed prospective client she could not represent her due to a conflict has no duty to warn prospective client about relevant statute of limitations).

54. MODEL RULES, *supra* note 3, at R. 1.18 cmt. 3.

55. RLGL, *supra* note 7, at § 15.

56. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 90-358 (1990) (discussing protection of information imparted by prospective clients).

57. MODEL RULES, *supra* note 3, at R. 1.18(b); RLGL, *supra* note 7, at § 15.

58. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 90-358 (1990) (discussing protection of information imparted by prospective clients).

59. Poly Software Int'l, Inc. v. Su, 880 F. Supp. 1487, 1491 (D. Utah 1995) (holding that lawyer who controlled disclosures in initial interview so that no details of proposed litigation were

What if several prospective clients interview a lawyer for the same matter? If that lawyer had no understanding with the first prospective client that meeting with her—regardless of what was said—would not preclude an alternative representation, then that prospective client will be able to conflict that lawyer and that law firm out of representation of other clients in the same matter if the lawyer learned any confidential information.[61] Courts may uphold advance waivers from prospective clients in this situation as long as the waiver warns that anything said at the beauty contest will not be asserted as a basis for barring them from taking on another client in the same matter.[62] And, as with all prospective waivers, this one will be subject to challenge on the ground that the client had no idea when it entered into it that the law firm would learn so much about the prospective client.[63] The irony here is that the more a lawyer shows off at the audition, the more likely it is that lawyer will be conflicted out, even if he or she secured a prospective waiver.[64]

B. Public Speeches

Prospective clients sit in audiences listening to lawyers speak and answer questions, and they also read books, articles and brochures prepared by lawyers. Lawyers should be proud of their role in educating the public about legal rights and obligations, and, of course, such occasions present the opportunity to advertise the lawyer's expertise and willingness to take on new clients as well. As long as the lawyer-speaker describes the law generally or explains its applications to general patterns of conduct, the lawyer does not accept any offer of any

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revealed not disqualified); B.F. Goodrich Co. v. Formosa Plastics Corp., 638 F. Supp. 1050, 1052-53 (S.D. Tex. 1986) (holding that a one-day discussion of case did not disqualify lawyer where client's inside legal counsel monitored disclosures and confidential information disclosed not likely to harm prospective client).

60. MODEL RULES, *supra* note 3, at R. 1.18.

61. Bridge Prods., Inc. v. Quantum Chem. Corp., No. 88 C 10734, 1990 WL 70857, at *4 (N.D. Ill. Apr. 27, 1990) (holding that a lawyer who learned settlement terms and strategy of a prospective client during a beauty contest and did not seek waiver was disqualified despite efforts to screen affected lawyer).

62. *See generally* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-372 (1993) (discussing waivers of future conflicts of interest).

63. *Id.*

64. State *ex rel.* Youngblood v. Sanders, 575 S.E.2d 864, 871 (W. Va. 2002) (holding that a lawyer was not disqualified from representing defendant where codefendant earlier consulted his paralegal but did not disclose information that was not already known by the police); Bays v. Theran, 639 N.E.2d 720, 724 (Mass. 1994) (holding that a lawyer was disqualified where one telephone conversation with prospective client included discussion of the merits of the case).

prospective audience-client to take on a new matter.[65] However, when a member of the lawyer's audience asks a question that depends upon an assumption of specific facts, the lawyer who offers a fact-specific answer may be accepting the offer by giving legal advice to that person.[66] To avoid this, lawyers should begin a response with "I'm not here to offer specific legal advice" (and then not do it), or "A person facing that situation would be wise to hire a lawyer for further advice" (which constitutes legal advice, but reliance on that admonition is unlikely to get the lawyer in trouble).

Lawyers are in especially dangerous territory when they begin a response with "There's no case/redress/cause of action in that circumstance" because the listener could rely on that advice and fail to seek a lawyer for a full opinion before the statute of limitations expires.

C. Advertising

Prospective clients also read or listen to advertising. Lawyers who are careful about giving legal advice to audiences should act with equal circumspection in writing advertising copy. It's great to educate the public about legal services and the law that provides persons with legal rights and responsibilities,[67] but stating anything about the law applied to specific facts that might be detrimentally relied on by a person unfamiliar with the law and its application can create an accidental client, whose name the lawyer does not know.

Lawyers can add a disclaimer to their advertising to prevent reliance, but they should be sure that it clearly informs readers why any reliance on their ad is not reasonable. "You should not rely on this message for legal advice" may not be sufficient if the lawyer has already given legal advice. Adding a "because" (every case differs, or a lawyer must evaluate all the facts, or the law provides for various defenses, or whatever else explains the situation) that spells out why the prospective client needs the lawyer (not just the lawyer's ad) and why reliance on the ad alone is unreasonable can eliminate an accidental client.

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65. Utah Bar Ethics Advisory Op. Comm., Formal Op. 99-04 (1999) (discussing the ethical considerations that govern a lawyer who wishes to conduct legal seminars; provide legal information to groups of retirement home residents; conduct open houses; set up trade booths; participate in bar-sponsored question and answer sessions; or make in-person contacts with potential clients).

66. *See id.* (holding that a lawyer who provides individualized legal advice during the course of a law-related seminar would be providing legal services).

67. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 334 (1974) (discussing the publicizing of the services of a legal services office).

D. E-Lawyering

Prospective clients also surf the web looking for legal information. If a lawyer would not say it in person to an audience, or write it in a newspaper, why would a lawyer create the same problem on the lawyer's website? Lawyers should feel free to use email and to create websites that advertise and educate the public, but also should understand that they may be entering a murky divide.[68] Targeted mailings—for example to the victims of an accident—are permissible.[69] In-person or telephone solicitations are not.[70] Although the Supreme Court has not yet weighed in on the issue, the comments to Model Rule 7.3 indicate that targeted email solicitations are permissible, but that interactive email conversations are not.[71] Some jurisdictions do not make this distinction.[72]

A lawyer's website can establish client-lawyer relationships with those who request the lawyer's assistance after reading the website's informative communication. But an unknown person also can rely on website legal advice that applies to that person's individual situation. For that reason, websites should invite inquiries, not reliance. Lawyers who want to offer prospective clients legal advice should know who they are, do a conflicts check, and, if they like, charge for the consult. These overt steps should trigger the lawyer's natural tendency to remember that the 4 C's have attached. Lawyers who want to attract new clients only after they have spoken to them should make sure their website disclaimer clearly informs prospective clients why.

E. Social Gatherings

Prospective clients occasionally appear at social events. A law firm that holds an open house to celebrate its new location may deliberately

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68. N.Y. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 709 (1998) (discussing the use of the internet to advertise and to conduct law practice focusing on trademark; use of Internet e-mail; use of trade names).

69. Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 479 (1988); *cf.* Florida Bar v. Went For It, Inc., 515 U.S. 618, 635 (1995) (upholding a state rule that bars such mailings within the first thirty days after the accident).

70. Ohralik v. Ohio St. Bar Ass'n, 436 U.S. 447, 454 (1978).

71. MODEL RULES, *supra* note 3, at R. 7.3 cmt. 1-3; Ohio Supreme Court on Legal Ethics and Prof'l Responsibility, Formal Op. 2004-1 (2004) (stating that lawyers are discouraged, but not prohibited from advertising legal services by sending unsolicited e-mails).

72. *E.g.*, D.C. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Formal Op. 316 (2002) (holding that lawyers may participate in chat rooms with prospective clients but should avoid giving specific legal advice).

invite them.[73] Everyone loves to get free legal advice, even if it is only worth what they are paying for it. Lawyers are easy targets at social occasions, where guests may be loosened up a bit and ready to talk. When the host introduces a lawyer and non-lawyer and the latter says: "So, you're a lawyer," the lawyer must think: *This may be a prospective client, so I should be careful about getting information and giving legal advice.* Of course, the lawyer who is too tired or otherwise under the weather, should just say, "Not tonight, I'm off the clock."

Again, any response to a specific legal question could indicate a lawyer's acceptance of the other person's offer or request for legal advice. If that person reasonably relies and is harmed, malpractice could result. Even if he or she doesn't rely on the lawyer's advice, the information shared could be confidential if that person later is identified as a prospective client under Model Rule 1.18.[74]

F. Consulting Lawyers

Prospective clients may lurk in the guise of another lawyer who seeks a lawyer's advice. For example, when an old law school friend calls and asks what to do about a difficult client who will not pay his bill and threatens a malpractice suit, the responding lawyer has at least one accidental client. The law school friend is asking for legal advice and will become a client if the responding lawyer offers it. If the friend shares confidential information about his client for the purpose of furthering his representation of that client, then his client also might become the responding lawyer's client. Lawyers who wish to avoid these accidental clients should conduct such conversations in a hypothetical format. Even then, friends can be considered clients insofar as lawyers offer advice about the effect of the law on the friend's conduct (whether she can withdraw from the representation, collect her fee, or avoid a malpractice suit). If a lawyer has learned the identity of a consulting lawyer's client in the course of a conversation, and if the consulting lawyer has obtained the client's permission for the consult, then the responding lawyer probably has undertaken a client-lawyer relationship with the calling lawyer's client as well. That event should trigger a conflicts check before any advice is offered.[75]

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73. See Wis. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Formal Op. E-94-3 (holding that lawyers may hold open houses to which business owners in the neighboring community receive written invitations).

74. MODEL RULES, *supra* note 3, at R. 1.18(b).

75. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 97-406 (1997) (discussing lawyers as the lawyer for, or client of, another lawyer).

G. Referral Fees

Prospective clients become real accidental clients when a referring lawyer intends to split a fee. Lawyers who are too tired, busy, or inexperienced to handle a matter wisely, refer the prospective client to the best lawyer in town who has agreed to share her fee with them. Everybody wins. But, does the referring lawyer have a client? If he or she shares the fee, yes.[76] Model Rule 1.5(e) allows for referral fees as long as three conditions are met.[77] The total fee must be reasonable, the client must agree in writing to the arrangement including the share each lawyer will receive, and the clincher: the fee must either reflect the proportion of services each lawyer provides to the client, or each lawyer "assumes joint responsibility for the representation."[78] The latter condition makes the referring and receiving lawyers jointly and severally liable for the "representation as a whole."[79] This means that they both have a client whether or not the referring lawyer agreed to or actually performed any service beyond the referral.

Recognizing referral clients as real clients should lead lawyers to take a number of other steps. First, the referred client's name should be entered in both lawyers' conflicts database. Second, if the client calls the referring lawyer for reassurance about advice or service received from the best lawyer in town, that lawyer should follow up to avoid his or her own tort liability. Third, the referring lawyer should be sure that the best lawyer in town properly informed the client in writing about the nature of the agreement. Otherwise, both lawyers have charged an illegal fee and may not be able to collect at all.

Lawyers who refer a case to another lawyer because they or someone in their firm has a nonconsentable conflict of interest cannot agree to or collect a referral fee, because it will be impossible for them to work on the matter or "assume[] joint responsibility for the representation."[80]

H. Unrepresented Parties

Unrepresented parties, even those on the opposite side of a transaction in which a lawyer represents a client, also can masquerade as prospective clients. For example, such a person may attempt to get legal advice from the other party's lawyer. If the lawyer gives it, the lawyer

76. MODEL RULES, *supra* note 3, at R. 1.15(e).
77. *Id.*
78. *Id.*
79. MODEL RULES, *supra* note 3, at R. 1.5 cmt. 7.
80. MODEL RULES, *supra* note 3, at R. 1.5(e)(1).

has a new client. If the lawyer's legal advice conflicts with obligations to the lawyer's first client, the lawyer has violated both the conflicts of interest rules as well as the rule that protects unrepresented persons from overreaching.[81] The lawyer should have warned the unrepresented party that the lawyer does not represent or advocate for anyone but the original client, and should have advised the unrepresented person to secure independent counsel.

Similarly, a lawyer who closes the real estate transaction for a buyer might be asked by the unrepresented seller to register the deed. If the buyer's lawyer agrees, most courts will find that the buyer's lawyer has a new client, albeit for a limited purpose.[82] The unrepresented party asked the lawyer to perform a legal task, the lawyer agreed, and the seller's detrimental reliance substitutes for consideration. If the lawyer failed to follow through on what he or she agreed to accomplish and caused harm, that lawyer is liable. From the seller's prospective, it is foreseeable that the seller could be harmed if the buyer's lawyer fails to register the deed. Any lawyer who agrees to perform a legal task for an unrepresented party, should follow through or risk liability.

I. Family Members

Family members can appear to lawyers as clients, representatives of other clients, or prospective clients. For example, if Son asks a lawyer to draft Dad's will, or transfer Dad's assets to make Dad eligible for Medicaid, the lawyer's client is Dad, whose money and legal rights are at stake. Son is Dad's agent in requesting the lawyer's services. But what if Son is the beneficiary of some of Dad's transactions? Is Son then relying on Dad's lawyer for legal advice for himself as well?

Lawyers bear the burden of clarifying which family members they represent, and if they intend to represent more than one, to identify and respond appropriately to joint client conflicts of interest.[83] Written engagement agreements should force lawyers to think about the implications of any joint representation and clarify murky family situations.

J. Limited-Term Pro Bono Services

Persons who seek legal information from volunteers in a limited-term nonprofit program also qualify as prospective clients, and become

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81. MODEL RULES, *supra* note 3, at R. 1.7, 4.3.

82. *E.g.*, Kremser v. Quarles & Brady, L.L.P., 36 P.3d 761, 764-65 (Ariz. Ct. App. 2001) (holding corporation's lawyers responsible for perfecting nonclient creditor's security interest).

83. MODEL RULES, *supra* note 3, at R. 1.7 cmt. 27.

real clients for a limited time and purpose once they receive legal advice. For example, lawyers who agree to staff a hotline or "Ask a Lawyer" night at a local television station or at the local courthouse kiosk once a month, will be answering questions about legal problems, and probably offering legal advice. Some lawyers are making good on their pro bono commitment under Model Rule 6.1 and helping people who really need legal services.[84] These lawyers have assumed the 4 C's, which mean that they must communicate adequately, give competent advice, keep the client's confidences, and resolve conflicts.

But here, running a conflicts check before answering any questions would make short-term legal services virtually impossible to provide. Yet without such a check, the potential exists for a pro bono lawyer to give a person legal advice contrary to the interests of a current client of that lawyer's law firm. Model Rule 6.5 was drafted with these considerations in mind. Lawyers who serve pro bono hotlines are free to take on any matter that does not involve a readily apparent conflict of interest without making an elaborate conflicts check. This approach facilitates pro bono service by making lawyers responsible for conflicts only when they know about them on the spot. If a caller wants to sue the lawyer's biggest client, the lawyer must excuse himself or herself from answering the question. But the lawyer is not required to inquire into the potential adversary's identity, and if the lawyer does not know the name of the caller or the names of other parties, or if the lawyer does know, but does not know that the adversary is currently a client of the lawyer's law firm, then the rule protects both the pro bono client, who receives legal advice, and the lawyer, who is not aware of any conflict.

K. Future Prospective Clients

Future clients, those who have neither spoken to nor identified themselves to a lawyer, can appear as accidental clients in the midst of another client representation. For example, an opposing party might make a settlement offer contingent on the plaintiff's lawyer agreeing never to sue the defendant again. Or a global settlement agreement might be sought in a mass tort action, which purports to include all current as well as all future cases by the firm.[85] More creatively, a party might consider a restriction on future use of information learned during the

84. MODEL RULES, *supra* note 3, at R. 6.1; RLGL, *supra* note 7, at § 38 cmt. c.

85. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-371 (1993) (discussing restrictions on the right to represent clients in the future).

course of the representation against the same party.[86] These practices violate Model Rule 5.6, which bans lawyers from offering or accepting as part of a settlement any restriction on their right to practice law.[87] This rule is designed to save lawyers from the trap that would be created by it being in the best interests of the present client to accept the limitation even though the lawyer, and more importantly potential new clients, would want the lawyer experienced in these matters to be able to take on new representations against the same opponent.[88]

Future clients also should be considered whenever funding restrictions or limitations appear imminent. For example, legal services lawyers may need to turn away otherwise eligible clients if faced with funding cutbacks, or may have to restrict the scope of future representations to meet funding restrictions.[89]

7. Joint Clients

A. The Issues

Accidental clients sometimes cluster in groups. After all, as human beings, we want and need to work together. So many more endeavors are possible with cooperation: Family solidarity, successful business partnerships, and innovative joint ventures all come to mind. Yet lawyers, perhaps enabled by law school education, tend to atomize things. Our paradigm is one lawyer/one client. Undivided loyalty. We are also expensive. The costs for the legal fees associated with any endeavor presents an impediment to securing the necessary legal services. To compound that expense by requiring each prospective client to hire his, her, or its own lawyer only makes matters worse.

With that tension palpable, the temptation for the lawyer confronted with multiple clients to help them economize usually is quite high.[90]

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86. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 00-417 (2000) (discussing settlement terms limiting a lawyer's use of information).

87. Formal Opinion 00-417 provides an exception when a lawyer seeks or agrees to a settlement term limiting or prohibiting disclosure (rather than use) of information obtained during the representation. *Id.*

88. *Id.*

89. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 96-399 (1996) (discussing ethical obligations of lawyers whose employers receive funds from the legal services corporation to their existing and future clients when such funding is reduced and when remaining funding is subject to restrictive conditions).

90. A lawyer also might seek to use joint clients as a means to unfairly double bill them, something prohibited by ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-379 (1993) (discussing billing for professional fees, disbursements and other expenses).

Whenever two or more prospective clients discuss a future representation with one lawyer, that lawyer must be clear whether he or she can represent one, some, all, or none. Some joint client conflicts are nonconsentable, which means that the lawyer must tell the parties that representation of all of them is not permitted. Other joint client conflicts are consentable, but first must be recognized before they can be waived by adequate informed consent, including attention to confidentiality as well as loyalty issues.[91] Once again, lawyers bear the burden of identifying the conflicts issues and obtaining informed consent.

To get through the loyalty maze, two things must occur. First, the lawyer must carefully set out the ground rules for the joint representation. What will the lawyer do with one client's confidential information? What will occur if the lawyer identifies a conflict of interest? May the lawyer agree now to represent only one of the co-clients, subject obviously to potential challenge later by the others? Second, the lawyer must remain ever vigilant for the development of conflicts during the representation and immediately notify the clients and address the matter—it would be hoped based on prior understandings.

So if there are two or more people sitting across a lawyer's desk seeking legal services (even husband and wife), all of the lawyer's ethical antennae should be poised, and if the lawyer has any doubts about whether the representation can go forward on these terms, the lawyer should ponder his or her 4 C obligations to each individual client.

Lawyers also face a potential joint client circumstance when a prospective client seeks representation that will have a material adverse effect on another current client of the law firm. Of course, a lawyer will rarely be able to respond to such a circumstance unless the lawyer knows it exists. This is why every law firm, from solo practices to huge multi-office conglomerates, must have a conflicts system that allows each lawyer to search the file, as well as poll her colleagues, to determine whether a proposed client representation will conflict with the firm's representation of another current client.[92]

B. The Lawyer's Role

The original ABA Model Rules included Rule 2.2, entitled "Lawyer as Intermediary," designed to address some joint representations. But

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91. *See, e.g.*, Fla. Bar Ass'n Comm. on Prof'l Ethics, Op. 02-3 (2002) (discussing the representation of both driver(s) and passenger(s) in a car accident).

92. *See* Susan R. Martyn, *What You Should Know About Implementing Effective Law Firm Conflict of Interest Systems*, 40 PRAC. LAW. 15 (1994).

this rule seemed to suggest that lawyers could think of themselves as being "lawyers for the situation" and neglect focused attention to conflict and confidentiality obligations. To clarify a lawyer's obligation to joint clients, former Model Rule 2.2 has now been jettisoned, and its comments were rightfully moved to Model Rule 1.7, the general conflict of interest rule governing concurrent client conflicts of interest.[93]

Thinking of themselves as lawyers for the situation can invite lawyers to favor the interests of one client at the expense of another. In the words of Judge Noonan, lawyers in all joint client representations can be tempted to "overidentify" with one client and "underidentify" with the other.[94] In serving the one, the lawyer may be tempted to breach duties to the other.[95]

Judge Noonan recalls a famous incident that became the focus of future Justice Louis Brandeis's Senate confirmation hearings.[96] Brandeis recommended that a client assign his business assets for the benefit of creditors.[97] He did not tell the client that this assignment constituted an act of bankruptcy, or that Brandeis's law firm represented one of the creditors.[98] Five days later, Brandeis, as lawyer for the creditor, instituted involuntary bankruptcy proceedings against the client who had assigned his business assets.[99] Brandeis later claimed that he had been "counsel to the situation," not counsel to each of his individual clients.[100] Here is Judge Noonan's characterization of Brandeis's conduct:[101]

> Underidentification is here, no doubt, carried to the point of caricature. The lawyer does not remember that he took the client as a client. The lawyer does not give the client the most elementary advice about the consequences of the act the lawyer is advising him to perform. The lawyer represents another client and, acting for that client, puts his unremembered client into bankruptcy. At the heart of the situation is the lawyer's desire to abstract himself from the needs and pressures of a particular individual in order to go on and straighten out a mess. In

93. MODEL RULES, *supra* note 3, at R. 1.7, cmts. 29-33.

94. *See* John T. Noonan, Jr., *Propter Honoris Respectum: The Lawyer Who Overidentifies with His Client*, 76 NOTRE DAME L. REV. 827, 833-34 (2001).

95. *See id.*

96. *Id.* at 829.

97. *Id.* at 831.

98. *Id.* at 832.

99. *Id.*

100. *Id.*

101. Judge Noonan points out that this episode was far from typical, but was the "most damaging episode" that Brandeis's enemies could cull from a distinguished thirty year career in law practice. *Id.* at 829.

> some other world, law could be practiced in that fashion. It is not the way law has been generally practiced in ours.[102]

Lawyers like this can abstract themselves from clients, and may risk ignoring their fiduciary duty to one client because they favor another client's interest. In intentionally or inadvertently favoring one client over another, they act as instrumental lawyers willing to do the favored client's bidding, perhaps presuming that that client seeks the maximum financial reward, liberty, or security from the other client. At the same time, they act as directive lawyers for the other, less-preferred client, perhaps assuming that the favored client's best interest requires the lawyer to direct a particular result. In other words, representing joint clients can lead to instrumental behavior, as well as directive behavior with clients.

The law governing lawyers responds to both of these extremes with concrete incentives that steer lawyers away from the dangers of violating their fiduciary duty and exceeding the bounds of legitimate advocacy. Lawyers who favor or tend toward an instrumental role with some or all of their clients need to be especially alert to the limits of the law that apply to their own conduct as well as those of their clients. The lawyers who evade those limits suffer liability for fraud and malpractice, sanctions for violations of procedural rules, criminal liability, disqualification, and professional discipline. On the other hand, lawyers who favor or tend toward a directive role in some or all of their client-lawyer relationships need to be vigilant to avoid client remedies for breach of fiduciary duty, such as malpractice liability, disqualification, loss of a fee, and professional discipline.

Fortunately, most lawyers avoid both of these extremes most of the time by acting as collaborators with their clients. They do not favor one client over another, or, if they worry about whether they might, they refuse to take on a joint representation. They realize that the rules of professional conduct allow them a great deal of professional discretion to do the right thing.

When considering whether to represent joint clients, this means that a lawyer's advocacy role must be tamed to allow the joint clients to take over greater responsibility for the representation. The lawyer provides all of the legal options and the clients make all of the decisions. If the clients are unable or unwilling to do so, the lawyer must refuse to serve both or withdraw from representing both of them, because the lawyer will be unable to continue without favoring one over the other. The

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102. *Id.* at 833.

clients will not be surprised at this result if the lawyer has warned them about it at the outset, including memorializing the confidentiality agreement they chose in the retainer agreement.

6. Third-Person Direction

A. The Issues

Just as representing joint clients can tempt lawyers to favor one client's interests over another, a third person who is not a client can tempt lawyers to treat them as if they too were clients. This is especially likely to occur if the third party pays for the representation. When a lawyer wakes up from the dream of guaranteed payment for the representation, suddenly the lawyer realizes that surprise, surprise, the third person does not take a totally passive view toward the lawyer's bills or even how the lawyer is handling the matter. The third person wants regular reports, wants to keep the cost down, or asks for detailed billings. The third person does not want the lawyer to take certain steps in the matter without prior approval. But, in law practice, he who pays the piper does not always call the tune.

When these triangular relationships cause a lawyer's collar to tighten, it is time to remember the identity of the lawyer's client and the 4 C's. If Son pays for Dad's legal advice or services, Dad, not Son, is the lawyer's client.[103] Parents who pay for the representation of minor children may want to know everything and control the representation, but Child, not Parents, is the client.[104] As a result, Child controls what Parents get to hear and ultimately, Child determines his or her own best interests. Model Rule 1.8(f) requires that lawyers get a client's consent to any third-person payment, inform clients that they will keep client's confidences from all, including the third-party payer, and that the lawyer will exercise independent professional judgment on behalf of the client.[105] Model Rule 5.4(c) further mandates that lawyers continue this single-minded devotion to their client's interests throughout the representation.[106]

The tension created by third person influence also occurs in other circumstances. For example, a potential beneficiary of a will (who may or may not also be the lawyer's client) may recommend or pay the

103. MODEL RULES, *supra* note 3, at R. 1.8(f), 5.4(c).
104. *Id.*
105. *Id.* at R. 1.8(f).
106. *Id.* at R. 5.4(c).

lawyer to draft the document.[107] Or a lawyer may be asked to share fees with a corporate employer or sponsoring pro bono organization. Such a lawyer who exercises independent professional judgment, may be required to reimburse the corporation for its costs when he or she works for others, but may not share fees, because the corporate employer's influence would be too great if it could reap profits from the lawyer's independent labors.[108] On the other hand, sharing fees with sponsoring pro bono organizations is not prohibited, because the economic interest of the organization "is not likely to be a predominant factor but at most a subsidiary one in the non-profit organization's sponsorship of the litigation."[109]

B. The Lawyer's Role

If lawyers cannot favor one client's interest over another's, they certainly cannot allow themselves to be directed by a non-client third person. Yet some allegiance to the person or entity that pays the lawyer seems natural, especially when the lawyer hopes for or becomes accustomed to repeat business. As in joint client situations, such a lawyer faces dual difficulties. An insurer can cause a lawyer to over-identify or act instrumentally on its behalf because the lawyer's financial instinct is to further the insurer's business and approval of the legal services in order to keep the business coming. But doing so may cause the lawyer to under-identify or engage in directive behavior with the lawyer's other primary client, the insured. In serving the interests of the insurer, lawyers may be tempted to breach duties to the insured or even aid the insurer in neglecting its contractual obligations to the insured.

Lawyers who translate the least bit of third-person allegiance into influence or advocacy, mistake the payer for the true principal—their client. And, if the third-person influence is carried just a bit too far, the lawyer risks breaching some or all of the 4 C fiduciary duties owed to clients. Lawyers can violate a client's confidentiality by disclosing the client's confidences without the client's consent. Lawyers can disregard loyalty by favoring the third person's interests over their client's. Lawyers can act incompetently by failing to recognize or implement

107. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-428 (2001) (discussing drafting a will on recommendation of a potential beneficiary who also is a client).

108. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-392 (1995) (discussing sharing fees with a for-profit corporate employer).

109. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-374 (1993) (addressing the sharing of court-awarded fees with sponsoring pro bono organizations); Roy D. Simon, Jr., *Fee Sharing Between Lawyers and Public Interest Groups*, 98 YALE L.J. 1069, 1076 (1989). Prof. Simon's article led to recently amended Model Rule 5.4(a)(4), which makes this rule explicit.

viable legal options for their clients. Lawyers can ignore basic obligations to communicate by failing to obtain their client's (not the third person's) informed consent about key issues that surface during the representation. All of this can cause incalculable damage to clients.[110]

The remedy: Lawyers should recognize and identify their real clients, to whom they owe the 4 C's, and expect to explain these fiduciary obligations to the third person. Lawyers cannot permit the third person to regulate or to interfere with a lawyer's independent judgment on behalf of a client, may accept third-party direction only if the client consents to it.[111] Even when client consent is given, lawyers must remain vigilant that third-person influence never compromises the 4 C's.[112]

Of course, the power and influence of some third-party payers, such as insurers, makes it difficult to resist their attempts to interfere. Fortunately, other law, such as insurance bad faith, helps lawyers because it imposes penalties on the third person when it seeks to interfere, say by refusing to settle within policy limits or by insisting that the lawyer help it establish a policy defense.[113] Courts also help by imposing obligations on third parties to provide separate counsel where conflicts arise between the third-party payer and the clients.[114] And do not forget collaboration. Clients may want to consent to disclosures to

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110. *See* Perez v. Kirk & Carrigan, 822 S.W.2d 261 (Tex. App. 1991). In *Perez*, the court upheld a cause of action for breach of fiduciary duty against lawyers who represented both employer and employee following a truck accident where twenty-one children died. The lawyers promised the employee truck driver confidentiality and took his sworn statement about the accident. *Id.* at 263. Without his consent, they then gave his statement to the prosecutor, who indicted the driver for twenty-one counts of involuntary manslaughter. *Id.* at 264. Maggie Rivas, *Truck Driver Says He Spent Years After Bus Crash Doing Penance; He Went into Self-Imposed Exile at Home as Punishment*, DALLAS MORNING NEWS, May 7, 1993, at 1A; Maggie Rivas, *Trucker Absolved of Bus Deaths; '89 Alton Tragedy Killed 21 Students*, DALLAS MORNING NEWS, May 6, 1993, at 1A. The employee waited over three years for trial and was acquitted on all counts.

111. *See* MODEL RULES, *supra* note 3, at R. 1.8(f); MODEL RULES, *supra* note 3, at R. 5.4(c).

112. *See* RLGL, *supra* note 7, at § 134; *In re* Rules of Professional Conduct, 2 P.3d 806, 807, 815 (Mont. 2000) (stating that Montana lawyers may not abide by an insurer's billing and practice rules which impose conditions limiting or directing the scope and extent of the representation of insureds and may not submit detailed descriptions of professional services to outside persons or entities without first obtaining the informed consent of the insured).

113. For a case involving sexual misconduct by a physician where the court found that the lawyer offered a "splendid" defense under a reservation of rights, see generally, St. Paul Fire & Marine Ins. Co. v. Engelmann, 639 N.W.2d 192 (S.D. 2002). For a case where the lawyer failed to get it right, see generally Beckwith Machinery Co. v. Travelers Indem. Co., 638 F. Supp. 1179 (W.D. Pa. 1986), where the failure to send a reservation of rights letter or file a declaratory judgment action estopped the insurer from denying coverage and created liability for bad faith and breach of contract.

114. *See* Wolpaw v. Gen. Accident Ins. Co., 639 A.2d 338, 340 (N.J. Super. Ct. App. Div. 1994).

Dad or involvement by Daughter in estate planning. The lawyer's job is to clarify the client's interests apart from third-party influence.

5. *Insurance Defense*

Typical liability policies promise to "defend" when a covered person is sued for a covered event, and to "indemnify" that person up to an insured amount. Defending a claim requires the insurer to provide a lawyer to represent the insured. When an insurer hires a lawyer to defend an insured, all jurisdictions agree that the lawyer represents the insured. At this point, a split develops. Many characterize insurance defense as a one-client situation, with defense counsel paid by a third party, the insurer.[115] Others prefer a joint client approach, meaning that the lawyer represents both the insured and the insurer.[116]

This joint client construct solves some problems and creates others. It gives the insurance company financing the engagement more clout with the lawyer; some would say too much clout. It also cements claims of privilege for communications with the insurance company. On the other hand, if it is a joint representation, the lawyer, from the beginning, has to worry about conflicts between the insurance company and the insured. As a result, some of these proposed joint representations will be non-starters because issues relating to coverage are already present. And if those conflict issues are not apparent in the beginning they can develop at any time. In addition, the joint representation model means that issues relating to the confidentiality of information must be addressed. When the lawyer could learn from the insured client confidential information that could provide a policy defense (such as intentional misconduct or lack of cooperation), the lawyer is barred from sharing that information with the co-client insurance company.[117]

In fact, it may not matter which of these characterizations a jurisdiction has adopted, because two-client courts usually go on to assert that the insured is the primary client whenever a conflict develops.[118] And third-party payment one-client jurisdictions often find that the insurer is the agent of the insured for purposes of the attorney-client privilege. So, be clear that the lawyer's primary or only duty is to the insured, despite daily reminders to the contrary. The insured, not the

115. *See id.*
116. *See* RLGL, *supra* note 7, at § 134 cmt. f.
117. *See* Paradigm Ins. Co. v. Langerman Law Offices, P.A., 24 P.3d 593, 598 (Ariz. 2001).
118. *See, e.g., id.* at 597.

insurer, controls the representation because neither Model Rule 1.8(f) nor 1.7(b) will let lawyers behave any other way.[119]

The same policies provide that the insurer retains the right to control most aspects of the representation, including the right to select counsel and usually, when to settle the matter.[120] This policy language grafts an additional layer of conflict on the client-lawyer relationship, which courts routinely resolve in favor of the insured parties.[121]

4. Organizations

Representing an entity can create dozens of accidental clients. Lawyers can be inside or outside counsel to a large publicly held corporation or a governmental unit.[122] Or they might occasionally provide legal advice to a partnership,[123] a family business, a trade association,[124] or a non-profit organization. Model Rule 1.13 governs all of these representations and begins by instructing lawyers that their client is the organization, not any constituent of the organization.[125] It further requires that when any doubt clouds a given representation or

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119. *See* MODEL RULES, *supra* note 3, at R. 1.8(f), 1.7(b); *cf.* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-421 (2001) (discussing ethical obligations of a lawyer working under insurance company guidelines and other restrictions); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 96-403 (1996) (addressing obligations of a lawyer representing an insured who objects to a proposed settlement within policy limits).

120. *See* Moritz v. Med. Protective Co., 428 F. Supp 865, 871 (W.D. Wis. 1977) (construing insurance policy to provide that "when the insured elects to tender to the insurer the defense of a claim against him or her, he or she consents to having the insurer choose the lawyer who is to defend the claim").

121. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 96-403 (1996) (detailing obligations of a lawyer representing an insured who objects to a proposed settlement within policy limits); *see, e.g.*, Rogers v. Robson, Masters, Ryan, Brumund & Belom, 407 N.E.2d 47, 49 (Ill. 1980) (holding that defendant lawyers' duty to plaintiff insured stemmed from the attorney-client relationship apart from the insurer's authority to settle without insured's consent).

122. *See generally* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 97-405 (1997) (discussing issues raised under conflict of interest provisions of the Model Rules where lawyers agree to represent a government entity while at the same time representing private clients against the government); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-393 (1995) (discussing the disclosure of client files to non-lawyer supervisors in government elder care offices after express consent is given by client in accordance with Model Rule 1.6).

123. *See generally* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 91-361 (1991) (addressing the question of whether a lawyer representing a partnership represents the entity or the individual partners and at what point that lawyer may have an attorney-client relationship with individual partners).

124. *See generally* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-365 (1992) (discussing the circumstances by which a lawyer may represent an individual against a trade association that the lawyer also represents without being in violation of the conflict of interest provisions of the Model Rules).

125. *See* MODEL RULES, *supra* note 3, at R. 1.13, cmt. 2.

occasion (from the client's point of view) the lawyer must clarify the identity of the client as well as his or her own role in the client's matters.[126]

Yet in practice, lawyers deal face-to-face with constituents, who can become their clients as well. If that person asks for personal legal advice, and the company lawyer gives it, or if the lawyer has given personal advice before, that lawyer is only that constituent's detrimental reliance away from another client-lawyer relationship.[127] Consider, for example, a lawyer's membership on the client's board of directors.[128] Do they rely on the lawyer for legal advice? If so, the lawyer should clarify when he or she is acting as a lawyer (and for whom) to ensure that the attorney-client privilege attaches to the conversation.[129] Similarly, accompanying employees to depositions does not necessarily mean that the lawyer represents them.[130] But if the employee depends upon the company's lawyer for personal legal advice, that lawyer should be sure to clarify his or her role.[131]

This does not mean that a lawyer cannot represent both organization and employee.[132] Their interests may not be adverse. The real question, however, is whether the employee's lawyer who is also the company's counsel will ever be free to give the employees the advice they may need. The employees might want to take the Fifth Amendment, or might want to confide that they are worried about keeping their jobs, or worried about what the lawyers may do with the information that these employees reveal. The company's lawyer may not even be able to give them advice on these issues. On the other hand, it could be that the interests of the employer and the employees are perfectly aligned. The problem is that at the time the lawyer takes on the representation of the employees the lawyer often will not know enough to make that determination, and there may be a substantial risk that material limitations exist now or will arise later.

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126. *See id.* at R. 1.13, cmt. 10.

127. *E.g.*, Cooke v. Laidlaw, Adams & Peck, Inc., 510 N.Y.S.2d 597, 598-99 (N.Y. App. Div. 1987) (involving a lawyer who represented both company and officer); Margulies v. Upchurch, 696 P.2d 1195, 1198 (Utah 1985) (involving a lawyer who represented general partners and limited partnership when general partners reasonably relied on lawyer acting on their behalf).

128. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 98-410 (1998) (discussing the propriety of a lawyer serving as director of a client corporation).

129. *See* MODEL RULES, *supra* note 3, at R. 1.7, cmt. 35.

130. *See* Lawrence J. Fox, *Defending a Deposition of Your Organizational Client's Employee: An Ethical Minefield Everyone Ignores*, 44 S. TEX. L. REV. 185, 188-89 (2002).

131. *See* MODEL RULES, *supra* note 3, at R. 1.13; R. 1.7 cmt. 34.

132. *See id.* at R. 1.13(g).

Lawyers who decide to proceed with a joint representation should make clear to the employee that he or she is a client and owed the same fiduciary duties afforded to that person's employer.[133] But joint representation depends upon a careful conflicts analysis, as well as attention to confidentiality, including clear disclosure about what events (conflicts) will require the lawyer to withdraw from the matter.

Entity lawyers also can learn of misconduct from a constituent of an organizational client. If the lawyer does nothing about it, that lawyer may suffer later liability to the organizational client for failing to protect it from the actions of a rogue employee.[134] The lawyer's duty of care requires protecting the entity client from harm, which is why entity lawyers are required to refer serious matters to a higher authority in the organization.[135]

3. *Clients Who Morph*

Accidental clients can be created when clients morph or change. Lawyers have been inadvertently caught in conflicts,[136] accused of incompetence,[137] and even charged with fraud[138] because a client's name was misspelled, or because a lawyer forgot to recognize that client identity can change over time. The most obvious client metamorphoses occur because of a specific event, such as a change in a client name, brought about by marriage, merger, acquisition, or corporate reorganization. All these changes must be entered in a lawyer's state of the art conflicts system, which is only as good as the information put into the database.

Yet, many instances of change in client identity are less obvious and have accordingly caught the most well-intentioned lawyers unaware.

A. Entities

Entity clients may or may not think and act like their legal structure. Some assume that every subsidiary, sibling or even joint venture morphs into one unified profit center for purposes of shareholder success, employee pensions, or lawyer loyalty. Others operate

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133. *See id.* at R. 1.13(g) cmt. 12.

134. *See id.* at R. 1.13(b).

135. *See* GEOFFREY C. HAZARD JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 4.8 (3d. ed. 2001).

136. *See* A v. B., 726 A.2d 924, 925 (N.J. Sup. Ct. 1999).

137. *See In re* Am. Cont'l Corp./Lincoln Sav. and Loan Sec. Litig., 794 F. Supp. 1424, 1438-39 (D. Ariz. 1992).

138. *See In re* Forrest, 730 A.2d 340, 342 (N.J. Sup. Ct. 1999).

subsidiaries independently. Family-owned businesses may treat the corporation as Dad's, and Dad may assume that the company's lawyer is his personal lawyer as well.[139] In identifying an entity client all of this matters.[140] Generally, a lawyer can rely on the name of the entity in identifying the client. But if the client is a family business, a wholly owned subsidiary, or the parent of a wholly owned subsidiary, the lawyer needs to clarify which entities or constituents are represented. If this clarification is not sought, then the CEO or parent company later may claim that the lawyer represented all of them, and seek the lawyer's disqualification in any subsequent matter against the affiliates the lawyer did not think were clients.[141]

Lawyers who represent family businesses need to be especially clear that taking on personal matters for family members may create reasonable expectations by those individuals that the lawyer is their personal as well as their corporate lawyer.

