Administrative Law Legal Ethics

BY TIMOTHY B. MCCORMACK

Ethical Issues in the Practice of Administrative Law, a Multi-State Accredited Continuing Legal Education Seminar Sponsored by the Washington State Bar Association
May 1999

mccormack
Intellectual Property Law
Business Law PS

617 Lee Street
Seattle, WA 98109 USA
p.206.381.8888 / f.206.381.1988
tim@McMormackLegal.com

Ethical Issues In The Practice of Administrative Law

Introduction

This paper has two basic aims: the first aim is to highlight a range of ethical issues that can arise and have arisen in the practice of administrative law; the second aim is to provide a starting point for thought, discussion and research on the issues presented and addressed herein.

The paper presents twelve hypothetical fact patterns with suggestions for each hypothetical as to which Rules of Professional Conduct are most likely applicable (and the text of those rules). Likewise, each hypothetical is followed by a model "answer." Many of the answers are based on actual state bar ethics opinions addressing similar situations.

The "answers' provided should not be considered dispositive on any particular issue; they are intended as a reference and as a starting point of discussion.

Question No. 1

You are a lawyer recently admitted to the Washington State Bar and are working for a general practice law firm. Your aunt approaches you regarding an administrative child support hearing that she has been summoned to attend.

The administrative agency in this case allows claimants to be represented by a lawyer or by other nonlawyer agents such as friends and family members. In discussing strategy with your aunt, she mentions that she does not believe the other side is represented by an attorney. She suggests that if you don’t mention that you are a lawyer, the other side might think that you were simply a nonlawyer family member. In order to avoid a legal "escalation" where the other side might choose to be represented by an attorney, you decided to not

mention that you are an attorney at the upcoming hearing. Is this ethical"

A week before the hearing, the other side asks your aunt if she is represented by an attorney. She tells them no but mentions a family member will be speaking for her at the upcoming hearing. She tells you about the conversation. Do you have an ethical dilemma?"

At the hearing, the state's attorney asks you if you are a lawyer and whether you are acting in a representative capacity. “What do you say?"

Would the situation be any different if you were representing a client at an administrative rule making hearing?

Question No. 1

Applicable Rules of Professional Conduct

Rule 3.3(a) Candor toward the Tribunal

(a) A lawyer shall not knowingly:
(1) Make a false statement of material fact or law to a tribunal;

Rule 3.9 Advocate in Non-adjudicative Proceedings

A lawyer representing a client before a legislative or administrative tribunal in a non-adjudicative proceeding shall disclose that the appearance is in a representative capacity . . .

Rule 4.1(a) Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) Make a false statement of material fact or law to a third person [.]

Rule 8.3(a) Reporting Professional Misconduct

A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, should promptly inform the appropriate professional authority.

Rule 8.4(c) Misconduct

It is professional misconduct for a lawyer to:
(c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation

Question No. 1

Suggested Answer

Based on Michigan Bar Opinion, R1-55

Under Rule 3.3 a lawyer is probably under no affirmative obligation to suasponte disclose, in all employment undertaken, the possession of licensed professional status. Any affirmative misrepresentation, or deliberate concealment, such as failing to respond to inquiries as to professional status, done in conjunction with any legal matter on which the lawyer has been employed, however, is likely a violation of the Washington Rules of Professional Conduct.

The Rule 3.3 is applicable to adjudicative hearings while Rule 3.9 concerns non-adjudicative proceedings. Under Rule 3.3 a lawyer must disclose all "material fact[s]" but is not necessarily required to disclose his or her professional status. Under Rule 3.9 a lawyer representing a client before a non-adjudicative administrative proceeding or a legislature is not required to inform the legislative or administrative tribunal of all material facts known to the lawyer but is required to disclose whether they are acting in a representative capacity.

A lawyer may not make a false statement of material fact or law to a tribunal, RPC 3.3(a), or to a third person, RPC 4.1(a). In proceedings before an Administrative Law Judge, the fact that a client's representative is a lawyer may be "material fact," because, although that status is not a prerequisite to the representation, it may be relevant to the adjudicator's fulfillment of their mandate under Rule 8.3(a). Rule 8.3(a) says that a lawyer "having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, should promptly inform the appropriate professional authority."

Put another way, the legal professional as a whole, lawyers, ALJs, etc. have a duty to each other and the public to police each other against ethical violations; the potential for unchecked ethical abuse by 'submarine" lawyers is enough to potentially call such practice into question under any of the above mentioned rules, including Rule 8.3(a).

At least one state bar ethics opinion [1] advocates requiring a lawyer to always disclose the existence of professional status affirmatively when appearing in a representational capacity. The opinion used the perfunctory “should" to describe the lawyer's duty, rather than the mandatory "must" or 'shall."

A second state bar ethics [2] opinion indicates that a lawyer acting as a layperson in administrative proceedings could avoid indicating lawyer status by making clear to the client that the lawyer "is not providing legal services or practicing law," thereby protecting the client from "any possible misunderstanding."

