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Taking and Pursuing a Case: Some Observations Regarding "Legal Ethics" and Attorney Accountability

BY RICHARD H. UNDERWOOD*

INTRODUCTION

This Article addresses some of the potential liabilities that may arise from an attorney's decision to decline, refer, undertake, continue or discontinue the prosecution of a civil action. The author's participation in several sessions of the Annual Intensive Course in Trial Advocacy, offered to practicing lawyers through the University of Kentucky's Office of Continuing Legal Education, intensified his interest in the subject matter.¹

Among the problems presented in that course is a hypothetical file concerning the plight of a general practitioner who was sued for negligently assessing the merits of a potential claim before declining to prosecute it, failing to advise the would-be plaintiff of the statute of limitations applicable to the claim, and failing to refer the case to a more specialized attorney.² Invariably, proposed solutions offered by course participants that even suggest attorney liability on the hypothetical facts of the problem are met with incredulity, if not outright indignation. The author believes that such responses are more the result of professional

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¹ Information regarding this course may be obtained by writing the Office of Continuing Legal Education, College of Law, Law Building, University of Kentucky, Lexington, Kentucky 40506-0048.

² 1 BESKIND, BOCCHINO & SEEKINGER, PROBLEMS AND CASES IN TRIAL ADVOCACY, CLE EDITION 341-58 (2d ed. 1982).

and academic indifference to what might be styled the law of law practice³ than a result of latent, or patent, self-interest.

Regarding the business of taking or rejecting cases, for example, it is regularly observed that the American lawyer is not a "common carrier."⁴ Similarly, one is repeatedly reassured that the attorney "who casually gives curbstome advice . . . is [not] liable for wrong advice."⁵ Nonetheless too ready an acceptance of such cliches as a restatement of the entire body of law governing the lawyer's duties and liabilities may prove hazardous in a legal environment in which the lawyer has become the new "target defendant."⁶

To begin with, such rules of thumb do not take into account the proposition that "[t]he fiduciary relationship existing between lawyer and client extends to preliminary consultation by a prospective client with a view to retention of the lawyer, although actual employment does not result."⁷ This rule is familiar to all attorneys in the context of counsel's duty to preserve the confidences and secrets "of one who has employed or sought to employ him."⁸ Nonetheless, relatively few practitioners have considered the implications of unintended violations of this "fiduciary relationship" in the context of refusals of employment or referrals.⁹

Similarly, in regard to counsel's liability to third-parties, it must be remembered that unprecedented pressure is being put

³ But see L. PATTERSON, *LEGAL ETHICS: THE LAW OF PROFESSIONAL RESPONSIBILITY* at V. (1982):

A course in legal ethics is, and should be, a law course involving rules of law and legal problems. That the subject of the rules is ethical conduct and that the problems may be characterized as ethical in nature does not make them any the less legal. Ultimately, the subject of all law is ethics and ethical conduct. A course in legal ethics narrows the subject only in that it is directed primarily to the rules of conduct for lawyers and rules relating to the practice of law generally.

⁴ Cf. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-26 (1981) ("A lawyer is under no obligation to act as advisor or advocate for every person who may wish to become his client. . . .").

⁵ Wade, *The Attorney's Liability for Negligence*, 12 VAND. L. REV. 755, 758 (1958-59).

⁶ Braly & Strachan, *The Lawyer as Defendant*, 6 A.B.A. SEC. LITIGATION 7 (1979).

⁷ *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1319 (7th Cir.) (footnote omitted), cert. denied, 439 U.S. 955 (1978).

⁸ MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-1 (1981).

⁹ See notes 132-148 *infra* and accompanying text.

on the legal profession to curb a perceived flood of groundless litigation.¹⁰ Recent court decisions and amendments to the various codes and rules of procedure have nearly mooted debate about whether this flood is real or imagined, and, at least in some jurisdictions, have eroded time honored rules of attorney immunity.¹¹ In deciding whether to pursue litigation, today an attorney must recognize that he or she has an obligation not only to protect the client's interests, but also to recognize the legitimate interests of others—if only to minimum degree.

This Article suggests that counsel's obligations to his or her client, adversary, and fellow members of the bar, as well as to the judiciary and the justice system, can be balanced without subjecting attorneys to liability. This balance can be attained, however, only if potential problems are spotted and minimal precautions are taken.

I. THE "NON-CLIENT" AND THE STATUTE OF LIMITATIONS

One need not turn to the hypothetical facts of a Continuing Legal Education (CLE) exercise¹² to find the ingredients of a legal malpractice claim arising from negligent advice given to a potential plaintiff.

In *Togstad v. Vesely, Otto, Miller & Keefe*,¹³ a potential client appeared at counsel's office to discuss pursuing a claim for medical malpractice.¹⁴ The claim arose from the treatment of the claimant's husband, who had been suffering from an aneurism on the left internal carotid artery. The aneurism was treated by the implantation of a Selverstone clamp, which was used to control the blood supply through the artery, allowing the aneurism to heal.¹⁵ The claimant suspected that the clamp had not been monitored and adjusted properly, resulting in an insufficient flow of blood to the patient's brain, severe paralysis, and a loss of speech.¹⁶ The claimant-interviewee contended that

¹⁰ See, e.g., Underwood, *Curbing Litigation Abuses: Judicial Control of Adversary Ethics—The Model Rules of Professional Conduct and Proposed Amendments to the Rules of Civil Procedure*, 56 ST. JOHN'S L. REV. 625, 628 (1981-82).

¹¹ See notes 85-108, 163-174 *infra* and accompanying text.

¹² See notes 1-3 *supra* and accompanying text.

¹³ 291 N.W.2d 686 (Minn. 1980).

¹⁴ *Id.* at 690.

¹⁵ *Id.* at 689.

¹⁶ *Id.* at 690.

at the conclusion of a 45 to 60 minute interview the attorney-interviewer opined that "he did not think [there was a] legal case, [but that] he was going to discuss this with his partner."¹⁷ The attorney did not request medical authorizations or advise the claimant of the need for action prior to the expiration of the period of limitations. The attorney also did not discuss fees with the interviewee or bill her for his consultation. When the claimant did not hear from counsel she assumed that "there wasn't a case,"¹⁸ and did not consult another lawyer until the period of limitations governing the original tort claim had expired.¹⁹

The attorney's defense in the resulting legal malpractice action was that no attorney-client relationship ever existed as a result of his discussions with the claimant.²⁰ According to the record evidence, the claimant recognized no more than a week after the interview²¹ that the attorney would not be representing her—apparently well before the statute of limitations had run.²² In other words, the case presented the issue whether an interviewee could bring an action for damages arising from a lost claim when the interviewee had concluded no more than a week after the interview (and within the period of limitations) that the attorney was not going to take any further action on the case.

The Minnesota Supreme Court affirmed a jury award totaling \$649,500.00,²³ after observing that the evidence substantiated the view that the defendant attorney had "failed to perform the minimal research that an ordinarily prudent attorney would do before rendering legal advice,"²⁴ and that the defendant attorney

¹⁷ *Id.* The attorney testified, "The only thing I told her . . . after we had pretty much finished the conversation was that there was nothing related in her factual circumstances that told me that she had a case that our firm would be interested in undertaking." *Id.* at 691.

¹⁸ *Id.* at 690.

¹⁹ *Id.*

²⁰ *Id.* at 692-93.