Lawyers who represent companies with related subsidiaries also may find that conflicts can be "thrust upon" them by changes in their corporate organization. For example, a client company might acquire the defendant against whom the lawyer proceeds on behalf of the plaintiff. It does not seem fair that the lawyer would have to stop representing plaintiff. But if the lawyer proceeds without consent this could be a violation of the rules of professional conduct. The corporate client may give the lawyer a waiver. If not, and if it moves to disqualify the lawyer or the lawyer's firm, the lawyer could urge the judge to use her discretion to let the firm continue. The ABA has promulgated a new comment to Model Rule 1.7 that permits the lawyer to choose to continue to represent one client or the other.[142]

B. Clients Who Die

If a client dies while a matter is pending, that client's lawyer has lost one client and probably gained another. Survivor statutes retain a cause of action for a deceased person, but transfer it to a legal

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139. *See, e.g.*, Maryland St. Bar Ethics Op. 01-04 (2001) (discussing conflict of interest pertaining to multiple representation of a corporation, its officers and directors).

140. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-390 (1995) (discussing conflicts of interest in the corporate family context).

141. *See* RLGL, *supra* note 7, at § 121 cmt. d.

142. *See* MODEL RULES, *supra* note 3, at R. 1.7 cmt. 5; RLGL, *supra* note 7, at § 132 cmt. j.

representative, such as a personal executor or the estate.[143] Wrongful death statutes create a new cause of action on behalf of new parties.[144]

A lawyer who continues to assert, even implicitly, that he or she represents a living person who has died commits a fraud, both because the client ceases to exist for legal purposes and because the client's legal rights may change upon death.[145] The truth is, right after the client's death, the lawyer has no client. Yet if the lawyer pursues a settlement the lawyer will be implicitly representing that he or she continues to represent someone who no longer exists. Under these circumstances the lawyer may not take any further steps until a new client retains the lawyer (e.g., the estate of the former client) and the other side is informed of the unfortunate untimely demise of the former client.[146]

This is why lawyers must acknowledge the client's change of identity with opposing counsel, in court, and in their conflicts database as soon as this event occurs.[147] Entity clients also die, through bankruptcy, reorganization, or dissolution. Competence demands that lawyers understand the nature of this legal metamorphosis and respond accordingly.

C. Clients with Diminished Capacity

1. The Issues

A client's diminished capacity to make decisions can cause a subtle or complete change in the client-lawyer relationship, creating one of the most difficult of legal ethics problems.[148] Model Rule 1.14, the rule that addresses this issue, recognizes that capacity exists on a continuum and

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143. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 46 cmt. a (1982); Eric W. Gunderson, *Personal Injury Damages Under the Maryland Survival Statute: Advocating Damages Recovery for a Decedent's Future Lost Earnings*, 29 U. BALT. L. REV. 97, 104 n.49 (1999).

144. *See* Jordan v. Baptist Three Rivers Hosp., 984 S.W.2d 593, 597 (Tenn. 1999).

145. *See* Virzi v. Grand Trunk Warehouse & Cold Storage Co., 571 F. Supp. 507, 512 (E. D. Mich. 1983).

146. Giroux v. Dunlop Tire Corp., 791 N.Y.S.2d 769 (N.Y. Sup. Ct. 2005) (where plaintiff's lawyer failed to seek substitution within a reasonable time after plaintiff's death, the trial court properly granted a opposing party's motion to void the settlement agreement and dismiss the action under N.Y. C.P.L.R. 1021 and properly denied plaintiff attorney's cross-motion to substitute plaintiff's administrator as plaintiff).

147. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-397 (1995).

148. *See, e.g.*, N.Y. Bar Ass'n Comm. on Prof'l Ethics, Formal Op 746 (2001) (discussing representation of an incapacitated client, and petitioning for appointment of guardian); Ala. Comm. on Prof'l Ethics, Formal Op. RO-95-03 (1995) (addressing representation of a client in manic stage of bipolar manic depression).

requires that lawyers "maintain a normal client-lawyer relationship" "as far as reasonably possible."[149]

When lawyers represent a client with diminished capacity, they need to be circumspect in relying on another person who purports to speak for the client, especially when that family member or friend stands to gain or lose from the communication. Lawyers have an obligation to clarify their client's intent, or to protect the client if the lawyer cannot discern it.[150]

When the client's intent is not clear, the Restatement recommends that lawyers pursue their own "reasonable view of the client's objectives or interests as the client would define them if able to make adequately considered decisions on the matter, even if the client expresses no wishes or gives contrary instructions."[151] When a client's diminished capacity threatens serious physical, financial or other harm, lawyers should take other protective measures, and lawyers are impliedly authorized to breach confidentiality to consult with others to do so, such as the client's family, or with other individuals or entities that can act to protect the client.[152] In an extreme case of threatened harm, lawyers may seek the appointment of a guardian to protect the client.[153] If that occurs, the lawyer may have a new client, the guardian, or, depending on the extent of the guardianship, the lawyer may have two clients: the client with diminished capacity for all purposes not covered by the guardianship and the guardian for all other purposes. Remember, however, that the guardian can choose another lawyer, which leaves the lawyer with either the impaired client for matters outside the guardianship or, if a general guardianship has been established, with a former client but no current client at all.

2. The Lawyer's Role

Representing a client with diminished capacity creates some of the most difficult dilemmas for lawyers because they can neither blindly follow such a client's instructions nor ignore them.

The professional rules tell lawyers to treat all clients as autonomous to the greatest extent possible, including a virtually absolute duty of confidentiality.[154] And lawyers must take direction from clients, acting

149. *See* MODEL RULES, *supra* note 3, at R. 1.14(a); RLGL, *supra* note 7, at § 24.
150. *See* MODEL RULES, *supra* note 3, at R. 1.14 cmt. 3.
151. *See* RLGL, *supra* note 7, at § 24(2).
152. *See* MODEL RULES, *supra* note 3, at R. 1.14(b) cmt. 5.
153. *See id.* at R. 1.14(b) cmt. 7.
154. *See id.* at R. 1.6.

in each client's best interests as defined by that client. When should the lawyer stay her hand in the name of her client's autonomy? On the one hand, lawyers are admonished by fiduciary duty to do everything they can to help fulfill the client's goals of the representation, goals that are to be determined by the client. On the other hand, clients may make decisions that the lawyer believes reflects bad judgment or, worst of all, risks substantial harm to the client. When lawyers place too much weight on the former proposition—simply being instruments unquestioningly abiding their clients' instructions—they can disserve their clients' true autonomy by failing to share their independent view of the merits of the course of action. If the client has legal obligations to others, accepting a client's decision at face value also can open such a client (and perhaps the lawyer as well) to potential liability.

Model Rule 1.14 offers an approach to a collaborative relationship with a client who suffers from diminished capacity.[155] It parallels mental health law by envisioning autonomous capacity as a spectrum, and it recognizes several causes of diminished capacity, such as minority, old age, mental retardation, dementia, chemical dependency, or depression. Following the logic and dictates of this rule can help a lawyer determine whether his or her conduct risks under-identification and directive behavior or over-identification and instrumental behavior that disregards the client's real interests.

Model Rule 1.14 begins by admonishing lawyers to maintain a normal client-lawyer relationship to the extent reasonably possible.[156] When a client proposes to act within legal bounds, lawyers ordinarily can and should rely on the client's decisions. When the decision seems idiosyncratic, or contrary to what most clients would believe in their best interests, the lawyer instinctively may pause to consider whether the client suffers from some compromise in judgment that disserves the client's autonomous self or true interests. But whenever a lawyer does this, the lawyer should do so within the goal of maintaining a normal client-lawyer relationship by remembering the 4 C's.

Lawyers can start by recognizing that communicating with an impaired client should require more rather than less explanation, and may require the assistance of others who know the client well.[157] The client may elect to have family members, trusted friends, or clinicians

155. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 96-404 (1996) (discussing client under a disability).

156. *See* MODEL RULES, *supra* note 3, at R. 1.14(a).

157. *See* Conn. Bar Ass'n Comm. on Prof'l Ethics, Informal Op. 98-17 (1998) (addressing how to represent an elderly client who makes "questionable" decisions).

participate as the client's agents in discussions to help articulate the client's interests. If a lawyer secures the client's consent to the help of these third parties, they become agents for the purpose of the attorney-client privilege. If the lawyer fails to obtain that consent, communication with third parties present may destroy the privilege.

With respect to decisionmaking, the lawyer should rely on informed consent, explaining the matter to the extent necessary to enable the client to understand the risks of the behavior or decision as well as the alternative choices to enable the client to determine his or her own best interests. Such an explanation should include the lawyer's experience with similar clients or situations in the past and the reasons most people might find the client's articulated choice unrealistic. Further, because capacity can fluctuate, the lawyer should expect to give the client additional time to consider the matter, as long as a delay does not prejudice the client's interests. A lawyer who has known a client for some time should consider whether the client has ever spoken of similar matters in the past, and if so, should remind the client about former expressions of belief that may inform the current decision.[158] Once again, a client's decision within the bounds of the law, even if idiosyncratic, must be upheld.[159]

As lawyer and client elect to expand the decisionmaking process, the lawyer must remember confidentiality and loyalty. Disclosures to family members or others without the client's consent are not in order. If someone other than the client (such as family members) retains the lawyer, the lawyer must remember that the payer is not the principal in such a triangular relationship and should keep his or her eye on the articulated interests of the client.[160]

If the client suffers from significantly diminished capacity, which prevents the client from recognizing his or her own interest, maintaining such a normal relationship may involve seeking the advice or assistance of others. If the client's decision or inaction risks substantial physical, financial, or other harm to the client unless action is taken, the lawyer may make disclosures to outsiders such as clinicians to seek assistance without the client's consent.[161] Shifting from an autonomy orientation to

158. *See* RLGL, *supra* note 7, at § 24 cmt. d.

159. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 96-404 (1996).

160. Mass. Bar Ass'n Comm. on Ethics and Prof'l Responsibility, Op. 04-1 (2004) ("When circumstances indicate that a client may not have had the capacity to make an adequately considered decision to discharge the lawyer, the lawyer should take further steps to ascertain whether the discharge represents the client's real wishes.").

161. *See* MODEL RULES, *supra* note 3, at R. 1.14 cmt. 5.

a best interests mode is justified to protect the client from harm (such as suicide), on the theory that the same client with full capacity would recognize the danger and respond accordingly.[162] If no one else can protect the client, protective action may even include seeking the appointment of a guardian or conservator over the client's stated or unstated objections. Here, disclosures to protect the client's best interests may be "impliedly authorized" under Model Rule 1.14(c), but only if reasonably necessary to protect the client.[163] Model Rule 1.13(c)(2) allows similar disclosures on a similar theory in representing organizations, in the name of the best interests of the organization.[164]

D. Class Actions

Identifying the client in a class action may not be easy. Initially, a lawyer represents the named class representatives, but not the unnamed class members, especially for the purposes of conflicts resolution.[165] Yet, a "fiduciary duty not to prejudice the interests that putative class members have in their class action litigation" may exist even before the class is certified, including the duty to notify and afford absent class members a chance to object to the lawyer's actions that would put their rights at risk.[166] After certification, the named plaintiffs represent a larger group, which means that their lawyer has assumed fiduciary duties to the entire class, not just the named plaintiffs.[167] As the representation continues, class action lawyers have the obligation to "act for the benefit

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162. Estate of Robinson *ex rel.* Robinson v. Randolph County Comm'n, 549 S.E.2d 699, 706 (W. Va. 2001) (Starcher, J., concurring) (explaining that defense lawyer who allegedly knew his incarcerated client was suicidal should have intervened to seek adequate care to prevent suicide); People v. Fentress, 425 N.Y.S.2d 485, 497 (Dutchess County Ct. 1980) (finding that client waived confidentiality and commented that lawyer-friend of criminal defendant "would have blindly and unpardonably converted a valued ethical duty into a caricature, a mockery of justice and life itself" had the lawyer not warned the police about the client's suicide threat); Mass. Bar Ass'n Comm. on Ethics and Prof'l Responsibility, Op. 01-2 (2001) ("A lawyer may notify family members, adult protective service agencies, the police, or the client's doctors to prevent the threatened suicide of a client if the lawyer reasonably believes that the suicide threat is real and that the client is suffering from some mental disorder or disability that prevents him from making a rational decision about whether to continue living."). At the same time, courts have refused to find criminal defense lawyers liable for failing to prevent a client's suicide. *See, e.g.*, Snyder v. Baumecker, 708 F. Supp. 1451, 1463-64 (D. N.J. 1989) (finding that a lawyer who allegedly delayed the prosecution of decedent's criminal defense was not liable for client's suicide because suicide is not a foreseeable risk of legal malpractice).

163. *See* MODEL RULES, *supra* note 3, R. 1.14(c).

164. *See id.* R. 1.13(c)(2).

165. *See id.* R.1.7 cmt. 25.

166. Schick v. Berg, No. 03 Civ. 5513, 2004 U.S. Dist. LEXIS 6842, at *18 (S.D.N.Y. Apr. 20, 2004).

167. *See* RLGL, *supra* note 7, at § 14 cmt. f.

of the class as its members would reasonably define that benefit."[168] At this point the class action client can morph because conflicts between class representatives and class members may require that the lawyer recommend redefining the class or creating subclasses.

Recent changes to Rule 23 of the Federal Rules of Civil Procedure require court approval of a settlement only after the class is certified.[169] This raises the issue of whether the rules of civil procedure have the ability to change the rules of professional conduct. On the one hand, the court does not have to approve or supervise a pre-certification settlement. One the other hand, the lawyer filed the lawsuit as a class action. When that occurred, the lawyer undertook to represent the class. At that moment the lawyer accepted a fiduciary duty to the class that cannot easily be discarded simply because suddenly the lawyer wishes to put the interests of his or her initial individual clients or the lawyer's own interests in the driver's seat.

E. Ending a Representation

When lawyers complete a client matter, withdraw from a representation, leave a job or are fired, their current clients morph into former clients.[170] At this point, lawyers lose all but one of the fiduciary duties they assumed when they took on the representation. They no longer owe duties of competence or communication, and their fiduciary obligation of loyalty only remains to the extent that they cannot undermine what they have accomplished.[171] Confidentiality, on the other hand, lasts forever, even after the death of the client.[172] The substantial relationship test protects former clients by requiring that lawyers obtain the informed consent of former clients before the lawyer may represent any subsequent clients whose interests are materially adverse to those of the former client in a substantially related matter.[173] Lawyers can be disqualified or disciplined if they take on a new matter when they should not. To clarify this change in status and obligation at the end of a

168. *Id.*

169. *See* FED. R. CIV. P. 23(e)(1)(A).

170. *See* MODEL RULES, *supra* note 3, at R. 1.9 cmt. 1.

171. *See* ABA Comm. on Ethics and Grievances, Formal Op. 177 (1938) (ruling that an attorney who represented the licensees of a patent in a suit brought by the licensor may not subsequently represent a third-party defendant in an infringement suit brought by the licensor); ABA Comm. on Ethics and Grievances, Formal Op. 64 (1932) (concluding that an attorney who drafts a will and after the testator's death drafts an instrument in supposed execution of the will may not thereafter accept employment from devisees and legatees under the will to attack the validity of the instrument formerly drawn by him).

172. *See* Swidler & Berlin v. United States, 524 U.S. 399, 399 (1998).

173. *See* MODEL RULES, *supra* note 3, at R. 1.9; RLGL, *supra* note 7, at § 132.

representation, lawyers should move their client's entry in the law firm's conflicts database from the current client conflicts file to the former client conflicts file whenever a lawyer completes a matter or the representation otherwise ends.

Disengagement letters also are helpful when lawyers complete a matter, decide to withdraw, are fired by the client, or when they leave a law firm and do not intend to continue to work on a matter. The letter should make clear the reason the relationship has ended, and include appropriate warnings about unfinished work and time deadlines.[174] Lawyers may want to address whether the client wants them to communicate with successor counsel, and how the lawyer intends to provide for the orderly transmission of client files and documents. Lawyers also can use this opportunity to convey a willingness to serve in additional matters in the future.

A lawyer who hopes for future business in a disengagement letter should be careful to clarify his or her lack of continuing obligation in the matter for which he or she no longer assumes any responsibility. Otherwise, the client may reasonably believe that the lawyer stands ready to be his continuing counsel, and may rely on the lawyer's lack of communication as legal advice that all is well, or that nothing else needs to be done.

2. *Quasi-Clients*

It seems axiomatic that lawyers owe no fiduciary duties to third persons who are not clients.[175] Yet, some situations create quasi-fiduciary duties to some third persons or entities.[176] These third persons can be called "quasi-clients" because they do not have all the legal rights clients possess, but they can become accidental clients of a sort, imposing some legal obligations upon a lawyer simply because that lawyer is another person's lawyer. A lawyer who drafts documents, represents fiduciaries, or agrees to accommodate someone else on behalf

174. *See* Gilles v. Wiley, Malehorn & Sirota 783 A.2d 756, 757 (N.J. Super. Ct. App. Div. 2001) (holding that a former client stated a cause of action against lawyers who withdrew at the last minute without adequately warning her by certified mail that the statute of limitations was about to run on her medical malpractice case).

175. *See In re* Estate of Drwenski, 83 P.3d 457, 467 (Wyo. 2004) (holding that a daughter was not the intended beneficiary of her father's divorce).

176. Fickett v. Superior Court of Pima County, 558 P.2d 988, 989-90 (Ariz. Ct. App. 1976) (holding lawyer who failed to detect and prevent conservator's misappropriation of assets liable to incompetent person).

of a client, must be clear whether he or she has assumed obligations to someone that lawyer never intended to represent.[177]

A. Third-Party Beneficiaries

If a client asks a lawyer to benefit a specific third party, for example, by writing an opinion letter or by drafting a document like a will or trust, the lawyer acts competently by fulfilling the wishes of the client. However, unlike the typical matter in which the lawyer's only exposure is to the client, here the lawyer knows that a third party—to whom the lawyer otherwise owes no duties and as to whom the lawyer may have been negotiating vigorously on behalf of the client—is relying on the lawyer's opinion. Therefore, if it is negligently prepared, even though there is no privity between the bank and the lawyer, the lawyer may be held liable to the bank as well if it turns out that the lawyer's opinion was in error.

The third-party beneficiary of such a letter is not the lawyer's client, but many courts grant certain classes of third-party beneficiaries duties of competence for malpractice purposes.[178] If the lawyer's client specifically names a third-party beneficiary in a document, the lawyer should assume that he or she owes coextensive duties to that person. If the lawyer's drafting requires that the lawyer assert certain propositions to be true, the lawyer should make sure that the boilerplate language accurately conveys what the lawyer has done (e.g., conducted a UCC tax and judgment search) and found (e.g., the farm property is free and clear of all liens). Relying on a client for these assertions is risky at best, because inaccurate statements can make a lawyer liable for malpractice or misrepresentation to the third-party beneficiary.[179]

A different rule may apply when lawyers draft a public offering that will be relied on by thousands. They are not third-party beneficiaries, even if they may be foreseeable plaintiffs. Here, absent fraud, many courts limit liability to those who are specifically identified or invited to rely on the lawyer's work at the time of the service.[180]

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177. *See* RLGL, *supra* note 7, at § 51.

178. *See In re* Guardianship of Karan, 38 P.3d 396, 397 (Wash. Ct. App. 2002) (finding that minor child has malpractice cause of action against mother's lawyer who set up child's trust to allow pilfering of the estate); Lucas v. Hamm, 364 P.2d 685 (Cal. 1961) (intended beneficiaries of a will were third-party beneficiaries eligible to recover from a lawyer if they could show lawyer was negligent in drafting document that caused them to lose testamentary rights).

179. *See* Greycas, Inc. v. Proud, 826 F.2d 1560, 1560 (7th Cir. 1987).

180. *See* RLGL, *supra* note 7, at § 51 cmt. e; Conroy v. Andek Resources 81 Year-End Ltd., 484 N.E.2d 525, 537 (Ill. App. Ct. 1985).

What if, in drafting a document that third persons will rely upon, a lawyer discovers confidential information that the third party would love to know, but the lawyer's client does not want to share? Of course, the lawyer owes only one client the 4 C's. That lawyer must first be competent, and second communicate his or her client's legal obligation to disclose. Third, confidentiality requires the lawyer to seek the client's permission to disclose the smoking gun. With respect to conflicts of interest, if disclosure is just too much for the lawyer's client to bear, then the client, not the lawyer, decides whether to forgo the whole deal (if relevant law requires disclosure) or to disclose the information. The lawyer's loyalty obligation to the client comes first, and only when the client decides to provide information or benefit to a third party is the lawyer's duty of competence to that third person triggered.[181] If the client insists that the lawyer write the letter without the legally required disclosures, the lawyer cannot proceed, if to do so would violate a legal obligation of the client or the lawyer.

B. Client-Fiduciaries

Lawyers who represent trustees, guardians, corporate directors, or partners, should be mindful of the beneficiaries of their clients' fiduciary duties as well as duties owed to the client to avoid later claims of malpractice by either.[182] Some commentators call the beneficiaries of a client's fiduciary duties "derivative client[s]," because such beneficiaries do not stand at arm's length with the lawyer's client.[183] A lawyer's legal advice to these clients, such as trustees, can impose a duty of competence to the beneficiaries.[184] If a lawyer suspects breach of fiduciary duty by a client, the lawyer should tell that client so in no uncertain terms. If the conduct does not stop, the lawyer should withdraw to avoid counseling or assisting the client's illegal or fraudulent act.[185]

Lawyers should not be held liable for later malpractice when their client's legal duties to another client conflict with the client's own rights or responsibilities. For example, courts have refused to find that a lawyer who represented an estate executor had a duty to beneficiaries of the

181. *See* MODEL RULES, *supra* note 3, at R. 2.3.

182. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-380 (1994) (discussing counseling a fiduciary).

183. *See* HAZARD & HODES, *supra* note 135, at § 2.7.

184. *See id.*

185. *Cf.* Whitfield v. Lindemann, 853 F.2d 1298, 1303 (5th Cir. 1988), *cert. denied*, 490 U.S. 1089 (1989) (lawyer who aided trustee in purchase of overvalued property liable to pension plan).

estate, because the beneficiaries' interests may conflict with those of the estate's administration.[186] The lawyer should be free to advise about both duties, so the lawyer's sole client is the executor.

C. "Accommodation" Clients

The Restatement created the label "accommodation client" to describe agreements by lawyers to provide limited services to third parties as an accommodation to a current client (often for no additional charge), for example, in a common representation situation.[187] Courts, however, often have rejected this concept, holding that an agreement to represent an accommodation client creates a real client-lawyer relationship.[188] This is why lawyers should never rely on their characterization of a favor to a client as "perfunctory" or "an accommodation," because a court, if later asked to address the matter, usually in the context of a disqualification motion or a malpractice claim, probably will disagree and find a client-lawyer relationship.

For example, when a lawyer accompanies the CFO of a client company to a deposition, the CFO is either unrepresented or he is the lawyer's client. Calling the CFO an accommodation client does not answer any question that will guide the lawyer's conduct. If the lawyer had two concurrent clients in the same matter, even after the representation of the CFO has been completed, the CFO remains a former client. And if the lawyer proposes to bring a claim on behalf of the company against the CFO in the same matter in which the lawyer once represented the CFO, that lawyer would violate Model Rule 1.9 in doing so. The CFO was a real client. The information the CFO shared with the lawyer must be kept confidential. And whether the lawyer was just doing the CFO (or the company client) a favor, the CFO is entitled to the loyalty the rules provide for former clients.

Lawyers who want to accommodate a client by taking on another representation are free to do so, but should recognize that they are taking on a new client, and that the burden rests on their shoulders to clarify and justify the limited nature and scope of the service, as well as any conflicts that may lurk in the representation.[189] Lawyers who want to accommodate a current client by providing service to a related party or entity should add that party to the law firm's current client database and

186. Trask v. Butler, 872 P.2d 1080 (Wash. 1994).

187. *See* RLGL, *supra* note 7, at § 132 cmt. i.

188. *See, e.g.*, G.D. Matthews & Sons Corp. v. MSN Corp., 763 N.E.2d 93, 97 n.4 (Mass. App. Ct. 2002).

189. *See* Universal City Studios, Inc. v. Reimerdes, 98 F. Supp. 2d 449, 455 (S.D.N.Y. 2000).

assume all the obligations to the "accommodatee" provided to all of their other clients.

1. Imputed Clients: Of Law Firms and Shared Office Space

If a lawyer has a client, so does every other lawyer in that lawyer's entire law firm, which may include associated law firms,[190] temporary lawyers,[191] and joint defense agreements. Likewise, if any other lawyer in the firm has a client, so does each lawyer associated with the firm.[192] But even when lawyers have not set up their practices to share revenue and clients,[193] they may in fact look or act like they have done so. Lawyers who share office space may also share secretarial or other office help, and may cover for each other, or share file space as well. Office-sharing lawyers also may interact informally as lawyers in law firms do, consulting each other on cases or becoming involved in informal office discussions about the matters of the day. Lawyers who use a common letterhead, or have a secretary answer a common phone with all of the lawyer's names in the same sentence, are holding themselves out as a firm even if they do not otherwise share revenue.[194] Similarly, lawyers who allow other lawyers access to their client files, or discuss their cases with other lawyers in their office space, are sharing client confidences and therefore treating their clients as if they were clients of the "firm."[195] This will impute all of each lawyer's conflicts of interest to the other lawyers in the firm and vice versa.

Lawyers who share office space must therefore be clear about the legal implications created by their practices. Courts will treat the clients of office-sharers as those of a law firm if they either hold themselves out to be or otherwise act like they are a "firm."[196] Lawyers who want this flexibility and interaction should enjoy the benefits of the collaboration, but combine each lawyer's client files for purposes of conflicts checks. Lawyers who do not want to be treated as a firm for conflicts purposes

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190. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-388 (1994) (addressing relationships among law firms); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 84-351 (1984) (discussing the letterhead designation of "affiliated" or "associated" law firms).

191. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 88-356 (1988) (discussing temporary lawyers).

192. *See* MODEL RULES, *supra* note 3, at R. 1.10.

193. A network of law firms may fit this description. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-388 (1994) (analyzing relationships among law firms).

194. *See In re* Sexson, 613 N.E.2d 841, 842-43 (Ind. 1993).

195. *See* MODEL RULES *supra* note 3, at R. 1.0(c), 1.0, cmt. 2.

196. *See id.*

should not act or look like one. They should bar access to client files, keep client confidences, answer each phone individually, and use separate letterheads.

Of course, like clients, law firms can morph, through merger, reorganization, or association for a joint defense agreement. Or, when a sole practitioner dies, some successor will need to make sure that client matters are not neglected.[197] That lawyer picks up new clients in the process. Similarly, when a lawyer changes law firms, or leaves a government[198] or corporate office[199] for new employment, the lawyer's current law firm clients become former clients. Those matters the lawyer worked on bring conflicts that will be imputed to the new law firm or office, and those the lawyer did not have any contact with will not. The matters in the middle, where the lawyer perhaps performed slight work or consulted just a bit on the case, require focused attention if the new law firm seeks to successfully oppose a disqualification motion.[200] All of this means that lawyers engaged in job negotiations with an adverse law firm or party who make the shift while the matter is pending, will conflict their new employer out of any subsequent representation in the matter.[201]

III. CONCLUSION

Accidental clients, those that lawyers never thought existed, can appear when lawyers least expect them and can impose some or all of the same fiduciary duties on lawyers that real clients can. Lawyers who ignore the presence of these accidental clients set themselves up for trouble, whether in the form of malpractice, disqualification, or professional discipline.

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197. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-369 (1992) (addressing the disposition of deceased sole practitioners' client files and property).

198. *See generally* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 342 (1975) (evaluating ethical obligations of former government lawyers).

199. *E.g.*, ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 99-415 (1999) (analyzing representation adverse to organization by former in-house lawyer).

200. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 99-414 (1999) (discussing the ethical obligations a lawyer has when he or she changes firms).

201. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 96-400 (1996) (reviewing job negotiations with an adverse firm or party); Kala v. Aluminum Smelting & Ref. Co., 688 N.E.2d 258, 262-63 (Ohio 1998).

As Monroe Freedman has reminded us again and again, the act of deciding who to represent is the lawyer's first ethical act.[202] The catalogue of accidental clients in this article also should remind lawyers that they can take on clients they never meant to represent.

Once lawyers learn to identify all of their clients, they will be well on their way to avoiding a client-lawyer relationship they do not intend or wish to create, or well on their way to recognizing the moment when fiduciary obligations attach to a client-lawyer relationship that they desire to undertake. They also will have clarified when they do not represent a client, or when some other lawyer has taken on that responsibility. In other words, recognizing accidental as well as intended clients gives lawyers control over their law practices; control that enables them to take on fiduciary obligations only when they choose to do so.

202. *See* Monroe H. Freedman, Address to Hofstra University School of Law Student Body (1976), *reprinted in* MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 371-72 (3d. ed. 2004).

444 S.W.3d 554
Supreme Court of Tennessee,
at Jackson.

STATE of Tennessee
v.
Noura JACKSON.

No. W2009–01709–SC–R11–CD.
|
Nov. 6, 2013 Session.
|
Aug. 22, 2014.

Synopsis

Background: Defendant was convicted in the Criminal Court, Shelby County, Chris Craft, J., of second-degree murder. Appeal followed. The Court of Criminal Appeals, 2012 WL 6115084, affirmed. Defendant filed an application for permission to appeal, which the Supreme Court granted.

Holdings: The Supreme Court, Cornelia A. Clark, J., held that:

[1] the Supreme Court would adopt a two-part test for ascertaining whether a prosecutor's remarks amount to an improper comment on a defendant's exercise of the constitutional right to remain silent and not testify;

[2] de novo review is the applicable standard of appellate review for a claim of impermissible prosecutorial comment on the right to not testify;

[3] remark by prosecutor during rebuttal argument violated defendant's constitutional right not to testify;

[4] five-factor test set forth in *Judge v. State* should be applied only to claims of improper prosecutorial argument that does not rise to the level of a constitutional violation, abrogating *State v. Flinn*, 2013 WL 6237253, and *State v. Becton*, 2013 WL 967755;

[5] the state did not prove that constitutional error in prosecutor's remark was harmless beyond a reasonable doubt;

[6] defendant showed that the state committed a *Brady* violation by failing to disclose certain witness's third statement to police until after trial;

[7] due process violation in the failure to disclose was not harmless; and

[8] attorney-client privilege did not apply to communications between defendant and attorney friend of victim.

Reversed in part and remanded; conviction vacated.

Attorneys and Law Firms

***560** Valerie T. Corder, (on appeal and at trial), and Arthur Quinn (at trial), Memphis, Tennessee, for the appellant, Noura Jackson.

Robert E. Cooper, Jr., Attorney General and Reporter; William E. Young, Solicitor

General; J. Ross Dyer, Senior Counsel; William L. Gibbons, District Attorney General; and Amy P. Weirich and Stephen P. Jones, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

CORNELIA A. CLARK, J., delivered the opinion of the Court, in which GARY R. WADE, C.J., and JANICE M. HOLDER, WILLIAM C. KOCH, JR., and SHARON G. LEE, JJ., joined.

CORNELIA A. CLARK, J.

The defendant was charged with the June 2005 first degree premeditated murder of her mother. The jury convicted her of second degree murder after a trial in which the evidence was entirely circumstantial. The Court of Criminal Appeals affirmed her conviction and sentence, although the judges on the Panel were not unanimous as to the rationale for the decision. We granted the defendant's application for permission to appeal. We hold that the lead prosecutor's remark during final closing argument at trial amounted to a constitutionally impermissible comment upon the defendant's exercise of her state and federal constitutional right to remain silent and not testify. We also hold that the prosecution violated the defendant's constitutional right to due process by failing to turn over until after trial the third statement a key witness gave to law enforcement officers investigating the murder. The State has failed to establish that these constitutional errors were harmless beyond a reasonable doubt. Therefore, we vacate the defendant's conviction and sentence and remand for a new trial.

I. Introduction

Noura Jackson ("Defendant") was charged with the June 2005 first degree premeditated murder of her mother, Jennifer Jackson ("victim"). At Defendant's two-week trial in 2009, the prosecution called forty-five witnesses, and three hundred and seventy-six exhibits were introduced. The prosecution's theory at trial was that Defendant's motives for committing the crime were to gain control of the property belonging to Nazmi Hassanieh, her recently deceased father, which was in her mother's possession, and to obtain the proceeds of the victim's life insurance policy and 401(k) account so that she could continue partying and using illegal drugs ***561** with her friends—a lifestyle which her mother disapproved of and was taking steps to curtail or end. Defendant did not confess to the crime, and no forensic proof implicated her. The prosecution's case consisted entirely of circumstantial evidence.

Defendant maintained her innocence and exercised her constitutional right to remain silent and not testify at trial. At the close of the prosecution's case, the defense rested without calling any witnesses. The defense attorneys vigorously cross-examined prosecution witnesses, seeking to: (1) impeach their credibility; (2) create reasonable doubt about Defendant's guilt; (3) highlight evidence suggesting that

someone else, and perhaps more than one person, committed the murder; and (4) attack the effectiveness of the methods the police used to process the crime scene and the thoroughness of the police investigation of other suspects.

At the conclusion of the trial, the sequestered jury convicted Defendant of the lesser-included offense of second degree murder, and the trial judge later sentenced her to twenty years and nine months. What follows is a more detailed summary of the proof presented at trial.[1] Additional facts presented during the hearing on the motion for a new trial, in connection with Defendant's dispositive claims that the prosecution impermissibly commented upon her federal and state constitutional right to remain silent during final closing argument and deprived her of Due Process by failing to disclose a witness statement before trial or after the witness testified, will be provided in the discussion of those issues.

II. Factual and Procedural History

In June 2005, Defendant, eighteen and working on her high school degree,[2] lived alone with the thirty-nine-year-old victim at 5001 Newhaven Drive in Memphis. The victim had divorced Defendant's father, Nazmi Hassanieh, when Defendant was an infant. In January 2004, Mr. Hassanieh was murdered during a robbery of the convenience store he owned. After his death, the victim attained property belonging to Mr. Hassanieh, which consisted primarily of several cars that the victim and Defendant both drove, many of which were parked in the driveway of the victim's home.[3]

The proof at trial showed that around midday on Saturday, June 4, 2005, the victim called Mark Irvin, her on-and-off again boyfriend since 2003, asking if she could attend church with him the next day and take him out for his birthday. Mr. Irvin declined. Mr. Irvin testified that the conversation ended on good terms, even though the victim seemed "disappointed."

At 5:30 p.m. on June 4th, the victim drove to the home of a friend, Jimmy Tual, and the two attended a wedding and reception together in downtown Memphis. Mr. Tual testified that the victim ate and drank ***562** alcohol but was not intoxicated. After the reception, Mr. Tual drove them to a bar, the Cockeyed Camel, where each paid for a drink. The victim's credit card statement, introduced at trial, reflected that her card was used there at 11:06 p.m. and was not used again. Mr. Tual then drove the victim back to her car at his house, and she left his house at 11:30 p.m., stating that she was going home.[4] Mr. Irvin, following up on their conversation of earlier that day, attempted to call the victim on her cell phone around midnight, but hung up before she answered.

The victim's body was discovered in her home shortly before 5:00 a.m. the next morning, Sunday, June 5, 2005. Joe and Rachel Cocke, who lived across the street with Mr. Cocke's mother, Sheila Cocke, were awakened by Defendant banging on their door and screaming, "My mom, my mom[!]

Somebody's breaking into my house[!]" Believing a break-in was in progress, Mr. Cocke grabbed a pistol and ran across the street, with Defendant close behind him. When Mr. Cocke paused before entering the house, Defendant passed him and entered the house first, proceeding to the sunroom at the back of the house, where she called 911. Mr. Cocke looked throughout the house, but did not see any intruders. He asked Defendant where her mother was, and Defendant replied, "[S]he's in her room. She's in her room." Mr. Cocke then walked down the hallway where the bedrooms were located, looked into the victim's bedroom, and saw her "laying on the ground," "naked," "with blood all over her." Mr. Cocke then ran back to his house in order to bring back his wife Rachel, who had also called 911 and was speaking to the operator on her home phone when Mr. Cocke returned. At that point, Mrs. Cocke gave the telephone to her mother-in-law to complete the call and went to the victim's home.

Defendant had remained in her home when Mr. Cocke left, and when Mrs. Cocke entered the house, she found Defendant in the sunroom still speaking with 911, "all curled up," and "rocking and wailing" on the floor. Mr. Cocke stood in the front foyer, where he observed bloody shoe prints and drops of blood on the kitchen floor directly adjacent to where he stood and saw that the window on the kitchen door had been broken. Mrs. Cocke, who had taken the phone from Defendant, returned to the victim's bedroom at the direction of the 911 operator to see if the victim could be revived. Mrs. Cocke found the victim's bedroom by following the "bloody footprints in the hallway." Mrs. Cocke saw "a lot of blood" and quickly realized that the victim was dead, explaining that "[t]he look on her face was fixed and it—and dead." Mrs. Cocke did not touch the victim, and on the recording of the 911 call placed from Defendant's home, which was played for the jury and introduced as an exhibit at trial, Mrs. Cocke can be heard calling out, apparently to someone else, "[D]on't touch anything."

Meanwhile, Defendant was crying and "hysterical," repeatedly asking Mr. and Mrs. Cocke, "[I]s she dead, is she dead?" Defendant then said, "What am I going to do[?] I just lost my dad.... Why is this happening to me[?]" Mrs. Cocke did not notice any blood on Defendant. The Cockes stayed with Defendant until the police arrived at around 5:15 a.m.

Memphis Police Officer Russell Tankersley and his partner were the first to arrive at the crime scene. When he entered the house, Defendant came to the door, yelling that something was wrong with her mom. "She's in the back," she ***563** said. He and his partner went inside and immediately saw blood on the hallway floor. As he walked down the hall toward the victim's bedroom, Officer Tankersley had to ask a third officer to remove Defendant, who was screaming, "my mom, my mom" as she attempted to run back into the bedroom.[5] When Officer Tankersley looked into the victim's bedroom, he had to use a flashlight to see because it was "very dark" inside. After going only one or two feet into the room, the

officers saw blood on the bed, blood "right there in the doorway," and the victim lying on the floor in front of the bed. They then backed out of the room and checked the rest of the house. Officer Tankersley noted glass on the kitchen floor, by the door going to the garage. He exited out that door and checked the garage and all of the outside doors, which were locked. The officers then went back to their squad cars and waited for the Crime Scene unit to arrive. Despite the heat —the temperature was already about ninety to ninety-five degrees when he arrived— Officer Tankersley observed that Defendant was wearing a "blue jean miniskirt" and a "long-sleeved" "fleece" or "sweatshirt."

Memphis Fire Department paramedics arrived next at the scene and followed the police into the house. Paramedic Michelle Hulbert found the victim lying on the floor at the foot of the bed, naked, with visible signs of trauma, including stab wounds to her head, neck, and chest. When Ms. Hulbert entered the room, she had to step over a stool to approach the victim, and "there was a basket that was laying over her head and her face" that she had to "remove ... to examine her body."[6] Ms. Hulbert formally declared the victim deceased at 5:18 a.m., but explained that she was not qualified to determine the actual time of death. Ms. Hulbert testified that, although the victim's body was cool to the touch, there was no indication of rigor mortis in her wrists. Ms. Hulbert did not measure the victim's core temperature.

Ms. Hulbert explained that she did a basic visual assessment of Defendant, who was standing on the curb in front of the house, crying. Ms. Hulbert did not see any evidence to suggest that Defendant was under the influence of any drugs or disoriented. Ms. Hulbert recalled that when the police asked Defendant if she had any idea who perpetrated the murder, Defendant responded that "her mother's boyfriend was an asshole[,] but [even] he wouldn't do something like this." During this time Defendant also told the police that she was tired and wanted to sleep.

The Memphis Police Department's Crime Scene Investigation ("CSI") unit arrived at the scene around 5:45 a.m. Crime scene tape had not yet been put up, although it was up by 6:30 a.m. From the time Officer David Payment, the head of the CSI team arrived at 5:45 a.m. until the time he left at 3:00 p.m., he documented in his crime scene log that twenty-two people entered the house. Officer Payment first walked the perimeter of the residence and noticed what appeared to be blood and glass on the kitchen floor, as well as possible blood on the front porch and foyer, front door, and the floors of the living room, hallway, shared bathroom off the hallway, and the victim's bedroom. A substance ***564** that appeared to be blood had soaked the sheets and pillows on the victim's bed, was spattered on the closet door next to the victim's body, was smeared on the wall by the light switch, and was pooled on the floor under and surrounding the victim. Given the nature of the crime scene and the extent of blood throughout the house, Officer Payment requested that special equipment and three additional officers be dispatched to

the scene. The CSI unit and police requested that the Medical Examiner, in particular the blood spatter expert, come out and evaluate the scene, but no one from the Medical Examiner's office ever came. In an attempt to lift and preserve what seemed to be bloody footprints in the hallway, the CSI unit used chemical products [7] they had not previously used and had not previously been trained to use. The CSI team also used a Krime Sight Imager, a "non-invasive body fluid fingerprint detection" device, throughout the victim's house, but no fingerprints with ridge details were detected.

