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“Final Jeopardy Ethics Question: How Much Are You Willing To Bet On The Answer... Your License?”

Tales From the Abyss: What Does It Take To Get Disbarred These Days?

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Tales From the Abyss: What Does It Take To Get Disbarred These Days?

As the behavior of attorneys appears to become more repugnant as the years pass, legal scholars continue to lament over the decline in civility and quality of attorneys in the profession.¹ One cannot avoid the YouTube clip where a judge finds that an attorney has shown up drunk in her court, or stories like that of a prominent plaintiff's attorney whose conduct included failing to obey court orders, failing to maintain respect to the courts, seeking to mislead the jury, and committing several acts of moral turpitude, which the reviewing court deemed outrageous.² The punishment for these two lawyers included (1) suspension and mandatory rehabilitation, and (2) suspension for three years, respectively.³

Not only does attorney conduct seem to be more reprehensible, or at least more visible these days, based on the ability to obtain news instantaneously from the Internet, but the rules of professional conduct for many states require the lowest common denominator of behavior.⁴ An attorney need only conduct herself

at the lowest levels of professionalism to avoid discipline. Based on the nauseating behavior by some attorneys these days, as well as the low standards of conduct required for an attorney, the question becomes: what does it actually take to get disbarred?

Part I of this article provides a brief background concerning the professional rules of conduct that govern attorney behavior, as well as the sanctions that may be imposed on attorneys for their misconduct. Part II examines several cases in several jurisdictions relating to disbarment. The cases do not involve conduct that would obviously warrant disbarment, such as embezzling thousands of dollars from the client, murder or arson. The cases discussed in this article focus on other misconduct, including lack of diligence, dishonesty, supervising, payment arrangements with a client, and even failing to act properly as a juror, each of which can also lead to disbarment.

The cases examined below demonstrate that a pattern of misconduct, plus prior disciplinary sanctions, failure to participate or participate truthfully in the disciplinary process, and lack of remorse are fatal combinations to a lawyer's license. These cases, however, also serve as cautionary tales to attorneys who need not break every rule, or break them repeatedly, to lose their licenses or suffer serious consequences. The article also provides practical tips to avoid the consequences that the attorneys suffered in those cases.

I. Background Regarding Professional Rules of Conduct and Sanctions

Each jurisdiction has a disciplinary mechanism that enforces the jurisdiction's rules of professional conduct.⁵ Each jurisdiction has authority to investigate alleged violations of its rules of professional conduct, adjudicate those claims, and impose sanctions if applicable.⁶

Attorneys can be disciplined in a variety of ways, including disbarment, which is the most severe for a practicing attorney. Attorney discipline can occur by: private reprimand, where the discipline is unknown to the public; probation, where a lawyer may continue to practice law under certain conditions; public reprimand or censure, where the lawyer's violation and the jurisdiction's punishment are made known to the public; suspension, where the attorney is not allowed to practice law for a specified amount of time; and finally disbarment, which can be either temporary or permanent.⁷

The American Bar Association's ("ABA") Survey on Lawyer Discipline Systems ("S.O.L.D.") compiles statistics on attorney discipline from lawyer disciplinary agencies across the country.⁸ The latest S.O.L.D. statistics come from the ABA's 2009 Survey.⁹ According to that 2009 data, many of the complaints filed, which can be filed by clients, other attorneys, or even judges, were dismissed for lack of jurisdiction.¹⁰ Many cases that were not initially dismissed based on lack of jurisdiction, but were investigated, also resulted in case dismissals.¹¹ As for the cases that did result in punishment, 14% resulted in private reprimand, 41% in public reprimand, 7% in public censure, 4% in public probation, 27% in suspensions, and 7% in some form of disbarment.¹²

The highest number of disbarments in 2009 came from New York, California, Florida and Texas.¹³ New Jersey, Alabama and Georgia also had a fairly high number of disbarments in 2009 compared to other states.¹⁴ Cases relating to these jurisdictions, including cases from 2009 to 2011, are discussed below.

The states each have a professional code of conduct, many of which are patterned after or nearly identical to, at least in parts, the ABA Model Rules of Professional Conduct ("Model Rules").¹⁵ Violations of the states' professional codes can result in the sanctions mentioned above.¹⁶ As a result, the Model Rules will occasionally be discussed below in conjunction with the cases.

II. Disbarment Cases

Lawyers Need to Be Diligent

Abraham Lincoln said of diligence, “The leading rule for the lawyer, as for the man of every other calling, is diligence. Leave nothing for to-morrow which can be done to-day.”¹⁷ The professional codes of conduct for the states and the Model Rules each require attorneys to be diligent.¹⁸ Failing to be diligent can result in the end of a law license.

