The Disciplinary Process: A General Description

Attorney discipline is regulated and administered through a state’s highest court or in some instances, through the state’s bar association if the bar is unified. Regardless of the body regulating the practice, the state supreme court usually determines the ethical rules that govern attorney conduct within its jurisdiction. In some jurisdictions, such as Colorado, the court appoints a Presiding Disciplinary Judge or other official(s) to preside over cases of attorney discipline. Other jurisdictions use committees for hearing cases. These committees may be appointed by the state’s highest court or the state’s bar association.

The Office that Investigates and Prosecutes Complaints About Lawyers

Many jurisdictions have an office of disciplinary counsel that serves as the investigator and, if necessary, as prosecutor in matters of attorney discipline. The attorney disciplinary counsel is usually appointed by the state’s highest court. The appointed regulation or disciplinary counsel then appoints a deputy and/or the rest of the attorneys and office staff, within the parameters prescribed by the court and/or the bar. The attorneys typically have several years of experience practicing law. The office fields complaints and conducts initial investigations of the underlying allegations. The office then determines whether there are sufficient grounds to establish that an ethical rule provision has been violated. If such a determination is made, the office must decide whether formal or informal proceedings are appropriate. Formal proceedings can include a trial, which is akin to a civil proceeding. In such a proceeding, the attorney regulation counsel or disciplinary counsel represents the People of that state.

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1Chief Deputy Regulation Counsel, Office of Attorney Regulation Counsel, 600 17th Street, Suite 200-South Denver, Colorado 80202, (303) 866-6400. Ms. Cohen wishes to thank April Seekamp, Office of Attorney Regulation Counsel’s law clerk, for the research and writing she provided in this outline.

2 However, in unified bar states, the Bar Association may appoint the regulation or disciplinary counsel.

3 In such a proceeding, however, the attorney is entitled to greater due process and protection than in a civil proceeding. See In re Ruffalo, 390 U.S. 544 (1968); see also People v. Weschler, 854 P.2d 217 (Colo. 1993).
Consumer Assistance Programs

Some jurisdictions, like Colorado, have a central intake staff within the disciplinary office to examine complaints at the initial intake stage. Alternatively, a number of states utilize a “consumer assistance program” to direct and screen complaints. While this program is typically separate from the disciplinary board or office, the office staff is responsible for directing and assisting complainants in the grievance process, and in some jurisdictions, will also intercede between the client and the attorney when requested to do so. States that have a version of a consumer assistance program in place include: Florida, Georgia, Kentucky, Massachusetts, Mississippi, North Carolina, Tennessee, Texas, and Utah.

The Ethical Standards Governing Lawyers’ Conduct

In 1983, the American Bar Association Code of Professional Responsibility (“ABA Code”) was replaced by the ABA Model Rules of Professional Conduct (“Model Rules”). The majority of states have adopted the Model Rules, while a few retained the ABA Code. The following is a breakdown of the different lawyer ethics rules delineated by jurisdiction:

1. ABA Model Rules
   a. Forty-three states have adopted the Model Rules of Professional Conduct (with some revision)

2. ABA Code
   a. Iowa, Nebraska, Ohio, and Oregon
   b. New York uses the Model Code, incorporating some aspects of the Model Rules

3. ABA Code and Model Rules (incorporates components of both)
   a. Illinois and Maine

4. Other (California)
   a. California uses neither the Model Code nor the Model Rules.

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4 In Florida, Georgia, Tennessee, Mississippi, North Carolina, and Utah the program is referred to as a Consumer Assistance Program. In Kentucky the program is called the Client Assistance Program. In Texas the program is called the Client Attorney Assistance Program.
Ethics 2000

In 1997, the American Bar Association Ethics 2000 Commission (“Commission”) was appointed to review and amend the Model Rules of Professional Conduct (“Model Rules”). The Commission recommended numerous amendments to the Model Rules at the annual ABA Meeting in August 2000, and the Board of Delegates approved the Commission’s report with some changes. Many states are now in the process of reviewing the amendments. The following is a list of those states or territories which have adopted or are reviewing the amendments.