In addition to taking over 200 photographs [8] of the scene and attempting to lift the bloody footprints, the CSI unit documented and collected a great deal of physical evidence from the scene, including a pair of gold sandals found in the foyer by the front door; two drinking glasses located on the kitchen counter; a knife block found in the kitchen with three empty knife slots; [9] one knife found by the kitchen sink; and another knife found farther along the kitchen counter, beneath a golf club. [10] A third knife was also collected from the scene. In a hallway bathroom that the victim and Defendant shared, the CSI team photographed a hair dryer on the floor near strands of hair and a substance that appeared to be blood. However, the CSI team did not inventory the contents of the trash cans in the hallway bathroom and the victim's bedroom.

In the victim's bedroom the CSI team collected an array of evidence, including a stool next to the victim's body; possible hair from that stool; the victim's bed, including the headboard, footboard, the entire frame, mattress, and all of the pillows and bedding; a wicker basket; and a shoe box containing shoes. After the victim's body was removed, the team also discovered and collected a blue condom wrapper from the floor near the bed, in the northeast corner of the bedroom.

The CSI unit took special care when collecting the bedding, aware that since the victim had been stabbed multiple times "it was quite likely to find blood of the attacker in the bed." Police officers also photographed multiple purses belonging to the victim which were found on the floor of the master bathroom with their contents spilled onto the floor. The victim's house keys were not found, and her wallet was ***565** not found near her purses. The victim's half-brother, Eric Sherwood, later found a wallet belonging to the victim in a plastic bin in the sunroom and turned it over to the police. The wallet contained credit cards that had not expired and also contained an identification card issued to the victim by a former employer located in Atlanta, Georgia. [11] A computer in the sunroom was also taken into evidence and later determined not to have been used by anyone during the time the prosecution believed the murder occurred. Information gathered suggested that the victim often kept a spare key to her home underneath a flower pot on the front porch, but the key was not recovered, and photographs taken of the flowerpot suggested that it had been moved. [12]

The head of the CSI team used a flashlight to look into the windows of the cars in the driveway, but did not look inside or examine the interiors of any vehicles. No photographs or inventories were taken of the interiors of the cars on the morning of the murder. Later that morning, Sergeant Thomas Helldorfer looked into the window of Defendant's car. Because he saw no blood or evidence of any weapon, the vehicle was released to Defendant later in the afternoon of June 5, 2005.

Additional surveys of the house and its environs were performed by police officers throughout the day on June 5, 2005, and on the following day, as officers attempted to process what they considered an "unusual scene." The house contained "so much property" that the police made a video, contrary to standard procedure, before removing any evidence. While some rooms were relatively orderly, others were a "mess," and the victim's family members described her at trial as a "packrat" who was in the midst of trying to reorganize her belongings at the time of the murder.

During his survey of the crime scene mid-morning on June 5, 2005, Sergeant Helldorfer noticed that the surfaces of the shower and sink in the hall bathroom, apparently shared by both women, were wet, although none of the more than 800 photographs of the crime scene documented Sergeant Helldorfer's observations. The CSI unit did not find any visible traces of blood in the bathroom, however, nor did the Krime Sight Imager reveal the presence of blood. Sergeant Helldorfer also noted that the hole in the glass of the kitchen door leading to the garage lined up with an interior butterfly lock not visible from the outside of the door.

Another police officer noted a box of condoms in Defendant's room, as well as condoms in the drawer of a bedside table in the victim's room. However, the condom wrapper found on the floor by the victim's bed was not the same brand as those found in the victim's bedside table.

Lieutenant Mark Miller, the case coordinator, found two cordless phones in Defendant's room and recorded the numbers recently dialed from the home phone number. The last number was for the cell ***566** phone of Andrew Hammack, a friend of Defendant's. He also examined Defendant's cell phone, on which the last number was also Mr. Hammack's. In addition to temporarily retaining her cell phone, police also retained Defendant's purse during the morning of June 5th, retrieving from it a receipt from a nearby gas station. Both Defendant's purse and cell phone were in the house when police conducted their search of the premises.

Early in their investigation of the scene, the police asked Defendant to sign a "Form for Consent to Search" authorizing them to enter and search the house. However, Defendant did not immediately sign the form, instead asking to speak to Genevieve Dix, a friend of the victim, who had arrived at the scene and whom Defendant knew to be an attorney. Ms. Dix arrived at the house before 8:00 a.m. and found Defendant sitting on the grass in front of the house. She

first noticed Defendant's outfit, particularly a "long[-]sleeved gray" "sweatshirt thing" that she found "very odd" for a girl who was always "fashionable." Defendant stood with her sweatshirt "pulled down ... to her knuckles" and kept her arms "straight at her side" when Ms. Dix hugged her. Ms. Dix also noticed that although Defendant was a smoker, her hair was "fresh and sweet smelling" and that she had no makeup on, even though she usually wore heavy eye makeup. Defendant told Ms. Dix that the victim had called her and told her to come home, continuing "but you know me, I didn't, and [Defendant] said [she] came home about four o'clock. And then [Defendant] just stopped and didn't say anything else." [13]

A few minutes later, while Defendant was speaking with detectives, Ms. Dix was informed that Defendant wanted to speak with her and asked why she might be needed. Ms. Dix explained that she was an attorney but that she "was not [there] in that capacity." The detective then took her to Defendant and showed her the "Form for Consent to Search" that the police wanted Defendant to sign. Rather than sign the form, Defendant told Ms. Dix, "I want to talk to you," and the two women walked fifteen to twenty feet away from police. Ms. Dix testified that she told Defendant several times that she was not a criminal lawyer, did not know anything about the form, and did not represent her. She said that Defendant persisted in asking her about the form regardless, demanding to know whether the police could "get in [her] car?" Ms. Dix informed Defendant that it was likely that "sooner or later, they're going to get into everything," and that they would get a search warrant if Defendant did not cooperate. When Ms. Dix asked Defendant why she was so concerned about the police getting into her car, Defendant replied that she had a "bong pipe" in her Jeep, and wondered if she would "get in trouble." Ms. Dix replied that she did not think that the police would "give a rip" about the pipe, given that Defendant's mother was dead. Ms. Dix described Defendant as an "extremely bright individual" who could comprehend Ms. Dix's advice. Defendant decided to sign the form after speaking with Ms. Dix for a few minutes. The form itself, introduced into evidence at trial, reflects that Defendant signed it at 7:51 a.m. Ms. Dix signed it as well. [14]

***567** After Defendant signed the form, Sergeant Connie Justice drove Defendant to the Memphis police station at 201 Poplar Avenue so that she could give a formal statement. Since Defendant had found the body, this was normal police procedure, and Defendant was neither Mirandized nor handcuffed. Rather, she sat in the front of the police cruiser, quickly fell asleep, and remained asleep for the duration of the fourteen-minute drive. Sergeant Justice woke Defendant when they arrived, at which point Defendant sat with Sergeant Justice and gave a statement.

Defendant told Sergeant Justice that she had gone to the Italian Festival the previous evening, then to a party at Carter Kobeck's house, and then to the house of her boyfriend, Perry Brasfield. She said that she had last spoken to her mother at 12:10 a.m.

that morning. After speaking to her mother, Defendant said she had remained at Mr. Brasfield's house for another thirty minutes before a friend drove her back to her own car. Defendant said she then stopped and bought cigarettes and went to Taco Bell, but realized she did not have her wallet. She called Mr. Brasfield and asked him to look for her wallet. Next, she went back to Mr. Kobeck's house and found her wallet there. After leaving Mr. Kobeck's house, Defendant said she bought gas and told Sergeant Justice that she had the receipt for the purchase. Defendant stated that she next drove to Eric Whitaker's house in Cordova, but decided to head home after speaking to him briefly. She then spoke to Mr. Hammack, who was supposed to come over to her house to see her new kitten, but she did not call him after she got home and discovered her mother's body. Defendant said that she arrived home between 4:00 and 5:00 a.m.

Defendant stated that when she arrived at home she finished smoking a cigarette, threw the butt in the flower bed, and used her key to enter the front door, which was locked. When she first came into the house, Defendant turned on the light in the hallway, although she noticed that the light in her mother's bathroom was on and her bedroom door was open, both of which Defendant characterized as "weird," explaining that the victim usually slept with her door closed and the light off. She first went into the kitchen to get her cat but stepped on glass and quickly realized that it was all over the floor. She then walked into her mother's room, "took the basket off of her head," tried to talk to her and attempted to find a pulse, but found none. Defendant later stated that she had touched her mother's arms and face when she found her. Finding her mother unresponsive, she "kept shaking her" but soon ran to the neighbor's house screaming, and Mr. Cocke followed her back to her house. Defendant said that her mother kept her purse to the left side of her bed, had a nice cell phone, and usually kept cash in her wallet. Defendant said that her mother usually slept in a big t-shirt, but sometimes slept in her underwear. [15]

In response to Sergeant Justice's questions, Defendant further stated that she and her mother recently had a disagreement over a party Defendant's boyfriend, Mr. Brasfield, had thrown at their house, and Defendant said that the victim "was disappointed with [Mr. Brasfield] cause [sic] she trusted him." Defendant described her disagreements with her mother as "the same kind that teenagers and mothers [have]." She said that the victim ***568** had an "on and off again boyfriend," Mr. Irvin, but that they were broken up and the victim had gone to a wedding with Mr. Tual the previous evening. The victim's arguments with Mr. Irvin, Defendant said, were only "heated words" and not physical. Defendant also mentioned that her mother had recently made an enemy at work over an account.

When asked about a cut on her left hand between her thumb and forefinger, Defendant said she had cut her hand at the Italian Festival on Friday night when she tripped and fell on a broken beer bottle. She said that her mother had purchased

"New Skin" adhesive for her to treat the cut. Defendant said the cut had not required stitches, but Defendant neither offered to show Sergeant Justice the cut, nor did Sergeant Justice specifically ask to see it. According to Sergeant Justice, Defendant did not appear to be intoxicated or under the influence of any drugs at the time of the interview.

Defendant signed her statement at 9:53 a.m. on June 5, 2005. After giving her statement, Defendant told Sergeant Justice that some of the receipts from her activities from midnight until the time she discovered her mother's body might be in her vehicle. At 10:50 a.m., at the request of detectives from the crime scene, Sergeant Justice had Defendant sign forms consenting to a search of the cars in the driveway and permitting the police to obtain DNA samples from Defendant, including "hair samples, blood samples, and/or saliva samples." At 11:05 a.m. Sergeant Justice accompanied Defendant to the Tennessee Bureau of Investigation, a few floors away in the same building, so that a full set of her fingerprints could be taken. At 11:25 a.m. Sergeant Justice photographed Defendant's hands, shoes, and clothes. The photographs showing Defendant's hands depict an apparently intact manicure and a small piece of white tape, with no absorption pad, covering the cut on Defendant's left hand. Sergeant Justice confirmed that such photographs are routinely taken during the investigation of a murder by stabbing because if the person perpetrating the crime hits a bone while stabbing the victim, the perpetrator's hand may continue to slide down the blade of the knife, thus cutting the attacker's palm. Overall, Defendant remained at the Memphis police station for approximately four hours on the morning after the victim's body was discovered.

When Sergeant Justice returned Defendant to the crime scene at 12:15 p.m., the police located her new kitten in the garage and helped her retrieve her dog from the back yard. Soon afterward the police returned her purse, keys, and cell phone, telling her that she could take her vehicle as well if she wished. At this point Sergeant Justice took Defendant's gray New Balance sneakers, as the shoes had blood on them. Defendant had been wearing the sneakers all morning, including during her trip to the police station. Defendant was given other shoes from inside the house to wear.

By the time Defendant returned to the crime scene, several of her friends, including Mr. Brasfield, had arrived. When Mr. Brasfield asked Defendant about the bandage on her hand, Defendant told him she "was in her house chasing her kitten through the kitchen and cut it on some glass, some broken glass." Defendant spoke with Ms. Dix again as well. Ms. Dix questioned Defendant about Mr. Brasfield's statement that Defendant had called him from her house around 12:30 or 1:00 a.m. Defendant denied that she had been home earlier, insisting that while the victim had called and told her to come home, when she drove by the house and saw the lights were off, she assumed the victim ***569** was asleep and drove to a boy's[16] house where she smoked pot with him, not returning home until after 4:00 a.m.

Shortly after Defendant returned to the scene, a friend of the victim, Patty Masterson, approached Defendant and hugged her. Ms. Masterson recalled Defendant asking her if "all of this is going to be on the news[.]" When Ms. Masterson, who noticed that Defendant was wearing a long-sleeve white shirt underneath a long-sleeve grey sweatshirt, asked Defendant if she was hot, Defendant removed the long-sleeve grey sweatshirt and threw it to the ground. Ms. Masterson picked it up and turned it over to the police.

By this time, members of the media and various onlookers, as well as family friends, had begun to gather outside the house. When Regina Hunt, a friend of the family, approached her, Defendant said that she "felt uncomfortable" around all of the victim's friends in the area and wanted to leave. Before Defendant left with Ms. Hunt, however, a friend of Defendant's testified that she saw Defendant sitting in Ms. Hunt's car with a plastic bag full of Lortabs in her hands. Ms. Hunt drove Defendant to a nearby restaurant that Ms. Hunt owned, where they went into her office to eat after Defendant saw Mr. Brasfield and two other of her friends in the dining area of the restaurant. After eating, Defendant and Ms. Hunt returned to the crime scene, where Defendant asked the police if she could retrieve her bag [17] from her Jeep. The police allowed her to do so.

Around this time Defendant's friend Caroline Giovannetti arrived, and Defendant asked if Ms. Giovannetti would care for her dog and if she could shower at Ms. Giovannetti's house. When she agreed, Ms. Hunt drove Defendant to Ms. Giovannetti's house. Defendant went to the back of the house to shower and returned a short while later, her hair wet but smelling of marijuana. Ms. Giovannetti packed Defendant a bag of clothes to wear, since Defendant's own clothes were at the crime scene and inaccessible. When Ms. Giovannetti asked about the previous night, Defendant said that after returning to her car from a party with friends, she had driven past her house around midnight, seen the lights all out, assumed her mother was asleep, and proceeded to drive to Mr. Whitaker's house, coming home to find her mother between 4:00 and 5:00 a.m. Defendant "didn't answer" when asked about the cut on her hand. Ms. Hunt and Defendant then left for Ms. Hunt's house, followed by Defendant's friends in two other cars. On the way, Defendant asked Ms. Hunt to drive by Memorial Park, the cemetery where Anna Menkel, Defendant's good friend who had died six months earlier, was buried. There, Ms. Hunt witnessed Defendant "sobbing" at her friend's grave.

Ms. Hunt then drove Defendant to her own home, where Ms. Hunt ordered pizza and many of Defendant's friends gathered to comfort her. One friend described Defendant as upset but "not overly upset." When they first arrived at her house, Ms. Hunt asked Defendant about the cut on her hand, and Defendant replied that "she had cut it on a beer bottle at Italian Fest" on Saturday night. Defendant reiterated a version of this explanation later in Ms.

Giovannetti's presence, commenting, "[O]h Caroline, you saw me, you saw how drunk I was." Although Ms. Giovannetti testified ***570** that she had seen Defendant at the Italian Festival on that Friday evening, June 3, 2005—rather than Saturday evening—she did not recall Defendant appearing to be drunk or noticing that Defendant had hurt her hand.

While talking with Ms. Hunt and other friends, Defendant declared that she "wanted to have a party." Ms. Hunt told her that this would not be a good idea. Defendant then said that she wanted to go to the movies. Ms. Hunt responded that Defendant was not going anywhere and needed rest. Ms. Hunt allowed Defendant's friends to remain at her house until around 11:00 p.m. that evening, and Defendant stayed with Ms. Hunt that night. During this time, Ms. Hunt looked through Defendant's purse and discovered "a prescription bottle with someone else's name on it," and twelve to twenty pills "with little speckles" and the name "Concerta" on them. When Ms. Hunt confronted Defendant about the pills, Defendant at first claimed that the pills had been prescribed for her by her doctor but ultimately confessed that they were drugs she had obtained from someone at Ridgeway High School. [18]

On the morning of Monday, June 6, 2005, Ms. Hunt asked Defendant where she had been on the night of the murder, but Defendant offered conflicting stories. First, Defendant claimed that she had gone home but then had sneaked back out again. Defendant later stated that she had driven by her house but decided not to go home. "She got very defensive when I corrected her that her story was different," Ms. Hunt recalled.

On this same morning, Sergeant Justice called Ms. Hunt's home and spoke with Defendant to clarify the location of the Taco Bell where Defendant said she had stopped on her way home the morning of June 5th. During this conversation, Defendant admitted to Sergeant Justice that she had not stopped at Taco Bell, but instead "rode around and smoked a bowl of weed" and had been too ashamed to say so before. After speaking with Sergeant Justice, Defendant asked Ms. Hunt if she were a suspect in the murder. When Ms. Hunt replied that, given the early stage of the investigation "everyone was a suspect," Defendant declared that she "touche[d] her mother, she hug[ged] her mother, [she was] all over her mother." When Ms. Hunt reassured her that the police would find the killer, Defendant replied in a tone that Ms. Hunt described as "real sharp" and "very cold," "[W]ell, they didn't find out who killed my dad."

Later that same morning, Defendant declared that she wanted to go tanning and shopping. When Ms. Hunt refused to accompany her, Defendant called another family friend, Ms. Kathy Menkel, the mother of Defendant's deceased friend. Ms. Menkel picked up Defendant from Ms. Hunt's house and took her out. Defendant spent Monday night at Kathy Menkel's house.

On Tuesday morning, June 7, 2005, Defendant called Sergeant Justice, asking

if there were any developments in the investigation. Defendant never called Sergeant Justice again. That same day, the police obtained DNA samples from Defendant's friend, Andrew Hammack. It was also on Tuesday that Ms. Hunt drove Defendant to the Memphis hotel where Defendant's aunts, her mother's sisters Cindy Eidson and Grace France, were staying.[19] As ***571** they drove to the hotel, Ms. Hunt again asked Defendant about the cut on her hand. This time, Defendant said that "her cat was stuck in the garage and she cut [her hand] trying to get the cat out of the garage." When Ms. Hunt pointed out that this was a different explanation than Defendant had given before, Defendant "got defensive, and then she started saying that she wanted to kill herself." Defendant was crying and saying, "I just want to die. I want to kill myself." At this point Ms. Hunt attempted to console her and brought her to her aunts.

Ms. France suggested that she and Defendant go see the police and get an update on the investigation, but Defendant refused to go. Ms. Eidson testified that she asked Defendant about the night of the murder, and Defendant told her that "[Mr. Brasfield] had called [her] and [she] was with this fellow Chris, and [Mr. Brasfield] hates Chris[,] and so [she] didn't want to tell him [she] was with him, and so, [she] said [she] was at home, smoking a cigarette." Then Defendant said that the night was too painful to talk about. Ms. France took Defendant shopping for clothes during this period. She noticed that Defendant was wearing a "polar fleece type jacket," and that during the shopping trip, Defendant chose all long-sleeved shirts and a long-sleeved nightgown, even though it was extremely hot in Memphis at the time.[20] Defendant also told Ms. France that the victim had bought her some New Balance sneakers while they were in Florida and that she wanted them back, which Ms. France thought was an odd request, given that the shoes had blood on them and were part of the murder investigation.

On Wednesday, June 8, 2005, Defendant was hospitalized.[21] Although Defendant attended her mother's funeral, she otherwise remained hospitalized for about a month. On the day of her mother's funeral, Friday, June 10, 2005, the police visited Defendant at the hospital and photographed her body and also took more pictures of her hands.

When Defendant's uncle, Mr. Sherwood, visited Defendant in the hospital and asked if she knew anything about her mother's murder, Defendant "just basically put her head down and wouldn't say anything." When he asked her about the cut on her hand, she said she cut it on barbed wire at the Italian Festival when jumping a fence. During a later conversation with Mr. Sherwood, Defendant claimed to have burned herself on a stove. Ms. Hunt also visited Defendant at the hospital and brought a picture of the victim and Defendant as a child. Defendant only commented on how "disgusting" the pantyhose were that the victim wore in the picture, according to Ms. Hunt, and seemed more interested in ***572** having Ms. Hunt contact Mr. Brasfield for her than in the

victim's murder. Ms. Hunt also testified that there was tension between Defendant and her aunts over money, specifically how much Defendant would be allowed to spend on apartment rent once she was released from the hospital. Regarding one potential apartment, Defendant told Ms. Hunt that she "wasn't living in that piece of shit" and said her aunts "were keeping her money from her. That the cars were hers, the money was hers, and they were keeping it from her."

On June 12, 2005, Mr. Hammack's friends brought in a pair of New Balance sneakers to the police station, claiming that he had been wearing them the weekend of the murder and informing police that they could not account for his whereabouts on the night of the murder. The police took pictures of the shoes and returned them. The shoes were never collected into evidence or tested in any way. Lieutenant Miller described Mr. Hammack's friends as "slightly incoherent" and behaving as if they had been smoking marijuana.

On June 17th, the police obtained a warrant and searched Defendant's Jeep Cherokee. They found two Walgreens bags, one containing several first aid supplies, including Nexcare First Aid Gentle Paper Tape, an empty box of Nexcare Bandage Drops Liquid Bandage, Skin Shield Liquid Bandage, loose change, and a brown paper towel. The police also found a white skirt among the "tons" of clothes and many other items in Defendant's car. [22]

After Defendant was released from the hospital in early July, she stayed with Mr. Sherwood for one night and then stayed with Rebecca Robertson, Mr. Sherwood's friend. Ms. Robertson lived at and was the assistant manager of the Quail Ridge Apartments, where Mr. Sherwood also worked. Defendant stayed with Ms. Robertson for a period of time before moving into her own two-bedroom apartment at the Quail Ridge complex. [23] During the time she stayed with Ms. Robertson, Defendant often went out with friends. When Ms. Robertson asked her about the cut on her hand, Defendant said that she cut it at Italian Festival, but refused Ms. Robertson's offer to treat the wound to keep it from scarring and did not want to discuss it. During this period and after she moved to her own apartment, Ms. Eidson and Ms. France provided for Defendant financially. Mr. Sherwood brought furniture from the victim's house to Defendant's new apartment. Defendant told him that she did not want to return to the house. When he asked her if she would get a job, Defendant informed him that she would just "go into selling pills or whatever."

Once she was established in her own apartment, Defendant often had friends over for parties. Several friends testified that they drank at her apartment, regarding it as "a place to drink" where no ***573** parents were around to supervise. One witness testified that she saw people smoking marijuana at the apartment, and Mr. Brasfield stated that he saw Defendant take Lortabs and snort cocaine at her apartment. [24]

Defendant often visited Ms. Robertson while Ms. Robertson was working in the

management office of the Quail Ridge complex. During one such visit, Ms. Robertson recalled Defendant becoming "very uncomfortable" when she saw the police arrive at the apartment complex. Defendant asked, "[A]re they here for me?" Ms. Robertson explained that the police had been called to deal with a problem caused by another tenant.

By the end of the summer of 2005, Defendant was evicted from her apartment for causing disturbances, not following the lease, and having an unauthorized pet. She had lived in the apartment for only a few weeks or a month before her eviction. When he helped to pack up Defendant's apartment, Mr. Sherwood noticed three to four pills on the counter, as well as a clear plastic straw with white residue, the latter of which he put in a bag and gave to a family member.

It is not clear where Defendant stayed after her eviction from the Quail Ridge Apartments, although the record indicates that she worked as a babysitter that summer. Defendant was arrested and charged with homicide for her mother's murder on September 29, 2005. After her arrest, Defendant called Ms. Eidson from the police station. When Ms. Eidson said, "Noura, tell me where you were and who were you with when Jennifer was murdered," Defendant responded, "I don't know. I don't know." Defendant never contacted Ms. Eidson again.[25] Defendant also called Ms. France after her arrest, asking if Ms. France would contact the family for which she had been babysitting and get the money they owed Defendant. When Ms. France responded by asking her questions, including one about the cut on her hand, Defendant told her that "any doctor would tell you that was a burn. I burned it cooking macaroni and cheese."

Dr. Karen Chancellor, the chief medical examiner for Shelby County, testified at Defendant's 2009 trial. Dr. Chancellor said she received the victim's body around 4:00 p.m. on June 5th and performed the autopsy on June 6, 2005. Dr. Chancellor described the victim as approximately five feet, ten inches tall and weighing 166 pounds.[26] During the autopsy, Dr. Chancellor discovered a small amount of alcohol in the victim's blood (.07), as well as traces of Benadryl. Dr. Chancellor determined that the victim's death was caused by multiple stab wounds, explaining that the victim sustained fifty or fifty-one stab wounds to her chest, abdomen, back, neck, and arms, and many cut wounds to various parts of her body.[27] Although Dr. Chancellor ***574** could not determine the order in which the wounds were inflicted, she opined that the knife was held at a ninety-degree angle to the victim's body when the chest wounds were made. The chest stab wounds passed through the right and left ventricles of the victim's heart and penetrated the victim's sternum. Dr. Chancellor explained that penetration of the sternum would have required more pressure, but not a great deal of force as long as the attacker used a sharp-edged instrument. The abdominal stab wounds involved the victim's stomach, liver, and aorta; the stab wounds to the front of the victim's right shoulder involved her right lung. One of the

seven or eight "side to side" stab wounds on the victim's neck lacerated her larynx. The victim had sharp force injuries on her forehead and cheek, as well as a cut wound on her chin with a pattern indicating that it was inflicted with a serrated edge. The victim sustained stab wounds to her left shoulder, both hands, right arm, and right wrist, as well as cuts on the back of the fingers of her left hand and on the palm of her right hand. Dr. Chancellor opined that the injuries to the victim's hands, particularly the palmar surface injuries, were consistent with defensive wounds. In addition to the stab and cut wounds, the victim had a contusion on the left side of her head, which Dr. Chancellor described as a recent injury caused by a blunt object.

Evidence introduced at trial provided only general information about the murder weapon, which was never discovered. The maximum depth of the victim's stab wounds was six inches, meaning the knife used was at least six inches long. Dr. Chancellor estimated the width of the knife as one-half to three-quarters of an inch. However, she could not determine the height of the assailant from the nature of the wounds. Based on the nature of the wounds, Dr. Chancellor opined that two knives may have been used in the assault. A forensic anthropologist who assisted Dr. Chancellor with determining the type of knife used in the assault concluded that the stab wounds to the victim's ribs were inflicted by a non-serrated, sharp-edged weapon. However, Dr. Chancellor said that she could not "imagine anything else other than a serrated knife" causing the cut wounds to the victim's neck and jaw. Dr. Chancellor opined that either two knives were used in the assault or a single knife with an unusual configuration of both a sharp edge and a serrated edge was the murder weapon.

Dr. Chancellor admitted that the CSI unit contacted her office and asked for a blood spatter expert to look at photographs from the crime scene, but she did not know if any photographs were ever sent. Dr. Chancellor did not recall the police asking anyone from her office to come to the scene.

Analysis of fingerprints collected at the scene failed to identify a perpetrator or link Defendant to the crime scene. Fingerprints found on the kitchen glasses matched those of Koale Madison, a friend of Defendant's who admitted to being in the house on June 4th and drinking water from a glass in the kitchen. Although prints or partial prints were found on other items, including a Skin Shield box, the condom wrapper, the kitchen door, and footboard, no other prints could be identified. The print on the condom wrapper was not that of either Defendant or the victim, and Defendant's prints did not match those found on the interior glass of the kitchen door. The three knives found at the scene were not processed for fingerprints.

Similarly, no DNA evidence linked Defendant to the crime scene. Dr. Qadriyyah Debnam, the Tennessee Bureau of ***575** Investigation ("TBI") forensic scientist who performed the analysis, reported that, while the tests of the victim's sexual assault kit were negative for semen, blood of unknown individuals who were neither the victim

nor Defendant was present in the victim's bed. Testing of stains on the top sheet revealed a complete DNA profile of an unknown female mixed with DNA that could be a match to the victim's. The former was a "major contributor" of DNA, likely derived from blood, while the victim "c[ould] not be excluded as a minor contributor" to the second strain of DNA discovered, which could have been saliva, skin cells, or blood. Stains on a pillowcase found on a pillow near the headboard contained DNA matching the victim's as well as the DNA of another individual who was not Defendant.[28] Testing of stains located on a bedpost of the victim's bed yielded a partial DNA profile consistent with a mix from the victim and an unidentified person who was neither Defendant nor the unidentified person whose DNA was discovered on the top sheet. Otherwise, DNA testing of the blood found throughout the victim's room and the house, including that found on the wicker basket, stool, bedding, closet wall and light switch in the victim's room, on the front porch and front door, and on the broken glass from the kitchen door as well as the bloody footprints found in the hallway, showed that the blood either matched or was consistent with the victim's DNA profile.

Defendant's DNA was not located on any of the crime scene items that were tested. Long, blond human hairs collected from the victim's hands were not tested by the TBI or otherwise identified. Only the victim's own DNA was found underneath her fingernails.[29] No DNA testing was performed on the condom wrapper, as the process used to lift the fingerprint made a DNA test impossible. No blood was found in Defendant's car or on the clothing she was wearing when police arrived at the scene. Additionally, no blood was found on the white skirt found in Defendant's car, nor was blood discovered on the gold sandals found near the front door of the victim's home. The victim's blood was found on Defendant's grey New Balance sneakers, however, which Defendant was wearing on the morning her mother's body was discovered. Defendant's blood was discovered only on a napkin found in the pocket of the grey sweatshirt Defendant was wearing when she discovered the victim's body.

The footprint evidence was not of a sufficiently good quality to enable the State's footprint expert, Dr. Linda Littlejohn, to make any specific identifications. CSI team photographs of the footprints were taken at an angle and, as a result, were "not examination quality"; therefore, Dr. Littlejohn could only do a "visual comparison." The footprint evidence, preserved using chemical products the CSI team had never used before, failed to produce any viable results.[30] Nine of the footprints Dr. Littlejohn analyzed had a "similar tread design" to Defendant's New Balance shoe, ***576** but could not be matched to any individual shoe. Dr. Littlejohn also opined that one gel lift of a footprint "could be" a print left by a New Balance shoe. The gold sandals found near the door of the house were not matched to any footprint evidence at the scene. While Dr. Littlejohn agreed that there appeared to be "some sort of a pattern" on the bloodstained sheet that might be a footprint,

she could make no further conclusions. Although she acknowledged that there were tread designs in the sandy ground outside the back gate, as depicted in a photograph of the crime scene, these prints were not closely examined or preserved by the police at the scene. Additionally, because the police, the first responders, and the neighbors had not been asked to provide elimination footprints, Dr. Littlejohn could not rule out that the footprints she examined were left by these individuals.

Despite the lack of physical evidence tying Defendant to the crime, the prosecution offered a great deal of proof about the acrimonious relationship between Defendant and the victim in the weeks and days prior to the murder. The proof indicated that a conflict had arisen because the victim was not turning over to Defendant assets belonging to Mr. Hassanieh, Defendant's deceased father. Mr. Sherwood, the victim's half-brother, testified that Defendant told the victim at one point, "[Y]ou know [those were] my father's cars, and the money goes to me." When the victim informed Defendant that any money resulting from Mr. Hassanieh's assets would go into a college account for Defendant or, if she did not go to college, would be used to reimburse the victim for unpaid child support, Defendant's anger increased.

Ms. Sheila Cocke, a neighbor, heard Defendant and the victim arguing outside their house on two occasions. In March 2005, Ms. Cocke heard Defendant twice screaming at the victim, "Just give me the fucking money," to which the victim replied, "Be quiet, Be quiet. Let's get inside." On the second occasion, Ms. Cocke recalled Defendant saying, "Give me the money. I want the money," to which the victim replied, "I will. I will." Ms. Cocke described Defendant as "in a rage" on both occasions. Ms. Hunt also saw Defendant speaking to her mother in a "very disrespectful, ugly" manner in the weeks and months before the murder. On these occasions the victim was quiet or attempted to continue the discussion in private.

The prosecution also offered proof to show that Defendant was angry about the victim's plans to end or curtail Defendant's lifestyle of "partying" with her friends rather than attending to her school work. On May 21, 2005, about a week and a half before the murder, the victim hosted a birthday party at her home for Mr. Sherwood. When Defendant arrived late for the party, the victim accused her of being high and informed Defendant that she was going to start drug testing her.

A few days later, on Memorial Day weekend of 2005, the weekend before the murder, Defendant, the victim, and Mr. Sherwood drove from Memphis to Perry and Winter Park, Florida, for a family reunion and to visit the victim's sister, Ms. Eidson, and her family. According to Mr. Sherwood, during the car ride to Florida the victim told Defendant that she had tested positive for drugs and that they would address the issue later.

When the group arrived at Ms. Eidson's home, the victim told Defendant that she

would have to go to boarding or military school or move out of their house. The victim was concerned that Defendant, then eighteen years old but still in eleventh grade, was partying with her friends rather than completing her school work. Defendant responded that she would just join ***577** the military. According to Mr. Sherwood's and Ms. Eidson's testimony, tension between the victim and Defendant increased after the victim received a call on Saturday evening from neighbors in Memphis informing her that a group of teenagers were having a party on her property and that the neighbors had called the police. The victim confronted Defendant, who denied any knowledge of the party. The victim suspected Defendant was aware of the party because Defendant's boyfriend, Mr. Brasfield, was caring for the house and dog while the victim and Defendant were away. The next day, after Mr. Brasfield called the victim and admitted to organizing the party, the victim confronted Defendant again.[31] This time, Defendant admitted that she knew of the party, and a "heated argument" ensued. The two women went upstairs to discuss the matter privately and were not speaking to each other when they came back down. Mr. Sherwood and Ms. Eidson described Defendant after the argument as "clearly upset," "crying," "cold," "distant," and "sad."

Despite the conflict, Mr. Sherwood, the victim, and Defendant left Florida together on Memorial Day 2005. On the drive back to Memphis, the victim, who worked in financial services, received a call from a client about selling a bond. Defendant then asked the victim how bonds worked and how much money she made in such transactions. During the discussion that followed, the victim assured Defendant that she would be well taken care of if anything ever happened to the victim, referring specifically to her life insurance policy and her 401(k) plan, the former of which listed Defendant as a beneficiary and the latter of which listed Defendant as well as Mr. Sherwood as beneficiaries. Before the group arrived in Memphis, the tension between the victim and Defendant had subsided enough that the victim stopped at an outlet mall and bought several items of clothing for Defendant.

However, the conflict heated up again after they arrived home. A couple of days before the murder, Defendant angrily told Mr. Brasfield and another friend that the victim was contemplating taking out a restraining order against Mr. Brasfield. Defendant also informed her friends that her mother was drug testing her and was upset about the party Mr. Brasfield had held at their house.

Numerous friends of Defendant testified to frequent drinking and drug use by Defendant and her social circle, and said the drug use often occurred at Defendant's home, although never when the victim was present.[32] The proof at trial indicated that Defendant's friends regarded the victim as extremely hospitable, explaining that she often entertained and cooked for them in her home. Defendant's friends believed the victim was aware of Defendant's marijuana use because the victim had teased Defendant and a friend for having the "munchies," and implied that it was "not a big deal"

when she caught another of Defendant's friends smoking marijuana in her backyard. Defendant "never really had a ***578** curfew set," according to one friend, although Defendant told another friend that she did have a curfew, which she obeyed on some occasions but at other times observed only to sneak out again after returning home.

On Friday June 3, 2005, the weekend of the murder, Defendant went out with friends, including Alexandra Kline. Defendant and Ms. Kline first went to a party with several other teenagers at the unoccupied home of Mr. Kobeck, another acquaintance. The Kobeck family was out of town, and the teenagers entered their house without permission through the garage door. Later, Defendant and Ms. Kline went to the Italian Festival, a street party at a park near the Kobeck home, where Defendant ran into Ms. Giovannetti. Ms. Kline and Ms. Giovannetti testified that they did not see Defendant injure her hand at the Italian Festival, and Ms. Giovannetti said Defendant did not appear intoxicated that night.

Around midday on Saturday, June 4, 2005, Defendant and Ms. Kline drove in Defendant's Jeep Cherokee to their friend Mr. Madison's house, where they swam and "hung out" by the pool while Mr. Madison did yard work. Although the witness testimony varied somewhat, the proof established that sometime between 3:00 and 5:00 p.m., Defendant, accompanied by Mr. Madison, drove Ms. Kline home, where Ms. Kline remained.[33] Defendant and Mr. Madison continued on to Defendant's house. When Defendant noticed her mother's car parked in the driveway, Defendant did not stop at her house and instead drove to the Eastgate shopping center near the Italian Festival to look for parking for the event, believing the victim would be gone by the time she and Mr. Madison returned. However, when they returned, the victim was still at home, so Defendant drove to a house on a nearby street, which had a sign in the yard offering free kittens. After Defendant selected a kitten, they drove back to Defendant's house, arriving sometime after the victim had left at 5:30 p.m. for the wedding. Realizing her mother was no longer home, Defendant stopped at her house, and she and Mr. Madison went inside. While Defendant got ready for the evening, Mr. Madison went into the kitchen, had a beer and a glass of water, played with the kitten, and took a golf club into the back yard and practiced his swing. Mr. Madison testified that he put the golf club back in the bag. Mr. Madison recalled seeing Defendant enter her own room, the hall bathroom, and the victim's room while getting ready for the evening.

After leaving her house, Defendant drove them to a liquor store to buy beer, and they proceeded to Mr. Kobeck's house, which was located near the Italian Festival. When Defendant and Mr. Madison arrived at Mr. Kobeck's house, a party was underway. Various witnesses, including Mr. Madison, Sophie Cooley, Kirby McDonald, Brooke Thompson, Joey McGoff, and Mr. Brasfield, placed Defendant at Mr. Kobeck's house that evening. All of these witnesses testified that the party took place while Mr.

Kobeck and his family were out of town, but the testimony conflicted regarding the time Defendant arrived at the party and the duration of the party, as well as if, and when, Defendant went to the Italian Festival on June 4, 2005.

Ms. McDonald, Ms. Thompson, and Ms. Cooley testified that they arrived before ***579** Defendant, and they estimated Defendant arrived between 7:30 and 8:00 p.m. Defendant's boyfriend, Mr. Brasfield, also attended the Kobeck party, but he brought another young woman as his date. The record does not indicate whether he arrived before or after Defendant. According to Mr. Brasfield, he and Defendant had a "bad conversation that went sour," and Defendant slapped him when she saw him kissing the other woman.

Mr. Madison testified that he and Defendant stayed at Mr. Kobeck's house for two and a half to three hours, that he drank beer and smoked marijuana, and that he then walked to the Italian Festival with a group of guys. While Defendant did not accompany him, Mr. Madison testified that he saw her there later that evening and talked to her around 10:30 p.m., as he was leaving with someone else. No other witness recalled seeing Defendant at the Italian Festival that night, although Mr. McGoff did recall a group from the Kobeck party going to the Italian Festival that evening.

Several witnesses, including Mr. Madison, Ms. Cooley, Ms. McDonald, Ms. Thompson, and Mr. McGoff, testified to seeing Defendant drinking beer at the Kobeck party. Ms. Cooley testified to seeing Defendant take three Lortab pills at the party as well. These witnesses acknowledged that they were also drinking beer that night, and Ms. McDonald acknowledged taking Xanax.

Multiple witnesses testified as to the clothes Defendant was wearing when she arrived at the Kobeck party. Ms. Cooley described Defendant's clothing as a "yellow tank top with a white out design on the outside of it" and a "long or knee-length skirt and gold sandals with a rhinestone clip." Ms. McDonald said Defendant was wearing a "yellow tank top" and a "long white skirt" that extended to her feet, while Ms. Thompson described Defendant's clothing as a yellow top with "spaghetti straps" and "white flowers" and a "flowy" white skirt that went to just below Defendant's knee. Two pictures taken with cell phone cameras that evening depict Defendant in a yellow and white shirt. Defendant's lower body and skirt are only partially visible in one photograph; the length of the skirt is not depicted in that image. At trial, Ms. Thompson identified the white skirt the police found in Defendant's car as the one Defendant had been wearing at the Kobeck party on June 4, 2005, while Ms. McDonald said it was not the same skirt.