²¹ See Comment, *Attorney Malpractice: Use of Contract Analysis to Determine the Existence of an Attorney-Client Relationship*, 63 MINN. L. REV. 751 n.6 (1978-79) (citing Transcript of Proceedings at 53, 54, 69, *Togstad v. Vesely, Otto, Miller & Keefe*, No. 722846 (Minn. Dist. Ct., Hennepin City, Sept. 26, 1978)).

²² 291 N.W.2d at 690.

²³ *Id.* at 689. The attorney's indemnity and contribution claim against the treating physician was dismissed in *Vesely, Otto, Miller & Keefe v. Blake*, 311 N.W.2d 3 (Minn. 1981).

²⁴ *Id.* at 693.

had been "negligent in failing to advise [the claimant] of the two-year medical malpractice limitations period."²⁵

The California case of *Miller v. Metzinger*²⁶ presented a slightly different scenario. In that case a potential medical malpractice plaintiff contacted law firm *A* regarding the death of her husband well before the running of the applicable one year statute of limitations. Firm *A* obtained the decedent's medical records and, after reviewing them, declined to handle the case. Approximately six months later the claimant contacted firm *B*.²⁷ Although there was conflicting testimony regarding the extent of firm *B*'s undertaking, the principal attorney handling the matter admitted that he had agreed to perform at least a preliminary investigation of the file.²⁸ He contended, however, that "he did not agree to represent her, charge any fee for his services or secure a retainer agreement."²⁹ A few days before the expiration of the limitations period, the lawyer from firm *B* notified the claimant that he lacked sufficient expertise to handle the case, and that the file would be referred to firm *C*.³⁰ Although the referring attorney knew that the limitations period was about to expire,³¹ he did not advise the claimant of this fact.³² As a result, the claimant made her first contact with firm *C* after the period had lapsed.³³ In reversing a summary judgment in favor of firm *B*, the appellate court observed that "a breach of duty could be found in [the attorney's] failure to advise plaintiffs of the necessity to act promptly in contacting [firm *C*], in view of the fact that there were only a few days remaining within which to institute an action."³⁴

There are obvious differences between the two cases under discussion. For example, the attorney in *Miller* apparently examined the available records, but did not venture an opinion as to the merits of the case.³⁵ The only act of negligence allegedly

²⁵ *Id.* at 694.

²⁶ 154 Cal. Rptr. 22 (Cal. Ct. App. 1979).

²⁷ *Id.* at 23.

²⁸ *Id.* at 25.

²⁹ *Id.* at 26.

³⁰ *Id.* at 27.

³¹ *Id.* at 25.

³² *Id.* at 26.

³³ *Id.* at 24.

³⁴ *Id.* at 29.

³⁵ *Id.* at 24, 26.

committed on his part was his failure to advise the client of the need for prompt action upon the referral.³⁶ When compared with *Togstad*, however, it is much easier to conclude that the attorney in *Miller* had undertaken to perform some legal service to the potential plaintiff at or about the time that the claim was lost, even if that service was only to find another attorney competent to handle the matter in a timely fashion.³⁷

Although the cases are dissimilar in these and other particulars, they do contain a common thread: giving incorrect legal advice to one who has not been formally retained, or failing to advise a potential client of an applicable period of limitations under circumstances in which it is foreseeable that such conduct or omission will create an unreasonable risk of harm to that potential client, may result in attorney liability in tort.³⁸

Admittedly, *Miller* and *Togstad* are on the cutting edge of the law, at least in comparison to many of the cases that are discussed in other sections of this Article. The author's discussion of them is not meant to be an endorsement. On the other hand, prudent counsel will anticipate and eliminate the risks of litigation that are posed by these reported cases, whether or not the lawyers and judges in his or her particular jurisdiction are likely to accept them as definitive. At a minimum, these cases stand for the proposition that counsel should not leave a potential client dangling.

The testimony of both the plaintiff's and the defendant's experts in the *Togstad* case alluded to the following list of suitable precautionary measures that may be taken to reduce the threat of litigation initiated by "non-clients":

- (1) Before rendering advice to a potential client, obtain appropriate authorizations, review the available records, and consult with an expert in the field, if such consultation is necessary.³⁹
- (2) If it is necessary or appropriate to render an opinion regarding the merits of a claim, do not purport to render a "categorical" opinion.⁴⁰

³⁶ *Id.* at 29.

³⁷ *Id.*

³⁸ *Cf.* Comment, *supra* note 21, at 758-59 (cited in *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d at 693 n.4) (desirable to drop the fiction of implied contract and recognize that attorney malpractice is negligence action).

³⁹ 291 N.W.2d at 691-92. See also note 69 *infra*.

⁴⁰ 291 N.W.2d at 692.

(3) If a potential client consults you regarding his claim, and the expiration of the statute of limitations is imminent, inform the interviewee of the applicable statutory period.⁴¹

Finally, and with particular reference to the *Miller* case, counsel must communicate any decision regarding his intentions in a timely fashion, and follow-up such communications with appropriate correspondence "for the record."⁴²

II. MORE REGARDING STATUTES OF LIMITATION

While Disciplinary Rule 6-101(A)(3) (hereinafter referred to as DR)⁴³ provides that "a lawyer shall not neglect a legal matter entrusted to him,"⁴⁴ traditionally neglect has been defined as involving more than a single act or omission.⁴⁵ Perhaps as a result of this restrictive definition, courts and disciplinary authorities have been reluctant to impose punishment on attorneys for single instances of negligence resulting in the running of a statute of limitations,⁴⁶ at least in the absence of aggravating circumstances.⁴⁷

⁴¹ *Id.*

⁴² See 154 Cal. Rptr. at 26, 29. In *Miller*, neither the plaintiff nor the attorney-defendant had any accurate recollection of either the exact dates of their consultations or the precise content of their consultations. *Id.* at 25-26, 28-29. Such uncertainty gave rise to conflicting testimony and inferences, and virtually precluded a grant of summary judgment for the defendant. *Id.* at 28-29.

⁴³ MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101(A)(3) (1981).

⁴⁴ Cf. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1983) ("A lawyer shall act with reasonable diligence and promptness in representing a client.").

⁴⁵ ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1273 (1973) ("Neglect involves indifference and a consistent failure to carry out the obligations which the lawyer has assumed to his client or a conscious disregard for the responsibility owed to the client. . . . Neglect usually involves more than a single act or omission.").

⁴⁶ See, e.g., *Florida Bar v. Neale*, 384 So. 2d 1264, 1265 (Fla. 1980) ("There is a fine line between simple negligence by an attorney and violation of Canon 6 that should lead to discipline."). Cf. *In re Goldstaub*, 446 A.2d 1192 (N.J. 1982) (references to a "pattern of negligence" and "gross negligence").

⁴⁷ See, e.g., *In re Deardorff*, 426 N.E.2d 689, 692 (Ind. 1981) (involving a "deliberate course of deception [to conceal attorney's error] for a period of more than three years," which included bringing the client to the Indiana statehouse for a fictitious hearing); *Oklahoma ex rel. Oklahoma Bar Association v. Peveto*, 620 P.2d 392, 394 (Okla. 1980) (misrepresentation to the client and the trial court). Cf. *In re Rinzel*, 319 N.W.2d 873, 874 (Wis. 1982) (involving efforts to delay or otherwise derail a legal malpractice suit by the injection of improper defenses and third-party claims against successor counsel). For conflicting approaches to attempts to limit legal malpractice liability through settlement see Mass. Comm. on Professional Ethics Op. 82-1 (release proper if client gives knowing consent and has independent counsel); *Florida Bar v. Leopold*, 320 So. 2d 819, 820, 822 (Fla. 1975) (violation of DR 6-102(A) even if client has consulted independent counsel).