5. Ethics 2000

a. States Which Have Adopted the Ethics 2000 Amendments: Arizona, Delaware, Idaho, Louisiana, Montana, New Jersey, North Carolina, South Dakota, Virginia, Northern Mariana Islands, and the Virgin Islands (the latter two bars automatically update to the most recent version of the Model Rules)


Purpose of the Rules

These various ethical rules and regulations provide the guidelines and standards that govern attorney conduct. They set forth the minimum standards lawyers must follow. Some rules are phrased in affirmative terms that are aspirational in nature (such as pro bono work). Other rules are phrased in terms that proscribe conduct (such as rules governing conflicts of interests).

The rules governing the ethics of attorneys have evolved over time. Although different jurisdictions use variations of the Model Rules or the Model Code, most follow some version of the Model Rules. While these rules are substantially similar in many circumstances, it is noteworthy that they are not identical. For instance, Minnesota adopted a modified Model Rule

5 Information available at http://www.abanet.org/cpr/e2k-report_home.html.
8.4(h) (conduct reflecting adversely on an attorney’s fitness to practice law). Similarly, Colorado’s RPC 3.7 is substantially different from the Model Rule.

It is therefore critical for an attorney to make two inquiries. First, the lawyer must ascertain whether the Model Code or the Model Rules (or neither if the attorney is practicing in California) govern attorney conduct in the practice of law in that jurisdiction. Second, it is essential to know what portions of the Model Rules or Model Code have been adopted in that particular jurisdiction.

**Summaries of the Disciplinary Process in Select States**

The following summaries profile various disciplinary systems. Colorado, for instance, generally adopted the ABA recommendations for attorney discipline systems. This system entails a disciplinary structure composed of the disciplinary office, attorney regulation committee and presiding disciplinary judge. Some states like Florida use a central disciplinary office that oversees disciplinary proceedings, but delegates the proceedings to one of the twenty judicial circuit bar committees.

**California**

In California, the State Bar Court is the administrative arm of the California Supreme Court. The State Bar Court handles the adjudication of disciplinary and regulatory matters. The court is staffed by Hearing Judges who hear cases and make recommendations to the California Supreme Court. In addition to disciplinary proceedings, the State Bar Court hears and makes recommendations to the Supreme Court regarding regulatory matters including reinstatement petitions and arbitration enforcement proceedings. In 2000, 2% (14 complaints) of California’s grievances involved employment law issues.

**Colorado**

The Office of Attorney Regulation Counsel is charged by the Colorado Supreme Court with the task of investigating and prosecuting claims of attorney misconduct and the unauthorized practice of law. The office consists of thirteen attorneys, five investigators and

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7 Minn RPC 8.4(h) provides: (a lawyer shall not) commit a discriminatory act, prohibited by federal, state or local statute or ordinance that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including (1) the seriousness of the act, (2) whether the lawyer knew that it was prohibited by statute or ordinance, (3) whether it was part of a pattern of prohibited conduct, and (4) whether it was committed in connection with the lawyer's professional activities.


support personnel. Any person may report alleged misconduct to the office by submitting the details of their complaint to the office by telephone or in writing. Requests for investigation are reviewed by a lawyer in the central intake division. The central intake attorneys will then investigate the claim to determine if a violation has in fact occurred. At this stage, the claim may be dismissed if no violation is found. If a violation is deemed to have occurred, the attorney may be offered diversion if the ethical misconduct involves minor misconduct or the complaint may be forwarded to one of the office’s trial attorneys for investigation. If the case is recommended for formal proceedings, a complaint is filed and the case is prosecuted before a 3-person hearing committee consisting of two members of the community, and the Presiding Disciplinary Judge.

Colorado receives approximately 5,000 complaints a year. For the first quarter of 2003, the office received 1,696 calls. Of those calls, 1,483 were dismissed at the intake stage and 2% (28 complaints), concerned employment law issues.

**District of Columbia**

The District of Columbia Court of Appeals has jurisdiction over attorney discipline matters and has authorized the Office of Bar Counsel to investigate and prosecute claims of attorney misconduct. After a complaint is filed, the Office of Bar Counsel investigates the complaint. If there is enough evidence to go forward, the matter may be resolved informally, or Bar Counsel may petition the Board on Professional Responsibility for a hearing. The hearing is held before a two or three member hearing committee which consists of two attorneys and one non-attorney. The committee will issue a report recommending dismissal or discipline. The report is reviewed by the Board on Professional Responsibility, which is composed of seven attorneys and two non-attorneys. The Board can dismiss the case or make a recommendation to the District of Columbia Court of Appeals regarding formal discipline. After reviewing the record, the court will make the final decision regarding the appropriate sanction.

