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Even Judges Don't Know Everything: A Call for a Presumption of Admissibility for Expert Witness Testimony in Lawyer Disciplinary Proceedings The Fourth Annual Symposium on Legal Malpractice and Professional Responsibility.

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EVEN JUDGES DON'T KNOW EVERYTHING: A CALL FOR A PRESUMPTION OF ADMISSIBILITY FOR EXPERT WITNESS TESTIMONY IN LAWYER DISCIPLINARY PROCEEDINGS

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I. INTRODUCTION

A lawyer charged with a disciplinary violation is in a precarious position. Not only has the lawyer been accused of being "unethical," but he or she faces prosecution by an adversary typically staffed with professional prosecutors who are familiar with the system's often-arcane procedures and backed up by substantial financial resources.[1] In cases where the accusations involve serious misconduct the lawyer may face suspension or disbarment from practice if found guilty.[2] Yet, because lawyer discipline is not considered a "criminal" proceeding, the full panoply of due process

1. *See Survey on Lawyer Discipline Systems*, ABA CTR. FOR PROF'L RESPONSIBILITY, Survey on Lawyer Discipline Systems, chart VI (2002), *available at* http://www.abanet.org/cpr/discipline/sold/02-ch6.xls (last visited Feb. 28, 2005) (noting that bar prosecutions typically are financed by funds collected from lawyers by a state supreme court or other state body or appropriated from the general budget of the state). Of fifty-three jurisdictions reporting, nine have their lawyer discipline systems funded through the legislature, twenty-five are funded by supreme court dues or fees assessments, and nineteen are funded through bar association dues. *Id.* Some of the "bar associations" that are the source of operating funds actually are "unified" bars, that is, bars to which lawyers are required to belong in order to be licensed to practice in the state. *Id.*; *see also* Bradley A. Smith & Allan Falk, *The Limits of Compulsory Professionalism: Does a Unified Bar Make Sense for Michigan*, *available at* http://www.mackinac.org/article.asp?ID=247 (last visited Dec. 16, 2004) (suggesting such associations may be more accurately described as "compulsory" bars).

2. *See generally* ABA Joint Comm'n on Prof'l Sanctions (1992) (discussing the standards for imposing sanctions).

protections provided to a criminal defendant is not available to the lawyer accused of unethical conduct.[3]

Added to these daunting circumstances is the fact that judges or hearing panels before whom discipline cases are tried often are not experts in legal ethics. They may have no actual experience in practicing the law of lawyering,[4] and their formal "training" may consist of preparing for the Multistate Professional Responsibility Exam many years ago or sitting through some continuing legal education sessions that touch on the topic.

In order to mount an effective defense against the disciplinary charges, an accused lawyer may want to introduce expert testimony on his or her behalf. Will such testimony be admitted? Unfortunately for the accused lawyer, the answer is not at all clear. The relatively few jurisdictions that have directly addressed the question have taken differing approaches, and most jurisdictions apparently leave the question to the discretion of the judge or panel trying the case.

This Article argues for the adoption of a presumption that expert testimony offered by an accused lawyer in a lawyer discipline case is admissible. Lawyers facing charges that could result in the loss of their livelihood—in essence, "capital punishment" in the economic sense—should be afforded every reasonable opportunity to defend themselves. Routinely admitting expert testimony relating to the alleged offenses will be a strong step in the right direction. Reasons supporting the adoption of such a presumption are discussed more fully in Section IV and include the nature of the ethics

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3. *See* discussion *infra* Part IV. B (discussing the nature of the disciplinary process).

4. The law of lawyering is found largely in the state ethics codes to which lawyers must adhere in order to remain in good standing as members of a licensed profession. In most states these codes are based on the ABA Model Rules of Professional Conduct. *See generally* MODEL RULES OF PROF'L CONDUCT (2004) (providing a uniform ethics code). In a few states they are based on the ABA Model Code of Professional Responsibility, which was replaced by the Model Rules of Professional Conduct in 1983. MODEL CODE OF PROF'L RESPONSIBILITY (1984); MODEL RULES OF PROF'L CONDUCT (2004). In other states, as is the case in California, ethics codes are based on the state's own formulation of ethical norms. The conduct of lawyers, however, is governed not only by these ethics codes, but also by other authorities such as case law (e.g., disciplinary, legal malpractice, breach of fiduciary duty, disqualification, attorney fees), statutes (e.g., attorney fees), and rules of procedure (e.g., civil procedure, evidence). A practitioner who does not specialize in ethics representations faces a daunting task in keeping up with current developments in each of these areas.

rules, the characteristics of the disciplinary process, and the harmony of such a presumption with accepted evidentiary practice.

Expert witness testimony in a disciplinary case can be used for a variety of purposes. Sometimes it is used for factual purposes, relating to physical evidence in the case. An example of such a use is to show that the accused lawyer (called the "respondent" in disciplinary parlance) signed a questioned document or was otherwise connected to improperly signed documents.[5] Another common use is to demonstrate that the accused suffered from some type of condition or disability and to tie that condition to the lawyer's culpability for the offense, usually in an effort to mitigate disciplinary sanctions.[6] This Article, however, is not concerned with those uses

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5. *See, e.g.*, Corn v. State Bar of Cal., 439 P.2d 313, 315 (Cal. 1968) (en banc) (reviewing handwriting experts' testimony that petitioner attempted to disguise his handwriting when he forged the endorsement of a check in his client's name); *In re* Lopes, 770 A.2d 561, 564 (D.C. 2001) (stating that an expert witness testified that respondent attempted to simulate his clients' signatures); *In re* Paris, 262 A.D. 474, 477 (N.Y. App. Div. 1941) (Martin, P.J., dissenting) (noting that a handwriting expert testified that the signatures on five different affidavits "were 'written by one person and not by the various persons whose names are signed'"); State *ex rel.* Okla. Bar Ass'n v. Scroggs, 70 P.3d 821, 833 (Okla. 2003) (reporting the testimony of two law clerks that contradicted the respondent's claim in a letter to the Oklahoma Bar that he instructed them to file a petition in court); *In re* Kraus, 616 P.2d 1173, 1176 (Or. 1980) (referring to a written report provided by the Oregon State Bar that concluded forgery had occurred and noting that the report was received by the court with the stipulation that the author was qualified as an expert witness and would testify as such if called upon); *In re* Guarnero, 93 P.3d 166, 169 (Wash. 2004) (en banc) (discussing expert testimony that the alleged forgery in question was a "simulated forgery," meaning that it was drawn or traced as opposed to fluidly written).

6. *See, e.g.*, *In re* Jett, 882 P.2d 414, 421 (Ariz. 1994) (en banc) (Zlaket, J., dissenting) (evaluating expert testimony concerning respondent's actions in light of battered woman syndrome); *In re* Greene, 701 A.2d 1061, 1062 (Del. 1997) (discussing expert testimony concerning respondent's drug addiction); *In re* Marshall, 762 A.2d 530, 533 (D.C. 2000) (discussing trial court expert testimony that respondent's cocaine addiction substantially affected his misconduct); *In re* Haith, 742 N.E.2d 940, 940-41 (Ind. 2001) (looking at expert testimony that respondent, who had three convictions for driving under the influence of alcohol, was alcohol dependent); Comm'n Prof'l Ethics of Conduct of the Iowa State Bar Ass'n v. Barrer, 495 N.W.2d 756, 758 (Iowa 1993) (discussing expert testimony concerning alcoholism); *In re* Marinoff, 819 So. 2d 305, 312 (La. 2002) (indicating that respondent "introduced no evidence, such as testimony from expert witnesses, which would have established that the head injury he suffered in the accident was sufficient to impair his responsibility for the statements" that led to disciplinary proceedings); Attorney Grievance Comm'n v. Garfield, 797 A.2d 757, 762 (Md. 2002) (assessing expert testimony that the "root cause" of respondent's professional lapses was drug abuse); *In re* Collins, 659 N.W.2d 754, 754 (Minn. 2003) (discussing a letter from an expert witness stating that respondent suffered from an unspecified "disability"); *In re* Tonzola, 744 A.2d 162, 166 (N.J. 2000) (examining expert testimony concerning bipolar disorder and respondent's misconduct); *In re of* Siegel, 193 A.D.2d 181, 184 (N.Y. App. Div. 1993) (noting that expert testimony that

of expert testimony. Rather, the focus is on expert testimony of the type at issue in the cases outlined in Section III. That testimony concerns issues such as the way that an ethics rule is understood by practitioners, the reasonableness of a lawyer's conduct in light of the terms of the relevant ethics rules, and whether the lawyer violated the rules as charged.

A "not-so-hypothetical" problem is used in Section II to set the stage for our discussion. That is followed in Section III by a review of the relevant case law from throughout the United States. The reasons in favor of a presumption of admissibility are considered in Section IV, and a description of how the presumption would operate in practice is presented in Section V.

II. A NOT-SO-HYPOTHETICAL PROBLEM

A look at a not-so-hypothetical situation will put the problem in perspective. Assume that you are a lawyer who sometimes teaches a professional responsibility course at the local law school. In fact, early in your career you prosecuted disciplinary cases for your state bar. You have served on your state bar Ethics and Lawyer Advertising Committee, have represented lawyers in state bar disciplinary proceedings, have consulted with and advised law firms on ethics issues, have written articles on ethical topics, and have testified as an expert witness in legal malpractice cases and lawyer disqualification hearings.

A former student of yours, who is now a practicing lawyer, has come to you with a problem. The lawyer is the subject of several complaints filed with the state bar. The bar recently made a finding of probable cause and has instituted formal disciplinary proceedings against your former student, the respondent. The formal complaint charges, in separate counts, that the respondent violated

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respondent's neglect in client's matters was largely attributable to depression); *In re* Rau, 533 N.W.2d 691, 695 (N.D. 1995) (indicating that respondent failed to offer expert testimony regarding his asserted mitigation due to mental illness); Akron Bar Ass'n v. Goodlet, 792 N.E.2d 1072, 1073 (Ohio 2003) (discussing respondent's severe depression); Office of Disciplinary Counsel v. Christie, 639 A.2d 782, 785 (Pa. 1994) (indicating that expert testimony provided that the respondent suffered from a psychiatric condition causing involuntary attraction to minor and adult males); *In re* Perry, 352 S.E.2d 479, 480 (S.C. 1987) (reviewing expert testimony that respondent's conduct was a direct result of alcohol and drug addiction); *In re* Petersen, 846 P.2d 1330, 1352 (Wash. 1993) (en banc) (discussing expert testimony when respondent pleads physical or mental disability as a mitigating factor).

your state's versions of American Bar Association Model Rules of Professional Conduct 1.15(d)[7] and 7.1.[8]

Regarding the first count, the respondent was representing a client in a personal injury matter. She was the client's second lawyer in the case. When the tortfeasor's insurance company offered the policy limits ($50,000), the respondent advised the client to accept and the client agreed. The respondent received the proceeds and placed them in her trust account. The respondent paid the outstanding expenses and satisfied liens (colloquially called "letters of protection") that she had issued to medical providers with the client's written authorization. As the respondent was preparing to disburse the remaining proceeds to her client, a chiropractor called her and demanded to be paid. The respondent did not have a copy of the letter of protection that the chiropractor claimed to be relying upon. The chiropractor told the respondent that the letter had been issued by the client's first lawyer. The client told the respondent that "it was possible" that he had authorized the letter of protection, but that he did not remember doing so. In any event, the client did not want the respondent to pay the medical provider. The respondent's attempts to negotiate an agreeable settlement were unsuccessful, so she ended up depositing the money in the court registry and filing an interpleader action. The chiropractor produced a copy of the letter of protection (even though he had not previously provided it to the respondent, despite her requests) and the court released the funds to him. The chiropractor then filed a complaint with the state bar alleging that the respondent had an ethical obligation under Rule 1.15 to promptly pay her and that the interpleader action was unnecessary.

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7. MODEL RULES OF PROF'L CONDUCT R. 1.15(d) (2004). The rule provides:

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

Id.

8. MODEL RULES OF PROF'L CONDUCT R. 7.1 (2004). The rule provides: "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 contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading." *Id.*

The second count of the disciplinary complaint concerns a statement on the respondent's web site. The home page of her web site contains a link titled "Click here to see our success stories" that leads to a page truthfully listing favorable settlements and verdicts that the respondent actually has obtained for clients. All of the information is true, but there is no explanation or disclaimer to the effect that "individual results may vary." The state bar, reacting to a complaint filed by one of the respondent's competitors, has alleged that the information on the respondent's web site is misleading and therefore improper under Rule 7.1. Specifically, the bar has alleged that the statements in question are misleading because they raise "unjustified expectations" about results the respondent could achieve for potential clients.[9]

The disciplinary charges are anything but minor to your former student, the respondent. Allegations involving trust funds are *always* serious, and an additional problem is the fact that the respondent has had disciplinary sanctions imposed against her on several prior occasions—including an unrelated advertising violation. With her record, being found guilty of the new charges is almost certain to result in a suspension from practice. As a solo practitioner, a suspension of any length will have devastating consequences on her financial situation.

Your former student would like to hire you to testify as an expert witness at her disciplinary hearing. Based on your substantial experience, you could truthfully testify to things such as:

- Many experienced lawyers view the ethics rules as unclear in these situations.
- The respondent acted reasonably in researching the issues, in her decision-making processes, and in her conduct.
- An experienced lawyer, competent in these areas, would have acted similarly in these situations.
- The Bar's Ethics and Lawyer Advertising Committee likely would have advised your former student (if only she had asked!) that in-

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9. *Id.* at R. 7.1 cmt. 3. Comment 3 to Rule 7.1 of the Model Rules of Professional Conduct provides in pertinent part:

> An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case.

Id.

terpleader was an ethically permissible option and that the web site statements fell in a "gray area" due to the lack of conclusive authority on point.
- Bar counsel in the several disciplinary branch offices around the state often take differing approaches concerning whether and how to prosecute lawyers in these types of situations.
- Under the totality of these circumstances, your former student did not violate the rules of professional conduct as alleged.

Normally you require a substantial retainer (including a hefty minimum engagement fee) for work as an expert witness. You would like to do the same in this case, but, being the ethical lawyer that you are, you do not want to accept the money from the former student without a reasonable probability that your testimony will be admitted in the case. Will the judge permit your expert witness testimony?[10]

III. The Existing Law (or Lack Thereof)

Considering the large number of disciplinary complaints filed against lawyers throughout the United States,[11] there is relatively little reported case law directly addressing the admissibility of expert witness testimony in lawyer disciplinary proceedings. These decisions range from cases concluding that such evidence is admis-

10. In the interest of full disclosure, it must be noted that the problem is more than an academic one for the author. The author has been asked to serve as an expert witness in discipline matters on various occasions. In some cases, he has been asked by the bar, in other cases, by the respondent. In some cases his testimony has been admitted; in other cases his testimony has been excluded. In one case in which expert testimony of the author was excluded, the respondent sought review of the judge's decision in the state supreme court. Foregoing an opportunity to provide needed guidance to the bench and bar, the Florida Supreme Court, in a lengthy opinion, completely ignored the issue of the admissibility *vel non* of the proffered testimony. Fla. Bar v. Bailey, 803 So. 2d 683 (Fla. 2001). The most ironic situation involving the author occurred during August 2004. During a break in a deposition in which the author was testifying *on behalf of the state bar*, he received a telephone call informing him that the bar had successfully obtained an order *excluding* him from testifying on behalf of a respondent in another, unrelated disciplinary case. It should be apparent that the lack of any real certainty, or even firm guidelines, concerning admissibility of expert testimony in discipline cases presents very real practical problems for respondents who are considering retaining an expert.

11. *See Survey on Lawyer Discipline Systems*, ABA Ctr. for Prof'l Responsibility, Survey on Lawyer Discipline Systems, chart I (2002), *available at* http://www.abanet.org/cpr/discipline/sold/02-ch1.xls (last visited Feb. 28, 2005) (indicating in 2002, state disciplinary agencies throughout the United States received more than 120,861 complaints against lawyers). Of these, 7322 warranted the filing of formal charges, and formal charges actually were filed against 4460 lawyers. *Id.*

sible, to cases holding that expert testimony is not required, to cases stating that the testimony is not admissible in *that* case, but might be admissible in others, to cases purporting to announce that such testimony is never admissible. As will be shown, in the cases in the latter category, either no rationale is given for the decision or the rationale offered is faulty.