While this attitude toward formal discipline for neglect may be changing,⁴⁸ the malpractice suit remains the primary deterrent for such omissions. It appears self-evident that "[f]ailure to file suit before the running of the period of the statute of limitations plainly constitutes malpractice where there is no reasonable justification shown therefor."⁴⁹ The following statement is equally clear:

It does not require expert testimony to establish the negligence of an attorney who is ignorant of the applicable statute of limitations or who sits idly by and causes the client to lose the value of his claim for relief. An attorney who delays the bringing of an action until the statute of limitations has run is guilty of negligence if the attorney did not act solely with a view to promote the interest of his client.⁵⁰

It is obvious that office "dockets," calendars, and "tickler files" are effective means of avoiding the statute of limitations trap.⁵¹ On the other hand, the discussion that follows demonstrates that an office system or procedure is no panacea.⁵²

A. "Burnout"—*The Disabled Lawyer*

Two recent cases⁵³ involving the malpractice of litigation attorneys merit special interest, not because they broke new ground, but because they direct our attention to a common phenomenon—the existence of which is typically ignored and frequently denied. These cases are similar in that both involved an attorney's failure to meet a statute of limitations or other procedural deadline, but not as the result of simple inadvertence. On the other hand, they differ with respect to the age and experience of the attorneys involved. While the first decision dealt with the plight of a young attorney who had allowed

⁴⁸ See, e.g., *Kentucky Bar Ass'n v. Yates*, 677 S.W.2d 304, 305 (Ky. 1984) (failure to file estate tax return injured client and resulted in public reprimand). See also *In re Crane*, 255 N.W.2d 624 (Mich. 1977) (failure of both attorney and former associate to file suit prior to the running of the statute of limitations); *In re Pump*, 326 N.W.2d 773 (Wis. 1982) (discipline notwithstanding a settlement with the client).

⁴⁹ *Hoppe v. Ranzini*, 385 A.2d 913, 916 (N.J. Super. Ct. App. Div. 1978).

⁵⁰ *George v. Caton*, 600 P.2d 822, 829 (N.M. Ct. App. 1979).

⁵¹ See J. SMITH, PREVENTING LEGAL MALPRACTICE 39 (1981).

⁵² See notes 53-67 *infra* and accompanying text.

⁵³ *In re Barry*, 447 A.2d 923 (N.J. 1982); *In re Loew*, 642 P.2d 1171 (Or. 1982).

himself to be subjected to professional demands beyond his capacity,⁵⁴ the second decision involved a seasoned, successful specialist.⁵⁵

In the case of *In re Barry*,⁵⁶ the malpractice of a newly admitted lawyer came to light when a client "came storming into the office"⁵⁷ demanding to see one of the lawyer's superiors. The supervising attorney related the following scenario to disciplinary authorities:

At this point I asked [the younger attorney] to get the file and come in. He brought in a file jacket with [what], I believe, was the original letter I had gotten in the file and turned it over to Tom and I said, "Bring me the whole file." I looked at it and saw the original letter from when I turned it over to him and asked him for the balance of the file and he said, "That's it."

He didn't do anything on the file [although the case had supposedly been in progress for at least four years]. I gulped, like I am gulping now, and asked if he had filed the complaint and he indicated that he hadn't, and at that point I called my partners . . . to come down to the office and indicated, "I think we have a problem."⁵⁸

Unfortunately, eighteen or so other files were in the same shape.⁵⁹ This situation should not have come as a complete surprise to the firm. The newly-admitted lawyer had been carrying a total of 200 cases.⁶⁰

In *In re Loew*,⁶¹ disciplinary charges resulted from an experienced litigator representing a client in a licensing proceeding before the National Transportation Safety Board. After suffering an adverse ruling before an administrative law judge, the client

⁵⁴ 447 A.2d 923.

⁵⁵ 642 P.2d 1171.

⁵⁶ 447 A.2d 923.

⁵⁷ *Id.* at 924.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* A lone justice dissented from the opinion imposing a suspension, observing: The conclusion is inescapable that a considerable measure of blame for respondent's predicament must fall on the shoulders of the principals in the law firm that employed him, even though he does not seek to place it there. . . . The "sink or swim" approach is ill-suited to a high volume professional operation.

Id. at 926 (Clifford, J., dissenting).

⁶¹ 642 P.2d 1171.

urged counsel to pursue appropriate appellate remedies. After filing a notice of appeal, counsel failed to submit a brief, although three extensions of time were granted. After the appeal was dismissed, counsel even failed to capitalize on an opportunity to reopen the appeal. For almost a year between the filing of the notice of appeal and counsel's discharge, the client placed nearly forty telephone calls to counsel that went unanswered and unreturned.⁶² The Supreme Court of Oregon reluctantly concluded that a temporary suspension from practice was warranted.⁶³

What these seemingly "extraordinary and bizarre"⁶⁴ cases have in common is that both involved well-intentioned people who came to grief, in part because they tried to do too much. As a result, the younger of the two began "suffering from psychic conflicts, . . . [developed] anxiety related to his work setting, and [became unrealistic in] his thinking and reasoning. . . ."⁶⁵ The more experienced attorney became afflicted with what a psychiatrist styled the "burnt out syndrome."

A common pattern of the syndrome is that a professional person feels obligated to help each person who seeks his help, takes on more work than he can handle, including work he finds unpleasant, and evades such work by procrastination and self-denial.⁶⁶

Neither attorney asked for help nor sought to refer his problem cases to another lawyer. Neither felt able to do so. The tragedy of the fledgling associate might have been avoided had his law firm followed the recommendations of the dissenting justice in the reported opinion and instituted "a systematic, organized routine for periodic review of a newly admitted attorney's files."⁶⁷

B. The Last Minute Interview or Referral

All of the cases discussed so far involved situations in which counsel had ample opportunity to assess the merits of a case

⁶² *Id.* at 1172.

⁶³ *Id.* at 1173-74.

⁶⁴ 447 A.2d at 923.

⁶⁵ *Id.* at 925.

⁶⁶ 642 P.2d at 1173 (footnote omitted).

⁶⁷ 447 A.2d at 926.

before deciding to accept it and file suit, or take other action to advance the matter. Needless to say, the luxury of time is not always available. This is particularly true for the specialist who receives cases on referral from other lawyers.

As one expert in the field of attorney malpractice recently observed, "a considerable dilemma arises when a lawyer must quickly sue without adequate information."⁶⁸ The following sections illustrate the increasing judicial and legislative recognition of the rights of potential adversaries to a certain degree of freedom from the burdens of groundless and vexatious litigation. This recognition, however, has aggravated the problems of the lawyer who has insufficient time to investigate the claim.⁶⁹ For now it is enough to consider counsel's potential liability to the *client* when the statute of limitations requires the prompt filing of a complaint. The author asks the reader to assume that counsel had only a limited opportunity to investigate and assess the merits of the claim, and exercised due care in light of the information that was reasonably available. Nonetheless, later (post-filing) developments in the case now lead counsel to conclude that the litigation is without merit. Recognizing the fallibility of such a judgment, and the fact that a precipitous exit from the case might send signals to the opposing party that could jeopardize any chance the client might still have for a settlement on favorable terms, counsel might be at a loss to determine a proper course of action.