None of the witnesses who spent time with Defendant on June 3rd and 4th, including Ms. Kline, Mr. Madison, Ms. Cooley, Ms. McDonald, Ms. Thompson, and Mr. Brasfield, recalled seeing a cut or injury on her hand, although Mr. Madison did recall Defendant coming into the Kobeck kitchen

and asking for a bandage for one of the young women.[34] Ms. McDonald testified to seeing and touching Defendant's hands at the Kobeck party on Saturday, June 4th, explaining that Defendant had held out her hands to display the French manicure she had obtained earlier in the day. Ms. McDonald said Defendant had no visible injury to her hands at that time. Others, including Ms. Kline and Ms. Thompson, said they would have seen an injury to Defendant's hand because her ***580** hands and arms were exposed that day, although Ms. Kline did not recall seeing the injury on Sunday, June 5, 2005, either.

Ms. McDonald also recalled that, after the cell phone photographs were taken at the Saturday, June 4th Kobeck party, Defendant and a group of friends were talking about their mothers. When one friend complimented Defendant's mother as hospitable and nice, Defendant responded, "My mom's a bitch and she needs to go to hell." Defendant said nothing further, and Ms. McDonald assumed that the comment was typical of a "teenager saying something about [her] mom, being in an argument with [her], and being mad."

Eventually, Mr. Kobeck's grandmother discovered the teenagers and broke up the party. The proof is undisputed that Defendant was part of a group that then left the Kobeck house and caravanned in several cars to find a party in the Midtown area. There was conflicting testimony as to whom Defendant rode with, but all witnesses agreed that Defendant rode with friends and did not drive her own vehicle when the caravan left the Kobeck home. Mr. Brasfield testified that at some point during the caravan Defendant switched cars and got into his car, explaining that his other date had left earlier in the evening. When the group arrived in Midtown and discovered that the party they were looking for had ended, they decided to go to Mr. Brasfield's home and continue their party there.

It is unclear when Defendant arrived at the Brasfield party. Ms. Cooley and Ms. McDonald recalled Defendant arriving about 11:00 p.m.—a half hour after they arrived. Ms. McDonald testified that Defendant arrived wearing a skirt and shoes that differed from those she had been wearing at the Kobeck's house, although she was still wearing the same yellow top. Ms. McDonald described the skirt as dark denim and the shoes as black sandals. When shown a picture of Defendant taken the morning the victim's body was discovered, Ms. McDonald stated that the skirt from the previous night had been a "darker denim skirt," while the skirt Defendant wore that morning was a "whitewashed denim."

After arriving at Mr. Brasfield's house, the group sat in the backyard and talked. Ms. Cooley described Defendant's demeanor as "more quiet than usual" at Mr. Brasfield's house, explaining that Defendant was usually the center of the party, but that night she was "very reserved and quiet and just kind of sitting there." Ms. Thompson recalled Defendant saying repeatedly that she "needed to go home and wanted to go home," which Ms. Thompson described as strange because Defendant ordinarily did

not have a curfew. Mr. Brasfield's parents, who were home that night, broke up the party around midnight.

All witnesses testified that Defendant left Mr. Brasfield's house shortly after midnight. Defendant, Ms. Cooley, and Ms. Thompson left with Richard Raines, another friend at the party. Mr. Raines dropped Defendant off at her car, still parked at the Kobeck house, which was about ten to fifteen minutes from Defendant's house. Ms. Thompson testified that when they dropped Defendant off, she was still wearing the same yellow top she had worn to the Kobeck party, but had changed from the white skirt into a short blue jean skirt with a ruffle at the bottom.

Much of the proof at trial focused on establishing Defendant's whereabouts from the time she left the party around midnight until 5:00 a.m. on June 5, 2005. Defendant offered different accounts of her movements to police and friends. In her statement to police, Defendant said that she received a call from the victim at around 12:10 a.m., in which the victim told ***581** her to come home and that she was going to bed. Phone records introduced at trial show two calls from the victim's home phone number to Defendant's cell phone: one call at 12:18 a.m., lasting one minute and thirty-nine seconds, and the second call at 12:20 a.m. lasting forty-seven seconds. Defendant also told police that, after picking up her car, she stopped and bought a package of cigarettes. A receipt from the BP station at 4830 Poplar Avenue, a few blocks from Defendant's house, shows a credit card purchase signed for by Defendant at 12:46 a.m.

At 12:59 a.m. Clark Schifani, Defendant's friend, received a hangup call from the victim's and Defendant's home phone number. Mr. Schifani testified that the victim had never called him previously from that number. About ten minutes later, at 1:09 a.m., Mr. Schifani received a call from Defendant's cell phone number, and a voice mail from Defendant. Phone records introduced at trial confirmed Mr. Schifani's testimony and also showed that Defendant had called another friend, Mr. Hammack, from her cell phone at 12:55 a.m.

Mr. Brasfield testified that Defendant called him shortly after leaving the party at his house, wanting to talk about getting back together with him. Mr. Brasfield cut their conversation short, as he and another male friend had plans to rendezvous with Ms. Cooley and Ms. Thompson at Ms. Cooley's house.[35] Mr. Brasfield testified that he thought Defendant "was outside smoking a cigarette," but did not state where. Shortly after their conversation, Mr. Brasfield said Defendant sent him a text message on the same topic. Phone records introduced at trial established that Defendant called Mr. Brasfield's cell phone at 1:00 a.m. and that they spoke for approximately two minutes. Defendant called Mr. Brasfield again at 1:06 a.m., and they spoke again for two minutes. Mr. Brasfield denied that Defendant ever spoke to him about a missing wallet that night.

Phone records introduced at trial showed a span of two hours and five minutes—between 1:13 a.m. and 3:18 a.m.—during which time Defendant did not call or text anyone and no witness testified to seeing Defendant. Defendant sent a text message at 1:13 a.m., received a text at 2:11 a.m., and did not text again until 3:34 a.m. No calls were made from Defendant's cell phone between 1:08 a.m., when she called Mr. Schifani, and 3:18 a.m., when she called Eric Whitaker. [36]

Mr. Whitaker testified that early in the morning of June 5th Defendant called him, wanting to come over and hang out. Mr. Whitaker agreed, and he encountered Defendant parked at the end of his driveway a short time later, as he was leaving to drive another friend home. Defendant, who said she had just pulled up, talked to Mr. Whitaker for two to three minutes, declined to ride with him or wait for him to return, and then left.

Video footage from a store security camera of a Walgreens store at the corner of Poplar and Massey, near Defendant's house, showed Defendant entering the store at 4:01 a.m. According to the testimony of the Walgreens clerk on duty at the time, as well as a record of the receipt produced by the store's computer, [37] Defendant ***582** purchased Liquid Skin, Nexcare tape, Skin Shield, adhesive tape, and hydrogen peroxide. Defendant also asked the clerk for a paper towel, which he gave her. Defendant paid $22.55 in cash for these items, and received change of $17.45. Defendant never mentioned going to Walgreens that night to the police or anyone else. Video footage of an All In One store located at 6646 Poplar Avenue showed Defendant purchasing gas with a credit card at 4:20 a.m. Defendant told the police of this stop during her interview with Sergeant Justice on the morning of Sunday, June 5th, and she informed them that they could find the receipt in her purse, which was in police possession at that time.

Although receipts and video footage placed Defendant in close proximity to her house that night, Mr. Hammack was the only witness who testified that Defendant told him she was at her house that morning before the victim's body was discovered. However, Mr. Hammack's testimony at trial regarding his contact with Defendant and activities that night varied from two prior statements he had given to the police, which were disclosed to the defense prior to trial. [38]

In his testimony at trial, Mr. Hammack described his relationship with Defendant as one of "friends with benefits." He testified that he spoke with Defendant at some point between 10 p.m. and midnight on the night of June 4th and that she asked him to meet her at her house. [39] They did not meet, but she called and sent him text messages throughout the night. He testified that he had been at a party with Ryan Grisham, that Mr. Grisham dropped him off at his house around 11:30 p.m., and that Mr. Hammack then drove a friend home around 12:30 a.m. to a location near Defendant's house. Mr. Hammack could not recall exactly, but he testified that he stayed at the friend's house for approximately two hours before heading home. Around 4:00 a.m., Defendant called

him again to tell him that she was on her way back from Mr. Whitaker's house and again asked him to meet at her house, a request Mr. Hammack found unusual. He did not go to meet her, he said, because he had been drinking and "couldn't afford a DUI."

On cross-examination, Mr. Hammack confirmed that he had his cell phone with him all night and denied that he left his phone anywhere. He also denied that a friend named "Marcus" was with him that evening. He admitted to heading to a topless bar that night with friends but claimed he decided not to go. Instead, he stated, he bought gas, smoked marijuana, and stopped at Krystal on the way home. Mr. Hammack admitted that he had been "intoxicated" during this time. When he awoke later, he noticed a text sent from Defendant's cell phone at around 5:00 a.m. that said simply, "answer." Mr. Hammack testified that even if phone records showed that Defendant called him repeatedly around 5:00 a.m., he did not remember ***583** talking to her.[40] He explained that any discrepancies between his first and second statements were simply the result of his having confused the activities of Friday and Saturday nights—June 3rd and 4th. When asked about the New Balance sneakers friends brought to the police, he testified that they belonged to a housemate and that he put them on because they were by the door and that the sneakers fit him. Mr. Hammack said that he thought he had worn them for the first time when he went to the police station to give a statement after the murder.

Attorneys for the prosecution and the defense presented closing arguments. The defense attorneys objected to a comment the lead prosecutor made at the beginning of final closing argument and moved for a mistrial, arguing that the comment amounted to an improper comment upon Defendant's exercise of her constitutional right to remain silent and not testify at trial. The trial court declined to grant a mistrial and submitted the case to the jury. Based on the foregoing proof, the jury, on February 21, 2009, acquitted Defendant of first degree murder and convicted her of the lesser-included offense of second degree murder.[41]

On February 26, 2009, five days after the jury had returned its verdict and prior to sentencing, the prosecution filed "State's Notice Of Omitted Jencks Statement in Relation To The Testimony Of Andrew Hammack" and attached to it a copy of the third statement Mr. Hammack had given the police on June 13, 2005, approximately one week after his first two statements.[42] Mr. Hammack's third statement was handwritten on the back side of a letter addressed to one of his housemates, gave a completely different account of the early morning hours of June 5th. He recalled going out with three friends —Ian, Jayron, and Marcus—and meeting another ***584** friend, Ryan Grisham, at the Paradiso, a movie theater not far from Defendant's house. He then proceeded to get in a car with Ryan and drive to a party, at which point Defendant called Ryan's phone looking for Mr. Hammack, as Mr. Hammack had left his cell phone with Ian. Mr. Hammack remained at the party for a

little while but left when Ryan tried to start a fight. The friends got into Mr. Hammack's truck, but Ian drove. Mr. Hammack stated that he wanted to get home because he was "rolling on XTC." At 3:57 a.m., Mr. Hammack and Ian decided to go to a strip club, stopped to get gas, but then decided to return home. They went out once again to visit a friend, but when that friend turned out not to be at his house, they returned home again and fell asleep.

In an affidavit filed along with the notice, the assistant district attorney described the circumstances surrounding his failure to turn over Mr. Hammack's third statement. The assistant district attorney stated that he learned of Mr. Hammack's third statement for the first time on February 15, 2009, while preparing for his direct examination of Detective Miller. The assistant district attorney then requested a copy of the statement and received it on February 17, 2009. Intending to provide the statement to defense counsel at the next opportunity, he placed a copy of it in "the flap of one of the trial notebooks." He stated that he did not provide the lead prosecutor with a copy of the statement, however, even though she was responsible for the direct examination of Mr. Hammack. By the time Mr. Hammack testified on February 19, 2009, the assistant district attorney said he had forgotten about the statement and did not realize his oversight until after the trial had concluded.

Defendant filed a motion for a new trial, raising numerous issues, including her claim that the State's failure to produce Mr. Hammack's third statement violated her right to Due Process. Defendant filed an affidavit in support of the motion in which the defense investigator stated that he had interviewed Ryan Grisham and that Mr. Grisham had confirmed that he was not in Memphis on the weekend in question and was instead visiting the University of Mississippi in Oxford, Mississippi with his parents. The defense also offered the affidavit of Dr. Jonathan J. Lipman, a neuropharmacologist, who described the effect of ecstasy on a person's ability to perceive events accurately. Defendant also filed an affidavit in support of her claim of improper prosecutorial comment on her right not to testify during final closing argument. In this affidavit, defense counsel described the lead prosecutor's actions and voice when delivering the allegedly improper comment.

The trial court denied Defendant's motion for a new trial and, on March 27, 2009, sentenced Defendant to twenty years and nine months on her conviction of second degree murder. Defendant appealed, raising twelve issues. The Court of Criminal Appeals affirmed Defendant's conviction and sentence. *State v. Jackson,* No. W2009–01709–CCA–R3–CD, 2012 WL 6115084 (Tenn.Crim.App. Dec. 10, 2012). However, the intermediate appellate court was not unanimous as to Defendant's claim that the prosecution improperly commented upon her constitutional right to remain silent and not testify. One member of the panel, who authored the lead opinion, concluded that the lead prosecutor's argument was not improper. *Id.* at *45. Two other members of

the panel, in a separate opinion, concluded that the argument was improper but did not require reversal. *Id.* at *66–68 (Bivins, J., and Woodall, J., concurring). Defendant then ***585** filed a Tennessee Rule of Appellate Procedure 11 application in this Court, which we granted.

III. Analysis

A. Improper Prosecutorial Comment Upon Defendant's Fifth Amendment Rights

Defendant asserts that the lead prosecuting attorney violated her constitutional right against self-incrimination when the lead prosecutor began final closing argument by walking across the court room, facing Defendant, and declaring in a loud voice, while raising both arms to point at and gesture toward Defendant, "Just tell us where you were! That's all we are asking, Noura!" Defendant contends that the lead prosecutor's statement, body language, and tone of voice could only have been understood as a command for Defendant to tell the jury where she was on the night of the murder. Defendant avers that the trial court erred by denying her motion for mistrial, made immediately after this statement. Although a majority of the Court of Criminal Appeals' panel determined that the lead prosecutor's argument was improper, Defendant argues that the majority applied an incorrect, non-constitutional standard when assessing the effect of the constitutional error. Defendant claims that the incorrect standard relieved the State of its burden to prove the error harmless beyond a reasonable doubt and shifted to Defendant the burden of proving prejudice. Defendant contends that the error was not harmless beyond a reasonable doubt; as a result, Defendant asserts that she is entitled to a new trial.

The State responds that the lead prosecutor's argument was not improper but was instead a summation of trial testimony. Even assuming the argument was improper, the State contends that Defendant is not entitled to a new trial because the error was harmless beyond a reasonable doubt.

[1] The Fifth Amendment to the United States Constitution, applicable to the States through the Fourteenth Amendment, *Malloy v. Hogan,* 378 U.S. 1, 6, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964), provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. Article I, section 9 of the Tennessee Constitution similarly provides that "the accused ... shall not be compelled to give evidence against himself." Tenn. Const. art. I, § 9. These constitutional provisions guarantee criminal defendants the right to remain silent and the right not to testify at trial. *Carter v. Kentucky,* 450 U.S. 288, 305, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981) ("The freedom of a defendant in a criminal trial to remain silent unless he chooses to speak in the unfettered exercise of his own will is guaranteed by the Fifth Amendment...." (quoting *Malloy,* 378 U.S. at 8, 84 S.Ct. 1489)); *Momon v. State,* 18 S.W.3d 152, 162 (Tenn.1999).

In 1965, the United States Supreme Court held that the Fifth Amendment right against self-incrimination prohibits prosecutorial comment upon a defendant's decision not to testify at trial and precludes a jury from drawing an adverse inference of guilt from a defendant's decision not to testify. *Griffin v. California,* 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). In *Griffin,* the prosecutor emphasized during closing argument that the defendant, who chose not to testify at trial, had been with the victim just prior to her murder and had "not seen fit to take the stand and deny or explain." *Id.* at 610–11, 85 S.Ct. 1229. The trial court instructed the jury that, although the defendant had a constitutional right not to testify, the jury could draw an inference unfavorable to the defendant as to facts within his ***586** knowledge about which he chose not to testify. *Id.* at 610, 85 S.Ct. 1229. The jury convicted the defendant of first degree murder; however, the Supreme Court reversed the conviction, holding "that the Fifth Amendment ... forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Id.* at 615, 85 S.Ct. 1229. The Court characterized comment on a defendant's right to remain silent and not testify as a "remnant of the inquisitorial system of criminal justice" and "a penalty imposed by courts for exercising a constitutional privilege." *Id.* at 614, 85 S.Ct. 1229 (citations and internal quotation marks omitted).

[2] The concepts *Griffin* announced were not new in this State. Long before *Griffin,* Tennessee courts had interpreted article I, section 9, together with a state statute, as precluding the prosecution from commenting on a defendant's decision not to testify at trial. *See* Act of March 4, 1887, ch. 401, sec. 2, 1887 Tenn. Pub. Acts 158 ("[T]he failure of the parties defendant to make such request and to testify in his own behalf, shall not create any presumption against him."); *Staples v. State,* 89 Tenn. 231, 14 S.W. 603, 603 (1890); *see also* Tenn.Code Ann. § 40–17–103 (2012) ("The failure of the party defendant to make a request to testify and to testify in the defendant's own behalf shall not create any presumption against the defendant."). This Court reiterated the importance of this principle thirty years ago, when it reversed a conviction based on a prosecutor's statement advising the jury *not* to consider the defendant's silence at trial against him. *State v. Hale,* 672 S.W.2d 201, 203 (Tenn.1984). In so holding the Court cautioned that "[t]he subject of a defendant's right not to testify should be considered off limits to any conscientious prosecutor." *Id.* (internal quotation marks omitted). [43]

[3] **[4]** More recent decisions have clarified the scope of the federal and state constitutional prohibition against prosecutorial comment on a defendant's exercise of the right not to testify. [44] For example, in *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the Supreme Court held that a prosecutor's characterization of the State's evidence as "unrefuted" or "uncontradicted" does not necessarily amount to a comment on the defendant's constitutional right not to testify, where defense counsel had already drawn the jury's attention to the defendant's

right to remain silent. *Id.* at 595, 98 S.Ct. 2954; *see also State v. Copeland,* 983 S.W.2d 703, 709 (Tenn.Crim.App.1998) (holding that a prosecutor may describe the proof as uncontradicted in certain circumstances). [45] Similarly, in *United* ***587** *States v. Robinson,* 485 U.S. 25, 108 S.Ct. 864, 99 L.Ed.2d 23 (1988), the Supreme Court held that, after defense counsel stated that the government had not afforded his client an opportunity to tell his side of the story, *Griffin* did not preclude the prosecutor from reminding the jury that the defendant could have testified. *Id.* at 32–34, 108 S.Ct. 864. The *Robinson* Court emphasized that, unlike the argument and instructions in *Griffin,* the prosecutor's comment did not treat the defendant's silence as "substantive evidence of guilt" but was a "fair response" to defense counsel's claim. *Id.* at 32, 108 S.Ct. 864; *see also State v. Cazes,* 875 S.W.2d 253, 267 (Tenn.1994) (applying *Robinson* to reject a *Griffin* claim).

Although prosecutorial responses to defense arguments are clearly permitted, *Griffin, Hale, Staples*, and their progeny continue to impose an absolute prohibition on prosecutorial comment in the absence of defense argument. Indeed, in *Mitchell v. United States,* 526 U.S. 314, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999), the Supreme Court expressly declined to adopt an exception to *Griffin* which would have allowed a judge to draw an adverse inference from a defendant's silence at sentencing. *Id.* at 328–30, 119 S.Ct. 1307. Writing for the Court, Justice Kennedy explained that "[t]he concerns which mandate the rule [of *Griffin*] against negative inferences at a criminal trial apply with equal force at sentencing." *Id.* at 329, 119 S.Ct. 1307. The *Griffin* rule, he wrote, "has become an essential feature of our legal tradition" and a "vital instrument for teaching that the question in a criminal case is not whether the defendant committed the acts of which he is accused," but "whether the Government has carried its burden to prove its allegations while respecting the defendant's individual rights." *Id.* at 330, 119 S.Ct. 1307.

[5] Furthermore, although *Griffin, Hale*, and *Staples* involved direct comments on the constitutional right to remain silent and not testify, "indirect references on the failure to testify also can violate the Fifth Amendment privilege." *Byrd v. Collins,* 209 F.3d 486, 533 (6th Cir.2000); *see Felts v. State,* 354 S.W.3d 266, 282 n. 10 (Tenn.2011); *Morris v. State,* 537 S.W.2d 721, 723–24 (Tenn.Crim.App.1976); *see also State v. Rutledge,* 205 Ariz. 7, 66 P.3d 50, 55 (2003) (en banc); *State v. Hodges,* 105 Idaho 588, 671 P.2d 1051, 1055 (1983); *People v. Bannister,* 232 Ill.2d 52, 327 Ill.Dec. 450, 902 N.E.2d 571, 593–94 (2008).

As the Court of Criminal Appeals has eloquently explained:

> There are ways other than by direct assertion to make a point with an audience. Sometimes it is more effective to get across a message in a negative manner. By telling the Romans over and over again that Brutus was an honorable man, Mark Anthony, in his oration at

> Caesar's funeral, skillfully and thoroughly convinced them that Brutus was a dishonorable traitor and murderer and turned them into a raging [m]ob.

Morris, 537 S.W.2d at 723.

[6] Most federal and state courts have adopted a two-part test for ascertaining whether a prosecutor's remarks amount to an improper comment on a defendant's exercise of the constitutional right to remain silent and not testify. *Smith v. State,* 367 Md. 348, 787 A.2d 152, 161–62 (2001) (Battaglia, J., concurring) (collecting federal and state cases). This two-part ***588** test inquires: (1) whether the prosecutor's manifest intent was to comment on the defendant's right not to testify; or (2) whether the prosecutor's remark was of such a character that the jury would necessarily have taken it to be a comment on the defendant's failure to testify. *Id.; see also United States v. Morris,* 533 Fed.Appx. 538, 543 (6th Cir.2013); *United States v. Rodriguez–Velez,* 597 F.3d 32, 44 (1st Cir.2010). The United States Supreme Court has never expressly approved this test, although Justice Stevens alluded to it approvingly in a separate opinion in *United States v. Hasting,* 461 U.S. 499, 515 n. 6, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983) (Stevens, J., concurring).

No prior Tennessee decision has adopted the two-part majority test or enunciated another test for ascertaining when a prosecutor's comment amounts to a constitutional violation. Although a minority of states have adopted a different test,[46] we conclude that the two-part test applied by the majority of jurisdictions is appropriate for Tennessee and therefore adopt it.

[7] Before utilizing this test to evaluate Defendant's claim, we must first determine the standard of appellate review applicable to such claims. Although courts in other jurisdictions differ in their characterization of the issue, with some describing it as a question of law and others describing it as a mixed question of law and fact, courts typically apply de novo review when addressing this issue. *See Robinson,* 485 U.S. at 31–34, 108 S.Ct. 864; *Rodriguez–Velez,* 597 F.3d at 44 (describing the issue as a question of law to which de novo review applies); *United States v. Gardner,* 396 F.3d 987, 988–89 (8th Cir.2005) (describing the issue as a mixed question of law and fact to which de novo review applies); *United States v. Layne,* 192 F.3d 556, 579 (6th Cir.1999) (same). Again, no prior Tennessee decision has enunciated the applicable standard of appellate review for a defendant's claim of impermissible prosecutorial comment on the right not to testify. In practice, however, Tennessee courts have applied de novo review when considering such claims. *See, e.g., Cazes,* 875 S.W.2d at 266–67; *State v. Thornton,* 10 S.W.3d 229, 235 (Tenn.Crim.App.1999); *Thompson v. State,* 958 S.W.2d 156, 168 (Tenn.Crim.App.1997). We agree that de novo review is the proper standard and apply it here, along with the two-part test, to determine (1) whether the prosecutor's manifest intent was to comment on Defendant's right not to testify; or (2) whether the prosecutor's remark was

of such a character that the jury would necessarily have taken it to be a comment on Defendant's decision not to testify.

[8] We have considered the allegedly improper remark and the context in which it was made, as well as defense counsel's contemporaneous comments and subsequent affidavit describing the lead prosecutor's body language and the tone and volume of her voice when making the remark. We have also considered the trial court's descriptions of the allegedly improper argument at trial and during the hearing on the motion for new trial.[47] We ***589** conclude that, regardless of the lead prosecutor's intent, the lead prosecutor's remark was of such a character that the jury would necessarily have taken it to be a comment on Defendant's exercise of her constitutional right not to testify.

The record belies the State's assertion that the trial court correctly characterized the lead prosecutor's argument as a permissible summation of the trial testimony of Defendant's aunt, Ms. Eidson. As the majority in the Court of Criminal Appeals explained, the lead prosecutor's argument differed significantly from this testimony.[48] Furthermore, the lead prosecutor included no prefacing language to signal that the argument was a summation of trial testimony, nor was the lead prosecutor's statement phrased in a manner to suggest that it was a summation of trial testimony. Instead, the lead prosecutor's argument was phrased in the first person plural and as a demand that Defendant explain herself. The lead prosecutor's actions before and during the argument reinforced this perception. For example, the lead prosecutor walked across the court room, stood in front of Defendant, gestured toward her, and demanded in a loud voice, "Just tell us where you were! That's all we are asking, Noura!" The lead prosecutor's word choice, specifically the plural pronouns "us" and "we" and the present tense verb, communicated to the jury that the lead prosecutor was speaking directly to Defendant on behalf of everyone in the court room. The prosecutor's language also conveyed the message that asking Defendant to explain her whereabouts was entirely reasonable and the least Defendant could do if she expected to be acquitted of the crime. The lead prosecutor's argument thus implicitly encouraged the jury to view Defendant's silence as a tacit admission of guilt. Regardless of the lead prosecutor's intent, we conclude that the lead prosecutor's remark was of such a character that the jury would necessarily have taken it to be a comment on Defendant's exercise of her constitutional right not to testify.

Given that "[t]he impropriety of any comment upon a defendant's exercise of the Fifth Amendment right not to testify is so well settled as to require little discussion," *Ledford v. State,* 568 S.W.2d 113, 116 (Tenn.Crim.App.1978), it is not at all clear why any prosecutor would venture into this forbidden territory. As the Court of Criminal Appeals cautioned more than thirty years ago, "[r]emarks which skirt the edges of impermissible comment are neither desirable nor worth the risk of reversal of what may well be a thoroughly deserved conviction." *Taylor v. State,* 582 S.W.2d 98,

101 (Tenn.Crim.App.1979) (quoting *State v. Dent,* 51 N.J. 428, 241 A.2d 833, 840–41 (1968)); *see also Lyons v. State,* 596 S.W.2d 104, 107 (Tenn.Crim.App.1979) ("We ... echo the trial judge's warning to the prosecutor concerning the unnecessary and wholly gratuitous risk involved in any comment on the defendant's valued right to decide whether he will testify or not, as well as the exercise of that decision."); *McCracken v. State,* 489 S.W.2d 48, 51 (Tenn.Crim.App.1972) ("Even in a case ... where the evidence of guilt is clearly made out we would not ***590** hesitate to reverse and remand if we thought an argument, however subtle and indirect, told the jury it could infer the accused was guilty because he did not take the witness stand.").

[9] While "closing argument is a valuable privilege that should not be unduly restricted," *State v. Bane,* 57 S.W.3d 411, 425 (Tenn.2001), we emphasize again that comment upon a defendant's exercise of the state and federal constitutional right not to testify should be considered "off limits to any conscientious prosecutor." *Hale,* 672 S.W.2d at 203 (internal quotation marks omitted). [49] As the United States Supreme Court has explained:

> [A prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, [a prosecutor] is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. [A prosecutor] may prosecute with earnestness and vigor —indeed, he [or she] should do so. But, while [a prosecutor] may strike hard blows, he [or she] is not at liberty to strike foul ones.
>
> *Berger v. United States,* 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935); *see also Manning v. State,* 195 Tenn. 94, 257 S.W.2d 6, 9 (1953) (recognizing that a prosecutor should vigorously prosecute offenders and represent the State "impartially in the interest of justice"); *Watkins v. State,* 140 Tenn. 1, 203 S.W. 344, 345 (1918) (recognizing that in a criminal case "[t]he vindication of justice, not of advocacy, is the true concern").

Our conclusion that the lead prosecutor's argument was constitutionally impermissible does not, however, end the inquiry. We must also consider whether the State has established that this constitutional error was harmless beyond a reasonable doubt. This Court has identified three categories of error: (1) structural constitutional error; (2) non-structural constitutional error; and (3) non-constitutional error. *State v. Rodriguez,* 254 S.W.3d 361, 371 (Tenn.2008). These categories are "more than academic" because the standard an appellate court uses to determine whether an error is harmless differs significantly depending on the type of error. *Id.*

[10] **[11]** Structural constitutional errors involve "defects in the trial mechanism" which "compromise the integrity of the judicial process itself." *Id.* Such errors defy harmless error analysis and always require reversal. *State v. Climer,* 400 S.W.3d 537, 569 (Tenn.2013); *Momon,* 18 S.W.3d at 164–66 (listing examples of structural constitutional errors).

[12] **[13]** However, non-structural constitutional errors do not require automatic ***591** reversal. *Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *Rodriguez,* 254 S.W.3d at 371; *State v. Transou,* 928 S.W.2d 949, 960 (Tenn.Crim.App.1996); *Lyons,* 596 S.W.2d at 107. Indeed *Chapman,* the landmark case enunciating the constitutional harmless error doctrine, involved *Griffin* error. *Chapman,* 386 U.S. at 24, 87 S.Ct. 824. Although reversal is not mandatory for non-structural constitutional errors, to avoid reversal, the State bears the burden of demonstrating that the error is harmless beyond a reasonable doubt. *Chapman,* 386 U.S. at 24, 87 S.Ct. 824; *Rodriguez,* 254 S.W.3d at 371.

[14] The effect of non-constitutional errors is determined by using the standard provided in Tennessee Rule of Appellate Procedure 36(b). *Rodriguez,* 254 S.W.3d at 371–72. Under this standard, a defendant bears the burden of establishing "that the error 'more probably than not affected the judgment or would result in prejudice to the judicial process.' " *Id.* at 372 (quoting Tenn. R.App. P. 36(b)).

[15] **[16]** **[17]** **[18]** **[19]** Because the standards differ fundamentally, a court must carefully identify the type of error at issue before undertaking an evaluation of its effect. *Climer,* 400 S.W.3d at 569 n. 18. We agree with Defendant that the Court of Criminal Appeals incorrectly applied the standard for non-constitutional errors when assessing the effect of the non-structural constitutional error in this case. We reiterate that *Griffin* errors are of constitutional dimension, and when determining whether such errors require reversal, courts must apply the *Chapman* standard for non-structural constitutional errors, which places the burden on the State to prove harmlessness beyond a reasonable doubt. When assessing whether the State has met its burden, courts should consider the nature and extensiveness of the prosecutor's argument, the curative instructions given, if any, and the strength of the evidence of guilt.[50] *Transou,* 928 S.W.2d at 960; ***592** *Lyons,* 596 S.W.2d at 107; *see also Bowling v. Parker,* 344 F.3d 487, 514 (6th Cir.2003).

[20] In this case, defense counsel's appropriately swift objection precluded the lead prosecutor from making extensive remarks, but the impermissible comment came at a critically important juncture in the trial—the prosecution's final, rebuttal argument to the jury. The defense had no opportunity to respond to the argument. The lead prosecutor's verbally and physically forceful delivery of the remark imbued it with a potential for prejudice greater than would ordinarily be ascribed to a single remark made during a lengthy trial. Although the trial court appropriately

provided curative instructions, in the context of this case, the instructions likely served to emphasize further Defendant's exercise of her constitutional right not to testify, much like the lead prosecutor's argument did in *Hale,* 672 S.W.2d at 203.[51] Finally, the evidence of guilt in this case was entirely circumstantial and, while sufficient to support the conviction, cannot be described as overwhelming. The lead prosecutor's remark implicitly invited the jury to consider Defendant's silence and exercise of her constitutional right not to testify as additional evidence of the State's theory that Defendant committed the murder. Considering the record in this appeal, we are constrained to conclude that the State has failed to establish that the lead prosecutor's constitutionally impermissible argument was harmless beyond a reasonable doubt. At Defendant's new trial, the prosecution must refrain from directly or indirectly commenting on Defendant's state and federal constitutional right to remain silent and not to testify.

Our conclusion that the lead prosecutor's unconstitutional argument was not harmless ***593** beyond a reasonable doubt and requires reversal of Defendant's conviction would ordinarily be the end of our analysis of this appeal. However, as explained below, the record on appeal also establishes that the prosecution violated Defendant's right to Due Process. This separate and flagrant violation of Defendant's constitutional rights also merits our consideration and independently entitles Defendant to a new trial.

B. Prosecution's Failure to Produce Evidence

Defendant claims that the prosecution violated her constitutional right to Due Process, and in particular the principles announced in *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), by failing to provide to the defense Andrew Hammack's third statement to the police until after the trial. The defense points out that, despite multiple and specific pre-trial requests for any statements Mr. Hammack had given the police, and a mid-trial request for *Brady* materials, the prosecution did not provide Mr. Hammack's third statement until after the trial.

The State concedes that the prosecution did not produce Mr. Hammack's third statement in a timely manner. The State argues, however, that Defendant is not entitled to relief because the prosecution's timely production of the statement would not have affected the outcome of the trial.

[21] **[22]** "[T]he Due Process Clause of the Fourteenth Amendment requires that criminal prosecutions 'comport with prevailing notions of fundamental fairness.' " *State v. Ostein,* 293 S.W.3d 519, 535 (Tenn.2009) (quoting *California v. Trombetta,* 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)); *see also State ex rel. Anglin v. Mitchell,* 596 S.W.2d 779, 786 (Tenn.1980) (recognizing that article I, section 8 of the Tennessee Constitution guarantees criminal defendants the right to a fair trial). "[T]his standard of fairness requires that criminal defendants

'be afforded a meaningful opportunity to present a complete defense.' " *Ostein,* 293 S.W.3d at 535 (quoting *Trombetta,* 467 U.S. at 485, 104 S.Ct. 2528). To effectuate this right, a body of law has developed recognizing " 'what might loosely be called the area of constitutionally guaranteed access to evidence.' " *Id.* (quoting *United States v. Valenzuela–Bernal,* 458 U.S. 858, 867, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982)). One of the foundational principles of this area of the law is that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady,* 373 U.S. at 87, 83 S.Ct. 1194.

[23] **[24]** "[E]vidence favorable to an accused," *id.,* also encompasses evidence relevant to the impeachment of prosecution witnesses. *United States v. Bagley,* 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); *Giglio v. United States,* 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); *Johnson v. State,* 38 S.W.3d 52, 55–57 (Tenn.2001); *State v. Walker,* 910 S.W.2d 381, 389 (Tenn.1995). " '[E]vidence which provides some significant aid to the defendant's case, whether it furnishes corroboration of the defendant's story, calls into question a material, although not indispensable, element of the prosecution's version of the events, or challenges the credibility of a key prosecution witness' " falls within the *Brady* disclosure requirement. *Johnson,* 38 S.W.3d at 56–57 (quoting *Commonwealth v. Ellison,* 376 Mass. 1, 379 N.E.2d 560, 571 (1978)).

[25] **[26]** Moreover, so long as the evidence qualifies as favorable to the accused, ***594** the *Brady* duty of disclosure applies, irrespective of the admissibility of the evidence at trial. *Johnson,* 38 S.W.3d at 56. Furthermore, *Brady* applies not only to evidence in the prosecution's possession, but also to " 'any favorable evidence known to the others acting on the government's behalf in the case, including the police.' " *Strickler v. Greene,* 527 U.S. 263, 275 n. 12, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) (quoting *Kyles v. Whitley,* 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)); *see also Sample v. State,* 82 S.W.3d 267, 270–71 n. 3 (Tenn.2002); *Johnson,* 38 S.W.3d at 56.

[27] To establish a Due Process violation based on *Brady,* a defendant must show that: (1) the defendant requested the evidence (unless the evidence is obviously exculpatory, in which case the prosecution is bound to produce the information, without a request); (2) the State suppressed evidence in its possession; (3) the suppressed evidence was favorable to the defendant; and (4) the evidence was material. *Johnson,* 38 S.W.3d at 56; *State v. Edgin,* 902 S.W.2d 387, 390 (Tenn.1995); *Walker,* 910 S.W.2d at 389; *State v. Evans,* 838 S.W.2d 185, 196 (Tenn.1992).

[28] The record in this appeal demonstrates that Defendant satisfied the first requirement of a *Brady* claim by requesting, on March 9 and March 23, 2007, any statements Mr. Hammack had provided to the State. Defendant identified Mr. Hammack as the suspect from whom

the police had taken fingerprints and a DNA sample. In two pre-trial hearings, the defense sought to compel the prosecution to produce evidence related to Mr. Hammack, including statements to the police, which were specifically referenced. At least four pre-trial hearings were held on defense motions to compel production of *Brady* materials in general. The defense renewed its request for *Brady* materials at trial. Thus, the record clearly demonstrates that the defense requested *Brady* materials and specifically requested any statements Mr. Hammack had given to the police.

[29] Second, the record also shows that Mr. Hammack's third statement was in the prosecution's possession. Mr. Hammack gave the statement to the police on June 13, 2005, long before Defendant's trial. Although the prosecution apparently did not obtain a copy of the statement from the police until midway through Defendant's trial, the *Brady* duty of disclosure applies even to evidence in police possession which is not turned over to the prosecution. *Kyles,* 514 U.S. at 438, 115 S.Ct. 1555; *Johnson,* 38 S.W.3d at 56. The record is thus undisputed that, for purposes of *Brady,* the prosecution had Mr. Hammack's third statement in its possession from June 13, 2005, and actually had the statement in its physical possession before Mr. Hammack testified, but did not provide the statement to the defense. Defendant has therefore established the second element of her *Brady* claim.

[30] Defendant has also established the third element of her *Brady* claim because Mr. Hammack's third statement qualifies as impeachment evidence favorable to Defendant. *Bagley,* 473 U.S. at 676, 105 S.Ct. 3375. Mr. Hammack's third statement differed from the accounts he had given in his first and second statements. Only in his third statement did Mr. Hammack confess that he was "rolling on XTC" on the night of the murder. The State does not dispute that this portion of the third statement referred to Mr. Hammack's use of the drug ecstasy. It was also only in his third statement that Mr. Hammack reported leaving his telephone in a friend's car on the night of the murder. When asked during cross-examination ***595** if he had left his phone anywhere on the night of the murder, Mr. Hammack denied doing so. Had the third statement been provided, the defense could have used it to impeach Mr. Hammack's testimony that he received text messages and telephone calls from Defendant on the night of the murder. Regardless of which, if any, of Mr. Hammack's statements are true, the third statement clearly provided relevant impeachment evidence. As such, it qualified as evidence favorable to the defense for purposes of the third *Brady* requirement.

[31] **[32]** **[33]** **[34]** **[35]** **[36]** **[37]** **[38]** **[39]** **[40]** The success of Defendant's *Brady* claim thus turns on the fourth element, which requires us to determine whether Mr. Hammack's third statement was material. Favorable evidence is considered material when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Edgin,* 902 S.W.2d at 390 (quoting *Kyles,* 514 U.S. at 433, 435, 115 S.Ct. 1555); *see also Johnson,* 38 S.W.3d at

58. The Supreme Court in *Kyles* discussed materiality at length and reiterated four key points. 514 U.S. at 434–37, 115 S.Ct. 1555. First, "a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Id.* at 434, 115 S.Ct. 1555; *see also Johnson,* 38 S.W.3d at 58. Second, determining materiality is not the equivalent of determining the legal sufficiency of the evidence. *Kyles,* 514 U.S. at 434–35, 115 S.Ct. 1555. Third, where a defendant establishes materiality, along with the other three elements necessary to show a *Brady* violation, the defendant also has inherently established that the violation was not harmless; thus, a separate harmless error analysis is unnecessary and inappropriate. *Id.* at 435, 115 S.Ct. 1555; *see also Johnson,* 38 S.W.3d at 63; *State v. Biggs,* 218 S.W.3d 643, 660 (Tenn.Crim.App.2006). Fourth, the materiality of suppressed evidence should be "considered collectively, not item by item." *Kyles,* 514 U.S. at 436, 115 S.Ct. 1555. In this way, the prosecutor's responsibility is "to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached." *Id.* at 437, 115 S.Ct. 1555.