Question No. 2

You are a staff attorney for the acting Chief Administrative Law Judge for the [Redacted] Office of Hearings and Appeals ("OHA"). Your office is part of the Social Security Administration and is responsible for adjudicating Social Security disability, retirement, and survivor’s claims

appealed from adverse determinations made by lower level components of the administration. The Administrative Procedure Act, Social Security Act, the code of Federal Regulations, and formal Rulings issued by the administration provide the basic legal framework that governs how hearings are held and decisions made in your office.

The Chief Administrative Law Judge asks you to research the applicability of Rule 3.3 of the Washington Rules of Professional Conduct in social security proceedings at the hearing level. Specifically, is a hearing held by an Administrative Law Judge in any of the OHA offices located in Washington an "ex parte proceeding" within the meaning of Rule 3.3(f)"

The Chief Judge explains to you that certain well-recognized Social Security attorneys have lectured at CLE Seminars and even made videotaped presentations during the past few years, suggesting that they have no duty to submit any evidence, medical or otherwise, potentially adverse to their client. The Chief Judge also points out that

". . .since the Federal Rules of Evidence do not per se apply in the administrative proceedings we conduct and because the adjudication process we follow is non-adversarial in nature, a real potential exists for decisions being made based on an incomplete record. Therefore, a potential for abuse is created strictly by differing interpretations of various applicable legal principles. It has been my experience that some advocates view themselves as more of an officer of the court, while others, as mentioned above, and adopt a more zealous approach to representation with respect to disclosure of facts adverse to their client."

Question No. 2

Applicable Rules of Professional Conduct

Rule 3.3 Candor toward the Tribunal

A lawyer shall not knowingly:

(1)Make a false statement of material fact or law to a tribunal;

(2) Fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client unless such disclosure is prohibited by rule 1.6;

(3)Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;

(4) Offer evidence that the lawyer knows to be false.

(b) The duties stated in section (a) continue to the conclusion of the proceeding.

(c) If the lawyer has offered material evidence and comes to know of its falsity, the lawyer shall promptly disclose this fact to the tribunal unless such disclosure is prohibited by rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all relevant facts known to the lawyer that should be disclosed to permit the tribunal to make an informed decision, whether or not the facts are adverse.

Question No. 2

Suggested Answer

Based on Alabama State Bar Ethics Opinion RO-93-06

Washington RPC 3.3(f) applies to lawyers participating in hearings before Administrative Law Judges adjudicating social security disability, retirement, and survivor claims. The term "tribunal", as used in the Rule, includes both courts and administrative proceedings.

Rule 3.3 of the Rules of Professional Conduct is a "fairness rule" designed to protect the integrity of the decision-making process. Professors Hazard and Hodes in their Handbook, The Modern Rules of Professional Conduct, Second Edition, § 3.3:101, provide the following overview of the Rule:

"When the adversary system is operating smoothly, opposing counsel police each other. They can generally be relied upon to expose false and misleading representations made by the other side, and to present legal argumentation in a sharp dialectic that will help the court come to a sound decision. But opposing counsel may not always discover the truth or the law, either through lack of diligence or because the truth has been effectively concealed. Without rules assuring that lawyers will police themselves, therefore, courts would occasionally make decisions on the basis of evidence that one of the professional participants knows is false, or apply legal concepts that one of the professional participants knows has already been rejected by a higher court.

The situation treated in Rule 3.3 entails the most severe tension between duties to a client and duties to the tribunal. According to this rule, where there is danger that the tribunal will be misled, a litigating lawyer must forsake his client's immediate and narrow interests in favor of the interests of the administration of justice itself. In these situations, the conception of lawyer as "officer of the court" achieves its maximum force."

Rule 3.3(f) expands the lawyer's duties in an ex parte proceeding requiring the lawyer to inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse. Professors Hazard and Hodes provide this explanation of subsection (f):

"Normally, the principal duty of an advocate in any proceeding is to present the best possible case for his client. However, since opposing counsel will not be present in ex parte proceedings, and will not be available to expose deficiencies in the proofs or to present

countervailing considerations, the tribunal must be protected from making wrong decisions that it would not have made in an adversary proceeding. In subsection (f), therefore, the special duty of candor to the tribunal (and the public interest in the integrity of the process) once again outweighs the advantage to an individual client."

By deliberately using the term "tribunal" in Rule 3.3, the rule is applicable to adjudications before administrative bodies, as well as courts. See also Charles Pfizer and Co., Inc. v. Federal Trade Commission, 401 Fed. 2d 574, 579, (6th Cir. 1968) (holding that a patent lawyer must present adverse facts to a U.S. Patent Office Hearing Officer even if that might cause the patent to be denied).

Question No. 3

Your law firm represents or has represented two clients who are adverse in an administrative proceeding. Specifically, your firm has represented Client A for a considerable period of time with respect to matters that are regulated by the Agency. Your firm successfully represented Client A in a completed, non-adversarial matter before the Agency and, thereafter, continued to provide advice regarding matters regulated by the Agency. Your firm has also represented Client B in unrelated contract matters from time to time, but has not done any work for Client B in some months (although the attorney-client relationship arguably still might exist).