In such a situation an attorney may glean considerable guidance from the California case of *Kirsch v. Duryea*.⁷⁰ Kirsch had received surgical treatment for a shoulder injury suffered in a fall.⁷¹ Following the surgery, Kirsch's physician placed his arm in an airplane splint.⁷² Shortly after the removal of the splint, Kirsch complained of numbness in the shoulder and forearm,

⁶⁸ Zilly, *Recent Developments in Legal Malpractice Litigation*, 6 A.B.A. SEC. LITIGATION 8, 13 (1979).

⁶⁹ In this regard, see *Mahaffey v. McMahon*, 630 S.W.2d 68, 70 (Ky. 1982), which suggests that in many medical malpractice cases, a layman's opinion or recitation of facts may not provide probable cause for a lawsuit.

⁷⁰ 578 P.2d 935 (Cal. 1978).

⁷¹ *Id.* at 937.

⁷² *Id.* "An airplane splint is designed to hold the patient's arm in the air perpendicular to the axis of the body with the forearm bent forward at the elbow in a 45 degree angle." *Id.*

and of considerable loss of motion in the affected arm. Subsequent diagnoses suggested several possible causes of this disability, including the possibility of ulnar nerve damage attributable to improper splinting. Just days before the running of the statute of limitations, Kirsch was referred to Duryea, an attorney specializing in medical malpractice litigation. On the strength of the limited information available, which included conflicting medical reports attributing the disability to a variety of possible causes, Duryea filed a complaint alleging medical malpractice. Approximately four months later, Duryea came to the conclusion that there was insufficient evidence to justify a trial.⁷³ The Supreme Court of California summarized the available evidence:

There was no direct evidence that the airplane splint was faulty. The one doctor who first believed that the injury was due to a defective splint, in a subsequent letter of December 1964, questioned his own initial opinion. . . . Based on the materials available to defendant, the possibility of recovery was remote. . . .⁷⁴

Upon reaching a determination that the case was marginal, at best, counsel attempted to contact his client and withdraw from the litigation.⁷⁵ Unfortunately, the fact that the client had moved to a state some distance from the California forum complicated this task. Nonetheless, counsel attempted to avoid any prejudice to the client by offering to cooperate with any substitute counsel designated by the client and by warning of the need for prompt action in light of a five-year trial requirement set forth in the California Code of Civil Procedure. When the client failed to respond, counsel repeated his attempts to contact the client prior to filing a formal motion for withdrawal. Indeed, upon the filing of this motion, the court continued the matter pending yet another notice. In the meantime, Kirsch attempted unsuccessfully to obtain substitute counsel. At least one of the attorneys Kirsch contacted assessed the case negatively, as had Duryea. Although Kirsch finally obtained substitute counsel, he never replied to any of the notices sent by Duryea. Ultimately, the case was dismissed before substitute counsel contacted Duryea.⁷⁶

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 937-38.

⁷⁶ *Id.* at 938.

Surprisingly, a jury found attorney Duryea liable for negligence, and awarded Kirsch \$231,175.50 in damages, presumably on the strength of expert opinion to the effect that Duryea waited *too long* prior to effecting his withdrawal.⁷⁷ The California Supreme Court, however, rejected this reasoning. Writing for the court, Justice Clark observed that in the circumstances of the case:

[A]n attorney should not seek a nonconsensual withdrawal immediately upon determination that the case lacks merit, but should delay to give his client an opportunity to obtain other counsel or to file a consensual withdrawal.

Plaintiff's expert testified that the attorney who concludes his client's case lacks merit should quickly proceed to obtain a nonconsensual discharge. This is contrary both to . . . [the California] rules of professional conduct and the American Bar Association's disciplinary rule.⁷⁸

In reversing the jury verdict, the court noted the following facts, which might serve as a checklist for the prudent practitioner seeking to withdraw under similar circumstances:

(1) counsel had reviewed all the records in the file, and conversed with physicians, and had completed his medical and legal research to make an informed decision regarding the merits of the cause;⁷⁹

(2) counsel gave due notice of his intended withdrawal;⁸⁰

⁷⁷ *Id.*

⁷⁸ *Id.* at 223. The MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-110(A)(2) (1981), provides:

[A] lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(d) (1983) is virtually identical to DR 2-110(A)(2). Regarding the relevance of the Code and Rules as a measure of attorney liability in legal malpractice cases, see *Van Horn Lodge, Inc. v. White*, 627 P.2d 641, 645 n.1 (Alaska 1981) (Rabinowitz, J., dissenting).

⁷⁹ 578 P.2d at 937.

⁸⁰ *Id.* at 940.

(3) counsel offered to provide all materials regarding the case to the client and other attorneys designated by the client;⁸¹ and

(4) counsel delayed in seeking a formal order of withdrawal in an effort to avoid the inference of lack of merit.⁸²

On the other hand, there might be rare situations in which a more hasty withdrawal is justified. For example, a preliminary investigation conducted after the retainer, but before the filing of a complaint, might yield convincing evidence that a case has no merit, or even a suggestion of client fraud. Given counsel's potential liability to the adversary (discussed in the following section),⁸³ a prompt withdrawal, even in the face of the statute of limitations, might be the only course available.⁸⁴ In such a case counsel might consider coupling a frank explanation of the circumstances with some directions on how the client may proceed pro se if that is still his or her choice. In any event, no "duty of loyalty" should compel an attorney to engage in an act of self destruction.

III. LIABILITY TO THIRD PARTIES

A. *Commencing Groundless Litigation*

While the opinion in *Kirsch v. Duryea*⁸⁵ indicated that counsel may be able to commence, and then withdraw from litigation without incurring liability to the client,⁸⁶ the opinion did not address liability arising from the initiation or prosecution of a case to the client's *adversary*.⁸⁷

Over the last ten years, the legal community had focused much attention on the countersuit for malicious prosecution as a mechanism for providing compensation to third parties for the burdens and expenses of unwarranted litigation. Nonetheless,

⁸¹ *Id.* at 938.

⁸² *Id.* at 940.

⁸³ See notes 87-131 *infra* and accompanying text.

⁸⁴ *Cf.* *Van Berkel v. Fox Farm and Road Machinery*, 581 F. Supp. 1248, 1251 (D. Minn. 1984) (continued prosecution of action that was clearly barred by statute of limitations—fee award of \$2,894.62 under 28 U.S.C. § 1927).

⁸⁵ 578 P.2d 935 (Cal. 1978).

⁸⁶ *Id.* at 939-40.

⁸⁷ See *id.* at 940.

despite a few notable exceptions, such as Kentucky law,⁸⁸ courts have been reluctant to abandon time honored rules conferring absolute immunity on attorneys.⁸⁹ At the least, courts have shored up some traditional barriers to too-easy recovery in malicious prosecution actions against trial counsel.⁹⁰ For example, the so-called "English Rule" has been retained in a number of jurisdictions.⁹¹ The rule requires pleading and proof of the plaintiff's arrest or the seizure of his property, or some other special injury in addition to the usual hardship resulting from the malicious prosecution of the original action. This rule at least has the salutary effect of forcing a malicious prosecution plaintiff to present evidence substantiating conclusory allegations of injury to reputation and loss of present and future income attributed to the original "vexatious" proceeding.⁹²

Similarly, a few jurisdictions have adopted a more objective culpability threshold for determining if litigation has been initiated with "probable cause,"⁹³ while other courts have concluded that allowing the recovery of substantial general and punitive damages against attorneys under such standards "is inconsistent

⁸⁸ See, e.g., *Raine v. Drasin*, 621 S.W.2d 895 (Ky. 1981) (awarding compensatory and punitive damages against attorney for malicious malpractice prosecution).