Courts that have declined to admit expert testimony appear to base their decisions on two grounds. The primary justification is that expert testimony that expresses an opinion on "the ultimate issue" in the case—that is, whether the respondent violated the rules as charged—somehow invades the province of the trier of fact (a judge or hearing panel).[12] In actuality, this fear is inconsistent with and has been rejected by the Federal Rules of Evidence.[13] A second reason, perhaps the most serious to disciplinary authorities, is the concern that by routinely allowing respondents to introduce expert defense testimony, the disciplinary agencies will incur greater costs.[14]

Cases in a number of jurisdictions do not directly address the admissibility question, but simply indicate that expert testimony was admitted at the disciplinary hearing. Although these cases do not shed much light on the precise question of admissibility, their facts and circumstances provide some examples of an area in which expert testimony has been useful. Some of these cases are briefly discussed below.[15]

A. *Cases Concluding That Expert Testimony Is Admissible*

Decisions in California, Nebraska, and Texas have expressly concluded that expert testimony is admissible in lawyer disciplinary proceedings. Moreover, expert testimony appears to be regularly used in California disciplinary cases.

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12. *See* NEB. SUP. CT. R. 10, *available at* http://court.nol.org/rules/Discipli_03.htm (last visited Feb. 28, 2005) (noting the trial of an accused lawyer occurs before a judge, referred to as a "referee"). In other systems, the trial occurs before a multi-member hearing panel. *See* MINN. RULES ON LAW. PROF'L RESPONSIBILITY R. 9, *available at* http://www.courts.state.mn.us/lprb/rlpr.html (last visited Feb. 28, 2005) (providing panel proceedings to hear charges of "unprofessional conduct").

13. *See* discussion *infra* Part IV.C. (discussing the admissibility presumption).

14. *See* discussion *infra* Part IV.D. (discussing the admissibility presumption).

15. *See* discussion *infra* Part III.E. (detailing cases where expert testimony was admitted without discussion).

The most expansive use of expert witness testimony in lawyer disciplinary proceedings appears to be in California. Perhaps this is not surprising, given the large number of California lawyers[16] and the state's highly developed disciplinary system.[17] The use of expert testimony in California disciplinary cases is not uncommon, even when such testimony goes to the "ultimate issue" in the case. California decisions have concluded that "ultimate issue" testimony is admissible.

Specifically, *In re Harney*[18] concerned a respondent lawyer who was charged with collecting an illegal fee, obtaining client and court consent to the fee by recklessness or gross neglect, and failing to reveal material information about statutory limits applicable to the fee to the client's conservator and the court.[19] The respondent's expert testified "that respondent was innocent of misconduct."[20] The California State Bar Court rejected this testimony, but in a footnote made this statement about admissibility of expert testimony in disciplinary proceedings:

> At the hearing below, Respondent presented the expert testimony of Professor Erwin Chemerinsky of the USC School of Law. Chemerinsky had taught a variety of courses, including constitutional law and professional responsibility. Chemerinsky opined that respondent's fee was not a contingency fee and that respondent did not commit any of the misconduct charged. Chemerinsky's testimony concerned questions of law on the ultimate issues before the hearing judge. *Although Chemerinsky could opine on ultimate issues, those questions are ultimately for the independent decision-making of the State Bar Court and Supreme Court.*[21]

The California Evidence Code section referenced by the court provides: "Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate

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16. *See* http://members.calbar.ca.gov/search/demographics.aspx (last visited Feb. 21, 2005) (noting that as of January 30, 2005, 200,220 lawyers were admitted to the California State Bar).

17. *See* http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10173&id=2111 (last visited Feb. 21, 2005) (explaining that the State Bar Court operates as "the administrative arm of the California Supreme Court in the adjudication of disciplinary and regulatory matters . . . ").

18. 3 Cal. State Bar Ct. Rptr. 266 (Review Dep't 1995).

19. *In re* Harney, 3 Cal. State Bar Ct. Rptr. 266, 273, 1995 WL 170223, at *1 (Review Dep't 1995).

20. *Id.* at 277.

21. *Id.* at 277 n.7 (emphasis added) (citations omitted).

issue to be decided by the trier of fact."[22] This provision corresponds to Federal Rule of Evidence 704(a), which states: "Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."[23]

The approach expressed in *Harney* best serves respondent lawyers and the disciplinary system. Expert testimony should be freely admissible, even if it concerns the issue of whether the respondent violated the rules as charged. The weight, if any, to be given to such testimony should be left to the trier of fact.

Subsequent California cases have followed the *Harney* approach. In one such a case the respondent was charged with misappropriating client funds and failing to account properly for funds.[24] On review in the state bar court, respondent argued that the testimony of his expert, a certified bankruptcy specialist, "provided uncontradicted evidence that respondent's conduct in representing TRC [, his client,] was within the standard of care of a bankruptcy practitioner and therefore reasonable."[25] The court disagreed, noting that the witness may have been qualified to testify to ultimate issues within his expertise – bankruptcy – but that "respondent failed to establish that [the witness] had any special knowledge of or experience with state bar disciplinary matters, or the rules and regulations governing professional responsibility."[26] Accordingly, the court treated the witness's testimony with "minimal weight, particularly since this case does not involve the standard of care of bankruptcy practitioners, but rather involves the failure to adhere to the ethical duties and fiduciary obligations to maintain client trust funds under the rules and statutes governing professional conduct."[27] Similarly, in a reinstatement case[28] the court noted that it was permissible for a witness to testify concerning the ultimate is-

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22. CAL. EVID. CODE ANN. § 805 (Deering 2004).

23. FED. R. EVID. 704(a).

24. *In re* Davis, 4 Cal. State Bar Ct. Rptr. 576, 2003 WL 21904732, at *10 (Review Dep't 2003).

25. *Id.* at *10.

26. *Id.*

27. *Id.*

28. *In* re Bodell, 4 Cal. State Bar Ct. Rptr. 459, 2002 WL 31654998, at *4 (Cal. Bar Ct. 2002). A lawyer who has been suspended or disbarred from practice typically must successfully complete certain procedures in order to be reinstated to active status as a member of the bar. *Id.*

sue—the lawyer's qualifications for reinstatement—although the actual decision on the issue was reserved for the court.[29]

Nebraska has also concluded that an expert witness may testify as to the ultimate issue in a disciplinary case. In *State ex rel. Nebraska State Bar Ass'n v. Miller*,[30] the respondent lawyer was charged with violating the following disciplinary rules and statutes: filing an unnecessary lawsuit from the motive of personal interest, in order to increase his fee allegedly due under the contract;[31] deceitful acts with intent to deceive a court or a party to an action;[32] conduct involving dishonesty, deceit, or fraud;[33] charging a clearly excessive fee;[34] and failing to properly preserve funds belonging in part to a client (by removing a disputed fee from his trust account).[35] Respondent had represented a mother and her son who were attempting to obtain a refund of the amounts overpaid by insurers to a hospital that cared for the son.[36] Hours after the hospital notified respondent's partner that the hospital and the insurer had reached an agreement on a refund, the respondent filed suit against the hospital.[37] After receiving the settlement proceeds, respondent deposited them in his trust account and withdrew money to pay himself the full amount of fee he claimed was due, despite the fact that the clients disputed his right to this fee.[38] The clients hired another lawyer to represent them in the fee dispute with the respondent.[39]

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29. *See id.* at *4 n.4 (discussing respondent's expert testimony).

30. 602 N.W.2d 486 (Neb. 1999) (per curiam).

31. State *ex rel.* Neb. State Bar Ass'n v. Miller, 602 N.W.2d 486, 491-92 (Neb. 1999); *see also* NEB. REV. STAT. § 7-105(6) (Reissue 1997) (prohibiting an attorney's motive of passion or interest from encouraging an action).

32. NEB. REV. STAT. §. 7-106 (Reissue 1997) (prohibiting the use of deceit or collusion with intent to deceive).

33. *See* NEB. CODE OF PROF'L RESPONSIBILITY DR 1-102(A) (2004) (defining attorney misconduct).

34. NEB. CODE OF PROF'L RESPONSIBILITY DR 2-106 (2004) (outlining the parameters of legal services fees).

35. NEB. CODE OF PROF'L RESPONSIBILITY DR 9-102 (2004) (detailing appropriate handling procedures for client's property and funds).

36. *Miller*, 602 N.W.2d at 490-91.

37. *Id.* at 491. The referee in the disciplinary proceeding found that respondent's real motive in filing suit was simply to increase the amount of fee he allegedly was due under the contingent fee contract (which provided for respondent to receive one-third of the recovery if settlement was reached before filing suit, and forty percent if suit was filed). *Id.* at 495.

38. *Id.* at 491.

39. *Id.*

Interestingly, in a very unusual turn of events, at the disciplinary trial before a referee, the lawyer who was representing respondent's former clients in the fee dispute was permitted to testify over respondent's objection, as an expert witness regarding the propriety of respondent's fee.[40] On review in the state supreme court, respondent contended that the referee erred in allowing the lawyer to testify.[41] The supreme court, however, rejected this contention, concluding that expert witness testimony is admissible in disciplinary proceedings within the referee's sound discretion.[42] The testifying lawyer had been properly qualified as an expert, and his "opinion with respect to the reasonableness of the fee is highly relevant because that fee is a major issue in this disciplinary case."[43] Any possible bias of the expert witness—who, after all, represented the respondent's former clients in their fee dispute—went "to the credibility of [the expert's] testimony, not its admissibility."[44]

The Supreme Court of Nebraska recognized that expert testimony as to the reasonableness of a fee is "highly relevant" and should be admitted in a disciplinary case involving charges of improper fees.[45] Similarly, expert testimony should be routinely admitted in connection with the alleged violations of many other rules that have elements of reasonableness or that could only be interpreted and applied in light of external standards.[46]

Although expert witness testimony is not *required* in Texas disciplinary cases,[47] a recent Texas decision permitted an expert witness to testify to the ultimate issue in a case in which the respondent was accused of violating the lawyer advertising rules. The respondent in *Rodgers v. Commission for Lawyer Discipline*[48] was

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40. *Id.* at 498.

41. State *ex rel.* Neb. State Bar Ass'n v. Miller, 602 N.W.2d 486, 498 (1999).

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *See* discussion *infra* Part IV.A (discussing ethics rules supporting a presumption of admissibility).

47. *See* Hawkins v. Comm'n for Lawyer Discipline, 988 S.W.2d 927, 962 (Tex. App.—El Paso 1999, pet. denied), *cert. denied*, 529 U.S. 1022 (2000) (finding that expert testimony interpreting the Texas Disciplinary Rules of Professional Conduct is not necessary since interpretation of the rules is a matter of law for the court and not within the province of the jury); *see also infra* text accompanying notes 55-62 (summarizing the *Hawkins* holding).

48. 151 S.W.3d 602 (Tex. App.—Fort Worth 2004, pet. denied).

charged with improper use of a trade name, misleading advertising, failing to include required disclosures, and failing to file his advertisement with the Texas Bar's Advertising Review Committee.[49] The case was tried to a jury, which found respondent guilty of the charged violations.[50]

Respondent appealed, contending that the trial court abused its discretion in admitting the testimony of the state bar's expert witness. The expert, who was the chair of the State Bar's Advertising Review Committee, testified that in her opinion, respondent violated the rules as charged.[51] Respondent claimed on appeal that the bar's expert "used the wrong legal standards to determine whether violations occurred, that she was unqualified, and that her testimony is unreliable."[52] Evaluating the trial court's decision in light of Texas Rule of Evidence 702,[53] the Court of Appeals rejected these assertions and concluded that the trial court did not abuse its discretion in admitting the testimony.[54]

B. *Cases Concluding That Expert Testimony Is Not Required*

Four jurisdictions (Texas, North Dakota, Massachusetts, and Vermont) have held that expert testimony is not *required* in lawyer disciplinary cases, although case law from one jurisdiction (Florida) indicates that expert testimony may be necessary to prove at least some types of charges. The general proposition that expert testimony is not required is a correct one. Lawyers who are accused of ethical breaches should be able to freely introduce expert testimony in their defense, but should not be required to do so.

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49. Rodgers v. Comm'n for Lawyer Discipline, 151 S.W.3d 602, 607-08 (Tex. App.—Fort Worth 2004, pet. denied).

50. *Id.* at 607. Texas appears to be the only jurisdiction in the United States that permits disciplinary cases to be tried before a jury. This may be due to the primacy placed by the Texas Constitution on the right to trial by jury. Article 1 Section 15 provides in part: "The right of trial by jury shall remain inviolate." TEX. CONST. art. I, § 15.

51. *Id.* at 616.

52. *Id.*

53. TEX. R. EVID. 702. Texas's evidentiary rule is substantially similar to the federal rule. Rule 702 of the Texas Rules of Evidence provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." *Id.*; *see also Rodgers*, 151 S.W.3d at 616 (explaining Rule 702 of the Texas Rules of Evidence).

54. *See Rodgers*, 151 S.W.3d at 616-17 (concluding that the expert witness was qualified and that her testimony was not unreliable).

Texas appellate courts have stated that expert witness testimony is not required in disciplinary proceedings. For example, *Hawkins v. Commission for Lawyer Discipline*[55] concerned a lawyer who had been appointed to represent a criminal defendant.[56] Despite his efforts, the lawyer could not convince the court to relieve him of the appointment.[57] The lawyer wrote to inform the client he no longer had a lawyer, and when the attorney failed to appear for docket call, the client received notice of intent to revoke bond.[58]

After the client filed a complaint with the state bar, the lawyer was accused and was found guilty of violating the rule against neglect of client matters[59] and the rules governing withdrawal from representation.[60] On appeal, the respondent argued that the evidence was insufficient to prove the violations "because the Commission failed to introduce expert testimony on the application of the Rules and the standard of care required."[61] This argument did not prevail, and the appellate court stated that "interpretation of the Rules, like interpretation of statutes, is a matter of law for the court. Accordingly, no expert testimony on the interpretation of the Rules was required."[62]

The court, however, did not discuss the critical distinction between not *requiring* expert testimony and not *permitting* it.[63] The

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55. 988 S.W.2d 927 (Tex. App.—El Paso 1999, pet. denied), *cert. denied*, 529 U.S. 1022 (2000).

56. Hawkins v. Comm'n for Lawyer Discipline, 988 S.W.2d 927, 930 (Tex. App.—El Paso 1999, pet. denied), *cert. denied*, 529 U.S. 1022 (2000).

57. *Id.* at 930-31.

58. *Id.* at 931-32.

59. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.01(b), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A-1 (Vernon 2005).

60. *Id.* at R. 1.15(c)-(d).

61. *Hawkins*, 988 S.W.2d at 936.

62. *Id.* (citations omitted). The court also noted that "no expert testimony on the standard of care required in malpractice cases was required to aid the trial court as the trier of fact in determining whether Hawkins' actions violated the Rules as interpreted." *Id.*

63. *Id.* at 927; *accord* Goldstein v. Comm'n for Lawyer Discipline, 109 S.W.3d 810, 815 (Tex. App.—Dallas 2003, pet. denied) (failing to discuss the distinction between permitting and requiring expert testimony). In this case a respondent lawyer was accused of charging a contingent fee in a divorce case in violation of Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct. *Id.* at 812. The respondent asserted that "expert testimony was necessary to establish violations of the disciplinary rules." *Id.* at 815. Without elaboration, the court cited *Hawkins*, stating "interpretation of the disciplinary rules is a question of law for the trial court, and therefore expert testimony is *not required*." *Id.* (citing Hawkins v. Comm'n for Lawyer Discipline, 988 S.W.2d 927, 936 (Tex. App.—El Paso 1999, pet. denied), *cert. denied*, 529 U.S. 1022 (2000)) (emphasis supplied).

court's pronouncement that interpretation of the ethics rules is a matter for the court may help explain why expert testimony is not required, but that explanation would fall short as a rationale for not permitting it. As in California, the ultimate decision as to whether a disciplinary violation occurred must be made by the court (or hearing panel), but this does not mean that the court cannot benefit from expert assistance. Furthermore, many of the ethics rules contain elements that are difficult to interpret or apply without reference to an external standard or practical experience.[64]

The *Hawkins* court, of course, did not address whether it was error for the trial court to permit the introduction of expert testimony. In fact, respondent did succeed in having this evidence admitted and he "called several attorneys who testified that in their opinions, the Rules could be read to require Hawkins to act in the manner he did."[65] The appellate court, however, reasoned that such evidence was not helpful to the respondent's case.[66] Although the expert testimony might not have been helpful in Hawkins's case, the court's holding did not preclude the possibility that such testimony could be useful in other cases.[67] As noted, expert testimony—even that pertaining to the ultimate issue—was admitted in a subsequent case.[68]

The Supreme Court of North Dakota also has concluded that expert testimony is not required in disciplinary actions. The most recent case is *In re McKechnie*.[69] The respondent was accused of letting a statute of limitations run in a client's potential employment discrimination claim, thereby violating the rule requiring adequate communication with clients.[70] A hearing panel

64. *See* discussion *infra* Part IV.A (discussing ethics rules supporting a presumption of admissibility).