Client B, represented by separate counsel, has initiated an adversarial action against Client A before the administrative Agency. Client B refuses to consent to your law firm's representation of Client A in the administrative matter.

Under what conditions can your law firm, consistent with the Washington State Rules of Professional Conduct, represent Client A in the administrative proceeding initiated by Client B?

Question No. 3

Applicable Rules of Professional Conduct

Rule 1.7 Conflict of Interest; General Rule

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

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

(2) Each client consents in writing after consultation and a full disclosure of the material facts (following authorization from the other client to make such a disclosure).

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

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

(2) The client consents in writing after consultation and a full disclosure of the material facts (following authorization from the other client to make such a disclosure). When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Rule 1.9 Conflict of Interest; Former Client

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a)Represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the

interests of the former client unless the former client consents in writing after consultation and a full disclosure of the material facts; or (b) Use confidences or secrets relating to the representation to the disadvantage of the former client, except as rule 1.6 would permit.

Rule 1.15 Declining or Terminating Representation

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

Question No. 3

Suggested Answer

Based on District of Columbia Bar Ethics Opinion No. 272

The first issue to be addressed is whether the lawyer may consider his representation of Client B as having ended for purposes of the conflict of interest rules.

The second issue, assuming the answer to the first is in the negative, is whether the lawyer may withdraw as counsel to Client B in order to be free to litigate against that party under the less stringent rules governing conflicts of interest with former clients.

Rule 1.7 of the Washington Rules of Professional Conduct provides that, without the fully informed consent of the affected clients, a lawyer may not represent a client in a matter if a position to be taken by that client in that matter is adverse to a position of another client in the same matter. This rule deals with a situation in which the lawyer is representing one client in a matter, such as litigation or an administrative proceeding, in which another client, which the lawyer represents only in unrelated matters, takes a position adverse to the first client. Rule 1.7 is designed to ensure that an attorney will act with

undivided loyalty to all existing clients. Undivided loyalty to a client is, of course, a fundamental tenet of the attorney-client relationship. See Wolfram, Modern Legal Ethics, 146 (1986).

A lawyer's duty to a former client is somewhat different and is governed by Rule 1.9. Under this rule, a lawyer may sue or otherwise take positions antagonistic to a former client, without disclosure and without the former client's consent, if the new representation is not substantially related to the matter in which the lawyer had represented the former client. The purpose of this rule is to assure the preservation of attorney-client confidences gained in the prior representation and to preserve the reasonable expectations of the former client that the attorney will not seek to benefit from the prior representation at the expense of the former client.

If the fact situation presented by this question were governed by Rule 1.7, it is clear that the law firm could not undertake the representation of Client A in the regulatory proceeding in which the firm's Client B was a party with separate representation, without the informed consent of both Clients A and B. On the other hand, if the firm's representation of Client B were at an end at the time Client A sought the firm's assistance against B, the situation would be governed by Rule 1.9 instead of Rule 1.7. In that situation, there would be no impediment to the firm's representing Client A against former Client B as long as the regulatory proceeding was unrelated to the firm's prior representation of former Client B.

In light of the difference in the conflict of interest rules governing present and former clients, it is important to determine at the outset whether Client B should be regarded as a current or a former client. In many instances, such a question can be easily answered from objective facts. If the lawyer had previously withdrawn from the representation of Client B under Rule 1.15, the withdrawal would have terminated the relationship and converted the client into a former client. Or, if the firm had completed the single discrete task for which it had been retained, the client is a former one. That is arguably the situation presented in

this question, as the law firm completed all tasks for Client B and there has been no communication between them for some months.

On the other hand, certain facts are presented suggest that the attorney/client relationship is continuing in this situation with respect to Client B. The law firm, for example, is from time to time consulted by Client B on contract matters, which may indicate a continuing relationship punctuated by periods of inactivity. Client B appears to have a subjective belief that it continues to be a client of the firm. Since a reasonable subjective belief can be the basis for the formation of an attorney/client relationship (see Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir. 1978)), it may also be the basis for the continuation of the relationship.

This question highlights the importance of distinguishing between existing and former clients. In many situations, the relationship between an entity and a lawyer and law firm is ambiguous. For example, a corporation, not providing a retainer, may call upon a law firm from time to time for legal advice, paying on a per hour basis for services rendered. During the hiatus between the last call and before another possible request for advice, it may be unclear whether the corporation is an existing client or simply a former and prospective client.

Absent an express termination, a court will likely examine the subjective expectations of both parties, as evidenced by their relevant conduct, to determine whether the attorney-client relationship continues. See, e.g., Manoir-Electroalloys Corp. v. Amalloy Corp., 711 F.Supp. 188 (D.N.J. 1989). While additional facts might affect any determination, let's assume, for purposes of this analysis, that Client B is a current client of the inquiring law firm.