⁸⁹ See, e.g., *W.D.G., Inc. v. Mutual Mfg. & Supply Co.*, 5 Ohio Op. 3d 397, 399-400 (Ct. App. 1976).

⁹⁰ See, e.g., *Ayyildiz v. Kidd*, 266 S.E.2d 108, 111-12 (Va. 1980) (malicious prosecution action by physician against attorney dismissed for failure to allege "special injury").

⁹¹ See *id.* at 111:

By the English common law rule, followed by a sizeable minority of American states, the malicious prosecution doctrine is not extended to a civil proceeding, even though this proceeding is instituted for an improper purpose and without probable cause, *unless there is an arrest of the defendant in that civil action, seizure of his property, or some other special injury to him* (emphasis added).

⁹² See, e.g., 266 S.E.2d at 111-12. Cf. 621 S.W.2d at 900 (alleged injury to a physician's reputation held to be "special injury" despite an absence of proof of pecuniary harm of "special, or out-of-pocket" injury). See generally Underwood, *supra* note 10, at 633 nn.35-36, (pointing out that the *Raine* Court erroneously concluded that allegations of negligence are necessarily defamatory, and inadvertently circumvented the traditional rule that allegations in pleadings are privileged).

⁹³ See *Tool Research & Engineering Corp. v. Henigson*, 120 Cal. Rptr. 291, 297 (Cal. Ct. App. 1975) ("An attorney has probable cause to represent a client in litigation when, after a *reasonable investigation* and industrious search of legal authority, he has an honest belief that his client's claim is tenable in the forum in which it is to be tried.") (emphasis added). Cf. 621 S.W.2d at 901 (lack of probable cause one of key ingredients of malicious prosecution action).

with the role of the attorney in the adversary system."⁹⁴ As one court recently observed:

A lawyer may be confronted with the choice between allowing the statute of limitation to run upon a claim with which the client has only recently come forward, or promptly filing a lawsuit based on the information in hand. . . . Time will not always permit "a reasonable investigation and industrious search of legal authority" before the lawyer must file a complaint to preserve the client's claim—and thus, perhaps, avoid an action by the client for legal malpractice.⁹⁵

The successive drafts of the Model Rules of Professional Conduct reflect the fear that a "reasonableness" standard might result in a proliferation of countersuits against trial attorneys.⁹⁶ For example, the 1981 Proposed Final Draft of Model Rule 3.1 [Meritorious Claims and Contentions] provides: "A lawyer shall not bring or defend a proceeding . . . unless there is a reasonable basis for doing so. . . ."⁹⁷ Shortly thereafter the Rule was amended to provide: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous. . . ."⁹⁸ Nonetheless, this version of the amended rule was accompanied with a comment⁹⁹ and notes illustrating the drafters' intent that the phrase "a basis for doing so that is not frivolous" was to be read as an objective inquiry.¹⁰⁰ When the rule was finally adopted by the American Bar Association (ABA), however, all references to an objective culpability standard were deleted, leaving the test

⁹⁴ *Friedman v. Dozorc*, 312 N.W.2d 585, 604 (Mich. 1981). Specifically, the court opined, "Framed as it is in terms of 'reasonableness,' the *Henigson* standard is difficult to reconcile with the lawyer's obligation to represent his client's interests zealously." *Id.* at 606. See also Underwood, *supra* note 10, at 633-35 (noting the potential "chilling" effect inherent in awards of substantial general and punitive damages via the countersuit against counsel).

⁹⁵ 312 N.W.2d at 604.

⁹⁶ The author has been informed that Ronald Mallen, author of *LEGAL MALPRACTICE* (1981), spoke out against a new "reasonable" standard in the American Bar Association (ABA) proceedings.

⁹⁷ MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (Proposed Draft 1981).

⁹⁸ MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1983).

⁹⁹ *Id.* at Rule 3.1 comment.

¹⁰⁰ See Underwood, *supra* note 10, at 637.

of "frivolity" hardly more enlightening than the language of the "old" *Code of Professional Responsibility*.¹⁰¹

Even so, it would appear that the original draft of Model Rule 3.1 did not go unnoticed. At the time that the drafters carved an objective culpability threshold out of the proposed disciplinary rule, a similar standard was incorporated into a new version of Federal Rule of Civil Procedure 11 (hereinafter referred to as FRCP).¹⁰² This standard also received honorable mention in the federal case law allowing fee awards for prevailing parties under the so-called "bad faith exception."¹⁰³

Elsewhere the author has argued that, "an award of fees directly against errant counsel as part of 'costs' pursuant to an appropriate standard of culpability, would serve as a sufficient deterrent to frivolous litigation, without the negative effects of a countersuit."¹⁰⁴ Moreover, the author observed that while few state courts recognized a "bad faith" rule for fee awards,¹⁰⁵ many "rules" jurisdictions might adopt amended FRCP 11¹⁰⁶

¹⁰¹ MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1) (1981) provides a subjective standard of attorney culpability: "(A) In his representation of a client, a lawyer shall not: (1) File a suit, assert a position, [or] conduct a defense . . . *when he knows or when it is obvious* that such action would serve *merely* to harass or maliciously injure another" (emphasis added). Regarding the problems of enforcement engendered by this standard, see Underwood, *supra* note 10, at 635-36.

¹⁰² FED. R. CIV. P. 11 (hereinafter cited as FRCP), as amended in 1983, provides: The signature of an attorney *or party* constitutes a certificate by him that he has read the pleading, *motion, or other paper*; that to the best of his knowledge, information, and belief . . . formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. *Id.* (emphasis added).

¹⁰³ See *Nemeroff v. Abelson*, 620 F.2d 339 (2d Cir. 1980), wherein the court cited the 1981 draft of Model Rule 3.1 and opined:

A claim is colorable, for the purpose of the bad faith exception, when it has some legal and factual support, considered in light of the *reasonable* beliefs of the individual making the claim. The question is whether a *reasonable* attorney could have concluded that facts supporting the claim *might be established*. . . .

Id. at 348 (emphasis added) (footnote omitted).

¹⁰⁴ Underwood, *supra* note 10, at 634 (citing Birnbaum, *Physicians Counterattack: Liability of Lawyers for Instituting Unjustified Medical Malpractice Actions*, 45 *FORD-HAM L. REV.* 1003, 1083 (1976-77)).

¹⁰⁵ For a statutory fee award provision, see *Sommer v. Carr*, 299 N.W.2d 856, 857 (Wis. 1981) (applying WIS. STAT. ANN. § 814.025 (West Cum. Supp. 1984-85)).

¹⁰⁶ See, e.g., Ky. R. Civ. P. 11.

and award attorney fee sanctions as an alternative to countersuit damages,¹⁰⁷ and as a substitute for, or supplement to, traditional forms of discipline.¹⁰⁸

B. "Bad Faith Continuance of Meritless Litigation": A New Wrinkle?

It has been noted that the Federal Rules of Civil Procedure may allow a prevailing defendant an award of attorney's fees if the plaintiff's action was brought without an adequate factual basis.¹⁰⁹ In addition, the Second Circuit's recent opinion in *Nemeroff v. Abelson*¹¹⁰ demonstrates that although an attorney may have an adequate factual basis for *commencing* a lawsuit, a fee award sanction may nonetheless be imposed if further proceedings are conducted in an "intentionally dilatory fashion,"¹¹¹ or if "during the litigation and prior to dismissal, sufficient facts [become] available to [plaintiff] to demonstrate that a failure at that point to withdraw the action [would amount to] bad faith."¹¹²

Nemeroff was a class action filed by a shareholder of Technicare Corporation against Abelson, a columnist for *Barron's Business and Financial Weekly*, Dow Jones (Abelson's publisher), and several investors who were acquaintances of Abelson's. The original complaint alleged that the investor-defendants profited from short sales based on advance information to be published in future columns. An amended complaint later changed the theory, alleging that the investor-defendants had induced the columnist to write negative articles to enhance their short posi-

¹⁰⁷ Of course, FRCP 11 sanctions may be invoked as a response to defenses and counterclaims that are not well grounded in fact. See *In re National Student Marketing Litigation*, 445 F. Supp. 157 (D.D.C. 1978) (party seeking security for costs must show that action was brought in bad faith or is frivolous); *American Automobile Ass'n., Inc. v. Rothman*, 104 F. Supp. 655 (E.D.N.Y. 1952) (purpose of FRCP 11 is to keep issues that an attorney knows to be false out of a case).