65. *Hawkins*, 988 S.W.2d at 937.

66. *Id.*

67. *Id.*

68. *See* Rodgers v. Comm'n for Lawyer Discipline, 151 S.W.3d 602, 607-08 (Tex. App.—Fort Worth 2004, pet. denied) (allowing testimony of experts as it pertained to ultimate issues).

69. 656 N.W.2d 661 (N.D. 2003) (per curiam).

70. *In re* McKechnie, 656 N.W.2d 661, 663-64 (N.D. 2003) (per curiam); *see also* N.D. RULES OF PROF'L CONDUCT 1.4(b) (West 2005) (requiring a lawyer to explain matters, allowing a client to make a reasonably informed decision)

recommended finding the respondent guilty and suspending him from practice for thirty days.[71]

On review in the supreme court, the respondent argued that no evidence existed in the record to support a finding that he violated the rule because the North Dakota Disciplinary Counsel had "presented no expert evidence of the applicable standard of care to support the charges."[72] In turn, Disciplinary Counsel asserted that the hearing panel erred in admitting the testimony of the respondent's expert, who opined that the respondent's actions "met the applicable standard of care under the circumstances."[73] The court thus faced two questions: Was expert testimony required? Was it prohibited? The court squarely answered the first issue in the negative, but was equivocal on the second.[74]

The court concluded that expert testimony was not required and distinguished between a legal malpractice case and a disciplinary case.[75] In the former, expert testimony assists the trier of fact to determine the standard of care and whether the lawyer met it; in the latter, according to the court, the rules set the standard and so no interpretation is necessary.[76] In this regard, the court's decision was consistent with its earlier case, *In re Howe*,[77] when it decided expert testimony was not necessarily required.[78] The flaw in the

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71. *In re McKechnie*, 656 N.W.2d at 664-65 (noting also that the respondent had been the subject of prior disciplinary sanctions).

72. *Id.* at 666.

73. *Id.*

74. *Id.*

75. *Id.* The court stated, "Whereas the rules of professional conduct set a minimum level of conduct with the consequence of disciplinary action, malpractice liability is premised upon the conduct of the reasonable lawyer under the particular circumstances." *Id.*

76. *Id.*

77. 621 N.W.2d 361 (N.D. 2001) (per curiam).

78. *In re* Howe, 621 N.W.2d 361, 365 (N.D. 2001) (per curiam). In *Howe*, the respondent was engaged in estate planning for a client and the client's sister. *Id.* at 363. He drafted a will and a trust agreement, but the trust was not funded before the client's death. *Id.* When the client died, respondent failed to fund the trust through post-mortem estate planning and failed to properly inform the beneficiaries of the situation. *Id.* Respondent was found guilty of engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of North Dakota Rules of Professional Conduct Rule 8.4(d) and making false statements to beneficiaries to induce them to sign disclaimer documents in violation of North Dakota Rules of Professional Conduct Rule 4.1. *Id.* at 364. On review respondent argued that expert testimony was required to establish a violation of the rules. *Id.* at 365. The supreme court disagreed:

> Under N.D.R. Lawyer Discipl. 3.5(B), the North Dakota Rules of Evidence apply in disciplinary proceedings "insofar as appropriate." Rule 702, N.D.R.E,[sic] *provides an*

court's reasoning is that many of the rules of professional conduct do require explication or interpretation in light of reasonability under the circumstances. In fact, twenty-nine of the seventy-five *ABA Model Rules of Professional Conduct* likely to be charged in disciplinary cases contain an element of "reasonableness." Furthermore, thirty-five of the seventy-five rules likely to be charged require reference to some external standard in order to be understood or applied in a particular factual situation.[79]

Regarding whether it was error to admit the expert testimony, the *McKechnie* court ruled that the testimony of respondent's expert was unnecessary to aid the hearing panel in understanding the evidence or determining a fact in issue.[80] The court did not hold it error for the hearing panel to admit the testimony at trial; because it deemed the evidence unnecessary, however, the supreme court elected to ignore it in deciding the case.[81] The court's action in ignoring expert testimony in the record as unnecessary was in accord with a prior case, *In re Boulger*,[82] where the court found admitting expert testimony was inappropriate, as it did not help the panel in understanding or deciding the issue before it.[83] These

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expert witness may testify if "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Here, Howe was alleged to have knowingly made false statements and engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation. Expert testimony would not have assisted the hearing panel in determining if Howe made statements he knew to be false or if he engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation. We conclude expert testimony was unnecessary *in this case.*

Id. at 365 (emphasis added). The court thus decided that, cases involving allegations of knowingly making false statements and engaging in dishonesty, did not require expert testimony. *Id.* Notably, the court did indicate that expert testimony was admissible in an appropriate case. *Id.*

79. *See* discussion *infra* Part IV.A (describing the rules and standards discussed).

80. *In re* McKechnie, 656 N.W.2d 661, 667 (N.D. 2003) (per curiam).

81. *Id.* (citing *In re* Boulger, 637 N.W.2d 710 (N.D. 2001)).

82. 637 N.W.2d 710 (N.D. 2001).

83. *In re* Boulger, 637 N.W.2d 710, 714 (N.D. 2001). Here, the respondent was accused of ethics rules violations in connection with his drafting of a codicil and a will. *Id.* at 711. At trial the hearing panel admitted testimony from respondent's expert stating that his conduct in drafting the will did not violate the rule. *Id.* at 714. On review, the North Dakota Disciplinary Counsel asked the supreme court to rule that "such testimony, regarding the appropriate interpretation of the rules of professional conduct, is never admissible in disciplinary proceedings." *Id.* The court declined the invitation to adopt a *per se* rule against admissibility. *Id.* Instead, citing *In re Howe*, the court stated that "in determining if the professional conduct rules have been violated, expert testimony is unnecessary if it will not assist the disciplinary hearing panel in understanding the evidence or in deciding a fact in issue." *Id.* (citing *In re* Howe, 621 N.W.2d 361, 365 (N.D. 2001)).

cases stand for the proposition that expert testimony may be admitted in a lawyer disciplinary case, even though it is not required, when it will be useful to the trier of fact.

The Massachusetts Supreme Judicial Court has held that expert testimony is not required in disciplinary proceedings. *In re Eisenhauer*[84] concerned a respondent lawyer who represented an elderly couple.[85] After the wife died, the respondent obtained a durable power of attorney from the husband, who had fallen ill.[86] The respondent also drafted a trust for the husband in which the respondent was named trustee, with a power of veto over the naming of any successor trustee.[87] When the husband died, the respondent became the lawyer for the wife's estate, lawyer for the husband's estate, and trustee of the trust.[88] The respondent allegedly paid himself a large portion (almost forty percent) of the total assets under his control to himself and did not accurately account for the assets, nor did he make distributions to the beneficiaries.[89] He was charged with violating the rules against deceitful conduct and excessive fees.[90] A hearing committee found the respondent guilty, and on appeal, the panel agreed and found additional violations; the Board of Overseers adopted the appeal panel's report, and a single justice of Massachusetts Supreme Judicial Court accepted the Board's recommendation and suspended respondent for four years.[91]

On appeal to the full Supreme Judicial Court, the respondent contended that the evidence against him was insufficient to support the guilty finding. He contended that expert testimony concerning the fees was required, but the court disagreed: "Nor, as the respondent contends, is expert testimony required to prove an ethical violation".[92]

Interestingly, the cases used as authority for the Massachusetts Supreme Judicial Court's holding do not compel such a result. In

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84. 689 N.E.2d 783 (Mass. 1998).

85. *In re* Eisenhauer, 689 N.E.2d 783, 785 (1998).

86. *Id.*

87. *Id.* at 785-86.

88. *Id.*

89. *Id.* at 786; *see also* MASS. R. PROF. C. RULE 1.5, 8.4 (1998), *available at* http://www.mass.gov/obcbbo/rpnet.htm (stating the rules regarding fees and misconduct).

90. *In re Eisenhauer*, 689 N.E.2d at 785-87.

91. *Id.* at 787.

92. *Id.* (citing *In re* Saab, 547 N.E.2d 919 (Mass. 1989)).

the case *In re Saab*,[93] the respondent was charged with violations that included incompetent representation of a client in an appeal of a divorce; the respondent contended to the Massachusetts Supreme Judicial Court that expert testimony was required to prove the charges against him.[94] The court disagreed, and quoting from a previous case, *Fishman v. Brooks*,[95] the court stated that "[e]xpert testimony concerning the fact of an ethical violation is not appropriate . . . ."[96] There are, however, two problems with the court's reliance on *Fishman*.[97] First, *Fishman* was a legal malpractice case, not a lawyer disciplinary case. Second, and perhaps more importantly, the *Saab* court's quote from *Fishman* was incomplete and, as a result, inaccurate for the purpose cited. The *Fishman* court went on to say, regarding expert testimony in a legal malpractice case: "Of course, an expert on the duty of care of an attorney properly could base his opinion on an attorney's failure to conform to a disciplinary rule."[98]

Vermont is the fourth jurisdiction to hold that expert testimony is not required in discipline cases. *In re Sinnott*[99] indicates, however, that such testimony will be admissible in an appropriate case.[100] In that case, the respondent lawyer was accused of charging an unreasonable fee[101] (i.e., charging a fee for representing a client in a consumer debt reduction matter, but doing no valuable legal work for the client). The hearing panel found him guilty.[102] Before the state supreme court, the respondent argued that "disciplinary counsel did not meet his burden of showing a violation by clear and convincing evidence because he did not produce evidence corresponding to each of the eight factors" listed in the fee rule.[103] Apparently, the respondent contended that expert testimony was

93. 547 N.E.2d 919 (Mass. 1989).

94. *In re* Saab, 547 N.E.2d 919, 927 (Mass. 1989).

95. 487 N.E.2d 1377 (Mass. 1986).

96. Fishman v. Brooks, 487 N.E.2d 1377, 1381 (Mass. 1986).

97. *In re Saab*, 547 N.E.2d at 927 (quoting Fishman v. Brooks, 487 N.E.2d 1377, 1381 (1986)).

98. Fishman v. Brooks, 487 N.E.2d 1377, 1381 (1986).

99. 845 A.2d 373 (Vt. 2004).

100. *See In re* Sinnott, 845 A.2d 373, 379 (Vt. 2004) (arguing that disciplinary counsel should consult experts in fee disputes).

101. *Id.* at 375; *see also* VT. R. PROF. CONDUCT R. 1.5(a) (describing the nature of permissible lawyer's fees).

102. *In re Sinnott*, 845 A.2d at 373.

103. *Id.* at 378-79.

always required in unreasonable fee cases. Noting that the respondent made this claim without citation to authority, the court stated:

> While it may be true that there are reported professional responsibility cases that rely on expert testimony, we have not previously established that expert testimony is required to meet the burden of production to show a violation. We decline respondent's invitation to do so here. As in other areas of law, expert testimony may be used to assist the trier of fact determine a fact in issue or understand evidence that is outside the expertise or perception of the fact finder. The facts of this case were so straightforward that an expert would do little to enhance the panel's understanding of the case. *Though this will not always be the case in professional responsibility cases generally, or in cases brought under Vermont Rules of Professional Conduct 1.5(a), it is all the more reason to allow the unique circumstances of each case to dictate the kind and quantum of evidence needed to show a violation.*[104]

The court's statement clearly indicates that expert testimony is admissible, though not required, in appropriate disciplinary cases.

Authority from one jurisdiction, Florida, can be read as indicating that expert testimony may actually be required in an excessive fee case. *Florida Bar v. Barley*[105] dealt with a lawyer who represented a client in a commercial dispute.[106] The client gave the lawyer over $76,000 to fund a potential settlement.[107] The lawyer placed the funds in his trust account, but later systematically withdrew the funds without client consent.[108] He also billed and received from the client over $62,000 in fees during a three-month period.[109] The client complained to the state bar, which charged the lawyer with violating the trust accounting rule[110] and the rule against clearly excessive fees.[111] The referee conducted a trial and recommended that the respondent be found guilty.[112]

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104. *Id.* at 379 n.3 (citations omitted) (emphasis added).

105. 831 So. 2d 163 (Fla. 2002).

106. Fla. Bar v. Barley, 831 So. 2d 163, 165 (Fla. 2002).

107. *Id.*

108. *Id.*

109. *Id.*

110. *See id.* at 166 (noting the recommendations of the referee); *see also* FLA. R. PROF. CONDUCT Rule 5.1.1(d), *available at* http://www.flabar.org/divexe/rrtfb.nef (stating the applicable trust accounting rules). Also, note that the court in *Florida Bar* cited to rule 4-1.15 in error as this rules does not exist. *Fla. Bar*, 831 So. 2d at 166.

111. *Fla. Bar*, 831 So. 2d at 166; *see also* FLA. R. PROF. CONDUCT Rule 4-1.5(a) (containing the excessive fee provisions).

112. *Fla. Bar*, 831 So. 2d at 166.

The respondent petitioned for supreme court review, arguing that the state bar failed to prove its claim on the excessive fee charge. The supreme court agreed, stating:

> Under rule 4-1.5(b) there are numerous factors that can be considered in determining what constitutes a reasonable fee, including the time and labor required, the novelty, complexity, and difficulty of the questions involved, and the skills requisite to perform the legal services properly. . . . *In the instant case, the Bar presented no expert testimony or any evidence, other than [the client's] Mr. Emo's testimony, challenging the legality or the reasonableness of the fees [respondent] Barley charged.* Moreover, the record shows that Barley consistently provided Mr. Emo with billing statements which detailed the work he did and the hourly rate he was charging. As Barley argued, Mr. Emo consistently paid these statements without challenging the reasonableness of the fees. Although we find Mr. Emo's testimony reliable, in and of itself, his testimony does not constitute competent, substantial evidence that Barley's fees were clearly excessive. Thus, we reject the referee's recommendation that Barley be found guilty of violating rule 4-1.5(a).[113]

Other Florida cases have admitted expert testimony in various situations, but no reported cases expressly discuss the admissibility issue.[114]

C. *Cases Excluding Expert Testimony Under the Facts of the Instant Case*

Courts in Colorado and Oregon upheld the exclusion of expert testimony in specific cases, but left open the possibility that such testimony could be admitted in a case involving different facts.

The Supreme Court of Colorado has indicated its approval of expert witness testimony for at least some purposes. *In re Attorney D*[115] dealt with a respondent lawyer charged with violating the rule against conduct involving dishonesty, misrepresentation, deceit, or

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113. *Id.* at 169 (citations omitted) (emphasis added). In the same case, the state bar's auditor testified as an expert witness concerning the trust account violation charge. *Id.* The court's opinion states that the auditor testified that the respondent "violated multiple trust accounting rules." *Id.* at 168. The referee thus clearly permitted the auditor to testify as to the ultimate issue of whether the respondent violated the rules as charged. *Id.*

114. *See infra* notes 184-86 (citing to another Florida case admitting expert testimony).