> [The] touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."

Id. at 434, 115 S.Ct. 1555 (quoting *Bagley,* 473 U.S. at 678, 105 S.Ct. 3375); *see also Johnson,* 38 S.W.3d at 58. Failing to disclose *Brady* materials may impair the adversary process in various ways, including causing the defense to "abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued." *Bagley,* 473 U.S. at 682, 105 S.Ct. 3375. A defendant seeking to establish materiality should call to the attention of the reviewing court any and all ways in which suppression of evidence impaired the adversary process and undermined confidence in the outcome of the proceeding.

Applying these principles, we conclude that Mr. Hammack's third statement was material because it "could reasonably be taken to put the whole case in such a different light as to undermine confidence ***596** in the verdict." *See Kyles,* 514 U.S. at 435, 115 S.Ct. 1555; *see also Johnson,* 38 S.W.3d at 58. Again, the third statement differed significantly from Mr. Hammack's first two statements and his trial testimony. Although Mr. Hammack's first two statements differed from each other in certain respects, Mr. Hammack explained these differences at trial by saying that he had confused the events of Friday and Saturday night. Had the third statement been produced, its very existence could have undercut Mr. Hammack's innocent explanation for the discrepancies between his first two statements. Additionally, the

defense could have used the discrepancies among all three statements and Mr. Hammack's admitted use of ecstasy to undercut Mr. Hammack's credibility and cast doubt on his mental capacity to perceive and remember the night of the murder.

The defense also could have used the disclosure in Mr. Hammack's third statement that he had left his phone in someone else's vehicle to counter Mr. Hammack's damaging testimony that Defendant called and asked, for the first time in their acquaintance, to meet her at her house and "walk in" with her. Mr. Hammack is the only witness who stated that Defendant called and told him that she was at her and the victim's house during the period when the murder likely occurred; therefore, his testimony was critical in placing her at the scene of the crime. It is difficult to overstate the importance of this portion of Mr. Hammack's testimony, and without the suppressed third statement, the defense had little means of countering it.

The defense also could have used Mr. Hammack's third statement to bolster its attack upon the thoroughness of the police investigation and to argue that Mr. Hammack himself was a plausible suspect. Testifying at the hearing on the motion for new trial, Lt. Miller conceded that the police failed to contact the alibi witnesses named in Mr. Hammack's third statement. One of these alibi witnesses was Mr. Grisham. According to an affidavit of the defense investigator offered in support of the motion for new trial, had the police contacted Mr. Grisham, they would have learned that he was out of the state with his parents on the weekend in question. The defense then could have argued that Mr. Hammack was without a consistent alibi for crucial periods of the night, consistent with a report from his housemates that they could not account for Mr. Hammack's activities throughout the night of the crime. Lt. Miller had testified at trial that the housemates went to the police station not long after the murder to report Mr. Hammack's late arrival home and strange behavior since the murder. They brought with them and turned over to the police the New Balance sneakers Mr. Hammack had worn since the night of the murder. Mr. Hammack's housemates viewed this conduct as odd because the shoes did not belong to him and did not fit him. In his testimony, however, Lt. Miller described the housemates as "slightly incoherent" and "high" and discounted their report, saying that they were "rambling" and "it was obvious that they had been sitting around coming up with conspiracy theories." The police instead chose to credit Mr. Hammack's assertion that his housemates had gotten the nights confused when they reported his late arrival home. The sneakers in question were simply photographed and returned without any further testing. The defense could have used the third statement to cast further doubt on Lt. Miller's characterization of the housemates' statements, and thus the thoroughness of the police investigation, and thereby cast suspicion on Mr. Hammack for the crime.

***597 [41]** The various ways in which the defense could have used Mr. Hammack's

third statement are significant because the proof against Defendant was entirely circumstantial and, although sufficient to support the conviction, cannot be described as overwhelming. No physical evidence tied her to the crime, despite the array of physical evidence removed from the scene for analysis. Defendant did not confess to committing the crime, although she did make contradictory statements to family, friends, and the police. The defense theory that one or more other persons perpetrated the crime found support in the results of DNA testing, which revealed the DNA of at least one unknown person mixed with that of the victim. Finally, the third statement would have enabled the defense to impeach the only prosecution witness whose testimony placed Defendant at her home during the time period the prosecution alleged the murder occurred. The importance of this third statement is clear. "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence...." *Napue v. Illinois,* 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).

> Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory. Flat contradiction between the witness' testimony and the version of the events given in his reports is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' [s] trial testimony.

Jencks v. United States, 353 U.S. 657, 667–68, 77 S.Ct. 1007, 1 L.Ed.2d 1103 (1957). The defense is in the best position to determine the most effective impeachment use of a witness's statement. *Id.* at 668–69, 77 S.Ct. 1007. "When the reliability of a witness may well be determinative of guilt or innocence, the non-disclosure of evidence affecting his credibility may justify a new trial, regardless of the good or bad faith of the prosecutor." *State v. Williams,* 690 S.W.2d 517, 525 (Tenn.1985). [52] Given the importance of Mr. Hammack's testimony to the prosecution's case and the manner in which the defense could have used his third statement to cast the proof at trial in a different light, we have no hesitation in concluding that Mr. Hammack's third statement was material.

[42] By establishing the materiality of Mr. Hammack's third statement, and the other three requirements necessary to show a *Brady* violation, the defendant has established that this constitutional violation was not harmless. *Kyles,* 514 U.S. at 435, 115 S.Ct. 1555; *Johnson,* 38 S.W.3d at 63; *Biggs,* 218 S.W.3d at 660. Thus, we conclude that this separate *Brady* violation also entitles Defendant to a new trial.

Our determination that Defendant has established a *Brady* violation obviates the ***598** need to address the prosecutor's violation of Tennessee Rule of Criminal Procedure 26.2.[53] *See State v. Caughron,* 855 S.W.2d 526, 534–35 (Tenn.1993) (discussing the history and the adoption of Rule 26.2). Had the prosecutor merely complied with Rule 26.2 by turning over the third statement after Mr. Hammack's direct examination, Defendant may well have been hard pressed to establish a *Brady* violation. Compliance with constitutional and procedural rules is crucial because "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair[,]" and "the administration of justice suffers when any accused is treated unfairly." *Brady,* 373 U.S. at 87–88, 83 S.Ct. 1194; *see also Stokes v. State,* 64 Tenn. 619, 622 (1875) ("Although we might be satisfied of the prisoner's guilt, yet it is our duty to see that he has a fair and impartial trial, and this he must have though costs may accumulate and punishment be long delayed.").

In this case, the lead prosecutor unconstitutionally commented upon Defendant's exercise of her constitutional right not to testify, and the prosecution violated *Brady* and Defendant's right to Due Process by failing to turn over Mr. Hammack's third statement. Neither of these constitutional violations was harmless beyond a reasonable doubt. Thus, we are constrained to vacate Defendant's conviction and remand for a new trial. In order to give the trial court further guidance on remand, we will now discuss Defendant's claims that: (1) certain portions of Genevieve Dix's testimony should have been excluded based on the attorney-client privilege; and (2) the trial court improperly admitted prior bad acts evidence consisting of Defendant's drug and alcohol use. Given our reversal and remand for a new trial, we need not address Defendant's challenge to the propriety of her sentence.

C. Attorney–Client Privilege

[43] Defendant argues that the trial court erred in ruling that the attorney-client privilege did not apply to the communications between Defendant and attorney Genevieve Dix. The State argues that the trial court properly credited Ms. Dix's testimony that she informed Defendant and the police at the scene that she was not acting as Defendant's attorney.

[44] **[45]** **[46]** The general rule is that all relevant evidence should be made fully available to the trier of fact. Neil P. Cohen et al., *Tennessee Law of Evidence* § 5.11[2] (6th ed.2011). Therefore, Tennessee Rule of Evidence 501 "limits the ability of parties and witnesses to refuse to disclose information or documents to the 'privileges' provided by the constitution, statutes, common law, and rules promulgated by the Tennessee Supreme Court." ***599** *Boyd v. Comdata Network, Inc.,* 88 S.W.3d 203, 212 (Tenn.Ct.App.2002). The attorney-client privilege, recognized both at common law and by statute, is the oldest privilege in this State and one a witness may invoke. Tenn.Code Ann. § 23–3–105 (2009);[54] Tenn.

Sup.Ct. R. 8, RPC 1.6, 1.18; *Johnson v. Patterson,* 81 Tenn. 626, 649 (1884); *McMannus v. State,* 39 Tenn. 213, 215–16 (1858). Its purpose is "to encourage full and frank communication between attorneys and their clients...." *Upjohn Co. v. United States,* 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981); *see also State ex rel. Flowers v. Tenn. Trucking Ass'n Self Ins. Grp. Trust,* 209 S.W.3d 602, 615–16 (Tenn.Ct.App.2006); *Boyd,* 88 S.W.3d at 212. In criminal cases, the privilege is integral to a defendant's constitutional rights against compulsory self-incrimination and to the effective assistance of counsel. *Fisher v. United States,* 425 U.S. 391, 403–05, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976); *Bryan v. State,* 848 S.W.2d 72, 79 (Tenn.Crim.App.1992).

[47] [48] [49] The statutory attorney-client privilege, originally enacted in 1821, is now codified at Tennessee Code Annotated section 23–3–105, which provides:

> No attorney, solicitor or counselor shall be permitted, in giving testimony *against a client or person who consulted the attorney, solicitor or counselor professionally,* to disclose any communication made to the attorney, solicitor or counselor as such by such person during the pendency of the suit, before or afterward, to the person's injury.

(Emphasis added). The statutory language and longstanding Tennessee law require a showing that the attorney was "applied to for advice or aid in his professional character...." *Jackson v. State,* 155 Tenn. 371, 293 S.W. 539, 540 (1927); *McMannus,* 39 Tenn. at 216. The person claiming the benefit of the privilege must "establish the communications were made pursuant to the attorney-client relationship and with the intention that the communications remain confidential." *Culbertson v. Culbertson,* 393 S.W.3d 678, 684 (Tenn.Ct.App.2012) (quoting *State ex rel. Flowers,* 209 S.W.3d at 615–16); *see also Smith Cnty. Educ. Ass'n v. Anderson,* 676 S.W.2d 328, 332 (Tenn.1984). "The attorney-client relationship is consensual and, significantly, it 'arises only when *both the attorney and the client have consented* to its formation.' " *Akins v. Edmondson,* 207 S.W.3d 300, 306 (Tenn.Ct.App.2006) (quoting *Torres v. Divis,* 144 Ill.App.3d 958, 98 Ill.Dec. 900, 494 N.E.2d 1227, 1231 (1986)). An attorney-client relationship does not arise unless the potential client has a reasonable expectation that the lawyer is willing to assent to the formation of the relationship. *See* Tenn. Sup.Ct. R. 8, RPC 1. 18, cmt. 2 ("Duties to Prospective Client") (explaining that "a person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a 'prospective client'...."); *see also Togstad v. Vesely,* 291 N.W.2d 686, 693 n. 4 (Minn.1980) (stating that an attorney-client relationship arises when a person "seeks and receives legal advice from an attorney

in circumstances in which a reasonable person would rely on such advice") (citations omitted) (internal quotation marks omitted). Restatement (Third) of the Law Governing Lawyers, Section 14, similarly states:

> A relationship of client and lawyer arises when:
>
> ***600** (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either
>
> (a) the lawyer manifests to the person consent to do so; or
>
> (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or
>
> (2) a tribunal with power to do so appoints the lawyer to provide the services.

Restatement (Third) of the Law Governing Lawyers § 14 (2000).

[50] Where, as here, an attorney is also a friend of the potential client, "the lawyer-friend must be giving advice as a lawyer and not as a friend in order for the privilege to attach." *Jones v. United States,* 828 A.2d 169, 175 (D.C.Cir.2003); *see also Ellis v. State,* 92 Tenn. 85, 20 S.W. 500, 505 (1892) (refusing to apply the privilege where an attorney had a conversation with a defendant and was afterward asked by the defendant's father to stay the night and represent the defendant if he were arrested, but the attorney declined the invitation); *United States v. Tedder,* 801 F.2d 1437, 1441–43 (4th Cir.1986) (holding that where a defendant confided in a friend who was also a partner at his law firm and whose family members were charged in the same matter, no attorney privilege applied); *Prichard v. United States,* 181 F.2d 326, 328–30 (6th Cir.1950) (holding that where a person consults with an attorney in his capacity as a friend, the privilege does not apply); *Lanci v. Arthur Andersen LLP,* No. 96 CIV. 4009(WK), 1998 WL 409776, at *1 (S.D.N.Y. July 21, 1998) ("[T]he privilege does not apply if the lawyer is acting as a friend, relative, accountant or agent.") (quoting Joseph M. McLaughlin, 3 *Weinstein's Federal Evidence,* § 503.13[3][a] (2d ed.1998)); *G & S Invs. v. Belman,* 145 Ariz. 258, 700 P.2d 1358, 1365 (Ariz.Ct.App.1984) ("The privilege does not apply where one consults an attorney not as a lawyer but as a friend or business advisor."). "Speaking in confidence is not enough; 'where one consults an attorney not as a lawyer but as a friend or as [an] ... adviser ..., the consultation is not professional nor the statement privileged.' " *State v. Gordon,* 141 N.H. 703, 692 A.2d 505, 507 (1997) (alterations in original) (quoting K. Broun et al., *McCormick on Evidence* § 88, at 322–24 (J. Strong ed., 4th ed.1992)).

[51] The trial court here was tasked with determining the "[p]reliminary questions concerning ... the existence of" the attorney-client privilege. Tenn. R. Evid. 104(a). Defendant had the burden of proving these preliminary facts by a preponderance of the evidence. *State v. Stamper,* 863 S.W.2d 404, 406 (Tenn.1993) ("[T]he appropriate standard of proof for preliminary facts required for the admission of evidence is

proof by a preponderance of the evidence."). The trial court's factual findings will be upheld on appeal unless the evidence in the record preponderates against them. *State v. Hicks,* 55 S.W.3d 515, 521 (Tenn.2001); *State v. Burns,* 6 S.W.3d 453, 461 (Tenn.1999); *see also Jones,* 828 A.2d at 174 (quoting *United States v. Evans,* 113 F.3d 1457, 1461 (7th Cir.1997)) (stating that a trial court's findings of fact regarding the elements of the attorney-client privilege, including its formation, will not be overturned unless clearly erroneous, placing a heavy burden on the defendant); *Gordon,* 692 A.2d at 506–07 (stating that the applicability of the attorney-client privilege rests in the sound discretion of the trial court to which deference is owed unless no reasonable jurist could have reached the same conclusion).

In this case, Ms. Dix testified that she told Defendant on more than one occasion ***601** that she was not acting as Defendant's attorney and was present at the scene because of her friendship with the victim, not as an attorney. Defendant, in contrast, testified at the jury-out hearing that she spoke with Ms. Dix because she knew Ms. Dix was an attorney. Defendant denied that Ms. Dix told her she was not acting as her attorney. The trial court accredited Ms. Dix's testimony, and the proof does not preponderate against the trial court's finding. In light of Ms. Dix's repeated statements to Defendant that she was not acting as her attorney, the trial court's finding that Defendant had no reasonable belief or expectation that Ms. Dix had assented to the formation of an attorney-client relationship is not clearly erroneous.

D. Evidence Regarding Drug and Alcohol Use

[52] Finally, Defendant argues that the trial court improperly admitted evidence from twelve witnesses regarding Defendant's drug and alcohol use before and after the murder. We note that the trial court acknowledged the requirements of Tennessee Rule of Evidence 404(b) in determining the admissibility of the evidence of Defendant's drug use and instructed the jury to limit its consideration of the evidence to motive.[55] However, as we have previously observed in another context,

> the Rule 404(b) criteria—in particular, the existence of a material issue at trial and the balancing of the probative value and unfair prejudice—require consideration of the evidence presented at trial. Thus, trial courts must be cognizant that if pretrial evidentiary rulings are made, they may need to be reconsidered or revised based on the evidence presented at trial.
>
> *State v. Gilley,* 173 S.W.3d 1, 6 (Tenn.2005). Similarly, at Defendant's new trial, the trial court must again apply Rule 404(b), and Tennessee decisions interpreting it, to determine anew the admissibility of evidence of Defendant's drug and alcohol use. In doing so, it must recognize, of course, that Defendant's acquittal of first degree murder means that premeditation will not be an issue at the

new trial. *See State v. Burns,* 979 S.W.2d 276, 291 (Tenn.1998) (recognizing that implied acquittal occurs and bars retrial on the acquitted offense when a jury is given a full opportunity to return a verdict on the charged offense and instead finds the defendant guilty of a lesser-included offense).

[53] In general, we caution that courts should take a "restrictive approach" to evidence admitted under Rule 404(b) as it "carries a significant potential for unfairly influencing a jury." *State v. Dotson,* 254 S.W.3d 378, 387 (Tenn.2008) (quoting *State v. Bordis,* 905 S.W.2d 214, 227 (Tenn.Crim.App.1995)). "[S]uch evidence easily results in a jury improperly convicting a ***602** defendant for his or her bad character or apparent propensity or disposition to commit a crime regardless of the strength of the evidence concerning the offense on trial." *Id.* at 387 n. 7 (quoting *State v. Rickman,* 876 S.W.2d 824, 828 (Tenn.1994)); *State v. Mallard,* 40 S.W.3d 473, 488 (Tenn.2001). " '[T]he risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary relevance.' " *State v. Sexton,* 368 S.W.3d 371, 403 (Tenn.2012) (quoting *Old Chief v. United States,* 519 U.S. 172, 181, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997)). The Rules also permit exclusion if a "needless presentation of cumulative evidence" will occur. Tenn. R. Evid. 403; *Wade v. State,* 914 S.W.2d 97, 102 (Tenn.Crim.App.1995).

In this case, the trial court repeatedly permitted the introduction of evidence concerning Defendant's alcohol use, drug use, and sex life. For example, Ms. Kline was permitted to testify that she and Defendant once drank beer while at a party on a friend's farm during the summer after the murder. In addition, at least six different friends were permitted to testify regarding specific and repeated instances of Defendant's drug use. Mr. MacDonald was permitted to testify to Defendant's use of marijuana dating back to her sophomore year in high school, at least one year prior to the date of the murder, and four other witnesses—Ms. Cooley, Ms. Madison, Mr. McGoff, and Mr. Brasfield—repeatedly testified to similar behavior. Perry Brasfield was permitted to testify that after the murder, Defendant came to his house, climbed up to his bedroom window, and had sex with him in his room. He also testified that he had sex with her in her apartment. The prejudicial effect of this evidence may well have outweighed its probative value. In the future, the trial court must carefully consider the probative value of such testimony in relation to its prejudicial effect upon a jury, especially in the context of a new trial in which a first degree murder charge is not at issue.

IV. Conclusion

We reverse, in part, the judgment of the Court of Criminal Appeals, vacate Defendant's conviction, and remand for further proceedings consistent with this opinion. Costs of this appeal are taxed to the

State of Tennessee, for which execution may issue if necessary.

All Citations

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Footnotes

1 The facts are presented to the extent possible in chronological order not in the order of the witness testimony at trial.

2 Defendant was enrolled in the Gateway Home School program after having previously attended multiple schools, both public and private.

3 The vehicles belonging to Mr. Hassanieh included a gray Mercedes occasionally driven by the victim, two white mini vans, a black Lincoln limousine, and an older white limousine. The victim also owned a Jeep Cherokee driven by Defendant. The record is not clear how the victim gained control of Mr. Hassenieh's former property. Testimony indicated that the victim was not able to obtain clear title to the vehicles, that Mr. Hassanieh's debts exceeded his assets, and that no probate estate had been opened for Mr. Hassanieh at the time of the victim's murder.

4 The record does not reflect the distance from Mr. Tual's home to the victim's home.

5 Officer Tankersley did not recall seeing the Cockes at the Jackson house, and instead recalled seeing only Defendant and “one girl that was on the scene and I don't know to this day what she looked like or who she was.” Officer Tankersley also recalled the Cockes telling him that Defendant had called 911 from their house.

6 During their testimony, neither of the Cockes mentioned seeing a basket over the victim's head.

7 These products were referred to at trial as Coomassie Blue and Hungarian Red. No witness testified as to the effectiveness of these products, the training required to use them, or the frequency of their use in crime scene investigations. Officer Payment testified, however, that he had never used these products before June 5th and had not used them since that day because he did not believe they preserved the evidence effectively.

8 Sergeant Helldorfer testified that 810 photographs of the crime scene were taken by the CSI and homicide units combined.

9 Officer Payment testified that there were two empty slots in the knife block, but the photograph of the knife block revealed three empty slots.

10 Mr. Irvin testified that the golf club was his and that he must have left it with the victim by mistake after golfing months earlier. The golf club tested negative for blood. Police asked Mr. Irvin to provide them with DNA samples, which he agreed to do, but none of his DNA was discovered at the crime scene.

11 Mr. Sherwood testified that he found the wallet after the murder. On direct examination Mr. Sherwood testified that the wallet contained the victim's driver's license, social security card, and two or three other cards. However, on cross-examination he identified the wallet as one “my sister used to carry,” and identified as belonging to the victim a First Tennessee First Check Card Debit Card; a Visa card due to expire on 02/07; a Social Security card issued to the victim; Focal Company cards with the victim's name on them; and a AAA Autoclub South card with Defendant's name on it that expired in 05/06. The victim's driver's license was not among the cards entered into evidence.

12 Testimony revealed that the victim, Defendant, Mr. Irvin, and Mr. Sherwood had keys to the victim's house.

13 Defendant's neighbor, Sheila Cocke, also sat and talked with Defendant soon after the police arrived, and she testified that when the police asked where she had been, Defendant “never gave the same answer twice.”

14 Ms. Dix insisted during her testimony at trial that she signed the form “as a witness only” and the form reflects that Ms. Dix signed in the lines designated for “Witnesses.”

15 Mr. Irvin testified that the victim would occasionally sleep in the nude during the summer.

16 Ms. Dix testified that Defendant mentioned the name of a boy Ms. Dix did not know and could not recall; it was a “very short name, like four or five letters.”

17 The record does not reflect what was in the bag.

18 Defendant had attended Ridgeway High School in the past and still had friends there.

19 Defendant notified Ms. France of the murder on June 5th, shortly after the police arrived at the crime scene. Ms. France then notified Ms. Eidson, who was in Portugal for a vacation. Ms. France arrived in Memphis on Monday, June 6th,

and Ms. Eidson returned to the United States immediately upon learning of the victim's murder, arriving in Memphis on Tuesday, June 7th.

20 Although the prosecution was careful to elicit testimony about Defendant's long-sleeved clothing in the aftermath of the murder, there was no evidence that Defendant sought to hide any marks on her body. No other explanation was presented for Defendant's unusual choice of clothing.

21 The trial court granted Defendant's motion and did not allow the prosecution to offer evidence about the cause of her hospitalization or the name of the facility in which she was hospitalized. The record reflects that Defendant was hospitalized at Lakeside Behavioral Health System, known in the Memphis area as a treatment facility for mental illness and substance abuse. Despite the trial court's ruling, at least one prosecution witness mentioned Defendant was hospitalized at Lakeside. The trial court overruled the defense motion for a mistrial, made after this mention occurred.

22 The Jeep had been in Defendant's control since the afternoon of June 5th, when the police returned the keys to her. Officer William D. Merritt, who assisted with the investigation, testified that the police found the Jeep in the driveway of the victim's house. There, they did an initial search and discovered the Walgreens bags, at which point they brought it to a police facility for a formal search. Officer Merritt observed that the Jeep “had been moved around” since the day of the murder, although it was unclear who had moved it or if it ever left the crime scene area.

23 The record is unclear as to how long Defendant stayed with Ms. Robertson. Ms. Robertson's dates also conflict with those of other witnesses. While other witnesses testified that Defendant stayed at Lakeside for a month and thus through early July, Ms. Robertson testified that Defendant stayed with her for several weeks beginning in mid-June.

24 Mr. Brasfield was also permitted to testify that, at one point in the months following the murder, Defendant telephoned him one night from outside his window. At his suggestion, she climbed into his window, and they had sex. According to Mr. Brasfield, they had sex several times at Defendant's apartment.

25 Mr. Sherwood and Ms. France admitted that, within a year of the murder, they and Ms. Eidson had brought a civil suit against Defendant to prevent her from inheriting from the victim.

26 Photographic evidence introduced at trial demonstrated that Defendant was significantly shorter than the victim.

27 Dr. Chancellor explained that a cut wound “is generally longer on the surface of the body than it is deep,” while “[a] stab wound is generally deeper into the body than it is in the width on the skin.”

28 Dr. Debnam offered the opinion that the victim's DNA “more than likely” came from blood, although the other individual's DNA could have come from saliva, skin or blood. She also testified that she has no way of determining when DNA had been deposited on a surface.

29 Dr. Chancellor, the medical examiner, had collected nail clippings from the victim's hands; loose hairs found in the victim's hands which appeared to be long and blonde, like that of the victim; and a sexual assault kit. However, this evidence was actually analyzed by the TBI.

30 *See supra* text accompanying note 7 for a discussion of the chemical products used at the crime scene.

31 Mr. Brasfield testified that no one entered the Jackson residence during the party, and that they remained out in the back yard by the pool. Only he had a key to the house, and he only entered earlier in the day to feed the dog. The dog escaped from the garage, where he had been placed during the party, when someone opened the garage door, but the house itself remained locked. Mr. Brasfield also testified that he “probably” returned the key to Defendant soon after she and the victim returned from Florida, since the victim was very upset with him.

32 Witnesses testified to Defendant's use of marijuana, alcohol, mushrooms, and Lortabs, as well as a single instance of cocaine use in the two years prior to the murder.

33 Although Defendant called Ms. Kline several times later that night asking her to “come out and party,” Ms. Kline refused and did not see Defendant again until after the victim's body was discovered.

34 Mr. Madison recalled this request when he was questioned by Defendant's counsel regarding the events of Friday evening, but the context makes it evident that he was referring to the party that took place on the evening of Saturday, June 4th. He admitted to some confusion regarding whether the events occurred on Friday or Saturday. Mr. Madison also testified that no one went inside the Kobeck house on Saturday evening, although photographs taken at the Kobeck house party that night clearly show the interior of a house.

35 Mr. Brasfield testified that he and a friend went to Ms. Cooley's house after 1:00 a.m. and remained there until after 5:00 a.m.

36 Phone records revealed that Defendant called Mr. Whitaker again at 3:40 a.m., and that he called her at 4:12 and 4:36 a.m.

37 The record of the receipt was generated by Walgreens electronic journal, which logs all store transactions, including items bought as well as the time and date of purchase. The record of the purchase was discovered and printed by Deborah

Walls, a Walgreens Assistant Manager, after police provided her with items found in a Walgreens bag in Defendant's Jeep and told her a time frame during which the items likely had been obtained. Defendant's original receipt was never discovered.

38 Mr. Hammack provided the police a third statement, which differed drastically from his first and second pre-trial statements and his trial testimony, but was not disclosed to the defense prior to trial and as a result was not part of the proof the jury heard. We will address later the content of Mr. Hammack's third statement and the consequences of the prosecution's failure to disclose this evidence.

39 Records show that Defendant called Mr. Hammack at 12:55 and 3:54 a.m.

40 Phone records show that Mr. Hammack called Defendant at 4:36 a.m. and that the call went to call waiting; they also reveal that Defendant called Mr. Hammack at 4:47, 5:00, 5:01, 5:02, 5:03, and 5:06 a.m. on June 5th and that they exchanged text messages an hour earlier. Mr. Hammack texted Defendant at 3:58; Defendant texted him at 4:04 a.m.; he texted her at 4:09 a.m.; and she texted him at 4:28 and 4:59 a.m.

41 On March 27, 2009, the trial judge sentenced her as a Range I offender to twenty years and nine months in prison.

42 In his first statement, Mr. Hammack said that he had been Defendant's boyfriend for three to four months. He said that he talked to Mr. Madison between 4:00–6:00 p.m. on June 4th, while Mr. Madison was driving around with Defendant. Mr. Hammack said he had called Defendant again at some point between 11:00 p.m. and 1:00 p.m., and Defendant told him she was coming back from the party by herself and asked him to meet her at her house in fifteen minutes. Mr. Hammack said he called Defendant again fifteen minutes later when he arrived home, and she told him that she was waiting for him in front of her house. When Mr. Hammack told Defendant he was at his house, Defendant said she was about to go inside her own home and would talk to him later. Mr. Hammack then stated that he sent a text message to Defendant at 3:50 a.m., and she sent him a text back at 4:28 a.m., stating that she was at Mr. Whitaker's house but wanted to meet. At 4:30 a.m., Mr. Hammack replied by text, saying that he wanted to see her too, but instead he went to Krystal, dropped off a friend named “Ian,” and went home because he had been drinking. At 5:00 a.m. Defendant sent him a text message that said “answer,” but he was already asleep and did not reply.

In his second statement to the police, Mr. Hammack stated that Defendant called him from her home phone number at some point between midnight and 5:00 a.m., but he did not answer. He also claimed that Defendant asked him to meet her outside her house and walk in with her during that time, a request that she had never made of him before. Mr. Hammack also stated that he noticed a cut on Defendant's hand two nights after the murder.

43 Likewise, evidence or argument about a defendant's post-arrest, post-*Miranda* silence is impermissible. *See Doyle v. Ohio,* 426 U.S. 610, 617, 619, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) (stating that post-arrest silence in the wake of *Miranda* warnings “is insolubly ambiguous” and may be nothing more than the arrestee's exercise of *Miranda* rights and holding that “the use for impeachment purposes of [an arrestee's] silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment”).

44 This Court is the final arbiter of the Tennessee Constitution and may interpret its provisions differently than the corresponding provisions of the United States Constitution. *State v. Watkins,* 362 S.W.3d 530, 554 (Tenn.2012). To date, the parameters of the state constitutional right have been interpreted co-extensive with the federal constitutional right.

45 We note, however, that a prosecutor's comments on the absence of any contradicting evidence may be viewed as an improper comment on a defendant's exercise of the right not to testify when the defendant is the only person who could offer the contradictory proof. *See, e.g., United States v. Sandstrom,* 594 F.3d 634, 662–63 (8th Cir.2010); *State v. Whitaker,* 152 Idaho 945, 277 P.3d 392, 399 (Idaho Ct.App.2012).

46 Three states have adopted a “fairly susceptible” test, which requires a finding of a constitutional violation whenever a prosecutor makes a statement that a jury may reasonably interpret as an invitation to draw an adverse inference from a defendant's silence. *See State v. DiGuilio,* 491 So.2d 1129, 1135–36 (Fla.1986); *Moore v. State,* 669 N.E.2d 733, 739 (Ind.1996); *Smith,* 787 A.2d at 156.

47 In adjudicating this issue, we have not considered as evidence the media videotape of the prosecutor's comment, which defense counsel was permitted to play during oral argument before this Court. *See* Tenn. Sup.Ct. R. 30(I) (“Impermissible Use of Media Material. None of the film, videotape, still photographs, or audio recordings of proceedings under this rule shall be admissible as evidence in the proceeding out of which it arose, any proceedings subsequent and collateral thereto, or upon any retrial or appeal of such proceeding.”).

48 Ms. Eidson testified that she told Defendant, “Noura, tell me where you were and who were you with when Jennifer was murdered.” Defendant responded, “I don't know. I don't know.”

49 The prosecutor in Shelby County is doubtless well aware of these principles. *See State v. Thomas,* 158 S.W.3d 361, 414 (Tenn.2005) (finding that the prosecutor's repeated characterizations of defendants as “greed” and “evil”

personified were "improper" and "unseemly"); *State v. Talley,* No. W2003–02237–CCA–R3–CD, 2006 WL 2947435, at *18 (Tenn.Crim.App. Oct. 16, 2006) (finding that the prosecutor's comments characterizing defendants as "hatred, vengeance and evil" were "improper" and "designed to inflame the passions and prejudices of the jury"); *State v. Bond,* No. W2005–01392–CCA–R3–CD, 2006 WL 2689688, at *8–9 (Tenn.Crim.App. Sept. 20, 2006) (finding that the prosecutor's remarks blaming the defendant for the lengthy trial and jury sequestration were "improper" insofar as they asked the jury to penalize the defendant for exercising his constitutional right to a jury trial).

50 When evaluating an improper prosecutorial argument that does not rise to the level of a constitutional violation, the test to be applied is "whether the improper conduct could have affected the verdict to the prejudice of the defendant." *Harrington v. State,* 215 Tenn. 338, 385 S.W.2d 758, 759 (1965). In answering this question, courts consider the following five factors: (1) the conduct complained of, viewed in light of the facts and circumstances of the case; (2) the curative measures undertaken by the court and the prosecutor; (3) the intent of the prosecutor in making the improper statement; (4) the cumulative effect of the improper conduct and any other errors in the record; and (5) the relative strength or weakness of the case. *See State v. Buck,* 670 S.W.2d 600, 609 (Tenn.1984) (adopting the five-factor analysis enunciated in *Judge v. State,* 539 S.W.2d 340, 344 (Tenn.Crim.App.1976)). There is some overlap between these five factors and the analysis a court should employ when addressing a defendant's claim of unconstitutional prosecutorial comment upon a defendant's right not to testify. For instance, the conduct complained of and the intent of the prosecutor are relevant in both instances to determining whether a prosecutor's comments are improper. Factors two and five are relevant in both instances to determining the prejudicial effect or harmfulness of prosecutorial comments.

We recognize that the Court of Criminal Appeals has used the five *Judge* factors when adjudicating claims of unconstitutional prosecutorial comment on a defendant's right not to testify as well as claims of improper prosecutorial argument. *See, e.g., State v. Flinn,* No. E2009–00849–CCA–R3–CD, 2013 WL 6237253, at *73 (Tenn.Crim.App. Dec. 3, 2013); *State v. Becton,* No. W2011–02565–CCA–R3–CD, 2013 WL 967755, at *23 (Tenn.Crim.App. Mar. 11, 2013). To avoid blurring the lines between improper prosecutorial argument and unconstitutional prosecutorial comment, the *Judge* factors should only be applied to claims of improper prosecutorial argument. Limiting their application in this manner will preserve the crucially important distinction between the two claims, which is that the State bears the burden of proving unconstitutional prosecutorial comment or argument harmless beyond a reasonable doubt, whereas a defendant bears the burden of proving prejudice when prosecutorial argument is merely improper. *Rodriguez,* 254 S.W.3d at 371–72.

51 The trial court instructed the jury, in relevant part, as follows:

> All right, ladies and gentlemen, I want to make a distinction here so you'll understand. I have given you in your jury instructions and you will get in your copy of the instructions, but to make sure that there's no confusion, the following instruction, which I will re-read to you, which you were discussed [sic] when we picked the jury last Monday. Defendant not testifying. The defendant has not taken the stand to testify as a witness, but you shall place no significance on this fact. The defendant is presumed innocent and the burden is on the State to prove her guilt beyond a reasonable doubt. She is not required to take the stand in her own behalf and her election not to do so cannot be considered for any purpose against her, nor can any inference be drawn from such fact. Now, when [the lead prosecutor] opened her argument, she was not at all discussing or asking Miss Jackson a question. What she is doing, and she will explain to you, is that she was quoting another witness and commenting on the proof of the case that Miss Jackson, a witness who testified to something about Miss Jackson being asked where she was. It's very important for all of you to understand that you cannot ever, ever, hold anything against Miss Jackson for not testifying in this trial. Also, at any time from the time of this alleged killing until today, Miss Jackson never has to talk to anyone about anything. She has an absolute right to remain silent and it's up to the State to prove her guilt beyond a reasonable doubt. It's not up to anyone to prove that they're innocent. Can every one of you follow that instruction? And I want to see every head. Can you, sir? (The jury was polled and each juror indicated an affirmative response.) Okay. I'm going to allow [the lead prosecutor] to continue with this argument, but I want everybody to understand that when she says this phrase, she's not asking Miss Jackson that question now about—commenting at all about her right not to testify. She is talking about proof in the case.

52 By our holding we do not disturb the trial court's finding that the prosecutor did not intentionally withhold Mr. Hammack's third statement. We observe, however, that this is not the first time prosecutors in the Thirtieth Judicial District have withheld evidence that should have been disclosed. *See, e.g., State v. Coleman,* No. W2001–01021–CCA–R3–CD, 2002 WL 31625009, at *9 (Tenn.Crim.App. Nov. 7, 2002) (stating that the prosecution offered an "untimely revelation" of an oral statement defendant made to the police, resulting in a thirty-day continuance); *Roe v. State,* No. W2000–02788–CCA–

R3–PC, 2002 WL 31624850, at *11 (Tenn.Crim.App. Nov. 20, 2002) (stating that the prosecution improperly withheld information favorable to the defendant, although no *Brady* violation resulted as the information was not material).

53 Tennessee Rule of Criminal Procedure 26.2 provides:

> (a) Motion for Production. After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney for the state or the defendant and the defendant's attorney to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter of the witness's testimony.
>
> (b) Production of Statement.
>
> (1) *Entire Statement.* If the entire statement relates to the subject matter of the witness's testimony, the court shall order that the statement be delivered to the moving party.
>
> ....
>
> (c) Recess for Examination of Statement. The court may recess the proceedings to allow time for a party to examine the statement and prepare for its use.

Tenn. R.Crim. P. 26.2(a), (b)(1), (c).

54 The statute in effect at the time of the crime in 2005 is identical to the current statute.

55 Tennessee Rule of Evidence 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. It may, however, be admissible for other purposes. The conditions which must be satisfied before allowing such evidence are:
>
> (1) The court upon request must hold a hearing outside the jury's presence;
>
> (2) The court must determine that a material issue exists other than conduct conforming to a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;
>
> (3) The court must find proof of the other crime, wrong or act to be clear and convincing; and
>
> (4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

Tenn. R. Evid. 404(b).

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738 S.W.2d 186
Supreme Court of Tennessee,
at Knoxville.

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John T. STINSON and wife, Mamie Stinson, Plaintiffs/Appellees,
v.
David L. BRAND and G. Reece Gibson, Defendants/Appellants.

Sept. 28, 1987.

Vendors brought action against attorneys for negligence and fraud. The Law Court, Hawkins County, John K. Wilson, J., directed verdict in favor of attorneys. The Court of Appeals reversed. The Supreme Court, Harbison, C.J., held that: (1) attorneys could be found to have breached duty to vendors even if attorneys only represented purchasers; (2) jury could find that attorneys represented vendors as well as purchasers; but (3) there was insufficient showing of fraud.

Judgment of Court of Appeals affirmed and cause remanded.

Attorneys and Law Firms

***187** George W. Morton, Jr., Janet L. Mayfield, Knoxville, for defendants/appellants.

Stephenson Todd, Todd & Dossett, P.C., Kingsport, for plaintiffs/appellees.

OPINION

HARBISON, Chief Justice.

This is a suit for damages against a firm of attorneys practicing in a small town. The claim is based upon the alleged negligence of the attorneys, or a secretary in their office and acting under their supervision, in the preparation of two deeds and a deed of trust. The plaintiffs, appellees here, did not directly retain the attorneys to represent them, and they paid nothing to the attorneys for their services.

The trial judge directed a verdict for the attorneys, appellants here, upon the ground that they were not liable for negligence to non-clients. The Court of Appeals reversed and remanded the case for a new trial, finding that a jury issue was presented as to whether appellants were liable to appellees for the negligent supplying of information pursuant to *Restatement (Second) of Torts 2d,* § 552 (1977).

We affirm the decision of the Court of Appeals. Under the circumstances a jury issue was presented as to whether the attorneys were negligent in the preparation of the instruments and in the handling of the transaction. An issue may well be presented under Section 552, but a trier of fact could also find that the attorneys so far undertook to represent the interests of the sellers as to permit a direct action for negligence in doing so or in not more fully advising them.

There were some disputed issues of fact and some facts from which differing inferences might be drawn. The following statement of the facts is based upon the most favorable view of the record toward the plaintiffs, in view of the fact that there was a directed verdict for the defendants-appellants.

The plaintiffs, John T. Stinson and wife, Mamie Stinson, owned two houses and lots situated a few hundred yards from the site of their own residence. They had acquired these properties many years earlier and owned them free of encumbrances, except for a small amount of taxes.

Plaintiffs were about seventy years old in February and March 1980 when the transactions involved here took place. They had limited educations and business experience. They had acquired deeds to their own residence and to the two properties involved in the litigation, which they had duly recorded. They were not, however, sophisticated or experienced in real estate transactions.