Kimbrough

In a Georgia case, attorney James M. Kimbrough III (“Kimbrough”) appeared before the Georgia Supreme on three separate disciplinary matters.¹⁹ The first matter involved an adoption.²⁰ Kimbrough was paid \$900 to represent a client in adopting a relative’s child of the client.²¹ Although he was provided the necessary information from the client, Kimbrough “failed to file the petition for adoption.”²² Initially, he did not respond honestly when the client asked him about the status of the case.²³ In 2006, four years after being paid for the case, Kimbrough stopped responding to the client’s calls altogether.²⁴ In late 2006, Kimbrough finally sent a letter to the client recommending she obtain another attorney and stating he would return the retainer.²⁵ Kimbrough, however, failed to address the letter properly and the client never received the letter.²⁶ Kimbrough also misrepresented facts to the State Disciplinary Board’s Investigative Panel.²⁷ The Court found that these actions violated Rules 1.3, 1.4, 1.5, 3.2 and 8.1 of the Georgia Rules of Professional Conduct.²⁸

Georgia’s Rule 1.3 states, “A lawyer shall act with reasonable diligence and promptness in representing a client.”²⁹ Reasonable diligence as used in this Rule means that a lawyer shall not without just cause to the detriment of the client in effect willfully abandon or willfully disregard a legal matter entrusted to the lawyer.³⁰ The maximum penalty for a violation of this Rule is disbarment.”³¹

Comment 2, which mirrors the Model Rules’ 1.3 Comment 3, states, “Perhaps no professional shortcoming is more widely resented than procrastination.”³²

Rule 1.4 deals with communication between attorneys and clients, Rule 1.5 deals with fees and Rule 3.2 deals with expediting litigation - violation of these rules in Georgia involves, at the most, a public reprimand.³³

Rule 8.1 provides “An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not: (a) knowingly make a false statement of material fact; or (b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.”³⁴ The maximum penalty for a violation of this Rule is disbarment.”³⁵

In the second matter, a different client paid Kimbrough \$500 to incorporate a business.³⁶ Kimbrough never completed the incorporation process.³⁷ In particular, he needed to make sure that the necessary documents were registered with the Secretary of State, which he did not.³⁸ After the client found out on his own that the incorporation had not been registered, she was unable to reach Kimbrough because he had disconnected his phone and moved out of his office.³⁹ Kimbrough did not respond to inquiries from the Investigative Panel about this matter.⁴⁰ As a result, the Supreme Court of Georgia found that Kimbrough violated Rules 1.3, 1.4, 1.16 and 9.3.⁴¹

Rule 1.16 deals with the procedure to decline or terminate attorney-client relationships and Rule 9.3 requires attorneys to cooperate with the disciplinary board - violation of these rules in Georgia involves,

at the most, a public reprimand.⁴²

In the third matter, yet another client paid Kimbrough \$1,500 to represent her in a child support matter.⁴³ Kimbrough promised in his agreement with the client to reimburse her retainer amount if he procured fees from the opposing party.⁴⁴ The parties settled, and Kimbrough received \$1,500 in fees from the opposing party.⁴⁵ Kimbrough, however, initially failed to reimburse the client with the retainer she paid.⁴⁶ Kimbrough, in fact, failed to provide his client with any documents from her case, including the child support order, despite repeated requests from the client.⁴⁷ Kimbrough then stopped responding to the client's inquiries.⁴⁸ Kimbrough finally sent the client a check for \$1,000, but did not mention what happened to the other \$500, and he never provided her with her case file or court documents from her case.⁴⁹ The Georgia Supreme Court found that Kimbrough violated Rules 1.4, 1.5 and 1.16 based on this matter.⁵⁰

As a result of his violation of the Rules, prior disciplinary history, the multiple cases and clients involved, failure to participate in the disciplinary proceedings or providing false statements when he did, and indifference to making restitution, Kimbrough was disbarred.⁵¹ Notably, the Court stated, in accordance with the Rule, that any **single** violation of 1.3 regarding diligence is grounds for disbarment.⁵² Here, Kimbrough's failure to be diligent on two matters, which included failing to complete the legal tasks the clients paid him to do, led to his disbarment.⁵³

If an attorney has a high caseload, then an attorney may have numerous tasks that need to be completed at or around the same time. An attorney's duty to be diligent does not allow for such tasks to slip through the cracks. Regardless of the importance of the case to an attorney, whether it is a case that does not generate a lot of revenue or is simply now (and may have always been) unappealing to the attorney for some reason, an attorney must serve the client with diligence in each and every case and on each and every task in those cases. Even a single instance of failing to be diligent can be fatal in some cases, as Rule 1.3 of the Georgia Rules states.⁵⁴

The passage of time or the change of conditions, even when no deadlines are missed, can adversely affect a client's interests, which means that failing to do work in a timely manner can lead to negative consequences for clients and their cases.⁵⁵ Overlooking a statute of limitations can destroy a client's legal position, and it can also lead to a malpractice claim.⁵⁶

Notably, failing to communicate timely with the client with updates about the status of the matter can lead to sanctions.⁵⁷ In Georgia, the highest sanction is public reprimand for failure to communicate timely with the client.⁵⁸ Although a public reprimand allows a lawyer to retain his license, it can tarnish an attorney's reputation. An easy rule to follow to avoid such violations is the 24 hour rule in which an attorney returns his client's phone calls or emails within 24 hours, which is also a good rule to use in business in general. Even if the attorney only tells the client within the 24 hours that he will be free in a day or two to speak at length with the client, this brief communication can help avoid the client feeling neglected or abandoned. Also, talking to or emailing the client on a weekly or bi-weekly basis will also help alleviate any potential communication issues. Certainly, if there are any significant updates on the case, such as the setting of a trial date, the results from a hearing on a summary judgment, or a settlement offer, the client should be informed as soon as possible.

As stated above, depending on the jurisdiction, a single violation of Model Rule 1.3 can lead to serious consequences, as can neglecting a single case, which is evident from the next case discussed.