In 2002, the District of Columbia Bar had approximately 500 complaints. The Bar segregates complaints regarding labor and the EEOC. In 2002, EEOC complaints made up 6% (30 complaints) of the Bar’s complaints. Labor complaints were approximately 1% (4 complaints) of the complaints.

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Florida\textsuperscript{11}

The Florida Bar Association has an office that is the investigatory and prosecutorial arm of the Supreme Court of Florida. The Florida Bar is an integrated bar, and therefore, one must be a member of the Bar to practice law in Florida.

Once a complaint is filed in Florida, bar counsel reviews the complaint to make a preliminary determination whether a violation has occurred. If bar counsel determines that the allegations constitute a rule violation, the matter is referred to one of Florida’s 20 judicial circuit bar committees. The committee is composed of volunteer members, one third of whom are not attorneys. The committee makes a determination whether the lawyer’s conduct violated any professional rules. The committee might determine an admonishment (lowest level of discipline) or an alternative program to discipline is appropriate. If the committee finds probable cause that a violation has occurred, bar counsel will file a formal complaint with the Supreme Court of Florida against the respondent. If the attorney contests the complaint, a circuit or county court judge is appointed as a referee to hold a trial on the complaint. The referee will make findings of fact and will file a report and recommendation with the Supreme Court of Florida. The court makes a final determination of guilt and the appropriate sanction.

Illinois\textsuperscript{12}

The Illinois Supreme Court regulates the registration and discipline of attorneys in Illinois. The Attorney Registration and Disciplinary Commission (“ARDC”), which is composed of seven members appointed by the court, is primarily responsible for attorney discipline matters. ARDC is composed of four members who are Illinois attorneys and three non-attorney members. The Commission acts as a board of directors and appoints and oversees an administrator to be the executive officer of the disciplinary agency. The administrator is in charge of 100 employees, including forty attorneys. The disciplinary agency is empowered to deal with attorney registration issues and to investigate and prosecute lawyers for ethical misconduct.

After a complaint is filed and an investigation is conducted, if there is evidence of misconduct, the matter may be referred to an Inquiry Board. The Inquiry Board is composed of two attorneys and one non-attorney. The purpose of the Board is to determine if there is sufficient evidence to file formal charges. If the Inquiry Board recommends discipline, the

\textsuperscript{11}Information available at http://www.flabar.org/.
\textsuperscript{12}Information available at http://www.iardc.org/overview.html.
Administrator will file a petition with the Clerk of the Commission. The matter will then go before a Hearing Board. If exceptions are filed to the Hearing Board Report, the case will be docketed before the Review Board, a panel of nine attorneys appointed by the Supreme Court. Exceptions to the Review Board are filed with the Supreme Court. Recommendations of the Hearing Board and the Review Board are filed with the Supreme Court as well.

**New York**  

The Appellate Division of State Supreme Court has authority over attorney discipline matters. The court appoints individuals, including lawyers and non-lawyers, to discipline and grievance committees. Each committee investigates each complaint it receives or refers the matter to the county bar association. If the attorney is found to have engaged in ethical misconduct, the attorney may receive a letter of private admonition. When serious misconduct has occurred, the committee may refer the matter to the court. After a hearing by a disciplinary panel or a referee, the court decides whether to impose discipline; that decision is usually made public.

**Differences Between Malpractice and Discipline**

In legal malpractice matters, a lawyer may be sued under a negligence theory and/or breach of fiduciary theory. A claimant in a legal malpractice action is required to show a duty, breach of that duty, causation and damages. Therefore, a legal malpractice claim can be classified as a tort action against an attorney by a party to whom a duty was owed. In some circumstances a contract claim may also exist.

There are some similarities between an ethical rule violation such as neglect and an attorney’s negligence that gives rise to a legal malpractice action. However, an ethical rule violation does not automatically give rise to a legal malpractice claim or vice versa. Further, there is a difference between a breach of duty to a client, for which the client can recover damages, and a rule violation that concerns a lawyer’s license to practice law. A rule violation alone is not enough to establish a malpractice claim.

