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Introduction

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CASE NOTES

INTRODUCTION

*Kathryn A. Stephens**

There is no escaping the awareness that nearly every aspect of our lives, from pleasure reading to national defense, is being transformed by advances in technology and globalization. These developments—some of which are truly astounding in nature and reach—are changing the way we think, make decisions, react to information, and relate to one another. It is in the context of these changes that the ABA House of Delegates in August 2012 accepted proposals made by the ABA Commission on Ethics 20/20 to update the Model Rules of Professional Conduct governing lawyers and legal professionals.¹ While these changes do not automatically modify individual states' ethical rules applicable to lawyers, they provide the basis for many states' rules; courts frequently apply the ABA rules to lawyers and refer to them to inform determinations of standard of care.²

Some of the recently accepted changes include revisions to existing rules

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1. For the full 2012 amendments, see *August 2012 Amendments to ABA Model Rules of Professional Conduct*, A.B.A., http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120808_house_action_compilation_redline_105a-f.authcheckdam.pdf (last visited Feb. 19, 2013).

2. See, e.g., *In re Proeducation Int'l, Inc.*, 587 F.3d 296, 299 (5th Cir. 2009) (recognizing the Texas Disciplinary Rules of Professional Conduct are not the “sole authority governing a motion to disqualify” and additionally considering the Model Rules (quoting *In re Am. Airlines*, 972 F.2d 605, 610 (5th Cir. 1992))).

requiring lawyers to make efforts to safeguard information relating to a client's representation against unauthorized access by third parties;³ the application of existing rules regarding advertising and client solicitation to internet-based technologies;⁴ the introduction of new rules permitting limited practice pending admission to facilitate a lawyer's short-notice relocation to a new jurisdiction; and expanding a lawyer's obligations to include staying abreast of the risks and benefits associated with relevant technology.⁵

The adopted changes, and others still under consideration, acknowledge trends towards cloud computing, the prevalence of various forms of electronic communication, and the mobility of lawyers between firms and among jurisdictions. As professionals entrusted with protecting the rights of others, we must continually consider how these changes affect our obligations to our clients and the courts.

While the tools we use and our modes of interaction may be evolving, placing new obligations on our profession, the basic responsibilities of a lawyer—to keep clients fully informed,⁶ maintain knowledge of the law,⁷ exercise sound judgment,⁸ and protect confidences—remain remarkably unchanged. The cases examined in the following Case Notes highlight this truth: the more things change, the more they stay the same.⁹

3. MODEL RULES OF PROF'L CONDUCT R. 1.6(c) & cmt. 18 (2012).

4. *Id.* R. 7.2 & cmt. 3; *id.* R. 7.3 & cmt.

5. *Id.* R. 1.1 cmt. 8.

6. The Supreme Court of Louisiana concluded a binding arbitration clause in an attorney retention agreement was unenforceable based on the lawyer's failure to fulfill his obligations of "utmost fidelity and forthrightness" when the client later sued for legal malpractice. *Hodges v. Reasonover*, 103 So. 3d 1069, 1071 (La. 2012). The lawyer's duties of candor and loyalty required full disclosure of the legal consequences of the agreement, which the court found lacking, subjecting the attorney to malpractice litigation. *Id.* at 1077–78.

7. A recent opinion of a Tennessee appellate court alluded to questions of malpractice in estate planning. An attorney hired to protect a client's assets through trust creation may have a duty to research the rules governing establishment of asset protection trusts, not only in the jurisdiction in which the client resides, but also in other jurisdictions, to determine whether adoption of the Uniform Trust Code provisions in a particular state may subject estate assets to a creditor's reach. See *In re Estate of Stidham*, E2011-02507-COA-R3-CV, 2012 WL 3612386, at *6 (Tenn. Ct. App. Aug. 23, 2012) (holding Tennessee law, which has adopted the Uniform Trust Code, allows creditors to "recover property held in a revocable trust when the assets held in the estate are inadequate").

8. A California appellate court held that attorneys identified as "stand-by" counsel for purposes of trial only may not avoid liability for malicious prosecution by intentionally avoiding the obligation to become fully informed as to the validity of claims asserted in litigation, even if the case never proceeds to trial. *Cole v. Patricia A. Meyer & Assocs.*, 142 Cal. Rptr. 3d 646, 666 (Ct. App. 2012).

9. In 1839 Alphonse Karr became editor of the French daily newspaper *Le Figaro* and started a monthly journal, *Les Guêpes*, a publication noted for its satirical tone. His aphorisms are frequently quoted, including "plus ça change, plus c'est la même chose"—literally, "the more it changes, the more it's the same thing"—often translated as "the more things change, the more they stay the same."

The *St. Mary's Journal on Legal Malpractice and Ethics* is the only student-run law journal in the country to focus on legal malpractice. These Case Notes represent the Malpractice Journal's dedication to this area of the law by serving as an update for practicing attorneys each year on the major cases and changes in the law. For that reason, the Case Notes are available online for quick reference to practitioners and judges everywhere. The website is www.stmaryslawjournal.org.