If Client B is a current client, the question then arises whether a lawyer may withdraw from representing Client B and invoke the more lenient conflict of interest provisions of Rule 1.9 to determine any obligation to the former client. Rule 1.15 provides, in relevant part, that a lawyer

may withdraw from representing a client only if withdrawal can be accomplished without "material adverse effect" on the interests of the client.

Under the facts presented here, one can argue that the firm may withdraw under Rule 1.15 because it appears that withdrawal as counsel from Client B can be accomplished without "material adverse effect" on Client B. All projects for Client B have apparently been completed; no work had been done on the unrelated contract matters for several months; no outstanding projects appear to be contemplated imminently; and Client B was able to obtain different counsel, as reflected by the fact that Client B retained other counsel to represent it in connection with the administrative proceeding.

Question No. 4

Attorney A is employed by a State Agency ("Agency") as a member of its legal staff. The Agency periodically enters into procurement contracts and is, therefore, sometimes involved in protests concerning the letting of those contracts.

The protest process is a special administrative procedure that begins with a hearing before one of three Chief Procurement Officers, chosen depending upon the subject matter of the protest. These Chief Procurement Officers are all employees of the State Office of General Counsel. Decisions by the Chief Procurement Officers are reviewed by the State Procurement Review Panel ("Panel"), and its decisions are likewise reviewed by the Circuit Court.

Attorney A has been appointed by the Governor to serve as an administrative hearing officer on the Panel, which occasionally hears protest appeals involving Agency contracts. In his capacity as staff counsel, Attorney A would normally represent the Agency in matters before the panel.

May Attorney A appear before a Chief Procurement Officer on behalf of the Agency, if he intends to recuse himself from the Panel if the matter is thereafter appealed"

May Attorney A appear in Circuit Court on behalf of the Agency in an appeal from the Panel, when he has recused himself from the Panel hearing on the matter.

May another member of the Agency legal staff appear before the Panel in a matter involving the Agency, when Attorney A has recused himself from serving on the Panel?

Does Attorney A's membership on the Panel prevent other members of the Office of General Counsel from appearing on behalf of the Agency before a Chief Procurement Officer, the Panel, or in the Circuit Court on matters involving the Agency, when Attorney A has recused himself from the Panel?

May Attorney A participate in Agency procurement matters such as contract negotiation and procurement law interpretation?

Question No. 4

Applicable Rules of Professional Conduct

Rule 1.7 Conflict of Interest; General Rule

See Question 3

Rule 1.10 Imputed Disqualification; General Rule

(a) Except as provided in section (b), while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by rules 1.7, 1.8(c), 1.9, or 2.2. . . .

Question No. 4

Suggested Answer

Based On South Carolina Bar Ethics Opinion 94-33

Assuming Attorney A seeks to accept appointment to serve on the Panel while at the same time continuing his employment as staff counsel for the Agency, the essential ethical issue is thus whether Attorney A can serve as a hearing officer on the Panel and still maintain a lawyer/client relationship with an Agency that regularly appears before the Panel.

The obvious problems are Attorney A's potential for exhibiting adjudicative bias in favor of his Agency client, and his inability to zealously advocate the interests of his client while maintaining his judicial impartiality. An apt analogy would be a Justice of the Washington State Supreme Court practicing law in the courts of this state during his tenure as a sitting Justice.

Rule 1.7(b) states that a lawyer may not represent a client "if the representation of that client may be materially limited by the lawyer's responsibilities...to a third person." In the situation presented, the lawyer's responsibility to the Panel, best characterized as a duty of strict impartiality, directly conflicts with his responsibility to act in support of his client's interests. Such a conflict cannot be waived because representation of the client is by necessity adversely affected by the duties inherent in the position of the hearing officer and vice versa.

Accordingly, Attorney A cannot serve on the Panel and continue to represent the Agency in matters that are reviewable by the Panel. This includes representation before the chief procurement officer because, as hearing officer, the Attorney would be reviewing decisions in which he had participated as an advocate and also representation in the

circuit court because he would then be advocating a position regarding his decisions as hearing officer.

Rule 1.10(a) states "While lawyers are associated in a firm, none of them shall knowingly represent a client when one of them practicing alone would be prohibited from doing so by Rule 1.7 . . . The “Definitions' section of the Rules state that the term "firm" includes lawyers who work together in the legal department of an organization or who are employed together in a legal services organization.”

Accordingly, the imputed disqualification of Rule 1.10(a) applies to other lawyers employed by the Agency.

As such, if the Attorney serves as a hearing officer on the Panel, the Agency's staff lawyers are disqualified from representing the Agency in matters reviewable by the Panel.

If members of the Agency's legal staff are disqualified from appearing before the attorney in his capacity as panel hearing officer, they cannot avoid that disqualification by limiting their role to one of a supervisory nature. If a lawyer is disqualified from handling a matter, that disqualification is meaningless unless it prohibits all involvement in the matter.

Question No. 5

Lawyer has recently left an unsuccessful private practice for a more secure governmental position with Agency. In the past, Lawyer has represented claimants from time to time before the Agency. While employed with the Agency one of Lawyer's former clients, Client, brings an action before the Agency that is somewhat related to one that Lawyer assisted with while in private practice. Is this a problem?