Kent

In another Georgia case, attorney Jeffrey Brooks Kent ("Kent") was hired to collect a debt of nearly \$600,000.⁵⁹ Kent failed to serve the corporate defendant with the complaint.⁶⁰ As a result, the complaint

was dismissed against the corporate defendant.⁶¹ Kent then failed to file a proposed scheduling/discovery order before the deadline set by the court.⁶² Next, Kent stipulated to the dismissal of the case without obtaining the consent of his client.⁶³ In addition, he did not communicate with his client during the case, refund the fee paid by the client or send the case file to his client's new counsel upon request.⁶⁴ Kent also failed to submit a response or cooperate with the Investigative Panel regarding his disciplinary case.⁶⁵

The Investigative Panel found that Kent had violated, among other rules, Rule 1.3 regarding diligence.⁶⁶ The Supreme Court of Georgia again noted that violation of Rule 1.3 can result in disbarment.⁶⁷ The Supreme Court of Georgia agreed with the Investigative Panel and held that disbarment was appropriate for Kent.⁶⁸

Missing deadlines is every attorney's worst fear. Preparation, foresight and diligence can prevent such nightmares from occurring. Kent missed a key deadline when he failed to file the proposed scheduling/discovery order on time, and his failure to do so helped lead to his disbarment. Taking the time to calendar when tasks (e.g., filing of pleadings or briefs, service of discovery requests or responses, etc.) are due, making sure reminders and updates are in place, and leaving oneself with enough time to complete those tasks in an adequate, competent manner are essential practices of any lawyer - junior, mid-level or senior. Setting up a process to make sure key deadlines are not missed may include the aid of staff (e.g., secretaries, docketing clerks, paralegals, project assistants) and/or docketing software if possible. Even if those safeguards are employed, the attorney must understand the onus ultimately falls on the lawyer to make sure tasks are completed properly in a timely manner. Failure to do so may result not only in disbarment, as seen in *Kent*, but also in a malpractice action.⁶⁹

Tavon

In New York, an attorney demonstrated clear incompetence and neglect in his handling of numerous clients' cases.⁷⁰ New York Lawyer's Code of Professional Responsibility, Disciplinary Rule ("DR") 6, is entitled "Competence and Diligence."⁷¹ A subset of DR 6, DR 6-101, entitled "Failing to Act Competently," part "A" states, "[A] lawyer shall not: (1) Handle a legal matter which the lawyer knows or should know that he or she is not competent to handle, without associating with a lawyer who is competent to handle it; (2) Handle a legal matter without preparation adequate in the circumstances; (3) Neglect a legal matter entrusted to the lawyer."⁷²

The charges of professional misconduct against attorney Robert Tavon ("Tavon") totaled 34.⁷³ Violations of Rule 6 regarding diligence encompassed six different charges of professional misconduct relating to several matters on which Tavon worked.⁷⁴ For example, in one case, Tavon failed to serve any discovery, filed a "Notice of Trial Readiness" despite being unprepared (apparently to try to force a settlement), failed to appear on the adjourned date for the trial.⁷⁵ As a result of his failure to appear, that case was dismissed.⁷⁶ In another matter involving custody and visitation, five months after being provided with the necessary information, Tavon had failed to file the application for the relief sought by his client.⁷⁷ As a result of his negligence and lack of diligence, along with lack of self-awareness regarding his failures and their consequences to his clients, the New York state court disbarred Tavon.⁷⁸

Tavon is simply another example of the professional consequences, as well as the practical effects on clients, that can result from a lack of diligence by an attorney.

Not only must lawyers be diligent, but they must also be honest.

Lawyers Must Be Honest

Again, President Lincoln offered some advice to potential, and likely current, lawyers about honesty, “Let no young man choosing the law for a calling for a moment yield to the popular belief -- resolve to be honest at all events; and if in your own judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer.”⁷⁹

The states’ codes of professional conduct, along with the Model Rules, provide that a “lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”⁸⁰

Olsen

In *Olsen v. Comm’n for Lawyer Discipline*,⁸¹ attorney Edwin C. Olsen IV (“Olsen”) represented Mary Ellen Logan Bendtsen (“Bendtsen”), who was in her late 80’s when she executed her first will in 2002, leaving everything to her only child Frances Ann Giron (“Giron”). In early 2005, Bendtsen was admitted to the hospital on two separate occasions.⁸² On the first occasion, Olsen and two others, Burgess and McCay, visited Bendtsen.⁸³ Olsen prepared a power of attorney by Bendtsen wherein she gave McCay authority to make financial and medical decisions for Bendtsen.⁸⁴ Olsen also prepared a revocation of a power of attorney by Bendtsen that previously gave Giron that authority.⁸⁵ The second occasion in the hospital for Bendtsen resulted from her massive stroke.⁸⁶ During that stay, Olsen prepared a will for Bendtsen, leaving almost everything to Burgess and McCay.⁸⁷ Bendtsen died shortly after.⁸⁸ Olsen filed the second will with the probate court, Giron filed the first will, and a court eventually admitted the first will to probate and set aside the second will.⁸⁹