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15 See e.g., *Lazy Seven Coal Sales, Inc. v. Stone & Hinds P.C.*, 813 S.W.2d 400 (Tenn. 1991); *Davis v. Findley*, 422 S.E. 2d 859 (Ga. 1992).
16 See *Peck v. Meda-Care Ambulance Corp.*, 457 N.W.2d 538 (Wis. App. 1990). See also *Restatement of the Law Governing Lawyers* sec. 74, comment f. (This comment provides examples of cases that discuss the professional ethical rules as a standard of care, cases that conclude rules are professional duties as a matter of law, and still others
For example, there are some contexts in which an ethical rule is violated with no breach of duty to a client. For instance, George C. Hazard Jr. and W. William Hodes cite Model Rule 3.7 as an example in which a violation would not breach a tort law obligation to an opposing party who might enforce the duty.\(^{17}\)

Model Rule 3.7 provides:

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where

1. The testimony relates to an uncontested issue;
2. The testimony relates to the nature and value of legal services rendered in the case; or
3. Disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer’s firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

It is particularly worthwhile to compare claims of legal malpractice involving neglect to claims of ethical neglect under Model Rule 1.3, which provides that “A lawyer shall act with reasonable diligence and promptness in representing a client.”\(^{18}\) There is no requirement of a pattern of misconduct to establish a violation of Model Rule 1.3.\(^{19}\) A single act of misconduct may amount to a violation of Model Rule 1.3. Quite simply, Model Rule 1.3 places two demands on an attorney. First, an attorney must act with reasonable diligence. Second, an attorney must act with promptness. Additionally, the Comment to Model Rule 1.3 implies that zeal is the appropriate standard for litigation.\(^{20}\)

A lawyer’s neglect does not have to result in actual harm to the client to constitute a rule violation.\(^{21}\) The *American Bar Association Standards for Imposing Lawyer Sanctions*,\(^{22}\) state that harm to the client can be actual or potential. By contrast, legal malpractice claims require proof of actual damages as an element of the charge.

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\(^{17}\) See Hazard and Hodes § 4.1, p. 4-5.

\(^{18}\) ABA Model Rule of Professional Conduct 1.3.

\(^{19}\) Hazard and Hodes § 6.4, p. 6-10.

\(^{20}\) Hazard and Hodes § 6.2, p 6-5.

\(^{21}\) American Bar Association Annotated Model Rules of Professional Conduct; Client-Lawyer Relationship; Rule 1.3 (2003).

However, it may be more difficult to prove an ethical violation of neglect than to prove an attorney malpractice or breach of fiduciary duty claim. Claims of legal malpractice require proof by the preponderance of the evidence, whereas ethical violations must be proven by clear and convincing evidence. This is due to the fact that attorney disciplinary proceedings are “quasi-criminal” in nature. Consequently, just as ethical rule violations are not enough to establish claims of legal malpractice per se, legal malpractice claims alone might not be enough to establish a violation of a given ethical rule violation.

**Ethical Issues Arising in the Employment Law Context**

While attorneys practicing employment law are often faced with many of the same issues that other attorneys confront, there are some ethical issues that arise more frequently in the employment law context. The topics and case law below profile some of these issues. The section also includes general disciplinary issues that involve employment lawyers.

**Fees**

a. *In re Lacobee*, 866 So.2d 237(La. 2004)(In 1998, a professor employed by Louisiana Tech University filed an employment discrimination suit against the school. Originally the professor was not represented by counsel. The professor subsequently visited with attorneys to secure representation. He met with Lacobee who agreed to represent the professor on a one-third contingency fee basis, with a minimum fee of $5,000, which the professor paid. Lacobee did not deposit the money into her trust account, nor did she obtain a written, signed contingency fee agreement. In July 1999, the professor paid Lacobee $2,500 towards the costs and expenses of litigation. Lacobee did not deposit this money into her trust account. In December 1999, the professor paid an additional $500 in costs. Later, Lacobee demanded more money despite the fact that the representation was based on a contingency fee. After the professor refused to pay the additional sums, Lacobee withdrew. She failed to account for the sums she was paid and failed to promptly return the professor’s file. Lacobee’s conduct violated Rules 1.5, 1.15 and 1.16(d). Based on her conduct in this matter and two others, she was suspended. The court considered her inexperience in the practice of law, her unselfish motive and her personal and emotional problems as mitigation.)(suspension, three years).

b. *In re Warner*, 11 P.3d 1160 (Kan. 2000)(The attorney agreed to represent a client in a civil action against her former employer. The attorney failed to provide the client with a written contingency fee contract in violation of KRCP 1.5(d). The attorney