What if Lawyer, employed by the Agency for a number of years, handling a high volume of cases, is later promoted to a hearings officer where former claimants, whom Lawyer represented while employed

with the Agency, come before Lawyer as a hearings officer" Does it make a difference whether Lawyer can recall specific information about a particular claimant whom Lawyer represented in the past while employed with the Agency

Question No. 5

Applicable Rules of Professional Conduct

Rule 1.9(b) Conflict of Interest; Former Client

A lawyer who has formerly represented a client in a matter shall not thereafter:

(b) Use confidences or secrets relating to the representation to the disadvantage of the former client, except as rule 1.6 would permit.

Rule 1.11(c) Successive Government and Private Employment

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

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

Question No. 5

Suggested Answer

Based On Rhode Island Ethics Opinion #92-69

Whether or not the matters are substantially related, Lawyer cannot not use information arising from her prior representation of Client to Client's disadvantage.

Further, any involvement in the matter is prohibited by Rule 1.11.

Rule 1.11 does not apply to the latter part of this question because any relationship with the former claimants / clients stems from Lawyer's employment with the Agency and not from Lawyer's former private practice.

Rule 1.9(b) should not apply when a lawyer does not recall any specific information about a particular former client. Use of confidences and secrets requires actual recollection of the same. Rule 1.9(b) does apply when a lawyer recalls specific confidential or secret information about a former client when that knowledge is relevant to adverse proceedings against the former client. In this case, if Lawyer recalls specific information about a former claimant whom Lawyer represented while employed with the agency and that knowledge is relevant to the administrative proceedings, lawyer should recuse herself as the hearings officer.

Question No. 6

You are an attorney who specializes in administrative matters before the Department of Motor Vehicles. In your state, driver’s license revocations hearings are civil actions by the Division of Motor Vehicles to limit, suspend or revoke a driver's license. Can you ethically charge a contingent fee based on the outcome of a driver's license revocation hearing?

May you charge a contingency fee for a license revocation hearing before the Commissioner of Motor Vehicles when the client is arrested for driving while intoxicated?

Question No. 6

Applicable Rules of Professional Conduct

Rule 1.5 Fees

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by section (d) or other law.

(1) A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(2) A contingent fee for representing a defendant in a criminal case.

Question No. 6

Suggested Answer

Based on Kansas Bar Ethics Opinion 96-10

Counsel is aware of the prohibition on contingent fees in criminal matters, and while revocation of drivers licenses often turn on whether a person refused a blood alcohol test during a DUI arrest and thus has the trappings of a criminal action, a revocation hearing is by law a civil action which uses civil practice rules and is, in essence, an

administrative hearing. While the DUI criminal defense could not be predicated on a contingent fee, there is no reason to prohibit the resulting revocation hearing from such prohibitions. Other states have approved contingent fees in similar situations. [3]

If otherwise lawful, contingent fees are possible in most any situation, but there are two types: (1) fees contingent on a percentage of a res created by the work of the attorney, and (2) fees that are determined on some basis (hourly or fixed fee) that is paid, or not paid, depending on the results obtained.

There are problems that arise with the use of a personal injury-like contingent fee. First, there is no res created by the attorney's actions as one might see with a recovery in a personal injury action. The attorney obtains no funds for a client in revocation hearings. The 'success' is more intangible – the ability of the client to keep his or her driving privileges which often impacts employment. Thus a percentage fee is obviously difficult to craft along traditional personal injury lines.

What counsel is truly seeking is a fee of some sort, determined in some manner, that is or is not paid depending on the outcome of the revocation hearing. For this sort of arrangement, the key is defining what constitutes 'success" in the endeavor. Further, counsel must first ask themselves whether there is in fact some "contingency" on which to base a fee. Is the attorney adding value to the client's predicament or could the client have achieved the same results acting pro se"

Lawyers have an ethical obligation to discuss alternative fee arrangements with clients, especially new clients. Contracts should not only cover how much the lawyer will charge but also how the client will be billed. Is the client going to be charged a retainer fee to be applied against costs or will the fee absorb out of pocket costs' Rule 1.5 requires that the elements of the fee agreement be expressed in writing at the outset of representation. The rule requires the use of a written contract setting forth the nature of the legal services, and the fee arrangement.

If there are to be financial charges on overdue fees, these and other sorts of items must be fully covered in the document ab initio, not added later. It is also wise to discuss with the client any arbitration or mediation system available for fee disputes.

Any kind of fee arrangement must be reasonable under all the circumstances. If, for example, counsel does little to earn the fee, then any kind of "incentive or bonus fee" may not be reasonable regardless of the provisions in the contract.

The simplest system would be a flat fee arrangement which is reasonable for the work necessary on the matter, and contingent on a defined level of 'success" set forth in the attorney agreement or engagement letter. The amount is escrowed in counsel's trust account and either transferred to the attorney's operating account upon success, or is reimbursed to the client if non-success is achieved. Any retained fee must be reasonable. The contingent nature of the fee might justify a slightly higher fee than simple hourly calculations.