Texas’ Commission for Lawyer Discipline contended, among other things, that Olsen violated Rule 8.04(a)(3) by filing the second will.⁹⁰ In particular, the second will consisted of two pages that Bendtsen signed, and the third page was a jurat that was signed by a notary public.⁹¹ The jurat claimed that the notary signed the jurat in front of Bendtsen, which the evidence before the Commission proved untrue, and that evidence also demonstrated that Bendtsen had not signed the will in front of the notary public.⁹² Olsen’s excuse: “it was [‘]erroneously not modified along with the attestation clause in the last minute rush to accommodate the notary’s refusal to go to Baylor’s Emergency room.[’]”⁹³

The Court in *Olsen* concluded that the Commission had a right to summary judgment based on Olsen’s filing the 2005 will and false jurat demonstrating that he violated rule 8.04(a)(3).⁹⁴ The Commission also claimed Olsen violated, among others, rule 3.03(a) regarding candor to the tribunal that forbids an attorney from a making a false statement of material fact or law to the tribunal or court.⁹⁵ The Court did not reach the issues involving rule 3.03(a) as it found he violated 8.04(a)(3) with his filing of false documents.⁹⁶

How many times has an attorney filed something incorrectly with the Court and tried to cover up a deficiency with that filing? If an attorney does so, he could be subject to sanctions under the equivalent of Model Rule 8.4(c) as his conduct could be considered dishonest, fraudulent, deceitful, or involving a misrepresentation.⁹⁷ That attorney may also be subject to Model Rule 3.3, which requires that a lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.⁹⁸ The attorney, in these cases, should either file a Notice of Errata regarding the incorrect filing or, if he knows what he is filing is substantively false, he should refuse to file the document(s) or take remedial measures if he has already filed the document before he knew it was false, which could include withdrawing the document or, if necessary, making disclosure to the court.

The *Olsen* case also had a twist in that the Commission alleged Olsen had committed other violations of the Texas Rules of Professional Conduct, and more importantly, the crimes of attempted theft and securing the execution of a document by deception, the latter of which it later dropped.⁹⁹ Nonetheless, the purported rouse that surrounded the obtaining of the second will apparently played a part in the approach taken by the Commission. Based on Olsen's misconduct, he was disbarred.¹⁰⁰

Marshall

In re Marshall,¹⁰¹ attorney Rachel Y. Marshall ("Marshall") "admitted to misconduct involving gross neglect, assisting a client in conduct that the lawyer knows is illegal or fraudulent, conflict of interest, record-keeping violations, making false statements of material fact or law to a third person, and acts involving dishonesty, fraud, deceit and misrepresentation."¹⁰² In particular, in 2002, Marshall represented the buyer and seller in a real estate scheme Marshall knew was fraudulent, and she falsified closing and loan documents related to the transaction.¹⁰³ She also "falsified information on an application for disability insurance."¹⁰⁴ She settled the civil fraud issues through a settlement with the New Jersey authorities by admitting to the fraud and paying a \$6,000 civil penalty.¹⁰⁵

The Supreme Court of New Jersey suspended Marshall from practice and placed conditions on her reinstatement (i.e., she needed to practice under a supervising attorney as opposed to having a solo practice, and she needed to provide proof from a mental health professional of her fitness to practice law). New York sought to impose reciprocal discipline on Marshall as she was licensed in New York as well.¹⁰⁶

Based on Marshall's serious misconduct, the resulting New Jersey disciplinary order, her failure to appear in the New York disciplinary proceeding and failure to pay her New York bar registration fees (that demonstrated to the Court Marshall's apparent disregard for her law license in New York), the New York Court disbarred her from practicing law in New York even though the Supreme Court of New Jersey only suspended her.¹⁰⁷ This result can be explained either as simply a difference of opinion between states' disciplinary powers regarding the punishment necessary for certain misconduct, or, it may demonstrate that, as evinced in other cases in this article, failing to participate or participate truthfully in the disciplinary process can increase the likelihood that an attorney may be disbarred.

Sex for Fees Arrangement

No, President Lincoln did not have a quote about the need for attorneys to avoid drafting and entering into agreements for attorneys' fees that included payment by sexual relations, but apparently he should have. The Model Rules appropriately include a rule prohibiting a lawyer from having sexual relations with a client unless a consensual relationship existed before the representation commenced.¹⁰⁸

In *Florida Bar v. Tipler*,¹⁰⁹ attorney James Harvey Tipler ("Tipler") admitted that he had an agreement with an eighteen-year-old mother, whom he represented in an aggravated assault case, wherein the client received a "credit of \$200 for each time she engaged in sex with [Tipler]" and a "\$400 credit if she arranged for other females to have sex with him."¹¹⁰ Tipler was subsequently charged with racketeering and multiple counts of prostitution.¹¹¹ He eventually pleaded guilty to one count of solicitation of prostitution.¹¹²

The Florida and Alabama Bars filed complaints against Tipler based on those same facts. Amazingly, in Alabama, Tipler *only received a suspension of fifteen months for his sex for fees arrangement*.¹¹³ The Florida Bar referee, somehow similarly, recommended only suspension for eighteen months, two years probation after reinstatement, and required rehabilitation for Tipler's sex for fees arrangement.¹¹⁴ Based on misconduct in other matters, including but astonishingly not limited to, altering evidence, causing a witness to unknowingly give false testimony, charging his clients excessive fees, stealing clients' money,

neglecting his clients, failing to prosecute his clients' cases, misrepresenting facts to multiple courts, and the sex for fees arrangement, Florida thankfully disbarred Tipler.¹¹⁵ Needless to say, Tipler did not cooperate truthfully during the disciplinary process.¹¹⁶ Nevertheless, a sex for fees arrangement, one might reasonably and logically assume, should be enough for disbarment. It was not in Alabama, but it did help lead to his disbarment in Florida.