¹⁰⁸ Recent cases in which counsel were reprimanded or suspended for violations of DR 7-102(A)(1) include: *Phelps v. Kansas Supreme Court*, 662 F.2d 649 (10th Cir. 1981); *In re Phelps*, 637 F.2d 171, 173 (10th Cir. 1981); *Florida Bar Ass'n v. Hunt*, 429 So. 2d 1201, 1204 (Fla. 1983); *In re Haasze*, 336 So. 2d 76, 77 (Fla. 1976); *In re Clark*, 539 P.2d 242, 244-46 (Idaho 1975); *In re Cartwright*, 282 N.W.2d 548, 551-52 (Minn. 1979); *In re Hopp*, 634 P.2d 238, 240-41 (Or. 1981).

¹⁰⁹ See notes 102-108 *supra* and accompanying text.

¹¹⁰ 704 F.2d 654 (2d Cir. 1983).

¹¹¹ *Id.* at 660.

¹¹² *Id.* at 655.

tions. Almost a year later, plaintiff's counsel agreed to a dismissal of the case.¹¹³

Because plaintiff's counsel had some circumstantial evidence of a relationship between several critical columns and the activity in Technicare stock which was "supported" by some rumors of wrongdoing in the financial community, and because counsel had understood from a conversation with a lawyer from the New York Stock Exchange (NYSE) that the NYSE had found a "correlation" between the dates of the columns and certain short sales, the Second Circuit concluded that there had been an adequate basis for commencing the suit. Six months later, however, NYSE disavowed any such "correlation" in a formal report. Between the receipt of this report in July 1977 and the following May when the case was dismissed, counsel did nothing to "replace the correlation" with other evidence.¹¹⁴ Moreover, a July 1977 deposition of plaintiff's key witness "revealed that he had no direct support for his previous statements that Abelson was leaking information to the investor defendants."¹¹⁵ The appellate court opined:

Given the thinness of Nemeroff's case and the questionable origins of his suit, the District Court was probably entitled to find bad faith solely because Nemeroff and his attorneys elected to pursue the matter for several months after July 19, when they should have realized that they had no support for their charges.¹¹⁶

The trial judge, however, also explored the dilatory conduct of the case after the collapse of the plaintiff's case. Specifically, the trial judge observed that, rather than pursuing aggressive discovery from the investor-defendants or Abelson to establish the crucial link between them, counsel instead engaged in discovery relating to class certification and to certain inconsequential matters.¹¹⁷ The appellate court agreed that this course of conduct was further evidence of bad faith: "[T]hey must have appreciated that they had at best an extremely marginal case. In

¹¹³ *Id.* at 654.

¹¹⁴ *Id.* at 655.

¹¹⁵ *Id.* at 657.

¹¹⁶ *Id.* at 659.

¹¹⁷ *Id.* at 659-60.

such a situation, we should expect [the plaintiff's attorneys] to make vigorous efforts to shore up their case, rather than to allow the matter to meander through pretrial procedures."¹¹⁸

C. *On Means and Ends*

Disciplinary Rule 7-105 prohibits threatening "to present criminal charges solely to obtain an advantage in a civil matter."¹¹⁹ Moreover, DR 1-102(A)(6) contains the vague commandment that thou shalt not "engage in any other conduct that adversely reflects on [your] fitness to practice law."¹²⁰ While the continued vitality of these rules may be in doubt,¹²¹ prudence dictates that counsel refrain from making threats to secure an advantage in a civil case.¹²² In order to reinforce this proposition, it is appropriate to examine the holdings of some of the "leading" cases, without an elaborate discussion of whether they were decided properly.

In *State v. Harrington*,¹²³ an attorney was hired by a wife seeking to obtain a divorce from her husband on grounds of adultery.¹²⁴ After setting up a compromising situation for the husband to fall into and arranging for photographs, our hero forwarded a demand letter, which included the following:

[A]ny such settlement would include the return to you of all tape recordings, all negatives, all photographs and copies of photographs that might in any way, bring discredit upon yourself. Finally, there would be an absolute undertaking on the part of your wife not to divulge any information of any kind or nature which might be embarrassing to you in your business life, or your life as it might be affected by the Internal Revenue

¹¹⁸ *Id.* at 660. The trial court's award of attorney's fees of \$50,000 to the publishing defendants and \$26,000 to the investor-defendants was affirmed.

¹¹⁹ MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-105 (1981).

¹²⁰ *Id.* at DR 1-102(A)(6).

¹²¹ The ABA Model Rules contain no provision like DR 7-105, and no explanation for its deletion. *But see* MODEL RULES AT PROFESSIONAL CONDUCT Rule 8.4(b) (1983) (professional misconduct to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects").

¹²² *See* Kentucky Bar Association E-265 (1982) (hereinafter cited as KBA) (regarding threat to file a complaint against opposing counsel).

¹²³ 260 A.2d 692 (Vt. 1969), *discussed in* Livermore, *Lawyer Extortion*, 20 ARIZ. L. REV. 403, 404-08 (1978).

¹²⁴ 260 A.2d at 693.

Service, the United States Customs Service, or any other governmental agency.

. . . .

[Y]ou should have [this letter] in your possession by March 13, at the latest. Unless the writer has heard from you on or before March 22, we will have no alternative but to withdraw the offer and bring immediate divorce proceedings in Grafton County. This will, of course, require the participation by the writer's correspondent attorneys in New Hampshire. If we were to proceed under New Hampshire laws, without any stipulation, it would be necessary to allege, in detail, all of the grounds that Mrs. Morin has in seeking the divorce. The writer is, at present, undecided as to advising Mrs. Morin whether or not to file for 'informer fees' with respect to the Internal Revenue Service and the United States Custom Service. In any event, we would file, alleging adultery, including affidavits, alleging extreme cruelty and beatings, and asking for a court order enjoining you from disposing of any property, including your stock interests, during the pendency of the proceeding.¹²⁵

The attorney was convicted of attempted extortion.¹²⁶

Moving from the sinister to the puerile, we arrive at the case of *State v. Zeigler*,¹²⁷ which involved the use of the following form letter:

OH! THE JOY OF BEING SUED!!

How do you explain to the neighbors and the kids when the Sheriff's car pulls up front and an officer hands you the summons?

OR, how do you explain a garnishment to the boss, and the other fellows at work???

I don't know, but I guess you do; at least you didn't bother to answer my letter. You do not need to send me your check immediately to pay your account, because I am not going to bother you any more—but the Sheriff will. Oh yes, I will see you in court.

¹²⁵ *Id.* at 695-96.