Care must be taken as to the premium billing system, especially if done on a contingent basis. Whether a fee is "reasonable" is often in the eye of the beholder. A significantly high fee based on a rather simple case can see the attorney facing discipline charges, or at the least result in an unhappy client seeking fee dispute resolution services, which often leads to a disciplinary complaint.

If the fee is determined based on an hourly or fixed rate basis and is otherwise reasonable under Rule 1.5, the lawyer and client can agree to make the payment of the fee contingent on a defined level of success of the representation in a driver's license revocation hearing. Such actions are civil in nature, not criminal.

Question No. 7

You currently represent Dr. A, the defendant in an alleged medical negligence action before the Health Claims Arbitration Office. Dr. A

recently re-opened his practice in a Washington community after a revocation and subsequent reinstatement of his license by the Board of Quality Physician Assurance.

Dr. A's license to practice medicine was previously revoked as a result of a finding that he was "guilty of immoral conduct in the practice of medicine." Such facts and the circumstances of his misconduct with his female patients were reported in local newspapers at the time the decision was issued.

Attorneys representing the plaintiff in the malpractice action have placed an advertisement in a newspaper in the community in which Dr. A practices. The advertisement provides Dr. A's name, refers to "litigation pending before the Health Claims Arbitration Office of Washington" and requests anyone with personal knowledge of Dr. A's activities, 'specifically, with respect to his relationship with female patients of [B] Medical Group since 1982" to contact the named attorneys.

You have been told by Dr. A that several of his patients have seen the advertisement and contacted his office. Some of these patients indicated that they believed that the attorneys named in the advertisement were representing the Health Claims Arbitration Office; others believed the advertisement involved the Board of Physician Quality Assurance. You believe that the advertisement may cause improper pretrial publicity. Is the advertisement proper"

Question No. 7

Applicable Rules of Professional Conduct

Rule 3.6 Trial Publicity

A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it

will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

Guidelines for Applying RPC 3.6

II. Civil. The kind of statement referred to in rule 3.6 which may potentially prejudice civil matters triable to a jury is a statement designed to influence the jury or to detract from the impartiality of the proceedings.

Question No. 7

Suggested Answer

Based On Maryland State Bar Ethics Opinion 91-32

Rule 3.6 of the Washington Rules of Professional Conduct is relevant to the question at hand. Rule 3.6 generally prohibits a lawyer from making extrajudicial statements which the lawyer knows or reasonably should know have a substantial likelihood of materially prejudicing an adjudicative proceeding.

The advertisement clearly states that information is being sought in connection with pending litigation before the Health Claims Arbitration Office. While it also states that information is being sought specifically about Dr. A's relationships with female patients, that statement does not appear to be prejudicial in this case. Dr. A's license to practice medicine was revoked as a result of a finding that he was "guilty of immoral conduct in the practice of medicine."

Such fact and the circumstances of his misconduct with his female patients were reported in local newspapers at the time the decision was issued. Therefore, such information is a matter of public record and as such cannot materially prejudice an adjudicative proceeding.

Question No. 8

Associate handles patent and copyright matters for many of your clients including some large software companies. His work is often praised.

While surfing the Internet one day, you come across a web site for the "League of Computing Freedom" ("LCF"). The LCF's motto is: "All Information Should Be Free and Unrestricted." You discover that Associate is one of the directors of LCF and has been for a number of years.

As it turns, out LCF is a grass roots organization dedicated to abolishing all legal regimes that protect software, including the copyright and patent laws. The LCF regularly sends formal written comments to Congress urging legal reform by abolishing copyright and patent protection for computer software. Is Associate acting unethically by attempting to reform the law in such a way that many of your clients would be adversely affected" Would the situation be different if Associate was lobbying Congress for reform that would benefit many of your clients"

Question No. 8

Applicable Rules of Professional Conduct

Rule 1.7(b) Conflict of Interest; General Rule

See Question 3.

Rule 6.4 Law Reform Activities Affecting Client Interests

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefited

by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

Question No. 8

Suggested Answer

Rule 6.4 of the Washington State Rules of Professional Conduct permit a lawyer to engage in law reform activities that affect or potentially affect a client's interests. As such, the associate's activities with the grassroots law reform group are not unethical per se. As a practical consideration, the client may resent the activity if it is discovered.

Under Rule 1.7 a lawyer has a duty to seek his or her client's informed written consent for any representation that may be "materially limited . . . by the lawyer's own interests." The extent to which Rule 1.7(b) is implicated by a lawyer's "personal interest" in law reform activities is not entirely clear. One can argue that a lawyer's own "interest" in the political reform of the patent and copyright laws is not the kind of "interests' implicated by Rule 1.7(b). This view is supported by the official comment to Model Rule 6.4.