115. 57 P.3d 395 (Colo. 2002).

fraud.[116] The respondent had business relationships with an insurance company and was appointed as an arbitrator in cases involving that same insurance company.[117] He was accused of misrepresenting (in one situation) and not disclosing (in other situations) his connections with an insurance company to the parties involved in the arbitrations.[118]

The case came before the state supreme court through a discovery dispute. The respondent sought to compel the deposition of and extensive document production from the lawyer who reported him to the bar (the "reporting lawyer").[119] The reporting lawyer, joined by the Colorado Attorney Regulation Counsel, moved for a protective order.[120] The Presiding Disciplinary Judge ("PDJ") partially granted the motion, but allowed the deposition to go forward, finding some of the requested documents to be "potentially relevant to what he referred to as the 'standard of care or standard of practice' for arbitral disclosures, on the grounds that such a standard might relate to a mitigating factor."[121] Attorney Regulation Counsel then petitioned for relief from the supreme court.[122]

The Supreme Court of Colorado concluded that the PDJ "misperceived the relevance of the opinion and prior conduct of a lay witness concerning a standard of care or practice for arbitral disclosures" and that "the PDJ abused his discretion in fashioning the protective order."[123] The court noted that, while the conduct of a respondent lawyer or other lawyers or their personal interpretations of the ethics rules,[124] is not itself relevant under the ABA Standards for Imposing Lawyer Sanctions,[125] there are situations in which expert testimony could be relevant:

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116. *In re* Attorney D., 57 P.3d 395, 397 (Colo. 2002) (en banc); *see also* COLO. RULES OF PROF'L CONDUCT R. 8.4, *reprinted in* 12 COLO. REV. STAT., app. to ch. 18 to 20 (1998) (describing acts of misconduct).

117. *In re Attorney D.*, 57 P.3d at 397.

118. *Id.*

119. *Id.*

120. *Id.* at 397-98.

121. *Id.* at 398.

122. *In re* Attorney D., 57 P.3d 395, 398 (Colo. 2002).

123. *Id.* at 402.

124. *Id.* at 400.

125. ABA Joint Comm'n on Prof'l Sanctions (1992). The standards are silent on the issue of expert testimony. *Id.*

> *Expert testimony concerning practice in a particular area of the law might be admissible under some circumstances, to assist the board with such things as the practical implications of ethical rules, the difficulty of their application, or even the way they are commonly understood among practitioners*, but the conduct of other individual attorneys in similar circumstances will rarely if ever be relevant to establishing either the occurrence of a violation or the propriety of a sanction. The fact that other particular attorneys may have engaged in the same practice as the respondent, even if those attorneys are numerous, amounts to neither justification nor mitigation for violation of an ethical standard.[126]

The court, however, went on to point out that a respondent's conduct in conformity with a "commonly-accepted practice," apparently as shown by expert testimony, may show a lack of improper intent or motive:

> [*T*]*he fact that an attorney is acting in conformity with a commonly-accepted practice may very well be probative of his lack of improper motive or intent.* Conforming to an accepted practice, either from a belief in its validity because of its general acceptance or merely as a matter of routine, although not dispositive, provides some explanation for the conduct apart from dishonesty or selfishness. *But the question whether a practice is standard or accepted in the professional community is a matter of specialized knowledge or opinion. It is not rationally based on the perceptions of witnesses without specialized training or knowledge but arises only from particular experience with and knowledge of the legal community and area of practice.*[127]

The court, thus, effectively recognized the value of expert testimony concerning possible mitigation of sanctions.[128] The same type of testimony, of course, can be valuable in helping a court or a hearing panel determine whether a rules violation occurred. *Attorney D* explicitly recognizes that testimony on areas such as the difficulty of rule application or the way that rules are commonly understood may be helpful to the trier of fact, and such testimony should come from a qualified expert in the area.[129]

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126. *In re Attorney D.*, 57 P.3d at 400 (emphasis added).

127. *Id.* at 401 (citations omitted) (emphasis added).

128. *Id.*

129. *Id.*; *see also In re* Cimino, 3 P.3d 398, 402 (Colo. 2000). An earlier Colorado case, *In re Cimino*, provides another example of the many ways in which expert witness testimony can be used in a lawyer disciplinary case. *Id.* A respondent was charged with violating the conflict of interest rules by entering into a business transaction with a corporation

Oregon is the second jurisdiction that has upheld the exclusion of expert testimony in a particular case while leaving open the possibility that it could be admissible under different circumstances. This position was taken in a 1990 case, *In re Leonard*,[130] when the accused was charged with two instances of dishonesty.[131] Subsequent Oregon cases have made it clear that expert witness testimony may be admitted, even when it appears to go to the ultimate issue in the case.[132]

In *Leonard*, the respondent was accused of violating the rule prohibiting lawyers from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation by unilaterally making changes to a lease agreement and then misrepresenting the importance of the changes with the intent to have the opposing parties agree to them without first consulting their counsel.[133] At the trial of the disciplinary case before a hearing panel, the respondent attempted to offer what was called an "expert opinion" from an experienced

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while he represented that corporation. *Id.* at 399-400; *see also* COLO. R. PROF. CONDUCT Rules 1.7(b), 1.8(a) (providing for Colorado's conflict of interest rule). A hearing board concluded that respondent violated rules and recommended discipline. *In re Cimino*, 3 P.3d at 399. Respondent sought review in the state supreme court. *Id.* Agreeing with the hearing board, the court suspended respondent for thirty days and ordered him to pay costs incurred in the prosecution, including $3708 for the complainant's expert witness. *Id.* The court's opinion does not explain why or how the complainant, who usually is not a party to disciplinary proceedings, was able to introduce expert testimony on its behalf. *Id.* The opinion, however, does recognize the value of the witness's testimony, which extended to whether a conflict of interest was present:

> The certified statement of costs in this case includes a charge of $3708 for the complainant's expert witness. [Respondent] Cimino claims that this charge is excessive because when the complainant's expert testified to matters other than the injury his misconduct caused, the testimony was outside the relevant scope of the disciplinary hearing. Cimino claims that he should be required to reimburse the expert for the time devoted to that one issue only. We disagree. *We have examined the witness's testimony and have found it relevant to, not only the harm, but also the existence of the conflicts of interest and how those conflicts may have shaped the corporation's capital structure.* Cimino has not advanced any other reason why the expert fee should be deemed excessive. We therefore order that he must pay the entire amount of expert fees.

Id. at 402 (emphasis added).

130. 784 P.2d 95 (Or. 1990).

131. *In re* Leonard, 784 P.2d 95, 95 (Or. 1989).

132. *See supra* notes 137-44 (discussing other Oregon courts clarification of when expert testimony should be admitted).

133. *In re Leonard*, 784 P.2d at 96. The rule in question was DR 1-102(A)(4) of the Oregon Code of Professional Responsibility. *Id.* At the time of the Oregon Supreme Court's opinion, the rule had been renumbered to DR-102(A)(3). *Id.* at 95.

lawyer who had served for fifteen years on the state bar's Legal Ethics Committee regarding whether "the conduct of the Accused violated the disciplinary rules."[134] The hearing panel excluded the proffered evidence, found the respondent guilty, and imposed a public reprimand. On review in the state supreme court, the respondent argued that the proffered evidence was admissible under Rule 702 of the Oregon Evidence Code.[135] The court concluded that the evidence was properly excluded:

> This court previously has expressed its reservations about the propriety of this kind of testimony in disciplinary cases. . . . *If the expert testimony were offered to explicate some external standard of actual practice, it might be admissible.* However, DR 1-102(A)(3) does not involve such a standard. The evidence therefore amounted to nothing more than an oral brief as to why one particular construction of the governing disciplinary rule would not be violated by a particular hypothetical set of facts. The Accused was able to make the same legal arguments through counsel, and did so. The evidence was not admissible.[136]

The court's pronouncement in its subsequent case of *In re Claussen*[137] directly undercut *Leonard*.[138] *Claussen* concerned a respondent who was charged with violating the *same* misrepresentation rule at issue in *Leonard* by allegedly misrepresenting that federal bankruptcy law entitled his client to the cash surrender of an insur-

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134. *Id.* at 100.

135. *Id.* at 100 n.3. Rule 702 of the Oregon Evidence Code Provides:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

Id. The Oregon statute also provides that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." OR. REV. STAT. § 40.420, Rule 704 (2003).

136. *In re Leonard*, 784 P.2d at 100 (citations omitted) (emphasis added). In the *Brandsness* case cited by the court, a hearing panel had permitted a respondent to have "local lawyers to testify as expert witnesses offering their respective opinions of the accused's conduct." *In re* Brandsness, 702 P.2d 1098, 1106 (Or. 1985). The state bar did not object until after the hearing, so on review the supreme court did not reach the issue. *Id.* at 1106-07. The court noted in dicta: "Although we have some misgivings about [admitting the testimony], because the Bar did not object to the receipt of the testimony until after the hearing and because of the outcome of this case, we do not reach this issue." *Id.*

137. 14 P.3d 586 (Or. 2000).

138. *In re* Claussen, 14 P.3d 586, 588 (Or. 2000).

ance policy.[139] Both the state bar and the respondent introduced expert testimony relating to the charges, specifically, whether the respondent's characterization of what the law permitted was correct and whether the failure to mention the bankruptcy court's oral pronouncement was a material misrepresentation.[140] Contrary to the court's dicta in *Leonard*, admission of the testimony shows that whether conduct is a "misrepresentation" may depend on the standards of actual practice.[141] Also, it shows that whether conduct is "illegal or fraudulent" depends on what the law allows, and expert testimony may be helpful in this area.[142]

Other Oregon cases subsequent to *Leonard*, in which expert testimony was admitted, include *In re Eadie*[143] and *In re Eakin*.[144]

D. *Cases Purporting to Exclude Expert Testimony in All Cases*

Courts in two jurisdictions, Illinois and Indiana, have upheld the exclusion of expert testimony and have purported to declare that such evidence is simply inadmissible in lawyer disciplinary actions. Yet, a close look at these cases shows that a rule of broad exclusion in every disciplinary case is unwarranted and unsupportable.

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139. *Compare In re Leonard*, 784 P.2d at 97 (noting a misrepresentation of a change to induce a signature), *with In re Claussen*, 14 P.3d at 588 (commenting that the accused made a misrepresentation concerning federal bankruptcy law).

140. *In re* Claussen, 14 P.3d 586, 593, 595 (Or. 2000).

141. *Id.* at 593.

142. *Id.* at 595.

143. 36 P.3d 468 (Or. 2001).

144. 48 P.3d 147 (Or. 2002). *In re* Eadie, 36 P.3d 468 (Or. 2001). Respondent was charged with not providing competent representation in the trial of a personal injury case, thus violating Oregon code of Professional Responsibility DR 6-101(A). *Id.* at 471. The state bar's expert witness was permitted to testify that "it is 'absolutely essential' for a lawyer to have a copy of the client's deposition transcript at trial so that the client does not mistakenly make statements inconsistent with the client's prior testimony." *Id.* at 480; *see also In re* Eakin, 48 P.3d 147, 155 (2002) (admitting expert testimony). Respondent was charged with conduct prejudicial to the administration of justice and charging a clearly excessive fee as proscribed by the Oregon Code of Professional Responsibility in DR 1-102(A)(3) and DR 2-106(A). *In re* Eakin, 48 P.3d 147, 149 (Or. 2002). Experts testified at the trial. *Id.* at 156. The testimony concerned respondent's handling of the case and the alleged excessiveness of the fee. *Id.* at 156, 157 n.8. Based in part on testimony from the state bar's expert regarding the handling of the case, the court concluded that the bar had failed to prove a violation by clear and convincing evidence. *Id.* at 156. The experts who testified regarding the excessive fee charge "were divided on the issue whether the accused's fees were clearly excessive." *Id.* at 157 n.8. As a practical matter, any such testimony went to the ultimate issue in the case: Whether the rule against clearly excessive fees was violated.

In a quarter-century old case, *In re Masters*,[145] the Illinois Supreme Court concluded that proffered expert testimony was properly excluded.[146] The respondent was charged with advising a client to comply with an extortion demand and assisting the client in doing so.[147] At the hearing, the respondent offered the testimony of two law professors "in which the professors analyzed the charges against respondent and by way of response to hypothetical questions concluded that his conduct constituted neither a crime nor a violation of a canon or rule of ethical conduct."[148] Disciplinary counsel objected, and the hearing panel sustained the objection, excluding the testimony.[149]

On review, the supreme court agreed with the hearing panel that the testimony was unnecessary to its disposition of the case:

> The hearing panel found no fault with the qualifications of the witnesses but refused to admit the testimony on the ground that it considered itself to be a body of experts and well able to resolve the issues before it. The panel stated that *the standards to be applied in disciplinary cases are those standards of conduct acceptable to members of the bar in general* rather than standards acceptable to a small group of lawyers who hold themselves "beyond and above the level of the Bar, in general, in the matter of professional conduct."[150]

Contrary to its apparent intent, the panel's statement actually demonstrates the value of expert testimony in a disciplinary case. How can a small panel or a single judge presume to have an intimate understanding of all of the many "standards of conduct acceptable to members of the bar in general"?[151] It should be obvious to any experienced lawyer that concepts of a reasonable fee, competent representation, or necessary disclosure of confidences are understood differently by lawyers in different practice specialties.

Also, the court's opinion supports the hearing panel's decision for another, more fundamental reason: The fear of driving up prosecution costs. The hearing panel stated an additional reason

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145. 438 N.E.2d 187 (Ill. 1982).
146. *In re* Masters, 438 N.E.2d 187, 191 (Ill. 1982).
147. *Id.* at 187-88.
148. *Id.* at 191.
149. *Id.*
150. *Id.* (emphasis added).
151. *In re Masters*, 438 N.E.2d at 187-89.

for the exclusion of the testimony, which was "that expert testimony would place an excessive and unnecessary economic burden on both sides in disciplinary matters."[152] This argument, while perhaps appealing at one level, is both inaccurate and insufficient as a ground for preventing a respondent from mounting a full defense that includes the introduction of expert testimony.[153]

But the supreme court in *Masters* did not stop at simply agreeing that the excluded testimony was unnecessary. It seemed to stake out a position against the use of expert testimony in *any* disciplinary case. Respondent cited, to no avail, to two Illinois disciplinary cases in which expert testimony apparently had been permitted.[154] The *Masters* court stated that although expert testimony had been admitted in those cases, the issue of admissibility was not before the court in those cases.[155] The cited cases "are not, as contended by respondent, authority for the proposition that when the ethical problem under consideration is unusual and fairly debatable expert testimony concerning the canons is admissible."[156] In the court's estimation, opinions offered for establishing "the meaning of the disciplinary rules and the ultimate conclusion that no provision of the Code had been violated" were not an appropriate use of expert testimony.[157]

In re Chatz[158] is the only Illinois case to cite *Masters* in connection with the admissibility of expert testimony in discipline matters.[159] In that case, the supreme court upheld a hearing board's decision not to admit proffered expert testimony in a disciplinary case concerning lawyers' compliance with election laws (respondent was accused of improper loans to judges).[160] Yet, elsewhere in its opinion, the court stated that although a respondent's intent is irrelevant in determining whether he or she violated the rule, it is a

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152. *Id.*

153. *See* discussion *infra* Section IV.D. (reviewing how there is no argument against a presumption of admissibility).

154. *See In re Masters*, 438 N.E.2d at 191-92 (citing *In re* Friedman, 392 N.E.2d 1333 (Ill. 1979) and *In re* Kutner, 399 N.E.2d 963 (Ill. 1979)).

155. *In re Masters*, 438 N.E.2d at 192.

156. *Id.*

157. *Id.*

158. 546 N.E.2d 613 (Ill. 1989).

159. *In re* Chatz, 546 N.E.2d 613, 617 (Ill. 1989).

160. *Id.* at 617.

factor in determining the appropriate sanction.[161] It therefore seems odd for the court not to recognize the value that the proffered testimony, regarding common understanding or practices among attorneys, would have regarding an appropriate sanction. Perhaps the concern of the court and the disciplinary agency truly lies in the additional costs of prosecution that supposedly would be engendered by allowing expert testimony.