On February 19, 1980 one Clyde D. Manis, a real estate broker in the community, called upon the Stinsons and offered them sixteen thousand dollars for the two houses and lots involved in this case. Plaintiffs had never met or dealt with him before. On that date they signed a written contract to sell the two properties to Avery L. Manis, brother of Clyde D. Manis, for the sum ***188** of sixteen thousand dollars, one thousand of which was paid in cash upon the signing of the contract. The remainder was to be evidenced by a note with interest at ten percent, payable in six months. The note was to be secured by a deed of trust. The instrument was signed in the name of Avery L. Manis, as purchaser, and witnessed "Manis Brothers, Inc., by Clyde D. Manis."

Mr. Stinson died while the present litigation was pending and before giving any evidence, by deposition or otherwise. Mrs. Stinson testified that her husband had retired shortly before the transactions involved in this case and had a stroke shortly thereafter.

Neither of the Manis brothers testified in the action. Apparently Clyde Manis took the written contract to the offices of the defendants/appellants and requested an appropriate title search and the necessary legal instruments called for in the contract. He gave the contract to Mrs. Phyllis Broome, secretary to appellant Gibson. Gibson and appellant Brand were partners, but Brand had no direct involvement in or knowledge of the transactions giving rise to this suit.

Mrs. Broome made some handwritten notations on the contract, apparently reflecting instructions given to her by Clyde Manis or his brother. These called for a title search and for two separate deeds. They also contained the terms to be inserted in the note and contained the notation "leave deeds open."

Testifying concerning the transaction some five years later, Mrs. Broome had no independent recollection of the matter. She apparently gave Mr. Gibson some information from which he conducted a

title search in the county seat, reporting no encumbrances except some unpaid taxes.

In accordance with her apparent instructions, Mrs. Broome prepared separate deeds for the two residential lots, to be executed by appellees, leaving the name of the grantee in each deed blank. Apparently this was done at the request of Clyde Manis, who was known by the sellers to be purchasing the property for his own account or that of his real estate firm. [1]

Mrs. Broome also prepared a note and deed of trust. The maker of the note was typed "MANIS BROTHERS, INC." It was signed by Clyde D. Manis and was made payable six months after date, the due date being September 10, 1980.

The deed of trust conveyed the property from Manis Brothers, Inc., to appellant G. Reece Gibson, Trustee. It was made and executed in the same manner as the note. In the acknowledgment Clyde D. Manis was stated to be the vice-president of the corporate grantor.

All of the instruments were dated March 10, 1980 and were executed on that date. Mrs. Stinson testified that Clyde Manis came to the residence of the sellers and took them in his automobile to the offices of appellants where all of the instruments were executed in the presence of Mrs. Broome. She was a Notary Public and duly acknowledged the execution of the two deeds (with the grantees' names in blank) and of the deed of trust. No closing statement was prepared. The sellers gave their check to Mrs. Broome for some unpaid taxes, and apparently these were paid to the county trustee by appellants or one of their employees. [2]

Mrs. Stinson testified that the deed of trust and note were delivered to her and her husband without any instructions. They did not record the deed of trust. They took the documents to their home and kept them in a safe place. She testified that there was expense involved in recording and that she and her husband saw no need to incur this expense in the absence of ***189** some instructions that the instrument should be recorded.

Mrs. Broome testified that she did not recall whether she gave any instructions to appellees regarding the recording of the deed of trust. She said that her instructions from her employers, appellants here, were to advise persons receiving deeds of trust such as this from their office to record them. Taken most favorably to appellees, the record would support a finding that no such instructions were given in this case.

Manis Brothers, Inc. did not pay the note in accordance with its terms. They did, however, sell the two houses and lots later in the year. One of the lots was purchased by Terry Morelock, an employee at a local Baptist church. He purchased one of the tracts for $24,900, and his name apparently was filled in as the grantee on the original deed executed in blank by Mr. and Mrs. Stinson on March 10, 1980. Mr. Morelock executed a deed of trust to secure a note for $23,650 on July 11, 1980, having borrowed the funds from a savings and loan

institution. The deed of trust was recorded the same date, and the previously incomplete deed from the Stinsons was completed and recorded at the same time. Mr. Morelock moved into the property shortly after the closing. Although he was a single man, he said that it would have been obvious to anyone in the neighborhood that the residence was occupied from and after July 1980.

The deed of trust securing Mr. Morelock's indebtedness showed on its face that it was prepared by Attorney Thomas A. Peters. Neither Mr. Peters nor any representative of the lending institution testified at the trial of this case.

Under date of November 10, 1980, the deed from appellees Stinson to the other house and lot was recorded, the grantee being shown as Jeffery L. Necessary and wife, Connie E. Necessary. The deed, of course, bore date and acknowledgment of March 10, 1980. The deed reflected a purchase price of eleven thousand six hundred dollars. No witness testified concerning the closing of this transaction.

Under date of November 28, 1980, Mr. Manis paid two thousand dollars in cash to the Stinsons; and two days later, on November 30, 1980, he paid them an additional fifteen hundred dollars. Mrs. Stinson noted these payments on the face of the original deed of trust. It will be recalled that the note to the Stinsons for fifteen thousand dollars was due and payable in full on September 10, 1980.

Mrs. Stinson testified that after these payments were made some neighbors or other unidentified persons advised her that she should record the deed of trust; and she ultimately did so on February 24, 1981, long after the recording of the deeds to Mr. Morelock and to Mr. and Mrs. Necessary above referred to.

Mr. Manis paid nothing else to the Stinsons, and he later went into bankruptcy. On July 8, 1982 the trustee in bankruptcy paid $663.11 to the Stinsons as a dividend, and apparently there is little prospect that any further dividends will be received. The record reflects that Manis was denied a discharge in bankruptcy because of fraud in the transactions.

No action was ever instituted, insofar as the present record reflects, against either the purchasers from Manis or the subsequent mortgagee which made a loan to Mr. Morelock. We are not concerned in this case, therefore, with whether or not those individuals were truly bona fide purchasers without notice or as to whether the lending institution holding Mr. Morelock's note could have sustained its lien as prior to that of the Stinsons. The suit for damages was brought only against the attorneys whose secretary prepared the legal instruments.

When the attorneys searched their files after suit was brought, it was found that they had billed Clyde D. Manis at Manis Brothers, Inc. for the title search and for the two separate deeds. Their invoice had never been paid. Apparently they never made any charge to anyone for the deed of trust and

note. An inference could be drawn from the testimony of both Mr. Gibson and Mr. Brand that the law firm should ***190** have charged the Stinsons for these instruments.

The printed contract between Manis and the Stinsons called for the purchaser to pay all expenses incident to consummating the transaction, but this language on the printed form was stricken through. There is no explanation concerning this in the record and no testimony as to what the actual agreement was between the Stinsons and their purchaser as to the closing costs.

It was the insistence of appellants at trial that the Stinsons were not their clients. They insist that they did not attempt to advise or represent the Stinsons and that they could not properly do so in view of the fact that the purchaser, Manis, was their regular client and was the one to whom their bill was submitted. Their counsel points to provisions of the Code of Professional Responsibility generally prohibiting an attorney from representing conflicting interests, DR5–105, or from giving advice to an adverse party not represented by a lawyer other than possible advice to secure independent counsel. DR7–104.

[1] It is, of course, the general rule that an attorney is not liable for negligence to third parties who are not clients and are not in privity of contract with the attorney. *See generally National Savings Bank v. Ward,* 100 U.S. (10 Otto) 195, 25 L.Ed. 621 (1879); 7 Am.Jur.2d *Attorneys at Law* § 232 (1980). *But see* Annot. 45 A.L.R.3d 1181 (1972) (noting the general rule but listing a number of situations in which liability to non-clients has been sustained).

[2] We have confined our consideration in this case to the issue of negligence. Appellees contend that there was sufficient evidence of actual fraud and deceit on the part of appellants to make a submissible jury issue on that theory. We are of the opinion that the trial judge correctly directed a verdict on that claim. As previously stated, Attorney Brand had no knowledge of the transaction at all, and apparently Attorney Gibson did no more than search the title. Neither of them had any conversations with Manis, and neither they nor their secretary, Mrs. Broome, is shown to have had any knowledge of any fraudulent purpose on the part of Manis or to have participated therein. Appellants do not deny that they are responsible for the negligence, if any, of Mrs. Broome, since she was their employee and was acting at all times in the scope and course of her employment.

[3] It is well settled in this state that an attorney may be liable to a third person, even an adverse party in litigation, for malicious prosecution and abuse of process. *See Peerman v. Sidicane,* 605 S.W.2d 242 (Tenn.App.1980). Further, as pointed out by the Court of Appeals, in the case of *Tartera v. Palumbo,* 224 Tenn. 262, 453 S.W.2d 780 (1970), this Court adopted the principles later approved by the American Law Institute in *Restatement (Second) of Torts 2d,* § 552 (1977) in connection with the liability of business or professional persons who negligently supply false information

for the guidance of others in their business transactions. These principles, of course, could apply to attorneys as well as to land surveyors, accountants, or title companies.

We adhere to the decision in that case and agree with the Court of Appeals that sufficient facts and circumstances were adduced in the present case to make a jury issue against appellants thereunder.

Further, in our opinion, appellants so far involved themselves in the transaction that a trier of fact could find that they were representing multiple interests, not just the purchaser, and could be liable to appellees for negligence on that basis. The appellants did attempt to furnish a proper deed of trust in this case, and one of them actually was named as trustee in that instrument to act for and on behalf of the holder of the note—Mr. and Mrs. Stinson. It is true that Mr. Gibson may not have known that his secretary inserted his name as trustee and that he could have resigned or have been replaced at a later date. As the papers were actually prepared for recording, however, he was the named trustee for these very persons, with duties and obligations spelled out in the instrument. Both of the deeds prepared by appellants ***191** bore a legend that they were prepared for recording by their office, and their names as attorneys were stamped on the deed of trust, indicating that they had prepared it for recording also. [3]

As pointed out by counsel for appellees, the deed of trust purported to be executed by Manis Brothers, Inc., as grantor, whereas no warranty deed vesting title in Manis Brothers, Inc. was ever prepared or recorded. All of the attorneys who gave opinions on the matter in this case testified that preparing warranty deeds in blank, with no grantee designated, was highly unusual. Mr. Gibson testified that he would never have permitted such an instrument to leave his office had he known about it without strongly advising against it. With the deeds in this form, and with the grantees to be designated at a later date, it was unlikely that the deed of trust from Manis Brothers, Inc. to Mr. Gibson as Trustee would have been discovered by anyone searching the title; or, at least, a trier of fact could so find, even if the deed of trust had been recorded. Further, as previously stated, there was evidence that Mrs. Broome was instructed to advise persons such as the Stinsons to record their deed of trust and that she failed to do so.

Under all of the circumstances, we are of the opinion that jury issues were presented as to the alleged negligence of appellants. There are, of course, issues of contributory negligence, proximate cause and damages, all of which require consideration by a trier of fact as well; but we are of the opinion that the trial judge erred in directing a verdict because of the absence of privity of contract or the absence of any legal duty to appellees.

[4] We recognize that the relationship between an attorney and the parties to a real estate transaction is often complex and delicate. *See generally* Annot. 68 A.L.R.3d 967 (1976). It may well be that an attorney could properly represent all concerned if adequate disclosures were made. On the other hand, it may well be that an attorney

should refuse to represent some of the parties or should advise them to retain independent counsel. Where attorneys charge or intend to charge all parties for services in connection with a real estate transaction, there is nothing unusual or harsh in requiring the exercise of reasonable care toward all concerned.

[5] We recognize that appellants insist that they represented only Manis in this case and that they followed his instructions to the letter. At best, however, the transaction was loosely and inexpertly handled, with a legal secretary being permitted to conduct an apparently routine matter without submitting the legal documents to her employers for approval. A jury could find that appellants intended to charge appellees for preparing the note and deed of trust, in which case they would clearly have been acting for the sellers. Even without charging the sellers, appellants may be found to have been acting for them by naming one of the appellants as trustee for the sellers. And even if no attorney-client relationship existed or was intended, appellants could be liable for negligence under the principles of the *Tartera* case, *supra.*

The judgment of the Court of Appeals is affirmed, and the cause is remanded for a new trial. Costs incident to the appeal are taxed to appellants. All other costs will be taxed by the trial court.

FONES, COOPER, DROWOTA and O'BRIEN, JJ., concur.

All Citations

738 S.W.2d 186

Footnotes

1 It is at least a permissible inference from the record that he intended to have the names of grantees inserted later when he sold the properties, possibly for the purpose of avoiding a state transfer tax upon the original purchase price. T.C.A. § 67–4–409.

2 Mr. Gibson testified that his firm's financial records were lax. Apparently the Stinsons actually paid to Mrs. Broome only $101.66, and the law firm paid to the trustee $123.99. Seemingly the Stinsons were never billed for the difference.

3 *See* T.C.A. § 66–24–115, requiring the name of the person preparing a conveyance to appear thereon before the instrument can be accepted for recording.

Akins v. Edmondson

Court of Appeals of Tennessee, At Nashville

December 19, 2005, Assigned on Briefs ; June 12, 2006, Filed

No. M2004-01232-COA-R3-CV

Reporter
207 S.W.3d 300 *; 2006 Tenn. App. LEXIS 397 **

MARGARET AKINS v. L. JOE EDMONDSON, ET AL.

Subsequent History: Appeal denied by *Akins v. Edmonson, 2006 Tenn. LEXIS 1038 (Tenn., Nov. 6, 2006)*

Prior History: [1]** *Tenn. R. App. P. 3* Appeal as of Right; Judgment of the Circuit Court Affirmed. Appeal from the Circuit Court for Davidson County. No. 97C-4018. Thomas Brothers, Judge.

Disposition: Judgment of the Circuit Court Affirmed.

Core Terms

services, limited partnership, farm, summary judgment, law firm, partnership agreement, trial court, issues, gift, contends, advice, cause of action, attorney-in-fact, partnership, recommended, unauthorized practice of law, accounting firm, false information, material fact, inheritance, documents, annual

Case Summary

Procedural Posture
Appellant attorney-in-fact engaged appellee accounting firm to render professional services for her aged and infirm friend, including estate planning. That firm engaged appellee law firm. After the friend's death, the attorney-in-fact filed a suit against both firms claiming their actions had diminished her expected inheritance. The Circuit Court for Davidson County (Tennessee) summarily dismissed the action. The attorney-in-fact appealed.

Overview
The issue was whether the attorney-in-fact was a client of the law firm and if so, had she sustained pecuniary damages as a result of its negligent acts or omissions or, if she was not a client, did the firm supply false information on which she reasonably relied to her pecuniary detriment. The credible evidence showed that the attorney-in-fact, acting in that capacity on behalf of her friend, engaged the services of the accounting firm to render professional services for and on behalf of the friend and no one else. But for her protestations during the pendency of the litigation, there was no credible evidence that suggested the firms were engaged to represent the attorney-in-fact or to render services for her benefit of or on her behalf. The evidence was undisputed that the attorney-in-fact was not and never had

been a client of the law firm. The record was devoid of evidence that the law firm supplied false information for the guidance of the attorney-in-fact upon which she had reasonably relied. The only "information" the firm provided was a limited partnership agreement, a certificate of limited partnership, and a quitclaim deed to transfer a farm to the partnership.

Outcome

The judgment of the trial court was affirmed. The matter was remanded with the costs of the appeal assessed against the attorney-in-fact.

LexisNexis® Headnotes

Estate, Gift & Trust Law > Wills > Failure of Bequests > Ademptions

HN1 **Failure of Bequests, Ademptions**

Ademption is generally defined as the extinction, alienation, withdrawal, or satisfaction of the legacy by some act of the testator by which an intention to revoke is indicated. Ademption by extinction results because of the doing of some act with regard to the subject-matter which interferes with the operation of the will. The rule of ademption by extinction is predicated upon the principle that the subject of the gift is annihilated or its condition so altered that nothing remains to which the terms of the bequest can apply.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Need for Trial

HN2 **Standards of Review, De Novo Review**

Summary judgments do not enjoy a presumption of correctness on appeal. The appellate court must make a fresh determination that the requirements of Tenn. R. Civ. P. 56 have been satisfied. The appellate court considers the evidence in the light most favorable to the non-moving party and resolve all inferences in that party's favor. When reviewing the evidence, an appellate court first determines whether factual disputes exist. If a factual dispute exists, the court then determines whether the fact is material to the claim or defense upon which the summary judgment is predicated and whether the disputed fact creates a genuine issue for trial.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

HN3 **Summary Judgment, Entitlement as Matter of Law**

Summary judgments are proper in virtually all civil cases that can be resolved on the basis of legal issues alone; however, they are not appropriate when genuine disputes regarding material facts exist. Tenn. R. Civ. P. 56.04. The party seeking a summary judgment bears the burden of demonstrating that no genuine disputes of material fact exist and that party is entitled to judgment as a matter of law. Summary judgment should be granted at the trial court level when the undisputed facts, and the inferences reasonably drawn from the undisputed facts, support one conclusion, which is the party seeking the summary judgment is entitled to a judgment as a matter of law.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

HN4 **Entitlement as Matter of Law, Materiality of Facts**

A court must take the strongest legitimate view of the evidence in favor of the non-moving party, allow all reasonable inferences in favor of that party, discard all countervailing evidence, and, if there is a dispute as to any material fact or if there is any doubt as to the existence of a material fact, summary judgment cannot be granted. To be entitled to summary judgment, the moving party must affirmatively negate an essential element of the non-moving party's claim or establish an affirmative defense that conclusively defeats the non-moving party's claim.

Legal Ethics > Client Relations > General Overview

Torts > Malpractice & Professional Liability > Attorneys

HN5 **Legal Ethics, Client Relations**

A cause of action for attorney malpractice requires inter alia a showing of employment of the attorney. The attorney-client relationship is consensual, and, significantly, it arises only when both the attorney and the client have consented to its formation. Moreover, the client must manifest her authorization that the attorney act on her behalf, and the attorney must indicate her acceptance of the power to act on the client's account.

Legal Ethics > Client Relations > General Overview

Torts > Malpractice & Professional Liability > Attorneys

Torts > Remedies > Damages > General Overview

Torts > ... > Elements > Duty > General Overview

Torts > Negligence > Elements

HN6 **Legal Ethics, Client Relations**

For a plaintiff to prevail against an attorney for attorney malpractice, the plaintiff must show (1) employment of the defendants; (2) neglect on the part of the defendants of a reasonable duty; and (3) damages resulting from such neglect.

Legal Ethics > Client Relations > General Overview

Torts > Malpractice & Professional Liability > Attorneys

Torts > ... > Standards of Care > Reasonable Care > General Overview

HN7 **Legal Ethics, Client Relations**

There is a narrow set of circumstances by which a non-client may have a cause of action against an attorney or law firm. There is a cause of action based upon information negligently supplied for the guidance of others. One who, in the course of his profession, supplies false information for the guidance of others is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information. The professional's liability, however, is limited to loss suffered by the person for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it and through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction. It is further significant to understand that liability exists only in circumstances in which the maker was manifestly aware of the use to which the information was to be put and intended to supply it for that purpose. Moreover, it is not enough that the maker merely knows of the ever-present possibility of repetition to anyone and the possibility of action in reliance upon it.

Legal Ethics > Sanctions > General Overview

Torts > Malpractice & Professional Liability > Attorneys

Legal Ethics > General Overview

Torts > ... > Duty > Standards of Care > General Overview

HN8 **Legal Ethics, Sanctions**

The Tennessee Rules of Professional Responsibility do not establish a standard of care for attorneys upon which a legal cause of action can be based. The rules are not designed to create a private cause of action for infractions of disciplinary rules; they are designed to establish a remedy solely disciplinary in nature. The same concept applies to the Tennessee Rules of

Professional Conduct, adopted effective March 1, 2003.

Evidence > Inferences & Presumptions > Presumptions

Legal Ethics > Sanctions > General Overview

Torts > Malpractice & Professional Liability > Attorneys

Legal Ethics > General Overview

HN9[] **Inferences & Presumptions, Presumptions**

See Tenn. Sup. Ct. R. 8, Scope (6).

Legal Ethics > Sanctions > General Overview

HN10[] **Legal Ethics, Sanctions**

A party and counsel would be well served to sufficiently familiarize themselves with the former Tennessee Rules of Professional Responsibility, now the Tennessee Rules of Professional Conduct, before suggesting another lawyer is in violation of an ethical rule.

Legal Ethics > Sanctions > Disciplinary Proceedings > General Overview

Legal Ethics > Sanctions > Disciplinary Proceedings > Investigations

HN11[] **Sanctions, Disciplinary Proceedings**

A lawyer having knowledge that another lawyer has committed a violation of the Tennessee 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 disciplinary counsel of the board of professional responsibility. Tenn. Sup. Ct. R. 8.3. As the comments to Rule 8.3 explain, the term "substantial" refers to the seriousness of the possible offense, and a measure of judgment is required in complying with the reporting provisions of this rule.

Governments > Legislation > Statute of Limitations > Time Limitations

Legal Ethics > Client Relations > Attorney Fees > General Overview

Legal Ethics > Unauthorized Practice of Law

HN12[] **Statute of Limitations, Time Limitations**

A plaintiff who claims to have been damaged by a non-lawyer practicing law or engaged in the business of law must commence the civil action within two years from the date the non-lawyer has been paid. *Tenn. Code Ann. § 23-3-103(b)*.

Counsel: Denty Cheatham, Nashville, Tennessee, for the appellant, Margaret Akins.

Darrell G. Townsend, Nashville, Tennessee, for the appellees, Beth Edmondson and Gullett, Sanford, Robinson & Martin, PLLC.

Judges: FRANK G. CLEMENT, JR., J.,

delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and WILLIAM B. CAIN, J., joined.

Opinion by: FRANK G. CLEMENT, JR.

Opinion

[*302] This is an action by a non-client of a law firm, contending she sustained pecuniary damages due to the acts and omissions of the law firm. The non-client, Margaret Akins, served as the attorney-in-fact for an aged, blind and infirm lady, Josephine Notgrass. In her capacity as attorney-in-fact, Ms. Akins engaged an accounting firm to render professional services for Ms. Notgrass, including tax services and estate planning. The accounting firm recommended the creation of a limited partnership as a vehicle for annual gifting, which the client approved; whereupon the accounting firm engaged the law firm **[**2]** to prepare a limited partnership agreement. Preparation of the partnership agreement was the only service for which the law firm was engaged, and the law firm had no communication or consultation with the client, Ms. Notgrass, or her attorney-in-fact, Ms. Akins. All communications went through the accounting firm. Ms. Notgrass died soon after the partnership agreement was executed, and only one annual gift had been perfected at the time of her death. Contending the inheritance she expected was substantially diminished by the law firm's failure to suggest amending the will after the creation of the limited partnership, Ms. Akins brought this action. The trial court summarily dismissed the complaint finding Ms. Akins was not a client of the law firm and the firm owed no duty to Ms. Akins. We affirm in all respects.

OPINION

[*303] Ms. Akins' relationship with Ms. Notgrass began in the 1970s when Ms. Akins was in high school. Ms. Notgrass was teaching high-school French and piano, and Ms. Akins was one of her students. While under Ms. Notgrass' tutelage, Ms. Akins developed a close relationship with her and eventually followed in her footsteps by continuing her education and teaching **[**3]** music at Cumberland College in Lebanon, TN. After teaching, Ms. Akins earned her real estate license and eventually her law degree.

Ms. Notgrass' husband passed away in 1989, after which, Ms. Akins began staying with and caring for Ms. Notgrass. Ms. Akins eventually moved in with Ms. Notgrass, and for the last few years of Ms. Notgrass' life, Ms. Akins lived with Ms. Notgrass and was her primary caregiver.

In 1991, Ms. Notgrass had a codicil prepared for her 1989 will, and in the codicil she deleted and revised bequests to her family members. This codicil was followed by a will that Ms. Notgrass executed in 1994 in which Ms. Notgrass bequeathed her Monroe County dairy farm to Ms. Akins. Ms. Notgrass also had stock in Valley Bank and the Farm Bureau, which she devised to Ms. Akins. The 1991 codicil and the 1994 will were prepared for Ms. Notgrass by an attorney in Madisonville, Tennessee. The Madisonville attorney also prepared a general and durable power of attorney designating Ms. Akins as attorney-in-fact for Ms. Notgrass.

With the power of attorney in hand, Ms. Akins returned to Nashville. In 1996, when Ms. Notgrass was in declining health, Ms. Akins engaged the Nashville accounting **[**4]** firm of Marlin & Edmondson to provide various services for Ms. Notgrass, including income tax and estate planning services. Ms. Akins specifically requested the accounting firm examine and revise Ms. Notgrass' federal income tax returns and to minimize Ms. Notgrass' taxable estate. Marlin & Edmondson designated Scott Shepard, an accountant working in its estate planning section, to provide the estate planning services for Ms. Notgrass.

As a method for reducing Ms. Notgrass' taxable estate, Shepard recommended the creation of a limited partnership [1] in conjunction with a series of annual tax exempt gifts [2] of her interest in the limited partnership. Ms. Akins approved Shepard's recommendations. To implement the plan, and with Ms. Akins' consent, Shepard contacted attorney Beth Edmondson of the law firm of Gullett, Sanford, Robinson & Martin (collectively referred to as "Gullett") and engaged the law firm on behalf of Ms. Notgrass to prepare the limited partnership agreement. Pursuant to Shepard's recommended estate plan, Ms. Notgrass was to be the general partner, Ms. Akins was to be the only limited partner, and all of the assets of the partnership were to be provided by Ms. Notgrass. **[**5]** Ms. Akins' initial interest in the partnership was to be a gift from Ms. Notgrass, and the estate plan called for Ms. Notgrass to make additional annual gifts of partnership interests to Ms. Akins in amounts not to exceed the annual gift tax credit.

Gullet prepared the Limited Partnership Agreement, the Certificate of Limited Partnership, and a quitclaim deed of Ms. **[*304]** Notgrass' farm to the partnership, and forwarded the documents for Ms. Notgrass' approval and execution. The fee for Gullett's services was paid from Ms. Notgrass' funds. [3] **[**6]** Gullet did not provide any other services during Ms. Notgrass' life. [4]

Ms. Notgrass did not review the documents with Gullett, nor did Ms. Akins. Instead, Ms. Notgrass and Ms. Akins reviewed the documents with Ms. Notgrass' Madisonville attorney. On July 3, 1996, in the presence of her Madisonville attorney, Ms. Notgrass executed all three documents. [5]

Ms. Notgrass died four months later, on November 8, 1996. At the time of Ms. Notgrass' death, Ms. Akins owned an 8.5% interest in the limited partnership and was the sole devisee of "the farm" in Ms. Notgrass' last will and testament, the 1994 will. Unfortunately for Ms. Akins, Ms. Notgrass no longer owned the farm. The farm was an asset of, and thus owned by, the limited partnership due to the quitclaim deed signed by Ms. Notgrass four months

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[1] At various places in the record, this limited partnership was referred to as a family limited partnership. Ms. Akins, however, was not family to Ms. Notgrass, and thus, the partnership could not be a family limited partnership.

[2] The Federal tax exemption for gifts was $ 11,000 per donee per year when the plan was recommended and the partnership agreement was executed.

[3] Ms. Notgrass paid Gullet for the firm's services by personal check.

[4] As we discuss later, Gullett was called upon for post-death advice.

[5] Ms. Akins additionally signed the partnership agreement because she was a limited partner.

earlier. As a consequence, the devise **[**7]** of the farm to Ms. Akins lapsed because it adeemed by extinction. [6]

Ms. Akins attended to Ms. Notgrass' post-death affairs, including paying for her funeral and other final expenses. While attending to **[**8]** Ms. Notgrass' final affairs, Ms. Akins realized there may be a problem with her expectation of inheriting Ms. Notgrass' farm, as devised to Ms. Akins in the 1994 will. Thus, Ms. Akins sought advice from an unnamed attorney regarding how to transfer assets of the limited partnership to herself. Ms. Akins testified that the unnamed attorney advised her the partnership agreement did not authorize her to transfer Ms. Notgrass' interest to Ms. Akins. Hoping to find a way to transfer the balance of the farm to herself, Ms. Akins then sought the advice of Marlin & Edmondson, which in turn sought the advice of Gullet. Gullet recommended she consider a dissolution of the partnership. Marlin & Edmondson relayed this advice to Ms. Akins; however, Ms. Akins did not follow Gullett's advice. Instead, Ms. Akins sought the advice of two other attorneys, both of which advised her not to follow the advice relayed to her by Marlin & Edmondson.

After realizing she would not inherit the farm from Ms. Notgrass, as provided in the 1994 will, Ms. Akins filed this action against Marlin & Edmondson and Gullet. She contends the defendants negligently and erroneously recommended that she and Ms. Notgrass execute **[**9]** the limited partnership as a means of effectuating Ms. Notgrass' intended bequests under her will with the minimum tax consequences. Gullet filed an answer to the complaint contending it never had an attorney-client relationship with Ms. Akins and was not **[*305]** negligent in the services it provided. Following discovery, Gullett filed a Motion for Summary Judgment. The trial court granted Gullet's Motion for Summary Judgment, from which order Ms. Akins appeals.

STANDARD OF REVIEW

The issues were resolved in the trial court upon summary judgment. ***HN2***[⬆] Summary judgments do not enjoy a presumption of correctness on appeal. *BellSouth Adver. & Publ'g Co. v. Johnson, 100 S.W.3d 202, 205 (Tenn. 2003)*. This court must make a fresh determination that the requirements of Tenn. R. Civ. P. 56 have been satisfied. *Hunter v. Brown, 955 S.W.2d 49, 50-51 (Tenn. 1997)*. We consider the evidence in the light most favorable to the non-moving party and resolve all inferences in that party's favor. *Godfrey v. Ruiz, 90 S.W.3d 692, 695 (Tenn. 2002)*. When reviewing the evidence, we first determine whether factual disputes exist. If a factual dispute exists, we **[**10]** then determine whether the fact is material to the claim or defense upon which the summary judgment is

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[6] ***HN1***[⬆] Ademption is generally defined as the extinction, alienation, withdrawal, or satisfaction of the legacy by some act of the testator by which an intention to revoke is indicated. *In re Estate of Hume, 984 S.W.2d 602, 604 (Tenn. 1999)* Ademption by extinction results because of "the doing of some act with regard to the subject-matter which interferes with the operation of the will." *American Trust & Banking Co. v. Balfour, 138 Tenn. 385, 198 S.W. 70, 71 (Tenn. 1917)*. The rule of ademption by extinction "is predicated upon the principle that the subject of the gift is annihilated or its condition so altered that nothing remains to which the terms of the bequest can apply." *Hume at 604* (citing *Wiggins v. Cheatham, 143 Tenn. 406, 225 S.W. 1040, 1041 (1920)*).

predicated and whether the disputed fact creates a genuine issue for trial. Byrd v. Hall, 847 S.W.2d 208, 214 (Tenn. 1993); *Rutherford v. Polar Tank Trailer, Inc., 978 S.W.2d 102, 104 (Tenn. Ct. App. 1998)*.

HN3[⬆] Summary judgments are proper in virtually all civil cases that can be resolved on the basis of legal issues alone, Byrd v. Hall, 847 S.W.2d at 210; Pendleton v. Mills, 73 S.W.3d 115, 121 (Tenn. Ct. App. 2001); however, they are not appropriate when genuine disputes regarding material facts exist. Tenn. R. Civ. P. 56.04. The party seeking a summary judgment bears the burden of demonstrating that no genuine disputes of material fact exist and that party is entitled to judgment as a matter of law. Godfrey v. Ruiz, 90 S.W.3d at 695. Summary judgment should be granted at the trial court level when the undisputed facts, and the inferences reasonably drawn from the undisputed facts, support one conclusion, which is the party seeking the summary judgment is entitled to a judgment as a matter of law. **[**11]** Pero's Steak & Spaghetti House v. Lee, 90 S.W.3d 614, 620 (Tenn. 2002); Webber v. State Farm Mut. Auto. Ins. Co., 49 S.W.3d 265, 269 (Tenn. 2001). ***HN4***[⬆] The court must take the strongest legitimate view of the evidence in favor of the non-moving party, allow all reasonable inferences in favor of that party, discard all countervailing evidence, and, if there is a dispute as to any material fact or if there is any doubt as to the existence of a material fact, summary judgment cannot be granted. Byrd v. Hall, 847 S.W.2d at 210; EVCO Corp. v. Ross, 528 S.W.2d 20 (Tenn. 1975). To be entitled to summary judgment, the moving party must affirmatively negate an essential element of the non-moving party's claim or establish an affirmative defense that conclusively defeats the non-moving party's claim. Cherry v. Williams, 36 S.W.3d 78, 82-83 (Tenn. Ct. App. 2000).

ANALYSIS

Ms. Akins raises seventeen issues and sub-issues on appeal, of which several are inartfully framed. We also find one of the issues to be, in part, a mis-characterization of both the trial court's conclusion and defendant's argument. [7] These **[**12]** deficiencies **[*306]** notwithstanding, we have recast the issues we believe to be dispositive of this appeal. This appeal hinges on whether Ms. Akins was a client of Gullett and if so, did she sustain pecuniary damages as a result of negligent acts or omissions of Gullett; or, if she was not a client of Gullett, did the law firm supply false information upon which Ms. Akins reasonably relied to her pecuniary detriment.

At all times material to this action, Ms. Akins, a licensed attorney, was acting as attorney-in-fact for her elderly friend, Ms. Notgrass. During the last few months of **[**13]** her life, and the months most significant to this action, Ms. Notgrass was aged, blind, and in declining health.

Although Ms. Akins engaged Marlin & Edmondson and Gullett to provide professional services on behalf of Ms.

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[7] On page 67, Appellant states an issue as follows: "The trial court erred in concluding the Attorney Defendants limited their role and liability to their client, Josephine Notgrass, . . ." This is simply incorrect. The trial court did not conclude the defendants limited their liability. Moreover, the defendants did not contend liability was limited; they merely contend they had a limited engagement, and Ms. Akins was not their client.

Notgrass, and paid their fees with Ms. Notgrass' funds, Ms. Akins contends the accountants and attorneys were engaged for Ms. Akins' benefit as well. Ms. Akins contends Gullett was to reduce Ms. Notgrass' taxable estate and advance Ms. Akins' expected inheritance via *inter vivos* gifts to Ms. Akins. The credible evidence, however, shows that Ms. Akins, acting in her capacity as attorney-in-fact on behalf of Ms. Notgrass, engaged the services of Marlin & Edmondson to render professional services for and on behalf of Ms. Notgrass and no one else. But for Ms. Akins' protestations during the pendency of this litigation, there is no credible evidence that suggests the defendants were engaged to represent Ms. Akins or to render services for the benefit of or on behalf of Ms. Akins.

HN5[] A cause of action for attorney malpractice requires *inter alia* a showing of "employment of the attorney." [8] *Walker v. Sidney Gilreath & Assocs., 40 S.W.3d 66, 71 (Tenn. Ct. App. 2000).* **[**14]** The attorney-client relationship is consensual and, significantly, it "arises only when *both the attorney and the client have consented* to its formation." *Torres v. Divis, 144 Ill. App. 3d 958, 494 N.E.2d 1227, 1230, 98 Ill. Dec. 900 (Ill. App. 1986)* (emphasis added). Moreover, the client must manifest her authorization that the attorney act on her behalf, and the attorney must indicate her acceptance of the power to act on the client's account. *Id*. The trial court found the evidence undisputed that Ms. Akins was not and had never been a client of Gullett. As the trial judge explained, "I find there are no genuine issues of material fact as to the existence of an attorney-client relationship between Ms. Akins and Gullett Sanford. There is no duty that exists therefore [sic] and there is no cause of action can exist . . . for attorney-client malpractice and professional negligence since there is no duty." We concur with the trial court and find the evidence is undisputed that Ms. Akins was not and never had been a client of Gullett.

[15]** The fact Ms. Akins was not a client of Gullett does not preclude a claim based upon professional negligence. The *Restatement (2d) of Torts, § 552*, which Tennessee adopted in 1970, affords ***HN7***[] a narrow set of circumstances by which a non-client may have a cause of action against an attorney or law firm. *Section 552* provides for a cause of action based upon information negligently supplied for **[*307]** the guidance of others. In pertinent part it provides,

> One who, in the course of his . . . profession . . ., supplies false information for the guidance of others . . . is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Restatement, (Second) of Torts § 552. The professional's liability, however, "is limited to loss suffered by the person . . . for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and through

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[8] ***HN6***[] For a plaintiff to prevail against an attorney for attorney malpractice, the plaintiff must show "1) employment of the defendants, 2) neglect on the part of the defendants of a reasonable duty and, 3) damages resulting from such neglect." *Walker, 40 S.W.3d at 71* (citing *Sammons v. Rotroff, 653 S.W.2d 740, 745 (Tenn. Ct. App. 1983))*.

reliance upon it in a transaction that he intends the information to influence **[**16]** or knows that the recipient so intends or in a substantially similar transaction." *Restatement, (Second) of Torts § 552(2)*. [9] It is further significant to understand that liability exists "only in circumstances in which the maker was manifestly aware of the use to which the information was to be put and intended to supply it for that purpose." *Restatement (Second) of Torts § 552, Comment (a)*. Moreover, "[i]t is not enough that the maker merely knows of the ever-present possibility of repetition to anyone, and the possibility of action in reliance upon it. . . ." *Id*.; *see* *Bethlehem Steel Corp. v. Ernst & Whinney, 822 S.W.2d 592, 594 (Tenn. 1991)*. [10]

[17]** The record before us is devoid of evidence that Gullett supplied false information for the guidance of Ms. Akin. In fact the only "information" Gullett provided were the three documents: the limited partnership agreement, the certificate of limited partnership, and the quitclaim deed to transfer the farm to the partnership. There is simply no evidence in the record, credible or otherwise, to suggest Gullett provided false information upon which Ms. Akins reasonably relied.

As an additional issue, Ms. Akins contends Marlin & Edmondson was engaged in the unauthorized practice of law by providing legal services, and that Gullett aided and abetted the unauthorized practice of law in violation of *Tenn. Code Ann. § 23-3-103(b)* and the Code of Professional Responsibility. [11] The record, however, presents no competent evidence to support either allegation, and the claim is barred by the statute of limitations.

Ms. Akins' **[**18]** claim of professional misconduct fails to recognize that ***HN8***[⬆] the Rules of Professional Responsibility do not establish a standard of care for attorneys upon which a legal cause of action can be based. *Wood v. Parker, 901 S.W.2d 374, 379 (Tenn. Ct. App. 1995)*. *The Rules are not designed to create a private cause of action for infractions* of disciplinary rules; they are designed to establish a remedy solely disciplinary in nature. *Lazy 7 Coal Sales v. Stone & Hinds, 813 S.W.2d 400, 405 (Tenn. 1991)* (emphasis added). The same concept applies to the Rules of Professional Conduct, adopted effective **[*308]** March 1, 2003. The Rules of Professional Conduct provide:

> ***HN9***[⬆] 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 regulation conduct through disciplinary agencies. They are not designed to be a basis for civil liability.

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[9] An exception, that is irrelevant to the facts before us, is found in *Restatement (Second) of Torts § 552(3)*.

[10] *Bethlehem Steel Corp. v. Ernst & Whinney, 822 S.W.2d 592, 595 (Tenn. 1991)* cited *Stinson v. Brand, 738 S.W.2d 186 (Tenn.1987)* (holding the Restatement principles could extend to all professions). *Bethlehem Steel* also cited *Tartera v. Palumbo, 224 Tenn. 262, 453 S.W.2d 780 (1970)* for adopting principles later approved by the American Law Institute in *Restatement (Second) of Torts 2d, § 552* (1977) in connection with the liability of business or professional persons who negligently supply false information for the guidance of others in their business transactions and noting these principles could apply to attorneys. *Bethlehem Steel, 822 S.W.2d at 595*.

[11] Now the Rules of Professional Conduct, effective March 1, 2003.

Tenn. S. Ct. R. 8, Scope, (6). Ms. Akins' pursuit of a claim based, in part, on the alleged violation of a Rule of Professional Responsibility indicates a lack of **[**19]** familiarity with the Rules. ***HN10***[⬆] A party and counsel would be well served to sufficiently familiarize themselves with the Rules of Professional Responsibility, now the Rules of Professional Conduct, before suggesting another lawyer is in violation of an ethical rule. [12]

Ms. Akins' claim that Marlin & Edmondson was engaged in the unauthorized practice of law and that Gullett was aiding and abetting the unauthorized practice of law in violation of *Tenn. Code Ann. § 23-3-103(b)* **[**20]** is time barred. [13] The claim was not asserted until Ms. Akins filed her Second Amended and Supplemental Complaint on July 21, 2003. The alleged offense, which Marlin & Edmondson is alleged to have committed, would have occurred in 1996 when it was paid by Ms. Notgrass for its services. [14] ***HN12***[⬆] A plaintiff who claims to have been damaged by a non-lawyer practicing law or engaged in the business of law must commence the civil action within two years from the date the non-lawyer has been paid. *Tenn. Code Ann. § 23-3-103(b)*. Ms. Akins delayed almost six years before commencing her claim based upon the alleged unauthorized practice of law; thus, it is time barred.