Although not adopted in Washington State, the comment to Model Rule 6.4 points out that there is generally not a lawyer-client relationship formed when a lawyer becomes involved with a law reform organization. Otherwise, the comment points out, an antitrust lawyer would be precluded from drafting legislative revisions to the rules affecting that subject. Presumably, the same reasoning applies to this question. Although the associate has a duty of loyalty to his or her clients, an actual conflict (as governed by the Rules of Professional Conduct) might not arise because there is only one attorney-client relationship that has been formed.

As a practical matter, however, it might be advisable to seek a client's informed written consent for the simple reason that it is easy to imagine situations where the lawyer's law reform activities could

become directly adverse to a particular client's interests (perhaps impinging on a lawyer's implicit duty of loyalty to his or her client).

If a lawyer is engaging in law reform activities that could materially benefit a particular client, then the lawyer must disclose that fact to any legislative or rule making body before whom the lawyer appears in a representative capacity.

If, for example, a lawyer were to write a letter concerning the adoption or rejection of a new bill before Congress that would be a material benefit to a client, the lawyer is ethically required to disclose that fact. The client's identity, however, need not be disclosed.

Question No. 9

In your practice, you sometimes serve as an administrative law judge. In that capacity you do not have a secretary. As a consequence, you must do all your own scheduling of appointments, issuing of subpoenas, setting deadlines for filings, and accepting such filings. You are concerned because of the general prohibitions against all ex parte contact between lawyers participating in a case and judges therein, including administrative law judges. Should you continue to contact lawyers directly for the limited purpose of scheduling hearings or performing other administrative or clerical tasks' Do lawyers violate the Rules of Professional Conduct by talking with the judge"

Question No. 9

Applicable Rules of Professional Conduct

Rule 3.5 Impartiality and Decorum of The Tribunal

A lawyer shall not:

(a) Seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) Communicate ex parte with such a person except as permitted by law …

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(d) Engage in conduct that is prejudicial to the administration of justice;

(f) Knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Question No. 9

Suggested Answer

Based On Arizona Bar Ethics Opinion No. 87-17

Rule 3.5 of the Rules of Professional conduct prohibits a lawyer from communicating ex parte with a judge except as permitted by law. The reasons for the prohibition against ex parte communications are clear. Without such a prohibition, the communicant might gain an unfair advantage in litigation by influencing the judge, however innocently, while the other party is unable to rebut.

Generally speaking, the prohibition against ex parte communications is designed to (1) insure the fairness of judicial proceedings, and (2) guard against the appearance of any impropriety to the end that the integrity of the judicial system may be preserved.

Given the wording of Rule 3.5, which prohibits ex parte communication between lawyer and judge except as permitted by law, there seems

little room to compromise. Nevertheless, there appear to be alternatives. Conference calls can be arranged. Communications could be in writing, addressed to all parties. The judge may establish a routine status conference with all parties present to settle administrative matters. As a final alternative, the administrative law judge may apprise the other party of any ex parte communication, allowing the other party time to be heard, and thus lifting the communication out of the realm of ex parte communications. The latter alternative clearly should be used only for procedural matters.

Ex parte communication of any kind between a lawyer and a judge is prohibited by Rule 3.5 unless permitted by law. The above example is not one in which ex parte communication is specifically permitted by law. Nevertheless, the administrative law judge may, by contacting the non-communicating party and allowing her or him to be heard on a procedural matter, lift the communication out of the ex parte realm. Such communications must be limited to purely procedural matters.

Question No. 10

A friend comes to you asking for help with an opposition proceeding involving the trademark "TIMCO". Your friend explains to you that they were representing themselves to get a trademark when things got a little bit out of control, i.e. another party got involved. Your friend tells you something about a "discovery deadline" but is unsure of what that is. You know nothing about trademark law but do know what a discovery deadline is.

You tell your friend that you will look into the matter and get back to them. Three weeks pass and your friend calls you up and tells you that there are several upcoming deadlines and wants to know what you have found out. You tell your friend that you have been very busy but are working on it. In fact, you have done nothing. Another week goes by. You have still done nothing. You decide to call your friend and tell them that you are too busy and that they should talk with a lawyer who specializes in trademarks. Have you done anything wrong?"

Question No. 10

Applicable Rules of Professional Conduct

Rule 1.1 Competence

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

Rule 1.3 Diligence

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

Rule 1.4 Communication

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

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

Question No. 10

Suggested Answer

Rule 1.1 requires that a lawyer be competent. Representation should not be undertaken when a lawyer is not competent to handle a matter or when a lawyer is not able to become competent in a reasonable time or associate with competent counsel. In this case, the lawyer was not competent, did not attempt to become competent and did not try to associate with competent counsel.

Rule 1.3 requires a lawyer to act with diligence in all matters undertaken. In this case, the lawyer waited three weeks and did nothing. After being informed of upcoming deadlines a second time, the lawyer still did nothing. The lawyer is not acting with diligence to protect his client's interests.

Rule 1.4 requires that a lawyer keep his or her client informed. In this case, the lawyer told the client almost nothing. The lawyer did not explain the importance or meaning of a discovery deadline and did not tell the client that a different attorney might be needed. In fact, the lawyer did not even attempt to withdraw from the representation until after four weeks had passed with almost no communications between the lawyer and the client.