¹²⁶ *Id.* at 700.

¹²⁷ 538 P.2d 643 (Kan. 1975).

You owe _____\$ _____

PAY ME NOW!!!¹²⁸

The attorney was suspended for violating DR 1-102(A).

Finally, it is once again worth noting that disciplinary proceedings are not counsel's only worry when the threats begin to fly. In *Kinnamon v. Staitman & Snyder*,¹²⁹ conduct in violation of DR 7-105¹³⁰ gave rise to a civil action for damages for the tort of intentional infliction of emotional distress.¹³¹

IV. TO REFER OR NOT TO REFER

DR 6-101(A)(1) provides, in pertinent part, "[a] lawyer shall not . . . handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it."¹³² The consequences of handling a legal matter incompetently need not be elaborated.¹³³ Consequently, counsel must "become competent" to handle his or her cases, or associate with another who is competent to handle them, or refer them to someone else.¹³⁴ This "common sense" is buttressed by the merging doctrine that if a general practitioner undertakes to perform professional services without the aid of a specialist under circumstances in which a reasonably careful skillful practitioner would refer the case to a specialist, then that attorney's work will be judged against a specialist's standard of care.¹³⁵

¹²⁸ *Id.* at 644.

¹²⁹ 136 Cal. Rptr. 321 (Cal. Ct. App. 1977).

¹³⁰ Attorney, the defendant in the action, had threatened the plaintiff with a criminal complaint for presenting a cold check to his client. *Id.* at 322.

¹³¹ *Id.* at 322.

¹³² MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101(A)(1) (1981).

¹³³ See *In re Deardorff*, 426 N.E.2d 689 (Ind. 1981) (suspension for failure to confer with or associate with an attorney competent to handle the matter); *Dayton Bar Ass'n v. Moore*, 442 N.E.2d 71 (Ohio 1982) (indefinite suspension for improper handling of a class action and several domestic relations cases); *Dayton Bar Ass'n v. Timen*, 405 N.E.2d 1038 (Ohio 1980) (public reprimand for improper handling of matters in federal court).

¹³⁴ See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 comment (1983).

¹³⁵ See *Horne v. Peckham*, 158 Cal. Rptr. 714, 720 (Cal. Ct. App. 1979); Johnston, *Attorney Accountability in Kentucky—Liability to Clients and Third Parties*, 70 Ky. L.J. 747, 751-63 (1981-82).

Unfortunately, the ABA Model Code of Professional Responsibility contains provisions that discourage, as well as encourage, referral of cases to specialists. There is an obvious economic reason why cases may not be referred. Specifically, DR 2-107(A), governing division of fees among lawyers, states, among other things, that fee splitting among lawyers who are not associated in practice is unethical unless the division is made in proportion to the services performed and the responsibility assumed by each lawyer.¹³⁶ The referring lawyer cannot collect an unearned fee as a "broker."¹³⁷ Putting it another way, "[t]o merely recommend another lawyer or refer a case is not performing a legal service,"¹³⁸ and the referring attorney can collect no fee.¹³⁹

The tension between DR 2-107(A) and the notion that a failure to refer may approach malpractice¹⁴⁰ led to the ABA's adoption of Model Rule of Professional Conduct 1.5(e), which provides:

A division of fee between lawyers who are not in the same firm may be made only if:

- (1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;
- (2) the client is advised of and does not object to the participation of all the lawyers involved; and
- (3) the total fee is reasonable.¹⁴¹

The rule—which would allow fee splitting pursuant to a written contract after full disclosure and with client consent, and if the referring lawyer assumes responsibility¹⁴² has been touted as a way to "get complex cases into competent hands and protect

¹³⁶ MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-107(A)(2) (1981).

¹³⁷ See *id.*

¹³⁸ *Belli v. Shaw*, 631 P.2d 980, 984-85 (Wash. Ct. App. 1981), *aff'd*, 657 P.2d 315 (Wash. 1983). See *In re Diamond*, 368 A.2d 353, 354 (N.J. 1976). See also KBA E-264 (1983); KBA E-55 (1971).

¹³⁹ MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-107(A)(2) (1981).

¹⁴⁰ Granelli, *Referral Fees: Legal Kickbacks?*, The Nat'l L.J. April 27, 1981 at 1, col. 4.

¹⁴¹ MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(e)(1)-(3) (1983).

¹⁴² It is unclear whether the responsibility assumed includes malpractice liability.

the client from ignorance and overpayment."¹⁴³ The philosophy of the new rule appears to be that *responsible* brokering of cases may be desirable.¹⁴⁴

Finally, it should be noted that counsel's decision to refer a case, or associate himself or herself with another attorney during the conduct of a particular case may result in certain "unexpected" legal consequences. Despite an ultimate reversal on the facts of the case, *Tormo v. Yormark*,¹⁴⁵ a widely read decision of the United States District Court for the district of New Jersey, continues to be read as a warning that a referring attorney may incur liability to the client if he knew or should have known that the attorney to whom the case was referred was incompetent or dishonest.¹⁴⁶ Similarly, a trial judge in the case of *J.M. Clemminshaw Co. v. City of Norwich*¹⁴⁷ imposed discovery sanctions on "counsel of record" because of the discovery abuse of another attorney who had been conducting the "more active representation" of the client.¹⁴⁸

V. WITHDRAWAL

There are many reasons why counsel might wish to withdraw¹⁴⁹ or be compelled to withdraw¹⁵⁰ from pending litigation. It is not the author's goal to enumerate the recognized grounds for permissive or mandatory withdrawal, although it is worth noting here that courts have become more critical of the abandonment of clients based upon economic considerations.¹⁵¹

¹⁴³ Granelli, *supra* note 140, at 10, col. 4 (quoting the late Robert Kutak). *Accord* Moran v. Harris, 182 Cal. Rptr. 519 (Cal. Ct. App. 1982) ("If the ultimate goal is to insure the best possible representation for a client, a forwarding fee is an economic incentive to less able lawyers to seek out experienced specialists to handle a case.").

¹⁴⁴ 182 Cal. Rptr. at 523.

¹⁴⁵ 398 F. Supp. 1159 (D.N.J. 1975) (referring counsel found not negligent for failing to further inquire into out-of-state counsel's background).

¹⁴⁶ *Id.* at 1171.

¹⁴⁷ 93 F.R.D. 338 (D. Conn. 1981).

¹⁴⁸ *Id.* at 349.

¹⁴⁹ See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(C)(1)(a)-(f) (1981) (permissive withdrawal).

¹⁵⁰ See *id.* at DR 2-110(B)(1)-(4) (1981) (mandatory withdrawal).

¹⁵¹ See, e.g., *Kriegsman v. Kriegsman*, 375 A.2d 1253, 1256 (N.J. Super. 1977) (client's inability to pay unanticipated fees and expenses did not justify withdrawal of firm that had agreed upon a fixed fee). See also *Vann v. Shilleh*, 126 Cal. Rptr. 401, 406 (Cal. Ct. App. 1975) (client's inability to pay attorney's fees does not justify counsel's withdrawal from case on Friday before Monday trial); *Imhoff v. Hammer*, 305 A.2d 325 (Del. 1973) (attorney may not withdraw on evening of trial simply because client rejects settlement).

Instead, the author's purpose is to emphasize that a lawyer must protect a client's interests upon withdrawal. Specifically, DR 2-110(A)(2) provides:

[A] lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.¹⁵²

The importance of adhering to this rule is best illustrated by yet another "rogues' gallery" of cases which might be subtitled "how not to get out of a case." Generally, these cases fall into one of two categories.