Be Careful Who You Hire and Supervise Carefully

Model Rules 5.1 and 5.3 provide for liability based on an attorney's failure to supervise properly attorneys and non-attorneys, respectively. Failure to supervise properly can lead to disastrous results in one's law practice, and it can also help lead to the loss of a law license.

In the *Matter of Anderson*,¹¹⁷ attorney Wade Gunnar Anderson ("Anderson") was a real estate closing attorney. He was approved by First American Title Insurance Company ("FATIC").¹¹⁸ In spring 2005, a number of Anderson's key employees quit, leaving him with just one employee, who was a college student.¹¹⁹ Anderson charged this college student with wiring closing funds, but the employee double wired funds (i.e., paid the recipients twice) from a single closing, and then the employee quit.¹²⁰ FATIC recommended an individual, Whatley, as a "qualified closing assistant" to help Anderson since he no longer had any employees.¹²¹ As a result, Anderson hired Whatley and, within a two-week period, "Whatley double wired funds on *nine* separate closings."¹²² Upon questioning about these mistakes, Whatley quit.¹²³

As a result of the double wires, Anderson's trust account became overdrawn by approximately \$2,300,000 and the recipients did not immediately return the miswired funds, so numerous other trust account checks began bouncing.¹²⁴ Moreover, a temporary restraining order was issued and a receiver was appointed to take over Anderson's law practice.¹²⁵

The Court found that the double wires occurred without Anderson's direction or advance knowledge, but despite taking steps to remedy the situation, Anderson admitted that he failed to supervise his staff and the operation of his practice properly.¹²⁶ The Court was clearly troubled by his lack of supervision.¹²⁷

In another matter, Anderson unilaterally paid himself for his services from escrowed funds despite an escrow agreement he drafted that stated he would not be paid from the escrowed funds.¹²⁸ Anderson also paid himself from the escrowed funds without consent from the client when it was his duty to safeguard those funds for his client.¹²⁹ As a result, the Court found that Anderson violated rules 1.15(I) and 1.15(II) regarding safeguarding client's property.¹³⁰ The maximum penalty for violation of Rule 1.15(I) and Rule 1.15(II)(b) is disbarment.¹³¹ Based on all of the circumstances of Anderson's case, including prior discipline, the Supreme Court disbarred Anderson.¹³²

Model Rule 5.1 requires that "[a] partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct."¹³³ It also requires that "[a] lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct."¹³⁴ Model Rule 5.3 is nearly identical for supervision of nonlawyers, but it basically requires that the reasonable efforts of the supervising attorney reasonably ensure that the nonlawyer's "conduct is compatible with the professional obligations of the lawyer."¹³⁵

Model Rule 5.1(a) "requires lawyers with managerial authority...to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers...will conform to the Rules of Professional Conduct."¹³⁶ Comment 2 to Model Rule 5.1 provides some examples of these policies and procedures, namely those designed to deal with conflicts of interests, identify deadlines for

case tasks to be completed, handle client funds and property, and “ensure inexperienced lawyers are properly supervised.”¹³⁷ Junior attorneys may be eager to take on more responsibility, and senior attorneys may be more than happy to give it to them, but if there is inadequate supervision, the senior lawyer may be disciplined and the client may suffer adverse consequences based on the junior attorney’s inept performance.

Similarly, attorneys must understand that the “measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.”¹³⁸ In *Anderson*, the attorney faced disastrous results when the nonlawyers employed by Anderson miswired the funds, as it resulted in funds being mishandled, trust account checks bouncing, a temporary restraining order removing Anderson from controlling his own law practice, and likely disbarment (although other acts contributed significantly to his disbarment).¹³⁹

Thus, supervising and managing attorneys need to hire attorneys with integrity, good work ethic and a solid ethical foundation. Attorneys must also hire nonlawyers with those same qualities. Nonlawyers are often responsible for handling filings with the court and service on parties, as well as managing other key documents. If these nonlawyers lack integrity or honesty, then fail to complete a task in a timely manner and do not reveal their failure in a timely manner, then the result can be devastating.

In *Mazon*, cited *supra*, the attorney instructed the paralegal to serve the complaint by August 13, 2002, the deadline for filing.¹⁴⁰ The paralegal did not file the complaint until August 16, 2002 after the deadline.¹⁴¹ As a result, the client sued for malpractice and received a \$1.3 million settlement for the malpractice action.¹⁴² The attorney was held responsible for the malpractice action, not the paralegal.¹⁴³ If the attorney’s policy on filings required the paralegal to email him when a filing deadline was approaching and was then met once the filing occurred, then the situation in *Mazon* may have been avoided. Similarly, if the attorney used a process that required significant filings (e.g., complaints, answers, summary judgment motions, etc.) take place at least a day before the due date in case any issues arose with the filing, then the attorney may have been alerted to the fact that the complaint had not been filed yet, and the complaint could have been filed on the next day, i.e., the last day for filing.