[21]** Finding the foregoing issues dispositive of all of Ms. Akins' claims, we see no reason to address the other issues. [15]

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against Margaret Akins and her surety.

FRANK G. CLEMENT, JR., JUDGE

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[12] ***HN11***[⬆] "A lawyer having knowledge that another lawyer has committed a violation of the Rules that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the Disciplinary Counsel of the Board of Professional Responsibility." Rules of Professional Conduct, Rule 8.3. As the comments to Rule 8.3 explain, the term "substantial" refers to the seriousness of the possible offense, and a measure of judgment is required in complying with the reporting provisions of this Rule.

[13] Our brief analysis of this claim by Ms. Akins does not suggest it would be viable but for it being time barred.

[14] The fact Marlin & Edmondson, as well as Gullett, contend the fees were remitted for accounting services and tax consultation, and Ms. Akins contends the services constituted the unauthorized practice of law is irrelevant to the issue of the Statute of Limitations.

[15] Ms. Akins presented several claims and issues we have not discussed. They include, but are not limited to, assertions the trial court failed to make findings; that it erred in concluding Gullett limited its role; that it erred in concluding Ms. Akins acted as an attorney-in-fact; that it erred by failing to find all defendants acted in concert to cause Ms. Akins to lose her inheritance; and that it erred by failing to conclude Akins was the direct and intended beneficiary of their services and "must be considered their client."

THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2003-161

ISSUE: Under what circumstances may a communication in a non-office setting by a person seeking legal services or advice from an attorney be entitled to protection as confidential client information when the attorney accepts no engagement, expresses no agreement as to confidentiality, and assumes no responsibility over any matter?

DIGEST: A person's communication made to an attorney in a non-office setting may result in the attorney's obligation to preserve the confidentiality of the communication (1) if an attorney-client relationship is created by the contact or (2) even if no attorney-client relationship is formed, the attorney's words or actions induce in the speaker a reasonable belief that the speaker is consulting the attorney, in confidence, in his professional capacity to retain the attorney or to obtain legal services or advice.

An attorney-client relationship, together with all the attendant duties a lawyer owes a client, including the duty of confidentiality, may be created by contract, either express or implied. In the case of an implied contract, the key inquiry is whether the speaker's belief that such a relationship was formed has been reasonably induced by the representations or conduct of the attorney. Factors to be considered in making a determination that such a relationship was formed include: whether the attorney volunteered his services to the speaker; whether the attorney agreed to investigate a matter and provide legal advice to the speaker about the matter's possible merits; whether the attorney previously represented the speaker; whether the speaker sought legal advice and the attorney provided that advice; whether the setting is confidential; and whether the speaker paid fees or other consideration to the attorney.

Even if no attorney-client relationship is created, an attorney is obligated to treat a communication as confidential if the speaker was seeking representation or legal advice and the totality of the circumstances, particularly the representations and conduct of the attorney, reasonably induces in the speaker the belief that the attorney is willing to be consulted by the speaker for the purpose of retaining the attorney or securing legal services or advice in his professional capacity, and the speaker has provided confidential information to the attorney in confidence.

Whether the attorney's representations or conduct evidence a willingness to participate in a consultation is examined from the viewpoint of the reasonable expectations of the speaker. The factual circumstances relevant to the existence of a consultation include: whether the parties meet by pre-arrangement or by chance; the prior relationship, if any, of the parties; whether the communications between the parties took place in a public or private place; the presence or absence of third parties; the duration of the communication; and, most important, the demeanor of the parties, particularly any conduct of the attorney encouraging or discouraging the communication and conduct of either party suggesting an understanding that the communication is or is not confidential.

The obligation of confidentiality that arises from such a consultation prohibits the attorney from using or disclosing the confidential or secret information imparted, except with the consent of or for the benefit of the speaker. The attorney's obligation of confidentiality may also bar the attorney from accepting or continuing another representation without the speaker's consent. Unless the circumstances support a finding of a mutual willingness to such a consultation; however, no protection attaches to the communication and the attorney may reveal and use the information without restriction.

AUTHORITIES INTERPRETED: Rule 3-310(E) of the Rules of Professional Conduct of the State Bar of California.

Business and Professions Code section 6068, subdivision (e).

Evidence Code sections 951, 952, and 954.

STATEMENT OF FACTS

Individuals with legal questions sometimes approach lawyers on a casual basis, in non-office settings, and in unexpected ways. We have been asked whether any of the following situations could result in the lawyer owing a duty of confidentiality to any of the individuals who approached him.

Situation 1: Jones, a complete stranger to Lawyer, approaches Lawyer in a main courthouse hallway and asks, "Are you an attorney?" As soon as Lawyer replies, "yes," Jones continues: "Doe and I have been charged with two burglaries, but I did the first one alone. What should I do?" In response, Lawyer declines to represent Jones and suggests that Jones contact the public defender's office. Later, Doe seeks to hire Lawyer to defend him on the burglary charges to which Jones referred in his statement to Lawyer.

Situation 2: Smith approaches Lawyer at a party after learning from the host that Lawyer is an attorney. Smith has no idea of the area of law in which Lawyer practices. During a casual conversation, Smith says, "My insurer won't provide coverage to replace my office roof even though my business flooded last year during a rain storm, and even though I have paid all the premiums. Do you think there's anything I can do about it?" Lawyer politely listens to Smith make that statement but as soon as Smith finishes, Lawyer tells Smith he is not in a position to advise Smith about his insurance situation. Later, Lawyer's existing insurance company client, InsuredCo, which insures Smith's business, assigns the defense of Smith's claim to Lawyer.

Situation 3: Lawyer receives a phone call at home from his Cousin. Cousin says, "Lawyer, I know you do legal work with wills and estates. Well, after Grandma died, I borrowed her car and wrecked it. Turns out the car wasn't insured. Do you think that will be a problem when her estate gets resolved? Should I do anything?" Lawyer listened without interrupting, and then told Cousin he could not represent him. He suggested that Cousin call a referral service for a lawyer. Later the family hired Lawyer to probate Grandma's estate, including obtaining compensation for the damaged automobile.

DISCUSSION

The three situations presented in the facts exemplify the kinds of communications that members of the public commonly direct to attorneys in non-office settings. We are asked to determine whether any of these situations results in Lawyer acquiring a duty to preserve the confidentiality of the information the speakers communicated to Lawyer.

In determining whether any of the three situations could give rise to a duty of confidentiality owed by Lawyer, we engage in a two-part analysis. First, we ask whether any of the situations result in the formation of an attorney-client relationship. If an attorney-client relationship is formed, either expressly or impliedly, then Lawyer owes the respective speaker all of the duties attendant upon that relationship, including the duty of confidentiality. Second, in the absence of an attorney-client relationship being formed, we still must ask whether Lawyer may nevertheless owe a duty of confidentiality to any of the speakers because Lawyer, by words or conduct, may have manifested a willingness to engage in a preliminary consultation for the purpose of providing legal advice or services, and confidential information was communicated to Lawyer.

I. If an attorney-client relationship exists, an attorney owes a duty of confidentiality to the clients.

Except in those situations where a court appoints an attorney, the attorney-client relationship is created by contract, either express or implied. (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 181 [98

Cal.Rptr. 837]; *Houston General Insurance Co. v. Superior Court* (1980) 108 Cal.App.3d 958, 964 [166 Cal.Rptr. 904]; *Miller v. Metzinger* (1979) 91 Cal.App.3d 31, 39-40 [154 Cal.Rptr. 22].) The distinction between express and implied-in-fact contracts "relates only to the manifestation of assent; both types are based upon the expressed or apparent intention of the parties." *Responsible Citizens v. Superior Court (Askins)* (1993) 16 Cal.App.4th 1717, 1732 [20 Cal.Rptr.2d 756], quoting 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 11, p. 46.

In none of the situations presented in the facts did Lawyer express his assent to represent the speaker. Indeed, in each situation, Lawyer expressly declined to represent the speaker. In the absence of Lawyer's express assent, no express attorney-client relationship exists.

Notwithstanding the absence of an express agreement between the parties, their conduct, in light of the totality of the circumstances, may nevertheless establish an implied-in-fact contract creating an attorney-client relationship. (Cf. *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 611 [176 Cal.Rptr. 824]; see *Kane, Kane & Kritzer, Inc. v. Altagen* (1980) 107 Cal.App.3d 36, 40-42 [165 Cal.Rptr. 534]; *Miller v. Metzinger*, supra, 91 Cal.App.3d 31, 39-40.) (See also Civ. Code, § 1621 ("An implied contract is one, the existence and terms of which are manifested by conduct.").) Neither a retainer nor a formal agreement is required to establish an implied attorney-client relationship. (*Farnham v. State Bar* (1976) 17 Cal.3d 605, 612 [131 Cal.Rptr. 661]; *Kane, Kane & Kritzer v. Altagen*, supra, 107 Cal.App.3d 36.)

A number of factors, including the following, may be considered in determining whether an implied-in-fact attorney-client relationship exists:

- Whether the attorney volunteered his or her services to a prospective client. (*See Miller v. Metzinger, supra,* 91 Cal.App.3d 31, 39);

- Whether the attorney agreed to investigate a case and provide legal advice to a prospective client about the possible merits of the case. (*See Miller v. Metzinger, supra*, 91 Cal.App.3d 31);

- Whether the attorney previously represented the individual, particularly where the representation occurred over a lengthy period of time or in several matters, or occurred without an express agreement or otherwise in circumstances similar to those of the matter in question. (Cf. *IBM Corp. v. Levin* (3d 1978) 579 F.2d 271, 281 [law firm that had provided labor law advice to corporation for several years held to be in an ongoing attorney-client relationship with corporation for purposes of disqualification motion, even though firm provided legal services on a fee for services basis rather than under a retainer arrangement and was not representing the corporation at the time of the motion.])

- Whether the individual sought legal advice from the attorney in the matter in question and the attorney provided advice. (See *Beery v. State Bar* (1987) 43 Cal.3d 802, 811 [239 Cal.Rptr. 121]);

- Whether the individual paid fees or other consideration to the attorney in connection with the matter in question. (See *Strasbourger Pearson Tulcin Wolff Inc. v. Wiz Technology, Inc.* (1999) 69 Cal.App.4th 1399, 1403 [82 Cal.Rptr.2d 326]; *Fox v. Pollack* (1986) 181 Cal.App.3d 954, 959 [226 Cal.Rptr. 532]);

- Whether the individual consulted the attorney in confidence. (See *In re Marriage of Zimmerman* (1993) 16 Cal.App.4th 556 [20 Cal.Rptr.2d 132].

- Whether the individual reasonably believes that he or she is consulting a lawyer in a professional capacity. (See *Westinghouse Electric Corp. v. Kerr-McGee Corp.* (7th Cir. 1978) 580 F.2d 1311, 1319-1320).

The last listed factor is of particular relevance. One of the most important criteria for finding an implied-in-fact attorney-client relationship is the consulting individual's expectation – as based on the appearance of the situation to a reasonable person in the individual's position. (*Responsible Citizens v. Superior Court, supra*, 16 Cal.App.4th 1717, 1733. See also *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 281 n. 1 [36 Cal. Rpt. 2d 537]; [discussing the factual nature of the determination whether an attorney-client relationship has been formed] and *Hecht v. Superior Court* (1987) 192 Cal.App.3d 560, 565 [237 Cal.Rptr. 528] [the determination that an attorney-client relationship

exists ultimately is based on the objective evidence of the parties' conduct].) Although the subjective views of attorney and client may have some relevance, the test is ultimately an objective one. (*Sky Valley Limited Partnership v. ATX Sky Valley Ltd.* (N.D. Cal. 1993) 150 F.R.D. 648, 652.) The presence or absence of one or more of the listed factors is not necessarily determinative. The existence of an attorney-client relationship is based upon the totality of the circumstances.

Before proceeding with our analysis of the particular facts presented, it is important to emphasize that not every contact with an attorney results in the formation of an attorney-client relationship. In a frequently cited case, the court found that it was not sufficient that the individuals asserting the existence of an attorney-client relationship "'thought' respondent was representing their interests because he was an attorney." *(Fox v. Pollack, supra,* 181 Cal.App.3d 954, 959.) The court noted that "they allege no evidentiary facts from which such a conclusion could reasonably be drawn. Their states of mind, *unless reasonably induced by representations or conduct of respondent,* are not sufficient to create the attorney-client relationship; they cannot establish it unilaterally." *Ibid.* [Emphasis added]. (See also *Moss v. Stockdale, Peckham & Werner* (1996) 47 Cal.App.4th 494, 504 [54 Cal.Rptr.2d 805].)

Situations 1, 2, and 3 do not appear to involve any of the foregoing factors. In none of the situations did Lawyer volunteer to provide legal services, agree to investigate, or offer any legal counsel, advice, or opinion. Nor is there any evidence that Lawyer had a prior professional relationship with any of the individuals. Moreover, none of the individuals provided any compensation or other consideration towards an engagement. Finally, Lawyer provided no comment on any of the individual's problems, other than to expressly decline to provide any assistance,[1/] or to refer the individual to other resources for legal representation. Given those circumstances, none of the individuals who sought out Lawyer could have had a reasonable belief that Lawyer would either protect his or her interests or provide legal services in the future. Accordingly, we cannot conclude that an implied-in-fact attorney-client relationship was formed in any of the situations presented.[2/]

II. Even in the absence of an attorney-client relationship, an attorney may owe a duty of confidentiality to individuals who consult the attorney in confidence.

In the first part of our analysis set out in section I, we concluded that none of the fact situations resulted in the formation of an attorney-client relationship. Thus, Lawyer does not owe any of the individuals *all* of the duties attendant upon that relationship. Nevertheless, even if an attorney-client relationship was not formed, it is still possible that Lawyer owes a duty of confidentiality to one or more of the individuals who sought him out because they have engaged in a confidential consultation with Lawyer's express or implied assent.

The second part of our analysis again focuses on the totality of circumstances surrounding each fact situation. Instead of evaluating those circumstances to determine whether the parties assented to the formation of an attorney-client relationship, however, we ask whether Lawyer evidenced, by words or conduct, a willingness to engage in a *confidential consultation* with any of the individuals. In making this determination, we first ask in section A of this part whether any of the individuals may be a "client" within the meaning of Evidence Code section 951. Second, assuming the individual is a "client," we inquire in section B whether the circumstances of the fact situation allow us to conclude that the communications between Lawyer and the individuals were confidential. (Evid. Code, §§ 952, 954.) Finally, in part III we discuss the ramifications of an affirmative answer to each of these first two questions.

[1/] An attorney can avoid the formation of an attorney-client relationship by express actions or words. (See, e.g., *Fox v. Pollack, supra*, 181 Cal.App.3d 954, 959; *People v. Gionis* (1995) 9 Cal.4th 1196 [40 Cal.Rptr.2d 456] [attorney disclaimed attorney-client relationship in advance of discussion]; and *United States v. Amer. Soc. of Composers & Publishers, etc.* (S.D.N.Y. 2001) 129 F.Supp.2d 327, 335-40 [no attorney-client relationship formed between attorney for unincorporated association and its member, in part because the association's membership agreement said so and the member therefore could not have had a reasonable expectation to the contrary].)

[2/] If an attorney-client relationship had been created, an attorney has two duties with regard to the handling of client information: the attorney-client privilege (Evid. Code, § 950, et seq.) and the duty of confidentiality (Bus. & Prof. Code, § 6068, subd. (e)).

A. <u>A person is a "client" for the purposes of the attorney-client privilege and the lawyer's duty of confidentiality if a lawyer's conduct manifests a willingness, express or implied, to consult with the person in the lawyer's professional capacity.</u>

In California State Bar Formal Opn. No. 1984-84, we concluded that a person who consults with an attorney to retain the attorney is a "client," not only for purposes of determining the applicability of the evidentiary attorney-client privilege under Evidence Code sections 950 et seq., but also for purposes of determining the existence and scope of the attorney's ethical duty of confidentiality under Business and Professions Code section 6068, subdivision (e), and under former rule 4-101 of the Rules of Professional Conduct of the State Bar of California[3/], the precursor to rule 3-310(E).[4/] In reaching that conclusion, our earlier opinion recognized that the duty of confidentiality and the evidentiary privilege share the same basic policy foundation: to encourage clients to disclose all possibly pertinent information to their attorneys so that the attorneys may effectively represent the clients' interests. Accordingly, we relied in part on the definition of "client" in Evidence Code section 951 in analyzing the duty of confidentiality set forth in Business and Professions Code section 6068, subdivision (e) to determine that the statutory duty of confidentiality applies to information imparted in confidence to an attorney as part of a consultation described by Evidence Code section 951, even if such a consultation occurs *before* the formation of an attorney-client relationship, and *even if* no attorney-client relationship ultimately results from the consultation.

Nothing has occurred in the interim by way of statute, decisional law, or regulation to persuade us otherwise. Indeed, the California Supreme Court recently stated: "'The fiduciary relationship existing between lawyer and client extends to preliminary consultations by a prospective client with a view to retention of the lawyer, although actual employment does not result.'" (*People ex rel. Dept. of Corporations v. Speedee Oil, Inc.* (1999) 20 Cal.4th 1135, 1147-48 [86 Cal.Rptr.2d 816] [quoting *Westinghouse Elec. Corp. v. Kerr-McGee Corp., supra,* 580 F.2d 1311, 1319, fn. omitted].)

Although the phrase "attorney-client privilege" suggests it is applicable only to those individuals who actually retain an attorney, the privilege may apply even when an attorney-client relationship has not been formed. For the purposes of the attorney client privilege, Evidence Code section 951 defines a "client" to mean: "a person who, directly or through an authorized representative, *consults* a lawyer *for the purpose of* retaining the lawyer or securing legal service or advice from him in his professional capacity . . ." (Emphasis added). Thus, to be a "client" for purposes of the privilege – and, as we discussed in California State Bar Formal Opn. No. 1984-84, the duty of confidentiality – a person need only "consult" with a lawyer with an aim to retain the lawyer or secure legal advice from the lawyer. By its terms, Evidence Code section 951 does not require that the "client" actually retain the lawyer or receive legal advice. Consequently, even if, as we have concluded, Lawyer did not establish, either expressly or impliedly, an attorney-client relationship with any of the individuals who sought him out, we still need to address whether any of those individuals may have become a "client" within the meaning of Evidence Code section 951.

The critical factor in determining whether a person is a "client" within the meaning of Evidence Code section 951 is the conduct of the attorney. If the attorney's conduct, in light of the surrounding circumstances, implies a willingness to be consulted, then the speaker may be found to have a reasonable belief that he is consulting the

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[3/] Unless otherwise indicated, all rule references are to the Rules of Professional Conduct of the State Bar of California.

[4/] Rule 3-310(E) provides:

> "(E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment."

Former Rule 4-101 provided:

> "A member of the State Bar shall not accept employment adverse to a client or former client, without the informed and written consent of the client or former client, relating to a matter in reference to which he has obtained confidential information by reason of or in the course of his employment by such client or former client."

attorney in the attorney's professional capacity. In *People v. Gionis, supra,* 9 Cal.4th 1196, 1211, a criminal defendant claimed his communications with an attorney with whom he had a longstanding business relationship were privileged. The defendant had made incriminating statements in those communications and argued that the attorney should not be allowed to testify. Before the defendant had made the statements, however, the attorney had informed the defendant that he would not represent him. The Supreme Court held that the statements were not protected and the attorney could testify about them. The court reasoned that the defendant could not have had a reasonable belief that he was consulting the attorney for advice in his professional capacity after the attorney had manifested his unwillingness to be consulted by expressly refusing to represent him. Id. at 1211-12.

As we elaborate in our examples below, taken together with California State Bar Formal Opn. No. 1984-84, *People v. Gionis* suggests that in the non-office settings we consider, an attorney will not owe a duty of confidentiality to the speaker if the attorney: (1) unequivocally explains to the speaker that he cannot or will not represent him, either before the speaker has an opportunity to divulge any information or as soon as reasonably possible after it has become reasonably apparent that the speaker wants to consult with him; and (2) has not, by his prior words or conduct, created a reasonable expectation that he has agreed to a consultation. In the absence of an express refusal by the attorney to represent the individual, however, it is possible for the individual to have a reasonable belief that he or she was consulting the attorney in a professional capacity, even without the attorney's express agreement. In determining whether a speaker could have such a reasonable belief, other circumstances that should be considered include whether the lawyer has a reasonable opportunity to comprehend that a person is trying to engage in a consultation, whether the lawyer has a reasonable opportunity to interpose a disclaimer before the person begins to speak, or whether the person addressing the lawyer does so in a manner that prevents the lawyer reasonably from interposing any disclaimer or disengaging from the conversation.

In applying these principles to the three situations presented in the facts, it can be seen that variations in those facts could lead to different conclusions.

For example, in Situation 1, if Jones approached Lawyer and blurted out his incriminating statement without giving Lawyer a chance to speak, there would be no basis for finding an apparent willingness of Lawyer to be consulted in his professional capacity.

On the other hand, had Jones, after Lawyer said he was an attorney, manifested a desire to consult privately by speaking in a low voice or drawing Lawyer to an unpopulated corner of the hallway, and Lawyer accompanied Jones without objection, the circumstances could support a finding that Lawyer and Jones impliedly agreed to a consultation. If, instead of merely listening, Lawyer engaged in discussion of Jones's situation, there would be a strong suggestion that Lawyer was consenting to consult in a professional capacity. (The relative privacy of the setting in which the individual communicates with the attorney is a critical factor which warrants careful examination, as we discuss in some detail in part II.B., below.)

In Situation 2, it appears that Lawyer did not have an opportunity to comprehend that Smith intended to consult with Lawyer and interpose an objection or disclaimer before Smith made any statement. It further appears that Lawyer interposed a disclaimer as soon as reasonably possible given the social setting and the time it would take Lawyer in that setting to comprehend the nature of Smith's statements. Indeed, the social setting itself weighs against finding a preliminary consultation, by contrast to the more professionally-oriented environment of the courthouse in Situation 1. In these circumstances, Smith could not have had a reasonable belief that Smith was consulting Lawyer in his professional capacity.

On the other hand, if the party's host had brought Smith to Lawyer and said, "Lawyer specializes in insurance law; he should be able to help you with your problem with that insurance company," and Lawyer politely listened to Smith's detailed recitation of the facts underlying his insurance problem before stating he could not help him, Smith could potentially have a reasonable belief that Smith consulted Lawyer in his professional capacity. While the informal social setting cuts against such a belief, the host's description of the lawyer's legal speciality and the client's problem, combined with the Lawyer's patience in listening to Smith's entire story despite the opportunity to terminate the interaction in a polite manner, could lead Smith to believe that Smith was consulting Lawyer in his professional capacity.

Given the familial relationship in Situation 3, Cousin's telephone call to Lawyer at home was not sufficient by itself to enable Lawyer to comprehend that Cousin intended to consult with Lawyer in a professional capacity. Lawyer listened to Cousin's story without interrupting, which could have created a reasonable inference that Lawyer did not object to the consultation. On the other hand, if Cousin spoke quickly without permitting Lawyer to interrupt, Cousin could not assert that Lawyer objectively manifested his consent to a confidential consultation in his professional capacity.

In all three situations, had Lawyer, before any information was disclosed or, at the earliest opportunity afforded by the speaker, demonstrated an unwillingness to be consulted or to act as counsel in the matter, there would have been no reasonable basis for contending that the lawyer was being consulted. (*People v. Gionis, supra,* 9 Cal.4th 1196, 1211.) Absent this critical element of "consultation," the individual would not be considered a "client" within the meaning of Evidence Code section 951.

B. Regardless of whether a person is a "client" within Evidence Code section 951's meaning, neither the attorney-client privilege nor the duty of confidentiality attaches to the communication unless it is confidential.

Even if the surrounding facts and circumstances give the individual a reasonable belief that a lawyer is being consulted in the lawyer's professional capacity, neither the attorney-client privilege nor the duty of confidentiality attaches unless the communication between the individual and the attorney is confidential. Evidence Code section 954 provides that a client "has a privilege to refuse to disclose, and to prevent another from disclosing, a *confidential communication* between client and lawyer . . . . " (Emphasis added.)

Evidence Code section 952 defines "confidential communication between client and lawyer" as follows:

> "As used in this article, 'confidential communication between client and lawyer' means information transmitted between a client and his or her lawyer in the course of that relationship and *in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation* or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship." (Emphasis added.)

For the privilege to attach, then, the information the speaker imparts to the lawyer during a consultation must have been transmitted in confidence by means which does not, as far as the speaker is aware, disclose the information to any third parties not present to advance the speaker's interests.

There are a number of circumstance that can affect whether a communication with an attorney is confidential. One of these circumstances is the presence of other individuals who are able to overhear the communication, but are not present to further the speaker's interests. If such a third person is present, there can be no reasonable expectation of privacy. (Cf. *Hoiles v. Superior Court* (1984) 157 Cal.App.3d 1192, 1200 [204 Cal.Rptr. 111] [Attorney-client privilege attached to communications made at meeting with corporate counsel as all persons at meeting, related by blood or marriage, were present to further the interests of the closely-held corporation].) [5/]

A second circumstance that can affect the confidentiality of the communication is the reason why the person speaks to the lawyer. (See *Maier v. Noonan* (1959) 174 Cal.App.2d 260, 266 [344 P.2d 373, 377].) If the communication is intended to obtain legal representation or advice, then the person might be considered to have made a confidential communication to the lawyer. (Evid. Code, §§ 951 and 952.)

[5/] Evidence Code section 952 specifies that "[a] communication between a client and his or her lawyer is not deemed lacking in confidentiality solely because the communication is transmitted by facsimile, cellular telephone, or other electronic means between the client and his or her lawyer."

A third circumstance affecting the confidentiality of the communication is what actions the attorney took, if any, to communicate to the speaker that the conversation is not appropriate or is not confidential. Because the attorney is dealing in an arena in which he is expert and the speaker might not be, a burden is placed on the lawyer to take what opportunity he has to prevent an expectation of confidentiality when the lawyer does not want to assume that duty. (See *Butler v. State Bar* (1986) 42 Cal.3d 323, 329 [228 Cal.Rptr. 499]; Cal. State Bar Formal Opn. No. 1995-141.)

Fourth, confidentiality may also depend on both the degree to which the information communicated by the speaker already is known publicly, and the inherent sensitivity of the information to the speaker. Although the concept of client secrets includes information that might be known to some people, or publicly available, but the repetition of which could be harmful or embarrassing to the client, it nevertheless would be more reasonable for the speaker to expect confidentiality to the extent that the information is truly "secret" in the ordinary sense. (See Cal. State Bar Formal Opn. No. 1993-133. Compare *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179 [2000 WL 1682427, at p. 10] [attorney breached duty of confidence owed client by revealing to another client that first client was a convicted felon, where first client had disclosed the fact of his conviction to attorney in confidence, and even though first client's conviction was matter of public record].)

Applying these principles to the facts presented, variations in those facts could lead to different conclusions:

For example, in Situation 1, if Jones had approached Lawyer and blurted out his statement with others around who could easily overhear him, without making any effort to draw the attorney aside or giving other indications of a need for privacy, and without giving Lawyer a chance to speak, there could not be a reasonable basis to conclude that the communication was confidential.

On the other hand, if Jones asked Lawyer if he were an attorney, Lawyer said yes, and Jones then spoke to Lawyer in a relatively unpopulated area of the hallway, in a low voice and with the Lawyer's seeming consent, the circumstances are consistent with a confidential communication. The absence of others who were likely to overhear the communication, the modulated tone in which Jones spoke, and the seeming acquiescence of Lawyer, are all consistent with confidentiality.

In the party setting of Situation 2, considerations similar to those in Situation 1 apply. For example, if Smith had taken Lawyer aside to a quiet corner of the room, or had gone with Lawyer into an entirely separate room, then the physical surroundings would have been consistent with a private or confidential communication. However, Smith provided Lawyer with facts that do not seem to be sensitive, much of which already would have been widely known. Consequently, even had Smith spoken in an entirely confidential setting, it appears unlikely that his statements would be found to be part of a confidential communication. If there is no confidential communication, and no actual employment of the attorney, the attorney owes the person who consulted him no duty of confidentiality. (*In re Marriage of Zimmerman* (1993) 16 Cal.App.4th 556 [20 Cal.Rptr.2d 132].)

Changes in the facts, however, could lead to a different conclusion. Had Smith's communication included information known only to Smith that suggested how the insurer could successfully defend against Smith's claim, and if the conversation took place in a confidential setting, the statements could well be found to be part of a confidential communication.

Situation 3 presents the best example of a confidential setting because it occurred over the telephone, out of the hearing of anyone else, and Cousin prefaced his statement by a reference to the kind of legal work Lawyer does. However, although there is a reasonable expectation that no third party would overhear their conversation, the information imparted may not be confidential. For example, if it were already publicly known that Cousin had borrowed and wrecked the car, and Lawyer merely referred Cousin to available counsel, Cousin could not be said to have imparted confidential information. (*In re Marriage of Zimmerman*, *supra*, 16 Cal.App.4th 556.)

Thus, where an attorney is approached and asked if he or she is an attorney, or where the speaker indicates by his or her actions that he or she wants to speak to the attorney in confidence, for example, by taking the lawyer aside, whispering or similar conduct, the focus then shifts to the attorney to see whether the attorney affirmatively encouraged or permitted the speaker to continue talking. If so, the communication will likely be found confidential.

III. Duties owed to individuals who consult the attorney in confidence

In part II of this opinion, we have discussed how the attorney-client privilege attaches to communications between speaker and the attorney where that speaker has a reasonable expectation that he or she is consulting an attorney in his professional capacity and is imparting information to the attorney in confidence. This privilege attaches even if an attorney-client relationship does not result. In this part, we discuss the duties owed by the attorney where the elements of a confidential communication are established.

Generally, every lawyer has a duty to refuse to disclose, and to prevent another from disclosing, a confidential communication between the attorney and client. (*Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 309 [106 Cal. Rptr.2d 906]; Evid. Code, § 954.) The attorney-client privilege is evidentiary and permits the holder of the privilege to prevent testimony, including testimony by the attorney, as to communications that are subject to the privilege. (Evid. Code, §§ 952-955.)

The attorney's ethical duty of confidentiality under Business and Professions Code section 6068, subdivision (e) is broader than the attorney-client privilege. It extends to all information gained in the professional relationship that the client has requested be kept secret or the disclosure of which would likely be harmful or embarrassing to the client. (See Cal. State Bar Formal Opns. No. 1993-133, 1986-87, 1981-58, and 1976-37; Los Angeles County Bar Association Formal Opns. Nos. 456, 436, and 386. See also *In re Jordan* (1972) 7 Cal.3d 930, 940-41 [103 Cal.Rptr. 849].)

In light of the policy goal that underlies both the attorney-client privilege and the attorney's duty of confidentiality – the full disclosure of information by clients to the attorneys who may represent them – we reaffirm our conclusion in California State Bar Formal Opn. No. 1984-84 that, with regard to information imparted in confidence, attorneys can owe the broader duties of confidentiality under Business and Professions Code section 6068, subdivision (e) and rule 3-310(E) to persons who never become their clients. (Cf. *In re Marriage of Zimmerman, supra,* 16 Cal. App. 4th 556, 564 n.2.)[6/]

As we noted in California State Bar Formal Opn. No. 1984-84, there are significant consequences for the attorney under these circumstances. Not only is the attorney required to treat as privileged all such information communicated to him and resist compelled testimony, but the attorney is also required to treat as secret under Business and Professions Code section 6068, subdivision (e) any confidential information imparted to him in such circumstances. Accordingly, the attorney must also comply with rule 3-310(E), which provides: "[a] member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment."[7/] For example, if the surrounding circumstances in either Situation 1 or 2 support a conclusion that either Jones or Smith had a reasonable belief that Lawyer willingly

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[6/] Business and Professions Code section 6068, subdivision (e) provides that it is an attorney's duty "to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." We do not address in this opinion the full scope of duties of an attorney under section 6068(e) to one deemed to be a "client" by virtue of Evidence Code section 951. Suffice it to say that such duties include the obligation to keep confidential information conveyed to the attorney that the client expects will not be disclosed to others or used against him. However, we decline to opine that other duties, if any, may arise from Business and Professions Code section 6068, subdivision (e) to a person who consults an attorney for the purpose of retaining the attorney or securing legal services or advice, where actual employment or an attorney-client relationship does not result.

[7/] Whether a lawyer should be disqualified pursuant to rule 3-310(E) is usually determined by reference to the substantial relationship test. (See, e.g., *H.F. Ahmanson & Co. v. Salomon Bros., Inc.* (1991) 229 Cal.App.3d 1445, 1455 [280 Cal.Rptr. 614] [to determine where there is a substantial relationship between two matters, and that there is a likelihood a lawyer acquired confidential information material to the present matter, a court should focus on the similarities between the two factual situations, the legal questions posed, and the nature and extent of attorney's involvement with cases].) If there is a substantial relationship, then the lawyer could not accept the subsequent employment because the lawyer's duty of competence would require its use or disclosure. (*Galbraith v. State Bar* (1933) 218 Cal. 329, 332 [23 P.2d 291].)

consulted with them, and they made their communications in confidence, then Lawyer would be precluded from representing Jones' co-defendant, Doe, and Smith's insurer, InsuredCo, in the matters at issue.[8/]

CONCLUSION

The nature and scope of the relationship between a lawyer and a person who seeks advice from the lawyer will depend on the reasonable belief of that person as induced by the representations and conduct of the lawyer. Lawyers should be sensitive to the potential for misunderstandings when approached by members of the public in non-office settings.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding on the courts, the State Bar of California, its Board of Governors, any persons or tribunals charged with regulatory responsibilities or any member of the State Bar.

[8/] We do not address the case in which a speaker, in an effort to "poison" a current or potential relationship between a lawyer and a client, communicates with the lawyer, not for the primary purpose of seeking legal advice or representation, but to interfere with his existing or potential client relationship. (See *State Compensation Insurance Fund v. WPS, Inc*. (1999) 70 Cal.App.4th 644 [82 Cal.Rptr.2d. 799] [recognizing the possibility that information will be communicated to a lawyer for the purpose of creating conflicts and disqualification].)

ABA/BNA Lawyers' Manual on Professional Conduct

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Conflicts of Interest

Firm That Never Dropped Subsidiary as Client Can't Maintain Suit Against Parent Company

A law firm that never formally ended its representation of a company is disqualified from handling litigation against the company's parent notwithstanding that the firm hadn't heard from the company in three years, the U.S. District Court for the Western District of Washington ruled Aug. 3 (*Jones v. Rabanco Ltd.,* W.D. Wash., No. C03-3195P, 8/3/06).

Concluding that some event inconsistent with an attorney-client relationship must occur in order to deem a representation terminated, Judge Marsha J. Pechman found that the company was still the firm's client for purposes of the rule that forbids lawyers to handle cases against a current client.

Former or Current Client?

Along with other counsel, the law firm of Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim (GTH) represented 13 plaintiffs in an employment discrimination action against Rabanco Ltd. and Allied Waste Industries Inc.

GTH had represented Regional Disposal Corp., a wholly owned subsidiary of Rabanco, in a contractual dispute unrelated to the present litigation. The contract dispute was settled in 2002. In the notice provision of the settlement agreement, a GTH lawyer was listed as a contact.

Defendant Rabanco moved to disqualify GTH as plaintiffs' counsel in the discrimination suit, claiming that the firm was handling litigation against a current client. In support of the motion, Rabanco submitted affidavits from several Rabanco executives stating their understanding that GTH was Rabanco's counsel in one particular county.

The firm insisted, however, that RDC was a former client. Although a conflicts check had turned up three open matters regarding the RDC dispute, the firm viewed the work as completed, and it had not provided any services for RDC since November 2002.

The court concluded that the firm still had an attorney-client relationship with RDC under Rule 1.7 of the Washington Rules of Professional Conduct, which prohibits representation directly adverse to a current client.

Named as Contact.

Whether or not a current attorney-client relationship exists is a question of fact, the court observed. It found that under the circumstances, Rabanco's belief that GTH was its representative in a specific county was reasonable.

> **"[T]he Court does not find that three years of no contact between an attorney and client, without more, constitutes an event inconsistent with representation."**
>
> ***Judge Marsha J. Pechman***

The court construed the insertion of GTH as a contact in the RDC settlement agreement as evidence of the firm's intent to represent the company on any future issues that might arise under the contract. GTH in fact performed such work shortly after the settlement, the court pointed out.

GTH easily could have asked RDC to amend the contact information if the law firm had not really wished to serve as a contact under the settlement contract, the court said. Without evidence that the firm took any steps to amend the notice provision, the court found that the inclusion of GTH's contact information in the settlement document helped create a reasonable belief on RDC's part that the law firm was still representing it in the dispute.

No Closure.

The court also emphasized that the contract dispute remained open in GTH's files. The firm's failure to formally close

the file, it found, was evidence that GTH intended to keep RDC and Rabanco as clients and hoped to represent them in future disputes. This conclusion was strengthened, the court added, by the fact that GTH was paying for storage of dozens of boxes of documents related to the dispute in its off-site storage facility.

The court pointed out that Comment [4] to ABA Model Rule 1.3, outlining an attorney's duties of diligence, provides that "[d]oubt 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."

Other courts have held, Pechman noted, that something inconsistent with the continuation of the attorney-client relationship must take place in order to end the relationship. Although GTH pointed out that neither RDC nor Rabanco had contacted the firm in more than three years, Pechman said that "the Court does not find that three years of no contact between an attorney and client, without more, constitutes an event inconsistent with representation."

The court found nothing in the record amounting to an event inconsistent with a continuing attorney-client relationship. The law firm apparently did not notify RDC when several of the lawyers who had worked on the contract dispute left the firm, and the files were not closed electronically, Pechman noted.

Instead, the court observed, the firm assigned a new billing partner to the matter, and it retained RDC's documents in storage. These actions were consistent with an expectation by GTH that it would serve as RDC's counsel in future disputes, Pechman said.

Family Ties.

The court also ruled that GTH should be deemed to represent Rabanco for purposes of the disqualification motion. Courts tend to take a pragmatic approach to the consequences of an attorney's relationship with the corporate family, Pechman said, although she acknowledged that there is not a large body of case law in this area.

The court pointed out that RDC and Rabanco share office space and staff, and that some of the RDC executives who submitted affidavits in support of the disqualification motion were also executives at Rabanco during the period of the alleged discrimination. Moreover, many of GTH's internal memos in the contract dispute referred to Rabanco as if the company were its client, the court noted.

Given this evidence of the intermingling of operations and the overlap of staff, the court concluded that the appearance of impropriety would be too great if GTH were to continue its representation of the plaintiffs against Rabanco and Rabanco's parent, Allied Waste.

The plaintiffs were represented by Peter Moote of Freeland, Wash., and Darrell L. Cochran, James W. Beck, and Maria L. Gonzalez of Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim, Tacoma, Wash.

Rabanco and Allied Waste were represented by Daniel P. Hurley and Trilby C.E. Robinson-Dorn of Preston Gates & Ellis, Seattle.

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Analysis
As of: Jan 01, 2010

ANDRE JONES, et al., Plaintiff(s), v. RABANCO, Ltd., et al., Defendant(s).

No. C03-3195P

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

2006 U.S. Dist. LEXIS 53766

August 3, 2006, Decided
August 3, 2006, Filed

SUBSEQUENT HISTORY: Motion denied by, Sanctions disallowed by *Jones v. Rabanco, 2006 U.S. Dist. LEXIS 58178 (W.D. Wash., Aug. 18, 2006)*

PRIOR HISTORY: *Jones v. Rabanco, Ltd., 2006 U.S. Dist. LEXIS 48045 (W.D. Wash., July 6, 2006)*

CORE TERMS: disqualification, facsimile, current client, attorney-client, assigned, notice, staff, disqualified, partner, storage, former client, wholly-owned subsidiary, oral argument, appearance of impropriety, notice provision, wholly owned, office space, legal matters, continuation, disqualify, inclusion, billing, silence, entity, amend, confirmation, mediation, formally, settling, lawsuit

COUNSEL: [*1] For Andre Jones, Stacy Gosby, Leonard McDade, Pasqual Montalvo, Lawrence Ortiz, Plaintiffs: Peter Moote, FREELAND, WA; Darrell L Cochran, James Walter Beck, Maria Lorena Gonzalez, GORDON THOMAS HONEYWELL MALANCA PETERSON & DAHEIM, TACOMA, WA.