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24 Ms. Cohen wishes to thank Mr. James Grogan, Chief Counsel, of the Illinois Attorney Registration and Disciplinary Commission for his contributions to the case law discussion.
also accepted $500 from the client as partial payment for the costs of bringing an out-of-town witness to the trial. The attorney failed to pay the witness in violation of KRPC 1.15. At the time of the hearing, the attorney was administratively suspended from the practice of law for failure to pay his attorney registration fees.)(public censure, with order that attorney reimburse witness for travel expenses).

c. *Columbus Bar Ass’n v. Klos & Columbus Bar Ass’n v. Zingarelli*, 692 N.E.2d 565 (Ohio 1998)(Attorney Klos agreed to represent clients in wrongful termination claims against their employers. In one matter, Klos charged an initial fee for writing an investigatory letter. The letter did not resolve the situation so Klos entered into a fee agreement with the client, which provided the client would pay a $4,000 retainer and or $150 per hour (with credit for the previously paid $500) “and or a sum equal to 33 percent of any sum which may be received by a compromise settlement of said claim recovered through prosecution of said claim to judgment in any court.” The client paid $2,710 of the retainer. The claim was settled for $15,000, Klos deducted $4,956.66 as the fee due him. Klos reasoned that the balance due on the retainer was $1,290, he then added to that the sum of $3,666.66 (one third of the $11,000, which was the settlement of 15,000 less the $4,000 retainer). In another matter, Klos agreed to represent a client in a wrongful termination matter. Klos charged $375 for an investigation letter. Thereafter, Klos entered into a fee agreement with the client which provided that the client would pay $3,000, plus one third of any recovery in excess of $3,000. The matter was settled for $4,500 and Klos claimed he was owed $3,500 ($3,000 retainer plus one third of the $1,500, the amount left after the retainer was deducted). Klos shared the attorney’s fees with Attorney Zingarelli in both of the cases. The Ohio Supreme Court recognized that it was customary in the field of employment law for attorneys to charge an investigative fee, which would be applied to a non-refundable retainer, and to charge a contingent fee. However, the court found that the attorney’s fee agreement was deficient because it provided the attorney with a nonrefundable fee if the attorney withdrew for any reason. It also found that if the attorney withdrew due to acts of the client, the attorney would be entitled to $150 per hour fee. The court found the contract to be one-sided, only providing protection for the attorney in the event of withdrawal. The court also found the “and or” language to be ambiguous. The court found the provisions of the agreements constituted clearly excessive fees.) (Both attorneys were publicly censured).

d. *El-Amin v. Virginia State Bar*, 514 S.E.2d 163 (Va. 1999)(In two matters, the attorney agreed to represent clients with employment discrimination claims. In both matters, he accepted retainers, did little to no work and failed to return the retainers. In the first matter, the attorney accepted a retainer in the amount of $4,000, and immediately cashed the client’s check, failing to deposit the retainer in a trust account in violation of DR 9-102(A)(2). When the client encountered difficulty in reaching the attorney she discharged him and asked for a refund; he failed to pay her. After persistent attempts by the client to get her refund, the attorney only paid her $1,000, claiming he did not have the rest of the money. When the client asked him what happened to the money given that he had told her the money would be in escrow, he simply said, “I don’t have the money.” The client had to retain new counsel to pursue
her claim against the attorney for the remaining $3,000. By the time fees and costs were deducted by the new attorney, the client realized only $911.95 of the $3,000 deposit balance. In the second matter, the attorney attempted to charge the client a $7,000 retainer, but the client was only able to pay the attorney $1,700. The attorney accepted the money but failed to do work on the case. The client sent a certified letter to the attorney requesting a refund. The attorney denied ever seeing the letter, despite the fact his secretary had signed for it. During bar counsel’s investigation, the attorney claimed he had earned the money, but failed to produce any documentation of completed work. In a third matter, the attorney agreed to represent a criminal defendant in the event the defendant appealed his case. To provide a retainer, the client asked the attorney to retrieve his car from impoundment, sell it and keep the proceeds for future representation. The attorney obtained the car, repaired it and traded the car for a newer one, receiving a credit of $4,636.04 on the new car. He executed a lien in favor of another client on the car. The attorney failed to make any note in his records or on the title indicating the credit was held in trust for the client. The attorney’s conduct in all three matters violated numerous rules including: DR 1-102(A)(4)(conduct involving dishonesty, fraud, deceit, or misrepresentation) and DR 2-108(D)(failing to protect client interests upon termination).)(suspension, four years).