Model Rules 5.1(a)(b) and 5.3(a)(b) regarding supervision do not require actual knowledge, ratification or ordering by the supervising attorney of the supervised lawyer or nonlawyer’s misconduct for violations of supervising duties to be found.¹⁴⁴ If, though, the supervising attorney ratifies or orders the misconduct, or knows of the misconduct at a time when it could have been avoided or mitigated, but the supervising attorney fails to take remedial action, then Model Rules 5.1(c) and 5.3(c) provide that the supervising attorney shall be vicariously responsible for that misconduct of the lawyer and nonlawyer.¹⁴⁵ Thus, it is critical for attorneys to hire individuals who are responsible and trustworthy. Failing to do so can lead to a failed practice and the revocation of one’s law license.

Be A Good Citizen

In *the Matter of Fahy*,¹⁴⁶ attorney Francis T. Fahy (“Fahy”) was selected to serve as a juror in a medical negligence case involving laser eye surgery. Fahy believed that the plaintiff should prevail.¹⁴⁷ The jury, however, was deadlocked at eight to four in favor of the defendant.¹⁴⁸ Fahy believed that the judge would not declare a mistrial based on the jury’s impasse, and he believed the judge would require the jury to deliberate for an extended period of time to reach a verdict.¹⁴⁹ Fahy wanted to end his jury duty service in order to return to his legal practice.¹⁵⁰ As a result, Fahy changed his vote in favor of the defendant simply to finish the case.¹⁵¹ In addition, when the judge found out from the foreperson that some jurors changed their votes to end the deliberations, the judge asked the jurors, including Fahy, whether their verdict was within the court’s instructions and the trial evidence - Fahy falsely responded yes.¹⁵²

Plaintiff moved for a new trial based on Fahy's misdeeds, and Plaintiff's motion included Fahy's signed declaration detailing how he changed his vote to end the deliberations and return to his practice.¹⁵³ Fahy testified before the judge that the signature on the declaration was his, but Fahy did not agree with the statements regarding his conduct as a juror; the judge accepted the declaration, but did not find Fahy's testimony about his declaration credible.¹⁵⁴

The Court affirmed the State Bar Court's hearing judge's finding that Fahy "violated his duty as an attorney to comply with the law (§ 6068, subd. (a)), by violating his duties as a civil trial juror."¹⁵⁵ The Court recognized that jury service can be difficult and burdensome for many busy citizens, but it is an "important civic responsibility," that must be fulfilled unless there is undue hardship.¹⁵⁶ Fahy was not facing undue hardship, and, moreover, as a practicing attorney at the time, he knew the importance of juries in the legal system.¹⁵⁷ Fahy's vote change to satisfy his own schedule resulted in a void verdict and additional costs and time to the parties for appellate and more trial court proceedings.¹⁵⁸

Based on Fahy's misconduct as a juror in changing his vote to return to his law practice, his dishonesty to the judge during questioning regarding Fahy's verdict, Fahy's prior suspension (stemming from willful misappropriation of trust funds and other trust account violations) and his failure to take responsibility for his wrongful conduct, the Court disbarred him.¹⁵⁹

Significantly, the Court found that Fahy "caused significant harm to the administration of justice and that his misconduct was serious, **even though he was not acting as an attorney in the case but as a citizen.**"¹⁶⁰

Conclusion

The professional codes of conduct that attorneys must obey require minimal effort to avoid sanctions. Nevertheless, some attorneys continue to make poor decisions and exhibit deplorable work ethic, which can result in punishment. Lawyers must be diligent and honest in their dealings with the courts and clients, and attorneys must be fair with opposing parties and their counsel. Lawyers must also strive to be good citizens. In doing so, attorneys must surround themselves with other attorneys and staff who possess integrity and are committed to professional excellence. If the attorney fails to do any of the aforementioned, the results can be grave.

The combination of repeated misdeeds, failure to cooperate with the disciplinary proceedings, failure to show remorse or acknowledge mistakes, can lead to disbarment. Keep in mind, though, that in some states even one violation of, for instance, diligence, can lead to disbarment, although the cases examined in this article typically involved repeated failures before disbarment occurred. Although it appears that sometimes disbarment may be avoided depending on what state reviews the file (see *Tipler and Marshall*), an attorney's differing conduct in each jurisdiction's disciplinary proceedings, as well as additional misconduct in one of the jurisdictions, may also be the cause for states handing down different sanctions for the same individual.

In any event, attorneys' conduct should not only meet the lower limits required by the professional codes of conduct, but they should also transcend those requirements to help maintain, or in some minds restore, the public's confidence in attorneys and the legal system.

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¹See generally Jack T. Camp, *Thoughts on Professionalism in the Twenty-First-Century*, 81 Tul. L. Rev. 1377.

² Glenn Puit, *Attorney who came to court drunk now sober, committed to rebuilding career*, Law Vegas Review-Journal Nov. 19, 2006, http://www.reviewjournal.com/lvrj_home/2006/Nov-19-Sun-2006/news/10910327.html; and Kay on Discipline, 2010 Cal. LEXIS 6838 (Cal. July 14, 2010).

³ Puit, *Supra* note 2; Kay on Discipline, 2010 Cal. LEXIS 6838, at *1.

⁴ Camp, *supra* note 1; see also, Adam O. Glist, Note, *Enforcing Courtesy: Default Judgments and The Civility Movement*, 69 Fordham L. Rev. 757, 769-778, (2000).