For Rabanco Ltd, Allied Waste Industries Inc, Defendants: Daniel P Hurley, Trilby C E Robinson-Dorn, Mark Stephen Filipini, Patrick M Madden, Suzanne J Thomas, Thomas E Kelly, Jr., PRESTON GATES & ELLIS (SEA), SEATTLE, WA.

JUDGES: Marsha J. Pechman, United States District Judge.

OPINION BY: Marsha J. Pechman

OPINION

ORDER ON DEFENDANTS' FIRST MOTION FOR DISQUALIFICATION OF COUNSEL

This matter comes before the Court on the parties' in camera submissions to the Court regarding the issue of whether or not Plaintiffs' counsel from the Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim ("GTH") should be disqualified because of an alleged current or former representation of Rabanco's wholly-owned subsidiary Regional Disposal Corporation ("RDC"). Having reviewed the briefing on this issue, as well as all of the documentation submitted, and having heard oral argument on the matter, the Court GRANTS Defendants' motion to disqualify the attorneys for Plaintiffs **[*2]** from GTH. The Court finds that RDC is a current client of GTH and that RDC and Rabanco as entities are too interrelated to avoid an appearance of impropriety in this matter. The law is clear that lawyers may not represent an interest adverse to a current client. For this reason, GTH must be disqualified, effective as of the date of this order.

BACKGROUND

On February 20, 2006, Plaintiffs' attorney Peter Moote associated GTH lawyers Darrell Cochran, Maria Lorena Gonzalez, and Walter Beck to help him in the representation of the thirteen Plaintiffs in this action. (Dkt. No. 307). In early March, Stephanie Bloomfield of the GTH firm ran a conflicts check and found that GTH had represented RDC on a long-haul waste contract dispute against LRI in Pierce county from 2000 to 2002. [1] The records attached to Ms. Bloomfield's declaration reflect that when she did the conflicts check, three open matters regarding the RDC/LRI dispute appeared, but she states that she considered that matter to be completed and concluded that there was no conflict. (Bloomfield Decl. at 1 and Ex. A).

1 The Court notes that appearing in court and giving notice of representation before a conflicts check has been run is not advisable on any level.

[*3] In May of this year Jeff Andrews, a Senior Vice President of Allied Waste, was in Seattle for a mediation in this lawsuit and recognized GTH as the law firm that he believed represented Rabanco in Pierce County. In support of this motion, Rabanco has also submitted several affidavits from Rabanco executives expressing the view that the affiants understood GTH to be Rabanco and Allied Waste's counsel in Pierce County. Although the parties agreed to disregard the potential conflict for the purposes of the mediation, Defendants now bring this motion for formal disqualification of GTH.

GTH entered into representation of RDC, Rabanco, and Allied in 2000 regarding a dispute with LRI in Pierce County over a contract to long haul waste to a landfill in Klickitat county. RDC is wholly owned by Rabanco and shares staff and office space with its parent. Although GTH claims that only RDC was formally its client, many of the internal memoranda between GTH staff refer to the matter as "Rabanco." (See e.g. Verhoef Decl., Ex. D). Former Rabanco District Manager Bob Berres hired GTH. He and Don Swierenga were key contacts at RDC and Rabanco during the LRI litigation. Both of these men are also **[*4]** involved in the current case before the Court and could potentially be called as witnesses. The main attorneys assigned to the case were Dennis Harlowe, Ronald Leighton, and Brad Maxa. Tim Thompson, a non-lawyer lobbyist, was also assigned to the case. In addition, up to 24 attorneys and paralegals in total worked on the RDC/LRI case at GTH. Over the course of the case, which settled on the eve of arbitration, GTH billed RDC for $ 567,371.62 in legal costs. The contract signed by RDC and LRI settling the case expires in 2011. (Defs' Mot. at

1). The notice provision under that contract provides:

> 12.11 Notice
>
> All communications under this Agreement must be in writing and are duly given when
>
> (a) delivered by hand (with written confirmation of receipt), (b) sent by facsimile (with written confirmation of receipt), provided that the communication also is mailed by certified or registered mail, return receipt requested, or (c) received by the addressee, if sent by a nationally recognized overnight delivery service (receipt requested). The appropriate addresses and facsimile numbers for receipt are set forth below. A party may designate by notice other addresses and facsimile **[*5]** numbers.
>
> If to RDC: Regional Disposal Company
>
> c/o WJR Environmental, Inc.
>
> 54 South Dawson Street
>
> Seattle, WA 98314
>
> Attention:
>
> Facsimile No: (206) 332-7600
>
> With a copy to:
>
> Gordon, Thomas, Honeywell, Malanca,
>
> Peterson & Daheim, P.L.L.C.
>
> 1201 Pacific Ave., Suite 2200
>
> Post Office Box 1157
>
> Tacoma, Washington 98373
>
> Attention: Dennis S. Harlowe
>
> Facsimile No.: (253) 620.6565

(Harlowe Decl., Ex. E). Shortly after this case settled, Dennis Harlowe, Ronald Leighton, and Tim Thompson all left GTH. When they left, GTH assigned B.B. Jones as the new billing partner for the this matter. Additionally, Brad Maxa continues to be a partner at the firm and several other attorneys and staff who played lesser roles in the RDC/LRI matter are still employed at GTH. Brad Maxa has stated that he has "explicitly refrained from any contact with the attorneys working on the Jones case . . ." (Maxa Decl. at 9). Although GTH handled a few small matters regarding issues with the RDC/LRI contract after the case settled, Mr. Maxa also states that neither he nor anyone at GTH has done work for RDC, Rabanco, or Allied on any matter since November 2002, despite the fact that these **[*6]** organizations have been involved in several legal matters since that time. (Id. at 4). Mr. Maxa notes that RDC and Rabanco did not contact GTH about defending them in the current lawsuit. (Id.).

ANALYSIS

I. Framework Under the Rules of Professional Responsibility

It is the Court's duty to resolve allegations that arise concerning attorney conflicts of interest because the Court is authorized to supervise the conduct of the members of its bar. *Oxford Systems, Inc. v. Cellpro, Inc., 45 F. Supp. 2d 1055, 1058 (W.D. Wash. 1999).* The conduct of the attorneys practicing before this Court is governed by the Washington Rules of Professional Conduct ("RPC"). Id. The burden of proof in such matters rests with the firm whose disqualification is sought. *Amgen, Inc. v. Elanex Pharmaceuticals, Inc., 160 F.R.D. 134, 140 (1994).*

II. Is RDC a Current Client of GTH?

Under *Washington RPC 1.7,*

> 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 **[*7]** client; and
> >
> > (2) Each client consents in writing . . .

RPC 1.7(a). Whether or not a current attorney-client relationship exists is a question of fact. *Bohn v. Cody, 119 Wn. 2d 357, 363, 832 P.2d 71 (1992)*; See also *Oxford Systems, Inc. v. Cellpro, 45 F. Supp. 2d 1055, 1059 (W.D. Wash. 1999)*. "The essence of the attorney/client relationship is whether the attorney's advice or assistance is sought and received on legal matters." *Bohn, 119 Wn. 2d at 363*. Washington courts have held that another key factor that is determinative of whether or not the attorney-client relationship exists is the subjective belief of the client. Id. However, this belief must be reasonably based on the factual circumstances of a particular case. Id. Looking at all of the circumstances before the Court on this motion, the Court finds that Defendants' belief that GTH is their representative in Pierce county is a reasonable one.

The Court construes the inclusion of GTH as a contact under the contract settling the LRI matter as evidence that there was intent for GTH to represent RDC and Rabanco on any future issues that might arise under that contract. Indeed, **[*8]** GTH does not deny that it performed this type of work for RDC shortly after the settlement. The Court also notes the fact that the LRI matter remains an open one in the GTH files. The Court views the failure to formally close the LRI matter as evidence that GTH had intended to keep RDC and Rabanco as clients and hoped to represent them on future disputes. This conclusion is strengthened by the fact that GTH is paying for the storage of 49 bankers boxes of documents related to the LRI matter in GTH's off-site storage facility, thereby making itself available to promptly respond to future requests from RDC for legal work.

Although the Court acknowledges GTH's argument that neither RDC, Rabanco, nor Allied Waste has contacted the firm in over three years, it does not find this argument by itself persuasive. GTH also asserts that the main attorneys at the firm who represented RDC are now gone, including Mr. Harlowe, whose name is provided in the contract as the contact person at GTH should a dispute arise under the RDC/LRI contract. The fact that these attorneys are longer at the firm, however, does not eliminate any responsibility that GTH might have to RDC under that contract. Comment **[*9]** Four to ABA Model Rule 1.3, outlining an attorney's duties of diligence, provides that "[d]oubt 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." In this spirit, the Court finds that GTH could easily have sent a letter to RDC asking it to amend this contact information, or informing it of Mr. Harlowe's new contact information, if the firm had really not wished to serve as a contact point under the contract. However, there is no evidence currently before the Court that GTH took such a step. Without evidence that GTH took steps to amend the notice provision in the contract, the Court finds that inclusion of GTH as a point of contact in the contract, along with the other circumstances outlined, created a reasonable belief on the part of the client that the firm named in the contract was still representing it on matters related to the contract.

Other courts have held that "once established, a lawyer-client relationship does not terminate easily. Something inconsistent with the continuation **[*10]** of the relationship must transpire in order to end the relationship." *SWS Financial Fund A v. Salomon Bros., Inc., 790 F. Supp. 1392, 1398 (N.D. Ill. 1992)*. The Court can find nothing in this record that constitutes an event inconsistent with the continuation of the attorney-client relationship between GTH and RDC. When asked by the Court at oral argument what this event could be, GTH attorney Stephanie Bloomfield responded, "Silence. Three years of silence." This answer was meant to reference the break in contact between GTH and RDC. However, the Court does not find that three years of no contact between an attorney and client, without more, constitutes an event inconsistent with representation. As noted, there was no evidence submitted that formal notices were sent to RDC when either Mr. Leighton or Mr. Harlowe left the firm; the files were not closed electronically; nor were RDC's documents returned to them. On the contrary, GTH assigned a new billing partner, B.B. Jones, to the matter when Leighton and Harlowe left and kept RDC's documents in storage. The Court finds that these actions are consistent with the expectation by a firm that it would be representing **[*11]** an entity in future disputes. Indeed, GTH admits that RDC did return to it on subsequent occasions during 2001 and 2002 when there were issues with the contract between it and LRI.

GTH argues vigorously that it should not be disqualified from representation because the current case is not "substantially related" to the LRI matter. In making this argument, GTH relies heavily on *State of Washington v. Hunsaker, 74 Wn. App. 38, 873 P.2d 540 (1994)* for support. However, this case concerns a firm's representation of a person adverse to a *former* client. The Court in this matter does not reach the analysis for attorney disqualification in instances where a the firm is adverse to a former client under *RPC 1.9* because the Court finds that RDC is a current client of GTH's under *RPC 1.7*.

III. Can GTH be considered to Represent Rabanco and/or Allied?

The Court's inquiry does not end with the finding that GTH is a current representative of RDC. The Court must determine whether it is also represents Rabanco and/or Allied. RDC is a wholly-owned subsidiary of Rabanco and Rabanco is wholly owned by Allied Waste, Inc. RDC and Rabanco share office space, as well as employees. Some **[*12]** of the RDC executives, such as Bob Berres and Don Swierenga, who submitted affidavits in support of this motion and who communicated with GTH during the LRI matter were also executives at Rabanco during the time period at issue in the employment discrimination case before this Court. Additionally, many of the internal memos of attorneys at GTH who worked on the LRI matter referred to Rabanco as if it were their client. Although there is not a large body of case law in this area, courts tend to take a pragmatic approach to the "consequences of the attorney's relationship with the corporate family." *Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft, 69 Cal. App. 4th 223, 253, 81 Cal. Rptr. 2d 425 (1999)*. The Ninth Circuit has held that "[f]iduciary obligations and professional responsibilities may warrant disqualification of counsel in appropriate cases even in the absence of a strict contractual attorney-client relationship." *Trone v. Smith, 621 F. 2d 994, 1002 (9th Cir. 1980)*. Here, the Court finds that given the overlap of staff and the intermingling of operations, especially between RDC and Rabanco, the appearance of impropriety would be too great if GTH were to **[*13]** continue to represent Plaintiffs against Rabanco and Allied in this matter. For this reason, the Court finds that it must disqualify the GTH firm as representatives for Plaintiffs in the case currently before this Court, effective as of the date of this order.

The Clerk of the Court shall direct a copy of this order be sent to all counsel of record.

Dated: August 3, 2006

Marsha J. Pechman

United States District Judge

ABA/BNA Lawyers' Manual on Professional Conduct

Source: ABA/BNA Lawyers' Manual on Professional Conduct: All Issues > 2009 > 04/15/2009 > Ethics Opinions > Obligations to Third Persons: Lawyer Dealing With Unrepresented Person May Go Beyond Mere Advice to Seek Counsel

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Obligations to Third Persons

Lawyer Dealing With Unrepresented Person May Go Beyond Mere Advice to Seek Counsel

When dealing with a self-represented person, an attorney is permitted to make certain statements beyond simply advising the person to obtain counsel but must clarify her role if the self-represented person shows confusion about it, the New York City bar association's ethics panel advised in a February opinion (New York City Bar Ass'n Comm. on Professional and Judicial Ethics, Op. 2009-2, 2/09).

Even when a self-represented person's interests diverge from the interests of the lawyer's client, the committee said, it is acceptable for the lawyer to identify legal issues, state indisputable facts or legal propositions, or refer the person to court-sponsored programs designed to help people who are representing themselves.

On the other hand, the committee concluded that attorneys also have a professional responsibility to explain their role whenever a self-represented person appears to misunderstand it, whether or not the individual would be harmed without the clarification.

What Communications Are Permissible

Explaining why it tackled the issue, the committee noted that although there has been a sharp increase in the number of self-represented litigants in the past two decades, little guidance has been offered to lawyers for dealing with such individuals. The foreclosure and credit crises will fuel the phenomenon of self-representation, the committee predicted.

The panel identified the key rule as DR 7-104(A)(2) of the New York Code of Professional Responsibility, which forbade a lawyer to give advice to an unrepresented person, other than the advice to secure counsel, if the person's interests conflict with the interests of the lawyer's client. Rule 4.3 of the New York Rules of Professional Conduct, which went into effect April 1, contains a sentence that is nearly identical.

The committee found that even in situations where the interests of the self-represented person conflict with the interests of the attorney's client, ethics opinions have construed the disciplinary rule to permit more than a simple statement that the person should obtain counsel. Based on a review of four ethics opinions from bar associations in New York concerning communications with self-represented persons, the committee gleaned three teachings and endorsed them:

- An attorney may advise a self-represented person to retain counsel and may identify general legal issues that could be useful for counsel to address, such as the existence of a charging lien or a surviving spouse's potential right of election.

- The lawyer may be obligated to give such advice when it would advance the interests of the lawyer's client to do so.

- The attorney may provide incontrovertible factual or legal information to the self-represented person, such as her client's own position in negotiations, nonnegotiable procedural requirements for doing business, or the existence of a legal right such as the right against self-incrimination.

In addition, the committee found it appropriate for a lawyer to direct a self-represented litigant to any available court facilities designed to aid pro se litigants, or to a clerk or other court employee designated to help self-represented persons with the litigation process.

Duty to Clarify Role

When communicating with a self-represented person, the committee said, a lawyer must not make any false or misleading statements.

But simply following that ethical precept is not enough if the self-represented person still misunderstands the lawyer's role and the lawyer knows or should know of the confusion, the panel said. In that situation, it concluded,

the lawyer should make clear that she does not and cannot represent the person, that she represents another party with adverse interests, and that she cannot give the person any advice other than to obtain a lawyer or consult a court facility that assists self-represented persons.

As authority for this conclusion, the committee cited Section 103(2) of the *Restatement (Third) of the Law Governing Lawyers* (2000), which states that "when the lawyer knows or reasonably should know that the unrepresented nonclient misunderstands the lawyer's role in the matter, the lawyer must make reasonable efforts to correct the misunderstanding when failure to do so would materially prejudice the nonclient."

The committee rejected the Restatement's "material prejudice" standard, however. It concluded that "a stronger approach is appropriate" under both the Code of Professional Responsibility and the new professional conduct rules:

> When a self-represented nonclient objectively manifests a belief that an attorney for an adverse or potentially adverse party is also acting as her own counsel, or attempts to solicit or accept guidance from that attorney on legal issues, there is an *inherent* risk of material prejudice to the nonclient and an element of unfairness that warrants a clear affirmative statement by the lawyer that she is not the nonclient's attorney.

The committee also pointed out that failure to intercede when the self-represented person is acting under a misapprehension may adversely affect the interests of the attorney's client. For example, it said, the validity of a client's settlement may be endangered.

The opinion indicates that whether or not a duty to clarify arises in a particular situation depends in part on the relative sophistication of the self-represented party. Similarly, whether the explanation of the lawyer's role needs to be in writing depends on the facts and circumstances, such as the demonstrated extent of the misunderstanding and the existence or threat of litigation.

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THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS

FORMAL OPINION *2009-2*

ETHICAL DUTIES CONCERNING SELF-REPRESENTED PERSONS

TOPIC: Ethical duties concerning self-represented persons.

DIGEST: DR 7-104(A)(2) permits a lawyer to advise a self-represented person adverse to the lawyer's client to seek her own counsel and to make certain other related statements. These statements may include, where appropriate, identification of general legal issues that the self-represented person should address with a lawyer; undisputed statements of fact or law such as the position of the lawyer's client on a contested issue; and references to court-sponsored programs designed to assist a self-represented litigant. A lawyer may at any time explain or clarify the lawyer's role to the self-represented litigant and advise that person to obtain counsel. The lawyer must volunteer this information if she knows or should know that a self-represented person misunderstands the lawyer's role in the matter.

CODE/RULE : DR 1-102; 4-101; 7-104; 7-106; EC 2-7; 7-13; 7-14; 7-18; 7-23; 9-4; Canons 4-7; Rule 4.3

QUESTIONS: What are a lawyer's ethical duties when another party to a litigation or transaction is self-represented? Does the Code of Professional Responsibility limit what a lawyer may say to a self-represented person?

OPINION

I. Introduction

Among the many changes to courts in the State of New York in the past two decades has been a sharp increase in the number of self-represented litigants. 1There are nearly 1.8 million self-represented litigants in the New York State Unified Court System, according to a recent estimate. *See* Hon. Judith S. Kaye, The State of the Judiciary 2007 at 18. 2 Undoubtedly, the widespread foreclosure and credit crises will further increase that number as more people, unable to afford legal representation, must nonetheless come to court to protect and assert their rights. *Cf.* Margery A. Gibbs, *More Americans serving as their own lawyers*, Associated Press News Wire, Nov. 11/25/08 (discussing the increasing numbers of self-represented litigants in domestic disputes).

Self-represented litigants provide many and varied challenges for tribunals. Some self-represented persons may have difficulty comprehending the rules and procedures of a tribunal. Others may not be able to adequately articulate facts, causes of action, or the relief they seek. Some may even misapprehend the respective roles of judicial officers, court personnel, or opposing counsel. The inexperience of self-represented persons can lead to additional litigation or motion practice, resulting in cost and delay for all parties, and sometimes an order setting aside an executed agreement. *See, e.g., Cabbad v. Melendez*, 81 A.D.2d 626, 626 (2d Dep't 1981) (vacating consent judgment "'inadvertently, unadvisably or improvidently entered into'" by self-represented, non-English-speaking tenant (citation omitted)); *600 Hylan Assocs. v. Polshak*, 17 Misc.3d 134(A) (2d Dep't 2007) (table decision), *text available at* 2007 WL 4165282; *see also Schaffer Holding LLC v. Fleming*, 1 Misc.3d 131 (A) (2d Dep't 2003) (table decision), *text available at* 2003 WL 23169883 (affirming order vacating stipulation).

Judicial response to the increase in self-represented litigants is ongoing and evolving. For example, state and federal courts in New York have opened offices to aid self-represented individuals appearing in their courtrooms. 3 Courses relating to self-represented litigants are now included in judicial training seminars. 4

There has, however, been little discussion of a lawyer's role when communicating with self-represented persons in the litigation and transactional contexts. This opinion considers whether the lawyer's duties to the court (*e.g.*, DR 7-106, EC 7-13, EC 7-23, EC 9-4), the administration of justice (*e.g.*, DR 1-102(A)(4)-(5), EC 2-7), and the lawyer's own client (Canons 4-7), require the lawyer to take proactive measures when dealing with an unrepresented person. We first address what communications between lawyers and their self-represented adversaries are permitted, and then articulate, consistent with the New York Code of Professional Responsibility (the "Code"), the newly-approved New York Rules of Professional Conduct and past precedent, a duty to warn self-represented persons who have objectively manifested their confusion about the opposing lawyer's role in a matter.

II. Discussion

A. What Communications Are Permissible Under DR 7-104(A)(2)

The Code explicitly recognizes that lawyers' encounters with self-represented litigants are inevitable. Indeed, Ethical Consideration 7-18 recognizes that attorneys acting on behalf of a client "may have to deal directly with" self-represented persons in a wide variety of transactional and litigation contexts.

The primary guidance the Code offers for managing these interactions is found in DR 7-104(A)(2) which provides in pertinent part:

> During the course of representation of a client a lawyer shall not . . . . [g]ive advice to a party who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such party are or have a reasonable possibility of being in conflict with the interests of the lawyer's client.

See also EC 7-18 (extending this obligation to an unrepresented "person"). 5

Even when the interests of a self-represented person "conflict with the interests of the lawyer's client," ethics opinions have construed this Code provision to permit more than a simple statement that the self-represented person should obtain counsel. For example, the New York State Bar Association Committee on Professional Ethics concluded that an executor of a will could, but was not required to, advise an unrepresented surviving spouse of the need to obtain a lawyer to address a legal issue, and also could identify the relevant issue (the spouse's potential right to take an election against the estate) to be addressed by the lawyer. *See* N.Y. State 477 (1977). Even though the executor might take a contrary position on that issue, the opinion concluded that "to remain silent in the face of the surviving spouse's expressed dissatisfaction with his testamentary share might seem somewhat unfair and could, under certain circumstances, tend to mislead." The opinion further stated that it would be permissible for a lawyer to freely provide to a self-represented non-client information that is "purely a matter of fact and non-privileged," so long as it otherwise would be ethically permissible to do so (*e.g.*, no confidences or secrets would be revealed in violation of DR 4-101).

The New York County Lawyers' Association addressed a lawyer's ability to negotiate a settlement with an adverse party who had discharged her attorney. *See* N.Y. Cty 708 (1995). The opinion concluded that once an attorney had verified that the adverse party was no longer represented, she could communicate with the adverse party directly about the lawsuit and continue the negotiations -- but could not render any advice other than to secure counsel. The opinion cautioned, however, that under the circumstances presented, the attorney had an affirmative duty to advise the self-represented party to seek counsel while flagging a particular legal issue:

> At the outset of their dealings, . . . inquirer should advise [the unrepre-sented] plaintiff that there may be legal issues, such as the possible [discharged] attorney's charging lien, affecting plaintiff's right to recovery under whatever settlement is reached and that plaintiff should consult a lawyer to advise him about such issues because inquirer is barred from doing so.

The inquiring attorney had expressed her concern that any settlement she reached with the unrepresented person might be affected by the charging lien of the former lawyer. Thus, it appeared that the *inquirer's client* could have been adversely affected had the unrepresented person failed to consider the impact of a potential charging lien before agreeing to a settlement.

More recently, the New York State Bar Association Committee on Professional Ethics recognized that in a governmental investigation, a government lawyer speaking to a self-represented person may, but is not required to, inform her of the need to retain counsel and alert her to the right against self-incrimination. *See* N.Y. State 728 (2000). The opinion reasoned that "the rule [DR 7-104(A)(2)] has been understood to allow a lawyer, additionally, to give certain non-controvertible information about the law to enable the other party to understand the need for independent counsel." *Id.* (citing N.Y. State 477 (1977) and N.Y. State 708 (1998); *s ee also* ABCNY Formal Op. 2004-3 (government lawyer "may advise" an unrepresented agency constituent of the "non-controvertible" legal proposition that "under no circumstances may the constituent testify falsely"). Concluding that the right against self-incrimination was such "non-controvertible information," and recognizing that a government attorney has a duty to "seek justice" even in civil matters (EC 7-14), the opinion stated that a government attorney "might reasonably conclude" that the government's "interest in dealing fairly with the public" warrants advising the unrepresented person to retain a lawyer even if a private attorney would be "disinclined" to do so.

Finally, the New York State Bar Association Committee on Professional Ethics examined the duties of a government lawyer when the other party to pending negotiations, although represented, was unaccompanied by its lawyers at a meeting. *See* N.Y. State 768 (2003). The opinion also considered the related issue of what a lawyer may do when she does not know that the other party is represented by counsel. Addressing a situation analogous to the lawyer who negotiates with a self-represented party, the opinion concluded that it would be permissible for the lawyer to describe her client's own position in negotiations. It further found that the lawyer would not violate DR 7-104(A)(2) by providing certain indisputable information to the unrepresented party, such as the filing requirements of the lawyer's agency client. *See id.*

The teachings of these opinions are, essentially, three-fold. First, a lawyer may, but need not, advise a self-represented party to retain counsel and identify the legal issues that could be usefully addressed by counsel. Second, the lawyer may be obligated to render this advice when it would advance the interests of her own client to do so. Third, the lawyer may, but need not, provide certain incontrovertible factual or legal information to the self-represented party, such as her client's own position in negotiations, non-negotiable procedural requirements for doing business, or the existence of a legal right such as the right against self-incrimination. We concur with each of these conclusions.

We also identify an additional option for matters pending before a court or other tribunal. In light of the efforts of a growing number of courts to provide support for self-represented litigants, we conclude that it is also appropriate for a lawyer to direct a self-represented adversary to any available court facilities designed to aid those litigants, such as an Office of the Self-Represented, or to a clerk or other court employee designated to orient the self-represented person through the litigation process. 7

B. Duty To Clarify the Lawyer's Role

A lawyer engaging in any of these permissible communications, or choosing not to make them, should remain mindful of the need to avoid misleading the self-represented party. *See* DR 1-102(A)(4) (forbidding "conduct involving dishonesty, fraud, deceit, or misrepresentation"); DR 7-102(A)(5) (forbidding a lawyer from "[k]nowingly mak[ing] a false statement of law or fact" in representing a client); Restatement (Third) of the Law Governing Lawyers (hereafter, "Restatement") § 103(1) (2000) (in dealing with a constituent of the lawyer's organizational client who is not represented by counsel, a lawyer "may not mislead the nonclient, to the prejudice of the nonclient, concerning the identity and interests of the person the lawyer represents"); *cf.Niesig v. Team I*, 76 N.Y.2d 363, 376 (1990) (stating, in the context of permissible interviews with self-represented employees of a lawyer's corporate client who could not bind the corporation, that "it is of course assumed that attorneys would make their identity and interest known to interviewees" and otherwise comport themselves ethically).

Refraining from misleading or deceptive conduct, however, may not be sufficient to satisfy the requirements of the Code in all dealings with self-represented persons. For some self-represented persons, further action may be necessary. In that regard, we conclude that a lawyer should be ready, when dealing with a self-represented person, to clarify when needed that the lawyer (a) does not and cannot represent the self-represented person; (b) represents another party in the matter who may have (or does have) interests adverse to the self-represented person; and (c) cannot give the self-represented person any advice, other than to secure counsel, or, as described

above, to consult an available court facility designed to assist self-represented persons.

The lawyer may provide this clarification at any time without violating DR 7-104(A)(2), but we conclude that she *must* do so whenever she knows or has reason to know that the self-represented person misapprehends the lawyer's role in the matter. This may require the lawyer to repeat the clarification more than once. If the represented side of a case or transaction involves multiple individual attorneys, each attorney may have to explain her role in the matter. If the lawyer believes it necessary under the circumstances, the lawyer should also ask the self-represented person to confirm that she understands what the lawyer has told her.

Although research has not revealed any New York authority previously recognizing this duty to a self-represented person, we believe it is supported by existing ethics principles. The Restatement, for example, specifically recognizes the need to correct misunderstandings between lawyers and self-represented individuals when an organization's attorney deals with an unrepresented constituent of the organization. Restatement, § 103(2) ("[W]hen the lawyer knows or reasonably should know that the unrepresented nonclient misunderstands the lawyer's role in the matter, the lawyer must make reasonable efforts to correct the misunderstanding when failure to do so would materially prejudice the nonclient."); *s ee also* ABCNY Formal Op. 2004-3 ("When a lawyer . . . retained by an organization is dealing with the organization's . . . constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents") (citing DR 5-109(A). The nuances of client identity and the lawyer's role are easily misunderstood when the lawyer is representing an organizational client. However, we believe the same logic compels clarification whenever a self-represented person objectively manifests her misunderstanding of a lawyer's role. We therefore believe the duty should be extended as discussed in this opinion.

We depart from the Restatement's "material prejudice" standard, however, and conclude that a stronger approach is appropriate under the Code (and the newly-approved Rules). When a self-represented nonclient objectively manifests a belief that an attorney for an adverse or potentially adverse party is also acting as her own counsel, or attempts to solicit or accept guidance from that attorney on legal issues, there is an *inherent* risk of material prejudice to the nonclient and an element of unfairness that warrants a clear affirmative statement by the lawyer that she is not the nonclient's attorney. Moreover, we note, as the Restatement itself does, that failure to intercede when the self-represented person is acting under a misapprehension may adversely affect the interests of the lawyer's client. For example, there could be prejudicial delay or additional expense if, as the result of a failure to correct a material misimpression, issues need to be re-litigated, agreements set aside, or attorneys disqualified. *Cf.* Restatement § 103 cmt. e ("Failing to clarify the lawyer's role and the client's interests may redound to the disadvantage of the [client] if the lawyer, even if unwittingly, thereby undertakes concurrent representation . . . .").

In reaching this conclusion, we are mindful that not all self-represented persons are alike. Some may be highly sophisticated and experienced business people, capable of handling delicate negotiations or maneuvering through the court system unaided. Others may be relatively uneducated and intimidated by the procedures of our legal system. The lawyer should consider where a specific self-represented person falls along that continuum in evaluating whether she has a duty to explain or clarify her role.

A lawyer also should determine, based on the facts and circumstances presented, whether the explanation to be

provided to the self-represented person should be in writing. Relevant factors include, but are not limited to, the extent to which self-represented person has demonstrated her misunderstanding of the lawyer's role, and the existence or threat of litigation, where failure to make a clear record of communications could be prejudicial to the lawyer's client.

III. Conclusion

DR 7-104(A)(2) permits a lawyer to advise a self-represented person adverse to the lawyer's client to seek her own counsel and to make certain other related statements. These statements may include, where appropriate, identification of general legal issues that the self-represented person should address with a lawyer; undisputed statements of fact or law such as the position of the lawyer's client on a contested issue; and references to court-sponsored programs designed to assist a self-represented litigant. A lawyer may at any time, explain or clarify the lawyer's role to the self-represented litigant and advise that person to obtain counsel. 8 The lawyer must volunteer this information if she knows or should know that a self-represented person misunderstands the lawyer's role in the matter.

February 2009

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1 Persons proceeding in legal matters without an attorney are often interchangeably referred to as "pro se," "self-represented," or "unrepresented." This opinion uses the term "self-represented person/party" to refer to non-attorneys who are representing themselves in a litigation or transaction in which one or more other persons are represented by counsel. Corporations may not appear self-represented in court in New York.

2 Informal surveys of court managers in the New York City Housing Court and New York City Family Court in 2003 revealed that "most litigants (Family Court, approximately 75%; Housing Court, approximately 90%) appear without a lawyer for critical types of cases: evictions; domestic violence; child custody; guardianship; visitation; support; and paternity." Office of the Deputy Chief Administrative Judge for Justice Initiatives, New York State Unified Court System, *Self-Represented Litigants in the New York City Family Court and New York City Housing Court* at 1, *inSelf-Represented Litigants: Characteristics, Needs, Services: The Results of Two Surveys* (Dec. 2005), *available at* http://www.nycourts.gov/reports/AJJI_SelfRep06.pdf. Similarly, survey respondents at the Town and Village Courts estimated in 2003 that 78% of litigants appeared without a lawyer "*almost all or most of the time* in small claims matters, 77% in vehicle and traffic cases, 47% in housing cases, 38% in civil cases, and 15% in criminal cases." *Id.*, *Services for the Self-Represented in the Town and Village Courts* at 3 (emphasis in original).

3 Contact information for the Office of Self-Represented or Pro Se Office is available online for New York State courts (http://www.nycourts.gov/courthelp/nolawyer-text.htm#add) as well as federal district courts (http://www.nynd.uscourts.gov/prose.cfm; http://www1.nysd.uscourts.gov/courtrules_prose.php?prose=contact; http://www.nywd.uscourts.gov/mambo/index.php?option=com_content&task=section&id=8&Itemid=43; http://www.nyed.uscourts.gov/probono/Locations/locations.html) and federal appellate court (http://www.ca2.uscourts.gov/Docs/COAManual/

everything%20manual.pdf) .

4 *See, e.g.* , Office of Justice Initiatives website http://www.nycourts.gov/ip/justiceinitiatives/srl2.shtml#6 (discussing the "Dealing Effectively with Self-Represented Litigants" program); New York State Unified Court System, *Handling Cases Involving Self-Represented Litigants: A Bench Guide for New York Judges* (Summer 2008) (working draft distributed in judicial training seminars); *see also* Cynthia Grey, *Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants* (American Judicature Society 2005) (discussion guide (pp. 59 ff.) containing "materials that can be used to plan and present a session on judicial ethics and self-represented litigants" (p. 59) including a self-test, hypotheticals, role plays, and small group exercises), *available at* http://www.ajs.org/prose/pdfs/Pro%20se%20litigants%20final.pdf; Best Practice Institute, National Center for State Courts, *Judicial Management of Cases Involving Self-Represented Litigants*, *available at* http://www.ncsconline.org/Projects_Initiatives/BPI/ProSeCases.htm.

5 The Justices of the four Appellate Divisions of the Supreme Court of the State of New York have approved and adopted new Rules of Professional Conduct (the "Rules"), which will become effective and replace the Code on April 1, 2009. Rule 4.3 provides: "In communicating 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. The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client." Although the term "legal advice" in Rule 4.3 suggests a narrower scope than the term "advice" in DR 7-104(A)(2), we see no need to discuss or resolve a possible distinction for the purposes of this opinion.

7 Although we believe that interactions between lawyers and self-represented persons typically will be far different than the relationship between a corporation's lawyer and the corporation's unrepresented employees that we addressed in ABCNY Formal Op. 2004-2, we acknowledge that there may be situations where a lawyer should not advise a nonclient to seek counsel. Indeed, we conclude that a lawyer is obligated to render such advice only where it is in the interest of the lawyer's client to do so, or the self-represented person has demonstrated confusion about the lawyer's role.

8 Nothing in this opinion alters a lawyer's duties under DR 7-106(B)(1) and EC 7-23, generally requiring a lawyer to advise the tribunal of controlling legal authority not cited by any other party, regardless of whether it is adverse to her client's position.

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Memphis Partner Lucian T. Pera joined Adams and Reese in 2006 and focuses his practice on commercial litigation, media law, and legal ethics work. Lucian is a past Treasurer of the American Bar Association and the current President of the Tennessee Bar Association.

Lucian's civil litigation practice has ranged widely and includes a variety of commercial, personal injury and intellectual property litigation, as well as numerous state and federal appeals.

Lucian's extensive bar association work in the field of legal ethics and professional responsibility has resulted in local Tennessee, and national practice and leadership. He represents and advises attorneys, law firms, their clients, and businesses who deal with lawyers about all aspects of the law. Recent assignments have included defense of lawyers in disciplinary investigation, counseling clients with disciplinary and other claims against lawyers, advising law firms about loss prevention and claims, and defending and prosecuting motions to disqualify lawyers or for sanctions.

Lucian has represented many media outlets in all sorts of matters, ranging from claims and lawsuits for defamation or invasion of privacy to access to courtrooms, public records and meetings of government bodies. He has litigated several key media access cases, including a Tennessee Supreme Court case extending access under the Tennessee Public Records Act to records of private companies that are the "functional equivalent" of government (Memphis Publishing Co. v. Cherokee Children & Family Services, Inc., 87 S.W.3d 67 (Tenn. 2002)) and expressly confirming the constitutional right of public and press access to attend civil trials (King v. Jowers, 12 S.W. 3d 410 (Tenn. 1999)).

Other significant accomplishments include:

- Active involved in the most recent complete revision of the American Bar Association Model Rules of Professional Conduct, which are now the model for the lawyer ethics rules in virtually every American jurisdiction, serving as the youngest member of the ABA "Ethics 2000" Commission. Since his Ethics 2000 experience, Lucian has been deeply involved in the ABA House of Delegates' consideration of every other significant change to the ABA Model Rules. He currently chairs the governing committee of the ABA Center for Professional Responsibility, the home of the ABA's standing

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INDUSTRIES

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- Princeton University, A.B., 1982
- Vanderbilt University School of Law, J.D., 1985

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- Tennessee

COURT ADMISSIONS

- Tennessee
- United States District Court for the Western District of Tennessee
- United States District Court for the Middle District of Tennessee
- United States District Court for the Eastern District of Arkansas
- United States Court of Appeals for the Sixth Circuit
- United States Court of Appeals for the Second Circuit

PROFESSIONAL MEMBERSHIPS / AFFILIATIONS

ethics, discipline, and professionalism committees.

- Served as ABA Treasurer (2011-2014), including service on the ABA Board of Governors and Executive Committee. Prior service on the ABA Board of Governors as a young lawyer from 1994-1997, including chairing its Finance Committee and serving on its Executive Committee. Membership in the ABA House of Delegates, primarily representing the TBA, for all but three years since 1991. View video of his August 2013, February 2014, and August 2014 reports to the ABA House of Delegates.
- Served as ABA Treasurer (2011-2014), including service on the ABA Board of Governors and Executive Committee. Prior service on the ABA Board of Governors as a young lawyer from 1994-1997, including chairing its Finance Committee and serving on its Executive Committee. Membership in the ABA House of Delegates, primarily representing the TBA, for all but three years since 1991. View video of his August 2013, February 2014, and August 2014 reports to the ABA House of Delegates.
- Served as President of the Association of Professional Responsibility Lawyers (APRL), the national membership organization of lawyers who work in the legal ethics arena.
- Leadership of the Tennessee Bar Association ethics committee from 1995 through 2009, including spearheading the TBA's petitions to the Tennessee Supreme Court seeking ethics rules revisions. These included the TBA's successful petition that led to Tennessee adopting in 2002 its own version of the ABA Model Rules of Professional Conduct to replace Tennessee's prior ethics rules, which had been in place since 1970.
- Active involvement in the Media Law Resource Center, the national organization of media entities and their lawyers, including as a contributor to several of its annual national surveys on media law. He also currently serves as Vice President of the Tennessee Coalition for Open Government, an alliance of media and citizen groups advocating for transparency in government at all levels.
- Assisted in creation of the TBA and ABA websites and chairing the ABA Standing Committee on Technology and Information Systems.
- Serves as Vice President of the Tennessee Bar Association and will become President in June 2017.
- Lucian regularly provides expert witness testimony in matters concerning legal ethics, professional responsibility and the standard of care for lawyers and law firms. He also advises businesses seeking to do business with lawyers about how they may do so legally and ethically.

Lucian also writes and speaks frequently, both nationally and in Tennessee, on legal ethics and professional responsibility and media law. In addition, he routinely conducts presentations and seminars for national audiences.

- American Bar Association - Former Treasurer (2011-2014); Member of Board of Governors, Executive Committee; House of Delegates; Task Force on the Financing of Legal Education
- Tennessee Bar Association, Vice President, President Elect (2016), President (2017)
- Media Law Resource Center
- Memphis Bar Foundation - Fellow; Member, Board of Directors
- Miller-Becker Institute for Professional Responsibility - Advisory Board
- Memphis Bar Association
- Association of Professional Responsibility Lawyers - Past President
- American Law Institute - Fellow
- Tennessee Bar Foundation, Fellow
- College of Law Practice Management, Fellow
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