First, there are those cases in which counsel did not provide notice adequate to allow the client time to find another lawyer and preserve his or her claim or defense, or to avoid the disruption of the court's docket associated with the necessity of obtaining a continuance.¹⁵³ Clearly, the loss of the client's claim or defense is likely to result in discipline,¹⁵⁴ if not malpractice liability.¹⁵⁵

Second, there are a surprising number of reported cases involving abuse of the attorney's lien to secure some advantage over the client.¹⁵⁶ Such conduct may not only run afoul of the rule regarding "delivery to the client of all papers and property to which the client is entitled,"¹⁵⁷ but also the rule that counsel has a duty to suggest the employment of successor counsel and cooperate with that counsel.¹⁵⁸ For example, attorneys have been disciplined for retaining client files for the purpose of hindering

¹⁵² MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(A)(2) (1981). See also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(d) (1983) which parallels the CODE provision.

¹⁵³ See, e.g., *Smith v. Bryant*, 141 S.E.2d 303, 306 (N.C. 1965).

¹⁵⁴ See *Florida Bar Ass'n v. Gray*, 380 So. 2d 1292 (Fla. 1980); *In re Price*, 261 S.E.2d 349 (Ga. 1979) (public reprimand of attorney for causing loss of claim when statute of limitations ran).

¹⁵⁵ But see *Van Horn Lodge, Inc. v. White*, 627 P.2d 641 (Alaska 1981) (attorney exonerated over a strong dissent discussing pertinent ethical considerations and their implications for malpractice liability).

¹⁵⁶ See, e.g., *In re Kaufman*, 567 P.2d 957, 960 (Nev. 1977).

¹⁵⁷ MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(A)(2) (1981).

¹⁵⁸ See *id.*

the client's effort to retain new counsel,¹⁵⁹ for the purpose of securing a fee splitting arrangement with successor counsel,¹⁶⁰ and for the purpose of securing the payment of a disputed fee.¹⁶¹ Similarly, courts have ruled that counsel's withholding of a client's papers to secure a release from malpractice liability is unethical and tortious.¹⁶²

VI. FRIVOLOUS APPEALS

At a recent meeting of the Federal Bar Association in Louisville, Kentucky, Court of Claims Chief Judge Alex Kozinski noted that "the ground rules of federal litigation have changed,"¹⁶³ citing a recent Second Circuit opinion awarding double costs and attorney's fees against a lawyer who had prosecuted a frivolous appeal.¹⁶⁴ Judge Kozinski's observations are confirmed by a number of opinions sanctioning lawyers for abusing the appellate process to secure delay gain.¹⁶⁵ We can expect to see an increase in judicial activity in this area in both state and federal courts. In that regard, the reader is urged to examine a remarkable opinion by the Chief Justice of the United States Supreme Court, dissenting from an order admitting an attorney to practice before the high court.¹⁶⁶ The attorney made

¹⁵⁹ See, e.g., *Dixon v. State Bar Ass'n*, 653 P.2d 321, 325 (Cal. 1982).

¹⁶⁰ See, e.g., 567 P.2d at 960.

¹⁶¹ See, e.g., *Academy of California Optometrists, Inc. v. Superior Court*, 124 Cal. Rptr. 668, 672 (Cal. Ct. App. 1975). Cf. *In re Thomsen*, 499 P.2d 815, 816 (Or. 1972) (nonappearance based on alleged fee dispute unethical).

¹⁶² *Nolan v. Foreman*, 665 F.2d 738, 743 (5th Cir. 1982) (client may sue for money damages based upon attorney's breach of ethics and fiduciary duty). Compare *In re Wetzel*, 574 P.2d 826, 829 (Ariz. 1978) (bad faith litigation initiated to coerce payment of fees) with *Office of Disciplinary Counsel v. Kissel*, 442 A.2d 217, 221 (Pa. 1982) (application of client funds to satisfy disputed fee, and other collection practices).

¹⁶³ Judge Kozinski's comments are reported at 52 U.S.L.W. 2186 (October 4, 1983).

¹⁶⁴ *United States v. Potamkin Cadillac*, 689 F.2d 379 (2d Cir. 1982) (appeal was "totally lacking in merit, framed with no relevant supported law, conclusory in nature, and utterly unsupported by evidence").

¹⁶⁵ *In re Visioneering Constr.*, 661 F.2d 119 (9th Cir. 1981) (default entered against party who wilfully and in bad faith failed to comply with discovery orders); *United States v. Pierce*, 609 F.2d 407 (9th Cir. 1979) (reprimand); *Cosenza v. Kramer*, No. A018214 (Cal. Ct. App. March 12, 1984); *Maple Properties v. Harris*, No. 69423 (Cal. Ct. App. 1984) (\$20,000 fine for inclusion of frivolous issues on appeal); *Florida Bar Ass'n v. Rosenberg*, 387 So. 2d 935 (Fla. 1980) (two paragraph affidavit was frivolous and insufficient to avoid summary judgement).

¹⁶⁶ *In re Brose*, 51 U.S.L.W. 3898 (June 20, 1983).

his application for admission in connection with a petition for a writ of certiorari seeking review of a \$10,000 fee award against the attorney and his client in the case of *Wood v. Santa Barbara Chamber of Commerce*.¹⁶⁷ Chief Justice Burger's opinion traced the procedural history of that litigation, which began as a "pro se" antitrust, copyright, and defamation action in the Central District of California. After engaging in flagrant discovery abuse, the "pro se" claimant suffered a dismissal of his lawsuit. Successive appeals proved fruitless. Undeterred, the "pro se" claimant filed a new complaint in the original trial court to set aside the prior dismissal on grounds of fraud, naming sixteen defendants including the special master that had been appointed to supervise discovery in the earlier action.¹⁶⁸ Once again, the case was dismissed,¹⁶⁹ and the Ninth Circuit affirmed the dismissal and awarded sanctions against the appellant.¹⁷⁰ The Ninth Circuit noted that following the dismissal of another lawsuit in Nevada, the claimant had brought thirty-six other cases in thirty-one districts in nine circuits involving three hundred defendants. Those cases had apparently been consolidated and ultimately dismissed after the claimant ignored the instructions of the Nevada trial judge. Sometime later the claimant filed a "pro se" notice of appeal to the Ninth Circuit.¹⁷¹ At that point, attorney Brose entered his appearance in the case, cosigned the appellate brief, and moved to disqualify the entire panel of judges assigned to hear oral argument. The appellate court affirmed the lower court's dismissal and, once again, imposed sanctions on the claimant and attorney Brose.¹⁷² The Chief Justice was outraged by the attorney's conduct: "Clearly, Brose was fully aware of all [his client's] abuse of the system when he agreed to associate with [the client]. By advocating yet another appeal of a trial court's dismissal of [the client's] frivolous claims, Brose joined and perpetuated an abuse of the judicial process."¹⁷³ The message? To quote Judge Kozinski, "know when to give up."¹⁷⁴

¹⁶⁷ 699 F.2d 484 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1445 (1984).

¹⁶⁸ 51 U.S.L.W. at 3898.

¹⁶⁹ *Id.*

¹⁷⁰ 699 F.2d at 485-86.

¹⁷¹ *Id.* at 485.

¹⁷² *Id.* at 485-86 (sanction of \$1250 to each of the eight groups filing a brief in the appeal).

¹⁷³ 51 U.S.L.W. at 3899.

¹⁷⁴ 52 U.S.L.W. at 2186.