e. Columbus Bar Ass’n v. Brooks, 664 N.E.2d 900 (Ohio 1996)(Attorney Brooks practiced law with Attorney Winkfield. Brooks agreed to represent a client in an employment discrimination suit. The fee agreement required the client to pay a retainer and hourly fee, with a provision which provided that if the case settled, Brooks would retain one third of the settlement and would reimburse the client for monies previously paid. The client advanced $13,956 in attorney fees, after which time the case settled for $48,298. When the client picked up the settlement check, he realized that he had not been reimbursed the $13,956. The client brought the matter to Brooks’ attention and Brooks agreed to reimburse the client. Brooks paid the client $3,000 and agreed to pay the rest of the money in $500 increments each month. Brooks made sporadic payments totaling $6,050, and failed to pay the rest of the money. Before filing a complaint against Brooks, the client contacted Attorney Winkfield regarding the money; Winkfield did not return the funds either. In the disciplinary proceeding, Attorney Brooks stated that while he realized his debt obligation to the client, there were no funds available to pay the client. Brooks’ failure to preserve client funds violated DR 9-102(B)(4).)(suspension one year, six months stayed on the condition that prior to stay, full restitution was made to client). See also Columbus Bar Ass’n v. Lawrence E. Winkfield, 664 N.E.2d 902 (Ohio 1996)(companion case to Brooks where Winkfield, Brooks’ partner, was also disciplined for failing to return the money.)(suspension one year, stayed with evidence of restitution).

Diligence & Communication

Timeliness, diligence and communication are important practices in all areas of law. These considerations are particularly important in the context of an employment discrimination
case where an attorney must be aware of and comply with the deadlines set forth by the Federal Equal Employment Opportunity Commission (“EEOC”). For example, Title VII claims, Americans with Disabilities Act claims, and Age Discrimination in Employment Act claims have statutory deadlines in which the notice to the EEOC must be given. This timeline must be examined in light of state agency rules and procedures, which may provide additional timelines for filing claims. Failure to diligently pursue a claim may cause the client to lose his or her claim, resulting in a malpractice and/or disciplinary action against the attorney.

In disciplinary proceedings, often times an attorney’s neglect of a case will be accompanied by an attorney’s failure to communicate with the clients, resulting in violations of multiple rules. Included below are cases in which the attorney failed to perform work in the employment law context (in addition to other areas of law), and also failed to communicate with the client.

a. In re Gentile, 774 N.Y.S.2d 522 (N.Y. App. Div. 2004)(The referee sustained 27 of the 38 charges of professional misconduct against the attorney, six of which were neglect charges. In one matter, the attorney agreed to represent a client with respect to a discrimination claim against her former employer. The client paid the attorney a $7,000 retainer. The attorney commenced the action by filing a summons with notice, but he failed to timely serve the complaint, even after the employer’s attorney granted him an extension of time. As a consequence, the action was dismissed during which time the statute of limitations had run. In another case, the attorney collected a $5,300 retainer to pursue a wrongful discharge for a client. The attorney filed a summons with notice but never served the papers on the defendant. In another matter, the attorney neglected to negotiate a client’s severance package with the client’s former employer. As a result, the client was left without medical insurance and incurred medical bills he could not pay.)(suspension, two years).

b. In re Gines, 869 So.2d 778 (La. 2004)(The attorney accepted a $500 retainer to represent a client with a sexual harassment and employment discrimination claim. The attorney forwarded a letter to his client’s employer regarding the matter but failed to take any further action and failed to communicate with the client, despite the client’s repeated attempts to get in touch with the attorney. Despite the fact that when the client was finally able to speak to the attorney, the statute of limitations had run on the claim, the attorney demanded additional fees to take further action in the matter. The attorney failed to cooperate with the ODC in its investigation. The attorney’s conduct in this matter violated Rules 1.3, 1.4, 1.5, 8.1(c) and 8.4(c). The attorney was also disciplined for violations in other cases.)(disbarment).