⁵ See American Bar Ass'n., *2009 Survey On Lawyer Discipline Systems*, <http://www.americanbar.org/content/dam/aba/migrated/cpr/discipline/2009sold.authcheckdam.pdf>. [hereinafter *2009 S.O.L.D report*]; MARGARET RAYMOND, *THE LAW AND ETHICS OF LAW PRACTICE*, 10, (West Publishing Co. 2009).

⁶ RAYMOND, *supra* note 5, at 10.

⁷ *2009 S.O.L.D report, supra* note 5. Other sanctions could include, but are not limited to, restitution or retaking and passing the Multi-State Professional Responsibility Exam (“MPRE”). See The Florida Bar’s Board of Governors, *Florida’s Standards for Imposing Lawyer Sanctions*, Lack of Diligence, § 2.8, 17, (Nov. 2000), [http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/18F71B077A612FB785256DFE00664509/\\$FILE/la_wyersanctions03.pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/18F71B077A612FB785256DFE00664509/$FILE/la_wyersanctions03.pdf?OpenElement).

⁸ *2009 S.O.L.D report, supra* note 5.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ RAYMOND, *supra* note 5, at 11.

¹⁶ See, e.g., *In re Kimbrough*, 685 S.E. 2d 713 (Ga. 2009); *In re Kent*, 694 S.E. 2d 665, (Ga. 2010); *In re Tavon*, 66 A.D. 3d 224, (N.Y. App. Div. 2009); *Florida Bar. v. Tipler*, 8 So. 3d 1109 (Fla. 2009).

¹⁷ Abraham Lincoln, Notes for a Law Lecture, July 1, 1850, vol. II, p. 141.

¹⁸ See, e.g., ABA MODEL R. PROF. CONDUCT 1.3; GA. STATE BAR RULE 1.3.

¹⁹ *In re Kimbrough*, 685 S.E. 2d at 715.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ GA. STATE BAR RULE 1.3.

³⁰ GA. STATE BAR RULE 1.3.
³¹ GA. STATE BAR RULE 1.3.
³² GA. STATE BAR RULE CMT. 2.
³³ GA. STATE BAR RULE 1.4; GA. STATE BAR RULE 1.5; GA. STATE BAR RULE 3.5.
³⁴ GA. STATE BAR RULE 8.1.
³⁵ GA. STATE BAR RULE 8.1.
³⁶ *In re Kimbrough*, 685 S.E. 2d at 715.
³⁷ *Id.*
³⁸ *Id.*
³⁹ *Id.*
⁴⁰ *Id.*
⁴¹ *Id.*
⁴² GA. STATE BAR RULE 1.16; GA. STATE BAR RULE 9.3.
⁴³ *In re Kimbrough*, 685 S.E. 2d at 715-16.
⁴⁴ *Id.* at 716.
⁴⁵ *Id.*
⁴⁶ *Id.*
⁴⁷ *Id.*
⁴⁸ *Id.*
⁴⁹ *Id.*
⁵⁰ *Id.*
⁵¹ *Id.*
⁵² *Id.*
⁵³ *Id.*
⁵⁴ GA. STATE BAR RULE 1.3; Compare The Florida Bar’s Board of Governors, *Florida’s Standards for Imposing Lawyer Sanctions*, Lack of Diligence, § 4.4, 29, (Nov. 2000), [http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/18F71B077A612FB785256DFE00664509/\\$FILE/la wyersanctions03.pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/18F71B077A612FB785256DFE00664509/$FILE/la wyersanctions03.pdf?OpenElement), which provides that diligence can result in disbarment when “(a) a lawyer abandons the practice and causes serious or potentially serious injury to a client; or (b) a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client; or (c) a lawyer engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client.”
⁵⁵ See ABA MODEL R. PROF. CONDUCT 1.3, Cmt 3.
⁵⁶ See *id.*; *Mazon v. Krafchick*, 144 P.3d 1168 (Wash. 2006) (holding that co-counsel could not sue his co-counsel where one of the co-counsel’s paralegals failed to serve the complaint timely resulting in a malpractice action against both co-counsel brought by their client and a settlement of \$1.3 million for that malpractice action).
⁵⁷ ABA MODEL R. PROF. CONDUCT 1.4.
⁵⁸ GA. STATE BAR RULE 1.4.
⁵⁹ *In re Kent*, 694 S.E. 2d at 665.
⁶⁰ *Id.*
⁶¹ *Id.*
⁶² *Id.*
⁶³ *Id.*
⁶⁴ *Id.*
⁶⁵ *Id.*
⁶⁶ *Id.*
⁶⁷ *Id.*
⁶⁸ *Id.*
⁶⁹ See generally *Mazon*, 144 P.3d 1168.
⁷⁰ *In re Tavon*, 66 A.D. 3d 224.
⁷¹ N.Y. CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101 (22 NYCRR 1200.30).
⁷² N.Y. CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101(A) (1)-(3) (22 NYCRR 1200.30).
⁷³ *Tavon*, 66 A.D. 3d at 231.
⁷⁴ *Id.* at 225-30.
⁷⁵ *Id.* at 226.
⁷⁶ *Id.*