Indiana, like Illinois, has painted the admissibility question with a broad brush. *In re Keller*[162] concerned respondent lawyers who were charged with violating the lawyer advertising rules by running television ads suggesting that insurance companies would settle claims just because the respondents' law firm was involved.[163] A hearing officer proceeded with an evidentiary hearing and recommended dismissal of the charges.[164] The Indiana Disciplinary Commission petitioned the state supreme court for review.[165]

At the hearing below, the respondents attempted to introduce expert testimony regarding the interpretation, application, and constitutionality of the rules in question.[166] The hearing officer excluded the proffered testimony.[167] Respondents argued to the supreme court that this exclusion was error, but the court sided with the hearing officer's decision:

> We deny the respondents' petition and uphold the hearing officer's exclusion of this testimony. The Constitution of the State of Indiana vests this Court with exclusive jurisdiction in matters involving the admission and discipline of attorneys. *The testimony of expert witnesses on the subject of the practice of law is not proper evidence, as it is the province of this Court to determine what the practice of law is.*[168]

The court's sweeping statement that expert testimony "on the subject of the practice of law" was not required by the authority it cited for support is not consistent with its prior decisions and fails to recognize that the court's exclusive authority to regulate the practice of law does not require it to disallow testimony otherwise

161. *Id.* at 616.
162. 792 N.E.2d 865 (2003).
163. *In re* Keller, 792 N.E.2d 865, 866 (Ind. 2003).
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *In re Keller*, 792 N.E.2d at 867 (emphasis added) (citations omitted).

permitted under rules of evidence just because it might somehow relate to "the practice of law."[169]

In re Perello[170] was an original proceeding in the supreme court concerning allegations that a suspended lawyer was continuing to practice law in violation of the supreme court's suspension order.[171] The respondent wished to have four experts testify that the business ends and the practice ends of a law practice were distinct and that "the business end of the practice was not the practice of law as contemplated in the suspension order."[172] The court excluded the testimony, stating that "[i]t is the province of this Court to determine [what] the practice of law is, and the opinions of experts on the subject are not proper evidence."[173]

Perello is distinguishable from *Keller* for at least two reasons. First, the dispute in *Perello* concerned precisely what the "practice of law" was; the respondent had been ordered to cease practicing law and was accused of violating this order.[174] *Keller* dealt with lawyers who were accused of violating lawyer advertising rules, which have certain factual aspects (e.g., whether statements might be viewed as misleading).[175] Second, *Perello* was an original proceeding before the supreme court.[176] In contrast, disciplinary cases originate in a lower tribunal, such as before a judge or hearing officer. While a state supreme court may be able to claim that it does not need any help in interpreting and applying the disciplinary rules because it is the ultimate authority, the argument certainly would not apply to a hearing panel or to a judge hearing the matter at the trial level.[177]

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169. *Id.*

170. 386 N.E.2d 174 (Ind. 1979).

171. *In re* Perello, 386 N.E.2d 174, 179 (Ind. 1979).

172. *Id.* at 179.

173. *Id.*

174. *Id.*

175. *In re* Keller, 792 N.E.2d 865, 866 (Ind. 2003).

176. *In re Perrello*, 386 N.E.2d at 175.

177. *See* Fla. Bar v. Barley, 831 So. 2d 163, 169 (Fla. 2002) (nothing that the Supreme Court of Florida has indicated that expert testimony is helpful, if not necessary, in cases involving an alleged violation of the fee rules). Whether a state supreme court, with most of its justices removed from the active practice of law for some time, actually is fully informed of the nuances of everyday practice in all areas of specialty is, at minimum, a debatable proposition.

Furthermore, other Indiana cases appear to be at odds with *Keller* in admitting expert testimony. *In re Hailey*[178] was a lawyer discipline case in which the respondent was accused of violating various rules including the prohibition on unreasonable fees.[179] Respondent had settled a client's case for a lump sum payment plus a series of future payments.[180] Issues in the discipline case included the present value of the future payments and how that value should be determined.[181] The hearing officer admitted testimony by respondent's expert concerning the present value.[182] On review of the hearing officer's recommendations, the disciplinary counsel apparently did not raise the issue of admission of the expert testimony, and the supreme court did not discuss the admissibility issue in its opinion. Comparing the issue in *Hailey* to the issue in *Keller*, one might ask why expert testimony concerning reasonableness of a fee is admissible when testimony concerning whether an ad might be misleading is not. There is no meaningful distinction.[183]

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178. 792 N.E.2d 851 (Ind. 2003).

179. *In re* Hailey, 792 N.E.2d 851, 853 (Ind. 2003). *See also* IND. R. PROF. CONDUCT 1.5 (prohibiting unreasonable fees).

180. *In re Hailey*, 792 N.E.2d at 855.

181. *Id.* at 859-60.

182. *Id.* at 860.

183. Other Indiana authority that appears inconsistent with the court's broad pronouncement in *Keller* is *Powers v. State*, 440 N.E.2d 1096 (Ind. 1982). This was a criminal case, not a lawyer disciplinary proceeding. Powers v. State, 440 N.E.2d 1096, 1099 (Ind. 1982). The defendant was charged with dealing in illegal drugs. *Id.* Over objection, the trial court admitted a police officer's testimony that, in the officer's opinion, the drugs were possessed for delivery and not for personal use. *Id.* at 1106. On appeal, defendant argued that "the witness' opinion of intent is inadmissible because whether or not Appellant intended to deal in narcotics was a determination that the jury must make." *Id.* at 1106. The supreme court held that the trial court did not abuse its discretion in admitting this testimony:

> The old rule that a witness may not give an opinion of an ultimate fact question has been abrogated in Indiana. *Shelby v. State*, (1981) Ind., 428 N.E.2d 1241, 1243; *Woods v. State*, (1978) 267 Ind. 581, 582, 372 N.E.2d 178, 178. The trial court in its discretion may permit such opinion evidence in an appropriate case; accordingly, this Court will reverse such an exercise of discretion only upon a showing of abuse. *Id.* Witnesses have given opinions on whether a person is intoxicated, *Wofford v. State*, (1979) Ind., 394 N.E.2d 100, whether the defendant made true statements to the police, *Porter v. State*, (1979) Ind., 391 N.E.2d 801, whether the defendant appreciated the wrongfulness of his conduct, *Bobbitt v. State*, (1977) 266 Ind. 164, 361 N.E.2d 1193, and whether a child had been abused, *Ball v. State*, (1980) Ind. App., 406 N.E.2d 305.
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> We do not find reversible error here. As the prosecution stated in response to defense counsel's objection, Officer Croft had investigated numerous drug cases and

E. *Cases in Which Expert Testimony Was Admitted Without Discussion*

Reported cases indicate that at least sixteen jurisdictions have admitted expert testimony in lawyer disciplinary cases, although the admissibility of the testimony was not an issue in the appellate opinions. However, these cases demonstrate that such testimony has been deemed admissible in disciplinary actions involving alleged rule violations regarding conduct relating to: handling or mishandling of client funds;[184] standards of competent representa-

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therefore he had enough experience to give an opinion on whether or not the drugs were held for sale or for personal use. The large amount of drugs found in the house, plus the sifters and other tools, indicated that the drugs would be prepared for sale. The jury would then weigh Officer Croft's opinion before ultimately deciding the question. There was no abuse of discretion in allowing the testimony of Officer Croft.

Powers, 440 N.E.2d at 1106. Again, one must ask: How is opinion testimony in a criminal trial regarding intent (an element of the crime) materially different from opinion testimony in a lawyer disciplinary proceeding regarding intent or knowledge (elements of some ethics rules)? Also, how is opinion testimony in a criminal trial regarding whether a defendant made true statements to the police different than opinion testimony in a lawyer disciplinary proceeding regarding whether a respondent's statements in an ad were truthful or misleading?

184. *See In re* Fair, 780 A.2d 1106, 1108, 1112 (D.C. 2001) (noting that respondent was accused of mishandling funds and violating fee rules by taking a probate fee prior to court approval; respondent's expert testified concerning "prevalence in actual probate practice" of taking fees prior to obtaining court approval to show that respondent did not intentionally misappropriate funds); *see also In re* Stiller, 725 A.2d 533, 534-37 (D.C. 1999) (indicating how the respondent was accused of dishonestly structuring cash fee payments in violation of the law; respondent's experts testified concerning the likelihood that practitioners would have known of recent changes in relevant statutory requirements); Fla. Bar v. Williams, 753 So. 2d 1258, 1261 (Fla. 2000) (discussing a respondent accused of trust accounting violations; the bar's expert testified that respondent "was not in compliance with the rules governing trust accounts"); Fla. Bar v. Simring, 612 So. 2d 561, 565 (Fla. 1993) (discussing a respondent accused of trust accounting violations; the bar's expert testified "concerning the trust account violations"); Fla. Bar v. Borja, 554 So. 2d 514, 514-15 (Fla. 1990) (noting that where a respondent was accused of trust accounting violations, experts for both the bar and respondent testified whether respondent had complied with rules regulating trust accounts); *In re* Wittenbrink, 849 So. 2d 18, 19 (La. 2003) (discussing the testimony from an expert where the respondent was accused of conversion and dishonesty in handling of funds withheld from employee's pay; the respondent's expert testified that "there was no 'bright line' test regarding who actually owned the funds"); Attorney Grievance Comm'n of Maryland v. Herman, 844 A.2d 1181, 1188-89 (Md. 2004) (indicating in a case where the respondent was accused of misappropriating trust funds, respondent's experts testified regarding the lack of intent due to substance abuse and psychological problems, although the trial court disregarded those opinions in reaching its decision); Attorney Grievance Comm'n of Maryland v. McClain, 817 A.2d 218, 227 (Md. 2003) (noting that where a respondent was accused of violating rules regarding competent representation and trust accounting, the bar's expert testified that respondent violated the rule).

tion;[185] fees;[186] dishonesty, deceit, fraud, or misrepresenta-

185. *See* Fla. Bar v. Della-Donna, 583 So. 2d 307, 309 n.1 (Fla. 1989) (discussing the admittance of expert testimony where the respondent was accused of multiple rules violations including bringing frivolous claims; the bar's experts testified that respondent had shown "pattern of misusing the courts to bring frivolous litigation for his own personal benefit"); Attorney Grievance Comm'n of Maryland v. McClain, 817 A.2d 218, 225 (Md. 2003) (discussing expert testimony where the respondent was accused of violating rules regarding competent representation and trust accounting; the bar's expert testified regarding mistakes respondent made in handling the foreclosure sale and the standard of competency in the area); *In re* Elmore, 934 P.2d 273, 275 (N.M. 1997) (discussing the bar's expert testimony where respondent was accused of failing to competently represent the client in bankruptcy matter; the bar's expert testified regarding how "reasonably competent attorney" would act in respondent's situation); *In re* Discipline of Laprath, 670 N.W.2d 41, 53 (S.D. 2003) (noting the testimony of the bar expert where the respondent was accused of multiple violations of the competent representation rule; the bar subpoenaed judges to testify as to their opinion regarding respondent's competency to practice law); *In re* Disciplinary Proceeding Against DeRuiz, 99 P.3d 881, 890 (Wash. 2004) (discussing the testimony of a bar expert where the respondent was accused of neglect, failure to communicate and failure to refund unreasonable and unearned fees; the bar's expert testified regarding the merits of respondent's defense to the lack of diligence charge); *In re* Disciplinary Proceedings Against Goldstein, 681 N.W.2d 891, 894-95 (Wis. 2004) (discussing the respondent's expert testimony where respondent was accused of neglect, failure to communicate, and fee violations; the respondent's expert testified regarding the extent of the duty to communicate with clients in matters of that type).

186. *See In re* Connelly, 55 P.3d 756, 758 (Ariz. 2002) (noting the testimony of both respondent and bar experts where respondent was accused of charging the unreasonable fee; experts for both the bar and respondent testified regarding the reasonableness of flat fee in criminal case); Fla. Bar v. Carlon, 820 So. 2d 891, 896 (Fla. 2002) (noting in this case where the respondent was accused of charging a clearly excessive fee that the bar's expert testified concerning what would constitute a "reasonable fee" or clearly excessive fee"); Fla. Bar v. Garland, 651 So. 2d 1182, 1183 (Fla. 1995) (allowing the testimony of the bar's expert regarding a reasonable fee for services performed by respondent where respondent was accused of charging a clearly excessive fee, engaging in dishonesty, fraud, deceit, or misrepresentation, and trust accounting violations); Fla. Bar v. Hollander, 607 So. 2d 412, 414 (Fla. 1993) (discussing the testimony of a bar expert where the respondent was accused of charging a clearly excessive fee; the bar's expert testified concerning "personal injury and contingency fee agreements"); Fla. Bar v. Richardson, 574 So. 2d 60, 61 (Fla. 1990) (allowing testimony of the bar expert where the respondent was accused of charging clearly excessive fees; the bar's expert testified regarding reasonableness of the fees); Fla. Bar v. Holland, 520 So. 2d 283, 284 (Fla. 1988) (discussing the testimony of the bar and respondent expert where the respondent was accused of failing to competently represent clients and charging excessive fees; experts for both the bar and respondent testified regarding the reasonableness of the fee); Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Gallner, 621 N.W.2d 183, 185-86 (Iowa 2001) (noting expert testimony where the respondent was accused of impropriety in connection with fees in social security disability matters; experts for both bar and respondent testified regarding practice of lawyers in the type of situation faced by respondent); *In re* Arabia, 19 P.3d 113, 117 (Kan. 2001) (discussing the reasonableness of fees where the respondent was accused of charging unreasonable fees; experts as well as attorneys practicing in the field of employment discrimination for both the bar and respondent testified regarding the reasonableness of respondent's fees);

tion;[187] and conflicts of interest.[188]

IV. WHY EXPERT TESTIMONY SHOULD BE PRESUMPTIVELY PERMITTED

The above review of extant case law clearly demonstrates the bewildering lack of predictability—sometimes even within the

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In re Keiser, 263 A.D.2d 609, 694 N.Y.S.2d 189 (N.Y. App. Div., 1999) (reviewing the testimony of experts where respondent was accused of charging excessive fees in a matrimonial matter; the bar's experts testified that the fee was clearly excessive); Office of Disciplinary Counsel v. Fish, 707 N.E.2d 851 (Ohio 1999) (noting the expert testimony utilized where respondent was accused of charging clearly excessive fees; the respondent's expert testified regarding the excessive fee issue); Columbus Bar Ass'n v. Klos, 692 N.E.2d 565, 567 (Ohio 1998) (discussing expert testimony where the respondent was accused of charging a clearly excessive fee; the respondent's experts testified regarding types of fee arrangements customarily used by lawyers in the employment law field); *In re* Discipline of Dorothy, 605 N.W.2d 493, 509 (S.D. 2000) (discussing expert testimony where the respondent was accused of charging unreasonable fees; the respondent's experts testified regarding the reasonableness of the fees and whether respondent violated ethical rules); Cohn v. Bd. of Prof'l Responsibility of the Supreme Court of Tenn., 151 S.W.3d 473, 477-78 (Tenn. 2004) (reviewing testimony of the expert; wherein respondent was accused of violations arising from fee practices in bankruptcy court matters; experts testified regarding common practices relating to fees and fee awards); *In re* Disciplinary Proceeding Against Vanderbeek, 101 P.3d 88, 91 (Wash. 2004) (discussing testimony of experts regarding fees issued by experts from both the bar and respondent; respondent was accused of charging the excessive and unreasonable fees); *In re* Disciplinary Proceeding Against DeRuiz, 99 P.3d 881, 890 (Wash. 2004) (evaluating expert testimony where respondent was accused of neglect, failure to communicate, failure to refund unreasonable and unearned fees; the bar's expert testified regarding the reasonableness of fee charged); *In re* Disciplinary Proceeding Against Egger, 99 P.3d 477, 489 (Wash. 2004) (appraising expert testimony where the respondent was accused of charging unreasonable fees; the respondent's expert testified regarding reasonableness of the fee); *In re* Disciplinary Proceedings Against Kinast, 660 N.W.2d 912, 912 (Wis. 1999) (examining the testimony of experts where respondent was accused of charging an excessive fee in divorce matter; experts for both the bar and respondent testified regarding the reasonableness of the fee); *In re* Disciplinary Proceedings Against Gilbert, 595 N.W.2d 715, 723-25 (Wis. 1999) (reviewing testimony of experts where the respondent was accused of multiple rules violations including charging excessive and unreasonable fees; experts for both the bar and respondent testified regarding the reasonableness of the fees).