Question No. 11

A new client comes into your office one day and makes inquiries regarding the Washington State laws that regulate airplane pilot licensing. The client seeks representation before an administrative board that will be reviewing his pilot license. The client gives you a five thousand dollar retainer from which you are entitled to draw fees and expenses. Your new secretary deposits the money into your firm's checking account.

Question No. 11

Applicable Rules of Professional Conduct

Rule 1.14 Preserving Identity of Funds and Property of A Client

(a) All funds of clients paid to a lawyer or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable interest-bearing trust accounts maintained as set forth in section (c), and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) Funds reasonably sufficient to pay bank charges may be deposited therein;

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

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(c) A lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) The lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) The lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Question No. 11

Suggested Answer

Rule 1.14 prohibits the mixing of client funds with the funds of a lawyer or the lawyer's firm. Client funds must be maintained in a separate interest bearing account or trust fund as provided in Rule 1.14. In this case, there is a clear violation the Rules of Professional Conduct by the lawyer's secretary. Under Rule 5.3 the lawyer will be responsible for

this ethical violation if they ordered the act or knew about it. If the check was deposited in the wrong account by accident and the situation is corrected as soon as it is discovered and all parties are informed of the mistake, then no ethical violation will likely be imputed to the lawyer under Rule 5.3.

Question No. 12

After reviewing the year's accounting books for her solo practice, Lawyer decides that she needs some advertising to bring business in before she goes broke. Lawyer is a licensed patent attorney. Having an account with a local Internet provider, she designs and posts a firm web page. The web page reads in part:

"Administrative Law Practice"
"Certified Patent and Trademark Attorney"
"Results Guaranteed"

Question No. 12

Applicable Rules of Professional Conduct

Rule 7.1 Communications Concerning A Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(b) Is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or

Rule 7.2 Advertising

(a) Subject to the requirements of rules 7.1 and 7.3, a lawyer may advertise services through public media, such as a telephone directory,

legal directory, newspaper or other periodical, outdoor, radio or television, or through written communication.

(b)A copy or recording of an advertisement or written communication shall be kept by the lawyer for 2 years after its last dissemination along with a record of when and where it was used. Upon written request by the State Bar, either instigated by the State Bar or as the result of any inquiry from the public, the lawyer shall make any such copy or recording available to the State Bar, and shall provide to the State Bar evidence of any relevant professional qualifications and of the facts upon which any factual or objective claims contained in the advertisement or communication are based. The State Bar Association may provide the lawyer's response to any person making inquiry.

Rule 7.4 Communication of Fields of Practice

A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer is a specialist except as follows:

(a) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "patent attorney" or a substantially similar designation.

(b) Upon issuance of an identifying certificate, award, or recognition by a group, organization, or association, a lawyer may use the terms "certified", 'specialist", "expert", or any other similar term to describe his or her qualifications as a lawyer or his or her qualifications in any subspecialty of the law. If the terms are used to identify any certificate, award, or recognition by any group, organization, or association, the reference must meet the following requirements: (1) the reference must be truthful and verifiable and may not be misleading in violation of rule 7.1; (2) the reference must identify the certifying group, organization, or association; and (3) the reference must state that the Supreme Court of Washington does not recognize certification of specialties in the practice of law and that the certificate, award, or

recognition is not a requirement to practice law in the State of Washington.

Question No. 12

Suggested Answer

Nothing in the Washington Rules of Professional Conduct specifically mentions advertising over the Internet. Rule 7.2(b) does require a lawyer to keep a copy of any advertising for two years (this presumably includes any Internet advertising).

Rule 7.4 permits a lawyer to mention that he or she does or does not practice in certain fields of law. Under Rule 7.4 the advertisement "Administrative Law Practice" is probably acceptable, if true. Further, Rule 7.4 allows practitioners licensed to practice patent law to refer to themselves as "patent attorneys" or other similar designations. Rule 7.4 also allows an attorney to use the words "certified" in some cases. In the situation mentioned above, the lawyer is a certified patent attorney with a special license to practice patent law so designation "Certified Patent . . . Attorney" is acceptable. There is nothing to indicate, however, that the lawyer mentioned is certified in the practice of trademark law. Even though the Patent and Trademark Office is the umbrella agency involved, trademark and patent practice are quite distinct. As such the lawyer's use of "Certified . . . Trademark Attorney" is probably unethical.

Rule 7.1 prohibits advertisements that "create an unjustified expectation[s] about results the lawyer can achieve". As such the words, "Results Guaranteed" appearing on the lawyer's web site are unethical because no lawyer can guarantee results.

[1] See Michigan Bar Opinion, R1-55 and CI-654.

[2] See Michigan Bar Opinion, R1-55 and CI-1117.

[3] Connecticut Informal Ethics Opinion 91-1 (1991) License revocation proceeding before commissioner following client's arrest for drunk driving); Pennsylvania Ethics Opinion 92-183 (1993) (habeas corpus petition to have client transferred to different prison).