c. *In re McKechnie*, 656 N.W.2d 661 (N.D. 2003) (The attorney agreed to represent the client in a discrimination suit against his employer. The attorney incorrectly told the client the statute of limitations ran from the time the client resigned, rather than from the occurrence of the last discriminatory incident. Consequently, the attorney filed the suit after the statute of limitations ran, resulting in the case being dismissed. The hearing panel found a violation of N.D.R. Prof. Conduct 1.1 (competence) and 1.4(b)(explaining matters to client). The North Dakota Supreme Court found that failing to properly advise the client regarding the correct statute of limitation was an “isolated instance of ordinary negligence” and did not constitute incompetence. The court found that the attorney’s conduct did constitute a failure to explain a matter to a client in violation of 1.4(b).)(public reprimand).

d. *Oklahoma Bar Ass’n v. Scroggs*, 70 P.3d 821 (Okla. 2003). (Attorney represented clients with their employment discrimination claims. In one matter, the attorney filed suit prior to the EEOC issuing a right to sue letter. After consulting with opposing counsel, the attorney agreed to dismiss the case, waited until the right to sue letter was issued, and re-filed the complaint. Thereafter, the attorney failed to serve the defendant with the complaint. The client retained new counsel. In another employment discrimination matter, the respondent mistakenly served the registered agent of a company with a similar, but different name than the defendant in the case. When the attorney did not correct his mistake and the client called the court to check on the status of her case, she determined that the defendant had not been served. Throughout this period of time, the attorney had misrepresented to the client that he had served and contacted the defendant. The client wrote the judge and requested that her case not be dismissed. Ultimately, she retained new counsel. In another matter, the attorney agreed to represent a client in a case against his employer. The attorney misrepresented the status of the case to the client, indicating he had filed a claim, when he had not. During the disciplinary proceedings, the attorney blamed his former law clerks for failing to file the claims. The bar found the attorney’s arguments that the law clerks were dishonest, incredible. The attorney was found to have violated Rules 1.1, 1.3, 1.4, 5.2, 8.4(c).)(suspension, one year, one day).

e. *In re Discipline of Cohen*, No. 00373-4 (Wash. 2003) (An attorney agreed to represent a client in an employment matter against the Department of Corrections. The defendants in the case filed a motion for summary judgment. The attorney failed to respond by the due date and when he filed with the court two days after the response was due, he filed a motion for continuance instead of an answer. A hearing was held on the motion at which time the judge required Cohen to elect for a voluntary nonsuit or to request a continuance which required that Cohen deposit $1,000 for costs/sanctions with the court for the defendants. Cohen opted to pay the sanctions, but failed to do so by the required date. The court dismissed the suit with prejudice. Cohen appealed the decision unsuccessfully, the entire time failing to explain the status of the case to his clients. The attorney continued to bill the clients, procuring $12,000 from them, and then charging them $3,000 for the appeal. By failing to keep the clients informed, neglecting the matter and by charging the clients
for his neglect, the attorney violated Rules 1.3, 1.4, 1.5(a.)(suspension, six months, two years probation).

f. **Oklahoma Bar Ass’n v. Southern**, 15 P.3d 1 (Okla. 2000)(Attorney was disciplined for his conduct in five matters, three of which involved employment law matters. In each of the three cases, the attorney agreed to represent the client in a wrongful termination suit and then performed some work, but failed to complete the agreed-upon work. When the clients attempted to contact the attorney, they were unable to. One client was able to contact the attorney only after waiting at his office all day. In addition to other violations, the attorney’s conduct violated RPC 1.3, 1.4. In mitigation, the attorney suffered from a severe Vitamin B-12 deficiency which affected his memory. Once treated, the bar noticed significant improvement in their communication with the attorney.) (public censure with one year probation).

g. **Nebraska Bar Ass’n v. Simmons**, 608 N.W.2d 174 ((Neb. 2000) (Attorney Simmons was hired to represent approximately 21 employees in a civil action against their employer. The attorney filed the suit; the defendants responded and Simmons filed an amended petition to which the defendants demurred. A hearing was held on the demurrers and attorney Simmons was provided 15 days in which to respond to the demurrers. The attorney failed to respond and the lawsuit was dismissed. The attorney failed to communicate the dismissal to the clients. The attorney also failed to cooperate in the investigation by the disciplinary board.) (indefinite suspension, minimum ninety days).