187. *See In re* Warner, 851 So. 2d 1029, 1030 (La. 2003) (reviewing the testimony of experts where respondent was accused of assisting client in criminal or fraudulent conduct; having conflicts of interest; lacking truthfulness in statements to others; and engaging in dishonesty, fraud, deceit, or misrepresentation in connection with settling personal injury claim for a deceased client; the respondent's experts testified regarding legal issues of probate and succession and opined concerning the lack of criminal activity on respondent's part).

188. *See In re* Johnson, 84 P.3d 637, 640 (Mont. 2004) (discussing expert testimony where the respondent was accused of violating conflict of interest rules by concurrently representing clients who were directly adverse; the respondent's expert testified regarding the concept of "informed consent").

same state—facing someone, like our not-so-hypothetical respondent, who would like to defend against charges of unethical conduct through the use of expert testimony. A lawyer facing these charges, brought to bear by a disciplinary agency often employing professional prosecutors who are familiar with the intricacies of specialized procedural rules, would be able to level the playing field somewhat if the lawyer and his or her defense counsel were aided by a presumption that expert witness testimony would be admissible.

There are a number of compelling reasons supporting a presumption of admissibility for expert testimony in lawyer disciplinary proceedings. The nature of the ethics rules themselves present many opportunities for helpful explication through expert testimony. The unique nature of lawyer disciplinary proceedings calls for such a particularized approach to admissibility. On the other hand, there are no convincing reasons opposing such a presumption.

A. *The Nature of the Ethics Rules Supports a Presumption of Admissibility*

The nature of ethics rules shows that the rules present a fertile ground for testimony by experts on legal ethics and law practice. In fact, many of the rules of professional conduct by their own terms require reference to standards of conduct or concepts outside of the rules themselves in order for the rules to be adequately understood or applied—or for a disciplinary authority to properly conclude that they were violated.

A review of the ABA Model Rules of Professional Conduct makes this point convincingly. The author examined the rules and determined[189] that there are seventy-five rules that are regularly used by lawyer disciplinary agencies when charging respondents with unethical conduct. Of these seventy-five rules, fifty-six of them—or seventy-five percent—can fairly be read as either containing an element standard of "reasonableness" or referencing some "external standard" of practice in order to be understood and applied.

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189. This determination was based on the author's almost two decades of experience in the legal ethics field, including research, teaching, consulting with and representing lawyers and bar organizations, as well as testifying as an expert witness.

Twenty-nine of the seventy-five rules, or thirty-nine percent, include an element of reasonableness:

1.1 Competence — requires "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation";[190]

1.2(c) Limiting Scope of Representation — lawyer "may limit the scope of the representation if the limitation is reasonable . . . ".[191]

1.3 Diligence – a "lawyer shall act with reasonable diligence and promptness in representing a client";[192]

1.4(a) Communicating with Clients — a lawyer shall "reasonably consult with the client about the means by which the client's objectives are to be accomplished"; lawyer shall "promptly comply with reasonable requests for information";[193]

1.4(b) Explaining Matters to Clients — a lawyer shall explain matters "to the extent reasonably necessary to permit the client to make informed decisions regarding the representation";[194]

1.5(a) Reasonable Fees – a lawyer shall not agree for, charge or collect "an unreasonable fee or an unreasonable amount for expenses";[195]

1.5(b) Communicating Basis or Rate of Fee to Client — the scope of representation and basis or rate of fee must be communicated to client "before or within a reasonable time after commencing the representation";[196]

1.6 Confidentiality and Disclosure of Client Information — a lawyer must believe that a permissive disclosure of confidential information is reasonably necessary;[197]

1.7(b) Ethically Representing a Client Notwithstanding Concurrent Client Conflict of Interest – whether a lawyer could reasonably believe that he or she could competently represent each client notwithstanding existence of conflict;[198]

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190. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2004).
191. *Id.* at R. 1.2.
192. *Id.* at R. 1.3.
193. *Id.* at R. 1.4(a).
194. *Id.* at R. 1.4(b).
195. MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (2004).
196. *Id.* at R. 1.5(b).
197. *Id.* at R. 1.6.
198. *Id.* at R. 1.7(b).

1.8(a) Business Transactions with Clients — whether terms of a transaction are "fair and reasonable to the client" and disclosed in manner that could be "reasonably understood" by the client;[199]
1.8(b) Using or Revealing Confidential Information — relating to exceptions to confidentiality Rule (1.6), whether a lawyer's belief that a permissive disclosure is necessary or is reasonably necessary;[200]
1.8(f) Third Party Fee Payment – relating to exceptions to confidentiality Rule 1.6;[201]
1.8(h) Settling or Limiting Malpractice Claims — whether a client has been given a "reasonable opportunity" to seek advice of independent counsel;[202]
1.9(c) Opposing Former Client and Using Confidential Information — relating to exceptions to confidentiality Rule 1.6;[203]
1.13(c) Organization As Client; Reporting Outside Corporation — whether a lawyer's belief that a permissive disclosure is reasonably necessary;[204]
1.13(f) Organization As Client; Identification of Client to Corporate Constituents — whether lawyer "reasonably should know" that corporation's interests are adverse to constituent's;[205]
1.14(b) Client with Diminished Capacity – reasonableness of a protective action for client;[206]
1.16(d) Termination of Representation; Protection of Client — extent to which protective steps are reasonably practicable;[207]
1.18(b) Prospective Clients; Confidentiality of Information — disclosure of confidential information (see 1.9);[208]
3.4(d) Fairness to Opposing Party and Counsel; Frivolous Discovery Requests, Failure to Comply — not making "reasonably diligent effort" to comply with discovery request;[209]

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199. *Id.* at R. 1.8(a).
200. MODEL RULES OF PROF'L CONDUCT R. 1.8(b) (2004).
201. *Id.* at R. 1.8(f).
202. *Id.* at R. 1.8(h).
203. *Id.* at R. 1.9(c).
204. *Id.* at R. 1.13(c).
205. MODEL RULES OF PROF'L CONDUCT R. 1.13(f) (2004).
206. *Id.* at R. 1.14(b).
207. *Id.* at R. 1.16(d).
208. *Id.* at R. 1.18(b).
209. *Id.* at R. 3.4(d).

3.6 Trial Publicity — whether lawyer "reasonably should know" that statement will be disseminated and have a potentially prejudicial effect;[210]

4.1 Truthfulness in Statements to Others — reasonableness of a lawyer's belief that disclosure not permitted under confidentiality Rule 1.6;[211]

4.3 Dealing with Unrepresented Persons — whether a lawyer "reasonably should know" that an unrepresented person misunderstands lawyer's role;[212]

5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers — whether efforts to ensure that firm has in place measures to encourage ethical compliance are reasonable;[213]

5.2 Responsibilities of a Subordinate Lawyer — whether a supervisory lawyer's resolution of a question was reasonable;[214]

5.3 Responsibilities Regarding Nonlawyer Assistants — whether efforts to ensure that firm has in place measures to encourage ethical compliance are reasonable;[215]

5.7 Responsibilities Regarding Law-Related Services — whether a service "might reasonably be performed" in conjunction with a provision of legal services;[216]

7.2 Advertising – whether the cost of advertising is reasonable;[217]

8.1 Bar Admission and Disciplinary Matters — whether information is protected by confidentiality pursuant to Rule 1.6;[218]

Thirty-five of the seventy-five rules or forty-seven percent require reference to some external standard (i.e., one outside of the rules themselves):

1.2(a) Allocation of Authority Between Lawyer and Client — distinction between "objectives" and "means"; whether certain actions would be understood as "impliedly authorized" in particular situation;[219]

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210. MODEL RULES OF PROF'L CONDUCT R. 3.6 (2004).
211. *Id.* at R. 4.1.
212. *Id.* at R. 4.3.
213. *Id.* at R. 5.1.
214. *Id.* at R. 5.2.
215. MODEL RULES OF PROF'L CONDUCT R. 5.3 (2004).
216. *Id.* at R. 5.7.
217. *Id.* at R. 7.2.
218. *Id.* at R. 8.1.
219. *Id.* at R. 1.2(a).

1.2(d) Assisting a Client in Criminal or Fraudulent Conduct — whether a lawyer in that area of practice would understand something to be "criminal or fraudulent";[220]
1.5(d) Contingent Fees Prohibited in Criminal and Certain Domestic Matters — practice in matrimonial law community regarding interpretation of this unclear rule;[221]
1.6 Confidentiality and Disclosure of Client Information — whether a disclosure is "impliedly authorized";[222]
1.7(a) Concurrent Conflict of Interest – whether in a particular type of representation there "is a significant risk that the representation of one or more clients will be materially limited by a lawyer's responsibilities to" other clients, former clients, or lawyer's personal interest;[223]
1.8(f) Third Party Fee Payment — "interference with lawyer's independence of professional judgment or with the client-lawyer relationship";[224]
1.9(a) Opposing Former Client in Same or Substantially Related Matter — whether matters should be considered "substantially related";[225]
1.10 Imputed Disqualification – existence of a conflict of interest under rules 1.7 or 1.9;[226]
1.11 Imputed Disqualification Rules for Government Lawyers — sufficiency of "screening" measures;[227]
1.12 Imputed Disqualification for Former Judge/Arbitrator/Mediator — sufficiency of "screening" measures;[228]
1.13(b) Organization As Client; Reporting Up the Corporate Ladder — what actions are "reasonably necessary" to protect a client;[229]

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220. MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2004).
221. *Id.* at R. 1.5(d).
222. *Id.* at R. 1.6.
223. *Id.* at R. 1.7(a).
224. *Id.* at R. 1.8(f).
225. MODEL RULES OF PROF'L CONDUCT R. 1.9(a) (2004). Such testimony routinely used in hearings on disqualification motions, which often turn on application of this rule. *See generally* RICHARD E. FLAMM, LAWYER DISQUALIFICATION: CONFLICTS OF INTEREST AND OTHER BASES § 22.5 (2003) (including the subjects of disbarment, disqualification, legal ethics, and conflicts of interest).
226. MODEL RULES OF PROF'L CONDUCT R. 1.10 (2004).
227. *Id.* at R. 1.11.
228. *Id.* at R. 1.12.
229. *Id.* at R. 1.13(b).

1.14(b) Client with Diminished Capacity – necessity of protective action for client;[230]
1.15(a) Safekeeping Property; Separate Account, Complete Records — adequacy of trust accounting records;[231]
1.15(d) Safekeeping Property; Interests of Others — what is considered an "interest" that must be protected;[232]
1.16(a) Termination of Representation; Required — when withdrawal is required by rules of professional conduct or law;[233]
1.16(d) Termination of Representation; Protection of Client — extent to which retention of papers/property is "permitted by other law";[234]
1.18(c) Prospective Clients; Adverse Representations — whether matters should be considered "substantially related" and whether information could be "significantly harmful" to a prospective client;[235]
1.18(d) Prospective Clients; Screening to Prevent Disqualification — sufficiency of "screening" measures;[236]
3.1 Meritorious Claims — practice in a particular area, regarding whether there was a "basis in law" or a good-faith argument for reversal/modification/extension of existing law;[237]
3.2 Expediting Litigation — whether expediting was "consistent with the interests of the client";[238]
3.3 Candor Toward the Tribunal — sufficiency of "reasonable remedial measures" to remedy fraud on the court;[239]
3.4(c) Fairness to Opposing Party and Counsel; Disobeying Obligation Under Rules of Tribunal – common understanding of court rules in practice;[240]
3.4(d) Fairness to Opposing Party and Counsel; Frivolous Discovery Requests, Failure to Comply – whether discovery request has legitimate practice purpose;[241]

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230. *Id.* at R. 1.14(b).
231. MODEL RULES OF PROF'L CONDUCT R. 1.15(a) (2004).
232. *Id.* at R. 1.15(d).
233. *Id.* at R. 1.16(a).
234. *Id.* at R. 1.16(d).
235. *Id.* at R. 1.18(c).
236. MODEL RULES OF PROF'L CONDUCT R. 1.18(d) (2004).
237. *Id.* at R. 3.1.
238. *Id.* at R. 3.2.
239. *Id.* at R. 3.3.
240. *Id.* at R. 3.4(c).
241. MODEL RULES OF PROF'L CONDUCT R. 3.4(d) (2004).

4.1 Truthfulness in Statements to Others — whether a particular fact is material;[242]
4.2 Communication with Persons Represented by Counsel — whether a communication is "authorized by law";[243]
4.4 Respect for Rights of Third Persons — legitimate purposes of actions taken by lawyer;[244]
5.2 Responsibilities of a Subordinate Lawyer — whether question of professional duty is "arguable";[245]
5.4(a) Professional Independence of Lawyer; Fee Sharing — whether a fee is a "legal fee" particularly in light of growth of lawyers' involvement in law-related businesses;[246]
5.6(a) Restrictions on Right to Practice; Restrictive Employment Agreements — whether a provision actually operates to restrict lawyer's practice;[247]
5.6(b) Restrictions on Right to Practice; Restrictive Settlement Agreements — whether a provision actually operates to restrict lawyer's practice;[248]
7.1 Communications Concerning a Lawyer's Services — whether a communication is misleading;[249]
7.2 Advertising – whether something given for recommendation is "something of value";[250]
7.3 Direct Contact with Prospective Clients — understanding of "prior professional relationship";[251]
7.5 Firm Names and Letterheads — whether trade name is misleading;[252]
8.4(d) Misconduct; Conduct Prejudicial to Administration of Justice — whether, or how, conduct would be prejudicial to administration of justice;[253]

Additionally, the value of expert testimony to the trier of fact becomes clear when one recognizes that most lawyers and judges

242. *Id.* at R. 4.1.
243. *Id.* at R. 4.2.
244. *Id.* at R. 4.4.
245. *Id.* at R. 5.2.
246. MODEL RULES OF PROF'L CONDUCT R. 5.4(a) (2004).
247. *Id.* at R. 5.6(a).
248. *Id.* at R. 5.6(b).
249. *Id.* at R. 7.1.
250. *Id.* at R. 7.2.
251. MODEL RULES OF PROF'L CONDUCT R. 7.3 (2004).
252. *Id.* at R. 7.5.
253. *Id.* at R. 8.4(d).

are not experts in professional ethics. The practice of law has become increasingly specialized, and most practitioners have their hands full just keeping up with their own particular area of practice. Legal ethics has become a private practice specialty area, as demonstrated by the establishment of groups such as the Association of Professional Responsibility Lawyers.[254]

Authorities interpreting ethical regulations have become more numerous, and at the same time, more difficult to access.[255] The increasing specialization in this area has led many bar organizations to set up processes whereby practitioners can obtain written[256] or oral[257] advisory opinions concerning the application of the

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254. Several hundred lawyers throughout the United States are members of the Association of Professional Responsibility Lawyers (APRL). Hundreds more belong to the National Organization of Bar Counsel (NOBC), a group of lawyers who prosecute discipline cases. The Mission Statement of APRL provides:

> The Association of Professional Responsibility Lawyers ("APRL") was formed to meet the growing demand for expertise in the law of lawyering, melding substantive law, procedural rules and regulatory standards governing various aspects of a lawyer's professional life. APRL provides a national clearinghouse of information regarding recent developments and emerging issues in the areas of admission to practice law, professional ethics, disciplinary standards and procedures, and professional liability. APRL fulfills its mission in a variety of ways: annual meetings; seminars; articles written by academics and practitioners; and through informal networking.
>
> APRL is an independent national organization of lawyers concentrating in the fields of professional responsibility and legal ethics, including: law professors; bar association counsel; counsel for respondents in disciplinary hearings; ethics expert witnesses; legal malpractice litigators; counsel to disciplinary committees; and in-house law firm ethics counsel. Consistent with its diverse membership, APRL speaks freely on issues of vital importance to the legal profession.

The Association of Professional Responsibility Lawyer, *Our Mission Statement*, at http://www.aprl.net/home.htm (last visited Jan. 27, 2005).

255. *See* Carl M. Selinger, *The Problematical Role of the Legal Ethics Expert Witness*, 13 GEO. J. LEGAL ETHICS 405, 410-15 (2000) (discussing justifications for admitting legal ethics expert testimony). One possible justification is to increase accessibility to the legal ethics area of the law. *Id.* at 410. Another justification for admitting the testimony "is that it provides decisionmakers with more objective analyses of the issues than they would gain from advocacy alone." *Id.* at 414.