⁷⁷ *Id.*
⁷⁸ *Id.*
⁷⁹ Abraham Lincoln, Notes for a Law Lecture, July 1, 1850 vol. II, p. 141.
⁸⁰ *See, e.g.*, ABA MODEL R. PROF. CONDUCT 8.4(c) and, *e.g.*, TEX. DISCIPLINARY RULES PROF'L CONDUCT 8.04(a)(3).
⁸¹ *Olsen v. Comm'n for Lawyer Discipline*, 347 S.W.3d 876, 877-78 (Tex. App. Dallas 2011).
⁸² *Id.*
⁸³ *Id.*
⁸⁴ *Id.*
⁸⁵ *Id.*
⁸⁶ *Id.*
⁸⁷ *Id.*
⁸⁸ *Id.* at 880.
⁸⁹ *Id.*
⁹⁰ *Id.*
⁹¹ *Id.*
⁹² *Id.* at 883.
⁹³ *Id.* at 884.
⁹⁴ *Id.*
⁹⁵ *Id.*; TEX. DISCIPLINARY RULES PROF'L CONDUCT 3.03(a).
⁹⁶ *Olsen*, 347 S.W.3d at 884.
⁹⁷ *See* ABA MODEL R. PROF. CONDUCT 8.4(c).
⁹⁸ *See* ABA MODEL R. PROF. CONDUCT 3.3.
⁹⁹ *Id.* at 880.
¹⁰⁰ *Id.* at 878.
¹⁰¹ *In re Marshall*, 871 N.Y.S.2d 764 (N.Y. App. Div. 3d Dep't 2009).
¹⁰² *Id.* at 765.
¹⁰³ *Id.*
¹⁰⁴ *Id.*
¹⁰⁵ *Id.*
¹⁰⁶ *Id.*
¹⁰⁷ *Id.*
¹⁰⁸ *See* ABA MODEL R. PROF. CONDUCT 1.8.
¹⁰⁹ *Florida Bar v. Tipler*, 8 So. 3d at 1112.
¹¹⁰ *Id.* at 1112.
¹¹¹ *Id.*
¹¹² *Id.*
¹¹³ *Id.*
¹¹⁴ *Id.* at 1113-14.
¹¹⁵ *Id.* at 1122.
¹¹⁶ *Id.* at 1121.
¹¹⁷ *Matter of Anderson*, 685 S.E.2d 711, 712 (Ga. 2009).
¹¹⁸ *Id.*
¹¹⁹ *Id.*
¹²⁰ *Id.*
¹²¹ *Id.*
¹²² *Id.*
¹²³ *Id.*
¹²⁴ *Id.*
¹²⁵ *Id.*
¹²⁶ *Id.*
¹²⁷ *Id.* at 713.
¹²⁸ *Id.*
¹²⁹ *Id.*
¹³⁰ *Id.*

¹³¹ Rule 1.15(I) regarding “Safeguarding Property-General” provides, in pertinent part, that a “ lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property...Other property shall be identified as such and appropriately safeguarded...Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property... The maximum penalty for a violation of this Rule is disbarment.” GA. STATE BAR RULE 1.15(I)(c). Rule 1.15(II), SAFEKEEPING PROPERTY- TRUST ACCOUNT AND IOLTA, provides in pertinent part that (a) Every lawyer who practices law in Georgia, whether said lawyer practices as a sole practitioner, or as a member of a firm, association, or professional corporation, and who receives money or property on behalf of a client or in any other fiduciary capacity, shall maintain or have available a trust account as required by these Rules. All funds held by a lawyer for a client and all funds held by a lawyer in any other fiduciary capacity shall be deposited in and administered from such account. (b) No personal funds shall ever be deposited in a lawyer's trust account, except that unearned attorney's fees may be so held until the same are earned. Sufficient personal funds of the lawyer may be kept in the trust account to cover maintenance fees such as service charges on the account. Records on such trust accounts shall be so kept and maintained as to reflect at all times the exact balance held for each client or third person. No funds shall be withdrawn from such trust accounts for the personal use of the lawyer maintaining the account except earned attorney's fees debited against the account of a specific client and recorded as such... The maximum penalty for a violation of Rule 1.15(II)(a) and Rule 1.15(II)(b) is disbarment. The maximum penalty for a violation of Rule 1.15(II)(c) is a public reprimand.” GA. STATE BAR RULE. 1.15(II)(c).

¹³² *Anderson*, 685 S.E.2d at 713.

¹³³ ABA MODEL R. PROF. CONDUCT 5.1.

¹³⁴ *Id.*

¹³⁵ ABA MODEL R. PROF. CONDUCT 5.3.

¹³⁶ ABA MODEL R. PROF. CONDUCT 5.1, Cmt 2.

¹³⁷ *Id.*

¹³⁸ ABA MODEL R. PROF. CONDUCT 5.1, Cmt 1.

¹³⁹ *Anderson*, 685 S.E.2d at 712-13.

¹⁴⁰ *Mazon*, 144 P.3d at 1170.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ ABA MODEL R. PROF. CONDUCT 5.1, 5.3.

¹⁴⁵ *Id.*

¹⁴⁶ *In the Matter of Fahy*, No. 05-O-05132, 2009 WL 567997, at *1 (Cal. State Bar Ct. Mar. 6, 2009).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at *2.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at *5. “It is the duty of an attorney to do all of the following: (a) To support the Constitution and laws of the United States and of this state.” CAL. BUS. & PROF. § 6068(a)(2004).

¹⁵⁶ Cal. Rules of Court, rule 2.1008(a).

¹⁵⁷ *Fahy*, 2009 WL 567997 at *5.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at *8.

¹⁶⁰ *Id.* (emphasis added).