256. *See* Peter A. Joy, *Making Ethics Opinions Meaningful: Toward More Effective Regulation of Lawyers' Conduct*, 15 GEO. J. LEGAL ETHICS 313, app. A (2002) (describing the option of using published ethics expert opinions or requesting a formal opinion if one does not exist on the subject). The Joy article also provides a state-by-state list of bar organizations that render written advisory opinions. *Id.*

257. *See* CONFERENCE OF CHIEF JUSTICES COMM. ON PROFESSIONALISM & LAWYER COMPETENCE, A NATIONAL ACTION PLAN ON LAWYER CONDUCT AND PROFESSIONALISM (1996), http://www.ncsc.dni.us/ccj/NATLPLAN/execsumm.htm (last visited Feb. 4, 2004) (calling on all state bars to provide assistance with ethics questions by establishing ethics hotline programs). Oral opinions are usually rendered through ethics hotlines, often

ethics rules to their contemplated conduct. By necessity, bar organizations devote their limited resources to this service. These services are an admission that, while all bar members must comply with the ethics rules, few have such a firm command of the rules that they can confidently apply them in any circumstance that might arise in the course of a lawyer's practice. A certain level of interpretation is required to apply the rules of professional conduct, which are designed to be general in nature, to the myriad of factual situations that a practitioner might face.

It simply is unrealistic to expect that every lawyer on a disciplinary hearing panel, or every judge assigned to serve as a referee, is fully versed on the intricacies of legal ethics law. Advisory opinion processes are available to help judges respond to their own ethical dilemmas.[258] Perhaps that is why the Federal Rules of Evidence permit triers of fact to hear the opinions of experts with specialized knowledge in their relevant field.[259]

Also, expert testimony routinely is used in connection with motions to disqualify lawyers and law firms in litigation. These disqualification matters most often turn on interpretation and application of the conflict of interest rules—the very *same rules* that are at issue in lawyer discipline cases. Expert witness testi-

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reached via a toll-free telephone number, operated by bar organizations. These hotlines are immensely popular with bar members. For example, during the 2003-04 fiscal year, the Florida Bar's ethics hotline, which is staffed by seven full-time attorneys, answered more than 21,000 telephone calls. National organizations operating ethics hotlines include the American Bar Association's Center for Professional Responsibility. State bar organizations operating ethics hotlines include: California, Colorado, Florida, Georgia, Kentucky, Maine, Maryland, Massachusetts, Michigan, Nevada, New Jersey, Pennsylvania, South Carolina, Texas, Utah, Virginia, Washington, and Wisconsin. Local bar associations operating ethics hotlines include: Baltimore City, Cincinnati, Nassau County (N.Y.), New York City, New York County, Philadelphia, San Diego County, and San Francisco.

258. *See* American Judicature Society, Links to Judicial Ethics Advisory Committees, *at* http://www.ajs.org/ethics/eth_advis_comm_links.asp (last visited Jan. 27, 2005) (on file with the *St. Mary's Law Journal*) (providing a list of state judicial ethics advisory committees and links to their Internet websites).

259. The Federal Rules of Evidence, Rule 702, provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

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mony is common in disqualification cases. It is also regularly used in medical and other professional disciplinary proceedings, which are often based on alleged violations of regulations or statutes.[260]

B. *The Nature of the Disciplinary Process Supports a Presumption of Admissibility*

The unique nature of lawyer disciplinary proceedings calls for a specialized approach to the admissibility of expert testimony. Lawyer disciplinary actions are typically considered neither civil nor criminal in nature; many courts have labeled them *sui generis*.[261]

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260. *See, e.g.*, Ark. State Bd. of Nursing v. Morrison, No. CA 03-1291, 2004 WL 2453932, at *1 (Ark. Ct. App. Nov. 3, 2004) (involving a nursing disciplinary action concerning an alleged statutory violation); State Bd. of Med. Exam'rs v. McCroskey, 880 P.2d 1188, 1191-92 (Colo. 1994) (en banc) (addressing a medical disciplinary action concerning an alleged statutory violation); Aldrete v. Dep't of Health Bd. of Med., 879 So. 2d 1244, 1245 (Fla. Dist. Ct. App. 2004) (involving a medical disciplinary action concerning an alleged statutory violation); Haw v. Idaho Bd. of Med., 90 P.3d 902, 905 (Idaho 2004) (involving a medical disciplinary action concerning an alleged statutory violation); Painter v. Dentistry Examining Bd., 665 N.W.2d 397, 399 (Wis. Ct. App. 2003) (addressing a dentistry disciplinary action concerning an alleged statutory violation).

261. *See, e.g.*, *In re* Beren, 874 P.2d 320, 322 (Ariz. 1994) (explaining that "[a]lthough [the court] use[s] criminal convictions . . . to shortcut the process of proving professional misconduct, [lawyer] disciplinary actions are *sui generis* proceedings [with] no other connection [to] criminal law"); Burnett v. Supreme Court Comm. on Prof'l Conduct, No. 04-137, 2004 WL 2476442, at *2 (Ark. Nov. 4, 2004) (agreeing with the committee's response that "attorney discipline proceedings are *sui generis*"); *In re* Rose V., 993 P.2d 956, 962 (Cal. 2000) (affirming that attorney disciplinary proceedings are sui generis and not necessarily governed by procedures applicable to ordinary civil and criminal litigation); Colo. Superior Court Grievance Comm. v. Dist. Court, City & County Denver, Colo., 850 P.2d 150, 152 (Colo. 1993) (en banc) (summarizing the respondent's concession "that district courts do not have subject-matter jurisdiction over disciplinary proceedings because they are not strictly civil or criminal cases"); *In re* Bailey, 821 A.2d 851, 863 (Del. 2003) (concluding that lawyer "[d]isciplinary proceedings are *sui generis* and are only governed by the . . . Rules of Civil Procedure [only] to the extent practicable."); *In re* Disciplinary Bd. of Haw. Supreme Court, 984 P.2d 688, 693 (Haw. 1999) (acknowledging that "[a]ttorney disciplinary proceedings are *sui generis*"); *In re* Blank, 585 N.E.2d 105, 114 (Ill. 1991) (restating a prior holding that lawyer "disciplinary proceedings are neither civil nor criminal and governed solely by [the supreme] court's rules and decisions"); *In re* Moore, 453 N.E.2d 971, 973 (Ind. 1973) (commenting that "[a]n attorney disciplinary action is neither criminal nor civil"); Grievance Adm'r v. Attorney Discipline Bd., 515 N.W.2d 360, 365 (Mich. 1994) (nothing that "attorney discipline matters are neither civil nor criminal cases; they are similar and dissimilar to both"); *In re* Ins. Agents' Licenses of Kane, 473 N.W.2d 869, 874 (Minn. Ct. App. 1991) (adopting the belief that "[a]ttorney discipline proceedings, under the supervision and control of the judiciary, are sui generis") (quoting *In re* Wang, 441 N.E.2d 488, 492 n.5 (Minn. 1989)); Davis v. Wright, 503 N.W.2d 814, 819 (Neb. 1993) (commenting that "attorney discipline proceedings have a 'nature all their own, neither civil nor criminal'" (citing Silva v. Superior Court, 17 Cal. Rptr. 2d 577, 580 (Cal. Ct. App. 1993)

This is because the primary purpose is not to punish the lawyer, but to protect the public.

Because lawyer disciplinary cases are not criminal in nature, the full panoply of due process protections available in criminal cases does not apply throughout a lawyer disciplinary prosecution. Ironically, the practical consequences are often more severe than the punishment would be in a criminal prosecution for the same conduct. Also, many disciplinary prosecutions can result in the imposition of essentially a financial capital punishment, in considering their effect on a lawyer's ability to practice her livelihood. For example: the notice requirements in disciplinary cases may not be as stringent as those in criminal cases;[262] there is no right to appointment of counsel;[263] there is no right to a jury trial;[264] the concept of double jeopardy does not apply;[265] and the Fifth Amendment right against self-incrimination may be limited in disciplinary proceedings.[266] Even though in some discipline systems the investigatory

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and quoting Ettinger v. Bd. of Med. Quality Assurance, 185 Cal. Rptr. 601, 603 (Cal. Ct. App. 1982))); Disciplinary Bd. Supreme Court of N.D. v. McDonald, 609 N.W.2d 418, 423 (N.D. 2000) (maintaining that "[a]lthough [lawyer] disciplinary proceedings are neither civil nor criminal, but quasi-judicial in nature, the Rules of Evidence and Civil Procedure apply 'insofar as appropriate'"); State *ex rel.* Okla. Bar Ass'n v. Minter, 961 P.2d 208, 213 (Okla. 1998) (emphasizing that "[a]ttorney-disciplinary proceedings are *sui generis*, having elements of both criminal and civil proceedings"); *In re* Barber, 904 P.2d 620, 626 (Or. 1995) (en banc) (writing that "[l]awyer disciplinary proceedings are *sui generis*, being neither civil nor criminal in nature"); Anonymous (M-156-90) v. State Bd. of Med. Exam'rs, 473 S.E.2d 870, 877 (S.C. Ct. App. 1996), *rev'd on other grounds*, 496 S.E.2d 17 (S.C. 1998) (commenting that "attorney discipline proceedings have a 'nature all their own, neither civil nor criminal'" (citing Silva v. Superior Court, 17 Cal. Rptr. 2d 577, 580 (Cal. Ct. App. 1993) and quoting Ettinger v. Bd. of Med. Quality Assurance, 185 Cal. Rptr. 601, 603 (Cal. Ct. App. 1982))); *In re* Brown, 197 S.E.2d 814, 818 (W. Va. 1973) (explaining that "attorney disciplinary proceedings are no more civil than criminal, rather sui generis").

262. *See, e.g., In re* Swisher, 41 P.3d 847, 851-52 (Kan. 2002) (reviewing proper notice to the lawyer in a disciplinary proceeding); Lawyer Disciplinary Bd. v. Barber, 566 S.E.2d 245, 252 (W. Va. 2002) (suggesting that notice requirements are similar to civil cases).

263. *See In re* Harris, 49 P.3d 778, 785 (Or. 2002) (en banc) (holding the trial court's denial of counsel to the accused was proper).

264. *See* People v. Smith, 937 P.2d 724, 727 (Colo. 1997) (en banc) (explaining the reasons the respondent was not given a jury trial in a lawyer discipline proceeding).

265. *See, e.g., In re* Triem, 929 P.2d 634, 641 (Alaska 1996) (explaining the reasons double jeopardy does not apply to lawyer disciplinary proceedings); *In re* Chastain, 532 S.E.2d 264, 268 (S.C. 2000) (holding there is no double jeopardy protection in a lawyer disciplinary proceeding).

266. *See, e.g., In Re* Frazier, 1 Cal. State Bar Ct. Rptr. 676, 697 (Cal. Bar Ct. 1991) (noting that while an attorney may be called to testify, the Fifth Amendment right may be asserted); *People*, 937 P.2d at 729 (holding it was not error to require the respondent to be deposed because he could invoke the Fifth Amendment to avoid self-incrimination); *In re*

and adjudicatory functions of the state disciplinary agency are combined in a single body, this has been held not to violate due process requirements.[267]

Disciplinary trials can involve two distinct stages. A hearing is held for the purpose of determining whether the respondent is guilty or innocent of the ethical breaches charged. Then, if the respondent is found guilty, a hearing is held for the purpose of determining the appropriate sanction. Expert testimony may be useful at both stages. As the Illinois Supreme Court acknowledged in *In re Chatz*,[268] if testimony is not deemed helpful to the trier of fact regarding guilt or innocence, that testimony may still be quite relevant at the sanction stage.[269]

Finally, a presumption of admissibility would add uniformity to the process of lawyer discipline throughout the country. Injecting consistency into the state-by-state lawyer regulatory scheme is vitally important because of another unusual feature of lawyer discipline—the concept of "reciprocal discipline." Each state disciplinary system employs reciprocal discipline.[270] Under the ru-

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Redding, 501 S.E.2d 499, 500 (Ga. 1998) (holding that an assertion of the Fifth Amendment equals admission of the allegations); *In re* March, 376 N.E.2d 213, 220 (Ill. 1978) (holding that an attorney can be compelled to testify in a disciplinary proceeding); Attorney Q. v. Miss. State Bar, 587 So. 2d 228, 234 (Miss. 1991) (reaffirming a prior holding that the Fifth Amendment is not available on a blanket basis); Tucker v. Va. State Bar, 357 S.E.2d 525, 528 (Va. 1987) (finding constitutional protection under the Fifth Amendment inapplicable in a lawyer disciplinary proceeding).

267. *See, e.g., In re* Crooks, 800 P.2d 898, 905 (Cal. 1990) (en banc) (rejecting a lawyer's claim that he was subject to triple jeopardy after being acquitted for mail fraud, convicted on a conspiracy count, and then subjected to disciplinary proceedings); Blinder, Robinson & Co. v. Bruton, 552 A.2d 466, 473 (Del. 1989) (affirming the court's holding that due process is not violated when investigation and judicial functions are performed in the same process); Goldstein v. Comm'n on Practice of Supreme Court, 995 P.2d 923, 928 (Mont. 2000) (reviewing the complaint procedure and rules on lawyer disciplinary enforcement and finding Montana's system is not unconstitutional).

268. 546 N.E.2d 613 (Ill. 1989).

269. *See In re* Chatz, 546 N.E.2d 613, 617 (Ill. 1989) (discussing the relevancy of expert testimony in a disciplinary proceeding).

270. ALA. R. DISC. P. 25; ALASKA BAR R. 27; ARIZ. SUP. CT. R. 53(i); ARK. RULES OF CT., PROCEDURES OF THE ARK. SUP. CT. REGULATING PROF'L CONDUCT OF ATTORNEYS AT LAW § 14 (2002); California State Bar Act § 6049.1(a) (codified at CAL. BUS. & PROF. CODE § 6049.1(a) (Deering 1983 & Supp. 2005)); COLO. R. CIV. P. 251.21(a); CONN. SUPER. CT. R. § 2-39 (West 2004); DEL. LAWYERS' R. DISCIPLINARY P. 18; D.C. BAR R. XI § 11; RULES REGULATING THE FLA. BAR Rule 3-4.6; RULES REGULATING THE FLA. BAR Rule 3-7.2; GA. STATE BAR R. 4-102, rule 9.4; HAW. SUP. CT. R. 2.15; IDAHO BAR COMM'N R. 513; ILL. SUP. CT. R. 763; IND. R. ADMIS. & DISCIPL. 23, § 28; IOWA CT. R. 35.18; KAN. SUP. CT. R. 202; KAN. SUP. CT. R. 217; KY. SUP. CT. R. 3.435; LA. SUP. CT. R.

bric of reciprocal discipline, a lawyer found guilty of an ethics violation in one state is subject to discipline for that same conduct in any other state where the lawyer is also admitted to practice. Finding of guilt and the imposition of a sanction in one state is conclusive proof of the violation for purposes of imposing discipline in other states where the offending lawyer holds a license; the matter cannot be relitigated in the other states.[271]

Assume that a lawyer is licensed in State X and State Y. State X typically does not permit the use of expert-witness-testimony in disciplinary proceedings and State Y routinely permits its use. If the lawyer is guilty of misconduct in State X, that finding of guilt will be conclusive for purposes of reciprocal discipline in State Y—even if the lawyer could have introduced extremely helpful expert-witness testimony, had the case only been brought in State Y instead. In other words, the lawyer's fate rises or falls on the approach taken in the first state's disciplinary action.

XIX § 21; ME. CODE OF PROF. RESP. 7.3(h); MD. RULE. 16-773; MASS. SUP. JUD. CT. R. 4.01 § 16; MICHIGAN CT. R. 9.104;; MINN. R. PROF. RESP. 12(d); MISS. BAR R. DISCIPLINE R. 13; MO. SUP. CT. R. 5.20; MON. R. LAW. DISCIPLINE R. 27; NEB. CODE OF PROF'L RESPONSIBILITY DR 21 (2004); NEV. SUP. CT. R. 114; N.H. SUP. CT. R. 37(12); N.J. CT. R. 1:20-14; N.M. R. GOVERNING DISCIPL. 17-210; N.Y. CT. R. §§ 603.3, 691.3, 806.19, 1022.22; N.C. BAR R. subch. B, § .0116; N.D.R. LAWYER DISCIPL. 4.4; OHIO GOV. BAR R. V § 11(f); OKLA. STAT. tit. 5, app. 1-A, rule 7.7; OR. BAR R. 3.5; PA. R. D. E. rule 216; R.I. SUP. CT. R. art. III, 14; S.C. APP. CT. R. 413, rule 29; S.D. CODIFIED LAWS § 16-19-74 (Thompson West 2004); TENN. SUP. CT. R. 9 § 17; TEX. R. DISCIPLINARY P. part IX, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A-1 (Vernon 2005); UT. CT. R. CHPT. 14 R. 22; VT. PROF'L RESP. R. 20; VA. SUP. CT. R. Part 6 R. 13; WASH. R. ENFORCEMENT OF LAW. CONDUCT 9.2; W.VA. R. LAW. DISCIPLINARY P. RULE 3.20; WIS. SUP. CT. R. 22.22; WY. BAR DISCIPLINARY C. § 20.

271. *See* Gary Wachtel, Recent Decisions, *Reciprocal Discipline Meets Due Process*, 14 PROF. LAW. 8, 8 (2003) (asserting the notion that when a second state where a lawyer holds a license pursues a disciplinary proceeding, the record from the original disciplinary action in the first state is "conclusive evidence of the misconduct"); *see also* Denise Benjamin, Project, *District of Columbia Court of Appeals A Survey of Recent Case Law on Professional Responsibility and Criminal Procedure* (pt. 1), 31 HOW. L.J. 299, 299-300 (1988) (distinguishing between the strict and more flexible applications of reciprocal discipline amongst jurisdictions and concluding that even the more flexible application provides the secondary jurisdiction with "a basis for disciplinary actions in their jurisdictions" as a result of the disciplinary outcome in the primary jurisdiction); Alan M. Colvin, Comment, *Reciprocal Discipline: Double Jeopardy or a State's Right to Protect its Citizens?*, 25 J. LEGAL PROF. 143, 144 (2001) (discussing the application of the reciprocal discipline rule by the Wisconsin and North Dakota supreme courts and giving the basic premise behind reciprocal discipline).

C. *A Presumption of Admissibility Is Consistent with Accepted Evidentiary Practice*

A presumption of admissibility would be quite consistent with the accepted evidentiary practice in lawyer discipline cases. Typically, the rules of evidence are applicable in discipline cases, but not necessarily in the same manner that they apply to civil or criminal cases. Often the disciplinary boards apply the rules in a relaxed or modified manner befitting the *sui generis* characterization of these cases.[272]

A presumption that makes expert testimony more easily and more consistently admissible may be a relatively novel approach that has no apparent counterpart in evidence law. Nevertheless, the presumption would not be inconsistent with the use of expert testimony that is already permitted by the Federal Rules of Evidence. Expert testimony in the form of an opinion may be admitted when it will be helpful to the trier of fact:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.[273]

Furthermore, the expert's opinion may go to the ultimate issue:

> (a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

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272. *See, e.g.*, N.D.R. LAWYER DISCIPL. 3.5(B) (mandating that the rules of evidence apply "insofar as appropriate" in lawyer discipline proceedings); TEX. R. DISCIPLINARY P. 2.17(L), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A-1 (Vernon 2005) (proclaiming that the admission or exclusion of evidence is in the Evidentiary Panel's discretion and the failure of the Panel to strictly comply with the Texas Rules of Evidence is not a basis for reversal of the disciplinary commission's decision); WASH. R. FOR ENFORCEMENT OF LAW. CONDUCT 10.14(d) (permitting the hearing officer to reference the Washington Rules of Evidence for consideration during evidentiary rulings so long as the rules do not conflict with the hearing officer's discretion to determine if the evidence is something on which a reasonably prudent person would rely, including hearsay); Fla. Bar v. Rendina, 583 So. 2d 314, 315 (Fla. 1991) (stating that due to the quasi-judicial nature of disciplinary proceedings, "the referee is not bound by technical rules of evidence").

273. FED. R. EVID. 702.

> (b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.[274]

As one court has stated, doubts about expert testimony should be resolved in favor of admissibility.[275] Despite this principle and the broad language of Rule 704 of the Federal Rules of Evidence, some courts have concluded it is improper to admit expert testimony offering a legal conclusion.[276] The reason these courts often give for excluding such testimony is that it would usurp the role of the trial court as the jury's sole source of instruction concerning the law.[277] This reasoning completely loses its force when applied to lawyer disciplinary proceedings because, with the exception of Texas, these are bench trials. Texas appears to be the only jurisdiction that permits jury trials for discipline cases. Yet ironically, Texas has permitted expert testimony on the ultimate issue of whether a lawyer's conduct violated the ethics rules as charged.[278]

A presumption of admissibility would help standardize decisions on the question, which currently depend highly on the views of the particular judge or hearing panel assigned to the respondent's case.

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274. FED. R. EVID. 704.

275. *See* Sil-Flo, Inc. v. SFHC, Inc., 917 F.2d 1507, 1517 (10th Cir. 1990) (quoting Specht v. Jensen, 853 F.2d 805, 810-11 (10th Cir. 1989) in its decision to admit questionable expert testimony).

276. *See, e.g.*, Shahid v. City of Detroit, 889 F.2d 1543, 1547-48 (6th Cir. 1989) (discussing the exclusion of legal conclusions by experts in the face of Federal Rule of Evidence 704); Owen v. Kerr-McGee Corp., 698 F.2d 236, 240 (5th Cir. 1983) (finding that Federal Rule of Evidence 704 does not permit a witness to assert legal conclusions).

277. *See, e.g.*, Hygh v. Jacobs, 961 F.2d 359, 364 (2d Cir. 1992) (asserting that regardless of an expert's qualifications to help the trier of fact, the expert cannot compete with the judge, in the role of instructing the jury); Specht v. Jensen, 853 F.2d 805, 808 (10th Cir. 1988) (prohibiting the testimony of an expert witness that offered an array of legal conclusions and, resultantly, "supplant[ed] . . . the [trial] court's duty to set forth the law"); *Shahid*, 889 F.2d at 1548 (quoting United States v. Zipkin, 729 F.2d 505, 509-10 (6th Cir. 1984) in its decision to exclude expert testimony since the expert witness's job is not to instruct the jury).

278. *See* Rodgers v. Comm'n for Lawyer Discipline, 151 S.W.3d 602, 616-17 (Tex. App.—Fort Worth 2004, pet. denied) (finding that the trial court's decision to admit the testimony of an expert who testified to the ultimate issue was not an abuse of discretion). The expert testified that, in her opinion, the respondent's actions constituted a violation of Texas's disciplinary rules. *Id.*; *see also supra* Part III.A. (summarizing the relevant portion of *Rodgers*).

In light of the unusual nature of discipline cases, (e.g., bench trials, the informal application of rules of evidence, limited due process rights, the specter of reciprocal discipline in a state having very different procedural rules but with no opportunity to relitigate the underlying issues) a presumption of admissibility for expert testimony on behalf of the respondent is entirely consistent with, if not required by, notions of fundamental fairness.

D. *There Are No Compelling Reasons Against a Presumption of Admissibility*

As discussed above, numerous reasons favor a presumption of admissibility for expert testimony offered by respondents in disciplinary proceedings. No compelling reasons against such a presumption exist.

Typically, two rationales justify the exclusion of expert testimony. First, it is argued that the testimony would invade the province of the trier of fact. Essentially, the basis for this rationale is that the referee or hearing panel does not need someone to help it determine whether the respondent has violated an ethics rule. Second, the exclusion of expert testimony in disciplinary proceedings is often justified by a fear that anything that potentially expands the use of expert witnesses by respondents will dramatically increase the disciplinary agency's cost of prosecuting its cases. Neither of these purported justifications withstands scrutiny.

While the former rationale fails for a variety of reasons,[279] the latter rationale fails for two basic reasons. First, it simply is not true. The procedural rules governing the prosecution of discipline cases in almost every jurisdiction entitle the disciplinary agency to recover its costs—and, in some jurisdictions, attorney fees—from a respondent found guilty.[280] In stark contrast, only a handful of ju-

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279. *See supra* Part IV.A. (giving reasons why the nature of ethics rules, combined with the lack of expertise from judges and lawyers, supports the admissibility of expert testimony).

280. Ala. R. Disc. P. 8 (costs); Alaska Bar R. 16 (costs and attorney fees); Ariz. Sup. Ct. R. 60 (costs); Ark. Rules of Ct., Procedures of the Ark. Sup. Ct. Regulating Prof'l Conduct of Attorneys at Law § 18 (2002) (costs); California State Bar Act Art. 1 § 6 (codified at CAL. BUS. & PROF. CODE § 6049.1(A) (Deering 1983 & Supp. 2005))(costs); COLO. R. P. REGARDING ATTORNEY DISCIPLINE AND DISABILITY PROCEEDINGS R. 251.19 (costs); Conn. Super. Ct. R. §§ 2-38, 2-51 (costs); Del. Lawyers' R. Disciplinary P. 27 (costs); D.C. Bar R. XI § 3 (costs); Rules Regulating The Fla. Bar Rules 3-7.6, 3-7.11 (costs); Haw. Sup. Ct. R. 2.3 (costs); Idaho Bar Comm'n R. 506 (costs); Ill. Sup. Ct. R. 773

risdictions authorize the successful respondent to recover costs from the disciplinary agency.[281] Second, a respondent will not be willing to hire an expert witness unless the respondent reasonably believes that doing so will materially benefit his or her defense.[282]

V. APPLYING THE PRESUMPTION TO OUR NOT-SO-HYPOTHETICAL

How would a presumption of admissibility actually work in our not-so-hypothetical situation? Recall that the respondent is charged with violating two rules of professional conduct Rule 1.15(d)[283] (not promptly delivering to a third party funds that the

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(costs); Ind. R. Admis. & Discipl. 23, § 16 (costs); Iowa Ct. R. 35.25 (costs); Kan. Sup. Ct. R. 224 (costs); Ky. Sup. Ct. R. 3.450 (costs); La. Sup. Ct. R. XIX § 10.1 (costs and attorney fees); Me. Code of Prof. Resp. 7.2 (costs); Md. Rule. 16-761 (costs); MASS. SUP. JUD. CT. R. 4.01 § 23 (costs); MICH. CT. R. 9.128 (costs); MINN. R. PROF. RESP. 15 (costs and attorney fees); MISS. BAR R. DISCIPLINE R. 27 (costs); MO. SUP. CT. R. 5.19 (costs); MONT. R. LAW. DISCIPLINARY ENFORCEMENT R. 7 (costs); NEB. DISCIPLINARY R. 23 (costs); Nev. Sup. Ct. R. 120 (costs and attorney fees); N.H. Sup. Ct. R. 37 (costs); N.J. Ct. R. 1:20-17 (costs); N.M. R. Governing Discipl. 17-106 (costs); N.Y. Ct. R. §§ 605.13 (costs); N.C. Bar R. subch. B, § .0105 (costs); N.D.R. Lawyer Discipl. 1.3 (costs); Ohio Gov. Bar R. V § 8 (costs); Okla. Stat. tit. 5, app. 1-A, rule 6.16 (costs); Or. Bar R. 10.7 (costs); Pa. R. D. E. Rule 208 (costs); R.I. Sup. Ct. R. art. III, 16 (costs); S.C. App. Ct. R. 413, Rule 19 (costs); S.D. Codified Laws § 16-19-70.1 (Thompson West 2004) (costs); Rule 9, Section 24, Tennessee Supreme Court Rules (costs and attorney fees); TEX. R. DISCIPLINARY P. part I, rule 1.06, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G app. A-1 (Vernon 2005) (costs and attorney fees); UT. CT. R. 14.30 (costs); VT. PROF'L RESP. P. Rule 8 (costs); VA. SUP. CT. 6.10 (costs and attorney fees); WA. CT. R. 5.7 (costs); W. VA. R. LAW. DISCIPLINARY P. Rule 3.15 (costs); Wis. Sup. Ct. R. 22.24 (costs); WY. BAR DISCIPLINARY C. § 26.

281. CONN. SUPER. CT. R. § 2-38 (West 2004); RULES REGULATING FLA. BAR Rule 3-7.6 (West 2003); MD. R. § 16-761 (West 2005); OR. REV. STAT., OR. R. BAR § 10.7(n)(I) (West 2005).

282. The author's personal experience bears this out. On a number of occasions, respondents who have inquired about retaining an expert's services have made it clear that they did not want to bear the cost unless it appeared the testimony would be relevant and potentially helpful, and that there was a reasonable likelihood that the testimony would be admitted into evidence.

283. American Bar Association Model Rule of Professional Conduct Rule 1.15(d) provides:

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

third person is entitled to receive) and Rule 7.1[284] (making a misleading communication concerning her services).

If the respondent wishes to introduce testimony from a qualified expert witness in defending these charges, there should be a presumption that the testimony is admissible. This means that, once the witness has been qualified, the witness's testimony will be declared admissible unless the disciplinary agency objects and can bear its burden of defeating the presumption.[285] In order to defeat the presumption, the disciplinary agency should have the burden of showing: (1) that the testimony is not relevant, or is otherwise improper under the jurisdiction's counterpart to Federal Rule of Evidence 403;[286] and (2) that the testimony would concern solely the application of a rule that had no element of reasonableness, no possible reference to external standards of practice, and no possible use in mitigation. If the judge or hearing panel concluded that the only possible use of the testimony would be for mitigation purposes, the testimony could be deferred unless and until the hearing on sanctions following a guilty determination.

If the respondent chooses not to introduce expert testimony, the presumption of admissibility should not apply to testimony of experts proffered by the disciplinary agency. Their testimony should be subject to the general standards set by Federal Rules of Evidence 702 and 704. The reason for not applying the presumption in situations where the disciplinary agency initiates the use of experts is again based on fundamental fairness: the agency controls the progress of the prosecution; the agency already bears the burden of proving the case, and is not required to use expert testimony in order to do so;[287] and the agency should not be permitted to drive up the respondent's defense costs through the one-sided use of ex-

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284. MODEL RULES OF PROF'L CONDUCT R. 7.1 (2004). The rule provides: "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 contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading." *Id.*

285. FED. R. EVID. 702. The respondent will have to show that the witness is qualified as an expert in the subject area, which here generally concerns lawyers' professional ethics. *Id.*

286. FED. R. EVID. 403. The rule provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.*

287. *See supra* Section III.B. (pertaining to the admissibility of expert testimony).

perts, especially since most cost-recovery disciplinary procedure rules do not authorize cost recovery by respondents.[288]

In our not-so-hypothetical, all of the potential areas of the expert testimony fall within the parameters of the presumption and therefore should be deemed admissible. Both rules have components of reasonableness or call for reference to external standards. Additionally, in the unfortunate event that the respondent is determined to be guilty as charged, the testimony would be useful in the mitigation of damages.

VI. CONCLUSION

Today's practice environment is full of potential ethics pitfalls for even the most conscientious lawyer. The governing rules continue to change and become more complex.[289] A lawyer is often a solo or small-firm practitioner who is charged with professional misconduct and faces as an adversary a disciplinary agency that is experienced, organized, and often well-funded. The consequences of being found guilty of misconduct can include suspension or disbarment from practicing one's livelihood. Added to these concerns is the fact that the judge or hearing panel before whom the case is tried may not be intimately familiar with the particular ethics rules or how they are interpreted in different areas of practice.

Many of the rules of professional conduct contain elements of reasonableness or require reference to external standards of practice in order to be properly understood and applied. A lawyer charged with misconduct may find it potentially helpful, though probably costly, to retain an expert witness who would testify favorably to the lawyer's case. The accused lawyer should be able to know that her expert will be permitted to testify. There should be a presumption that the testimony presented by the respondent's expert will be admissible. This presumption will aid in leveling the playing field upon which so much rests for the respondent. The result will be a fairer process, more informed decisions, and ultimately a better disciplinary system.

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288. *See supra* notes 177-78 and accompanying text (providing citations to state rules concerning cost recovery).

289. The ABA Canons of Ethics were in place from 1908 to 1970. The Canons were replaced by the Code of Professional Responsibility from 1970 to 1983. The Code was in turn replaced by the Rules of Professional Conduct, which took effect in 1983, but were substantially revised in 2002.