h. **People v. McReynolds**, No. 99PDJ028 (Colo.O.P.D.J. 1999)(This case was resolved by stipulation) (Attorney McReynolds agreed to represent a client in regards to an Americans with Disabilities Act claim. The client had filed a claim with the EEOC, but the agency had not made a decision. Some confusion regarding the agency’s issuance of notice to the client arose. The attorney’s failure to properly investigate the facts caused him to file suit after the jurisdictional period lapsed. The attorney failed to review the complaint for accuracy with his client, and failed to explain the affidavit he drafted to his client before the client signed it, resulting in inaccuracies in the affidavit, which was submitted to the court. After the case was filed and the defendant employer filed a motion for summary judgment, the attorney failed to respond to the motion, which resulted in a dismissal. The attorney did not immediately tell the client the case had been dismissed and failed to explain the attorney’s responsibility for the outcome. The Presiding Disciplinary Judge approved the parties’ conditional admission of misconduct and publicly censured McReynolds. The Stipulation required a practice monitor and imposed other conditions.
Communicating with Person Represented by Counsel\textsuperscript{26}

Model Rule 4.2 prohibits an attorney from communicating with a party represented by counsel. The comment to Rule 4.2 explains that the rule does not prohibit communications with a party, or an employee or agent of the party concerning matters outside the representation.

For a discussion of the rationale behind Rule 4.2, see ABA Formal Op. 91-359 regarding contacts by a lawyer with employees of opposing corporation party and the limitations thereto. See also Palmer v. Pioneer Inn Associates Ltd., 59 P.3d 1237 (Nev. 2002) (the Ninth Circuit certified questions to the Nevada Supreme Court concerning lawyer’s ex parte contacts with employees of an entity); and Snider v. Superior Court, 7 Cal. Rptr. 3rd 119 (Cal. App. 2003) (counsel did not violate California’s version of Rule 4.2 by contacting employees of former employer and therefore the disqualification motion should not have been granted).

a. \textit{People v. Wotan}, 944 P.2d 1257 (Colo. 1997)(The attorney represented a client in suit against the client’s employer alleging claims of discrimination and unemployment compensation. The attorney contacted employees of the corporation after opposing counsel admonished him not to, in violation of Colo. RPC 4.2. In another matter, the attorney neglected a client’s worker’s compensation claim in violation of Colo. RPC 1.3. The attorney also engaged in misconduct by adding a surcharge to his monthly bills and failing to withhold federal taxes.) (suspension, one year, one day).

b. \textit{Hammond v. City of Junction City, Kansas}, 167 F.Supp.2d 1271 (D. Kan. 2001)(reconsideration denied by \textit{Hammond v. City of Junction City, Kan.}, 168 F.Supp.2d 1241 (D. Kan. 2001)(Although this case is not a disciplinary case, it provides extensive discussion of Kansas Rule of Professional Conduct 4.2)(An employment discrimination case against the City was brought by the plaintiff and other past and present African American employees of the City. At the time of this case, the action had not yet been certified as a class action. The defendants alleged that the plaintiff’s attorneys violated Kansas Rule of Professional Conduct 4.2 by having ex parte communication with Mr. Hope, a managerial employee of the City. Mr. Hope is African American and was identified by plaintiff’s counsel as a potential member of the putative class. The plaintiff’s attorneys admitted they had ex parte communications with Mr. Hope, but denied that Mr. Hope was a managerial employee under the rule. The attorneys explained that Mr. Hope had contacted them

\textsuperscript{26} Although not disciplinary decisions, the following cases address the issue of whether a lawyer may interview current and former employees of a party represented by counsel. See \textit{Messing, Rudavsky & Weliky, P.C. v. Harvard College}, 764 N.E.2d 825, 836 (Mass. 2002)(holding Rule 4.2 only applies to those employees who have “supervisory authority over the events at issue in the litigation.”). See also \textit{Weeks v. Independent School District No. I-89}, 230 F.3d 1201 (10th Cir. 2000); and \textit{Johnson v. Cadillac Plastic Group, Inc.}, 930 F.Supp. 1437 (D.Colo. 1996).
to discuss potential employment discrimination claims he considered bringing against
the City. The defendants moved for a protective order to prevent further
communication by plaintiff’s counsel with Mr. Hope. The court held that Mr. Hope’s
communications fell within the scope of Rule 4.2 because Mr. Hope had
communicated about the subject of the representation as specified by the rule when he
discussed the following with plaintiff’s counsel: the document production in the case;
the interrogatory responses he helped to prepare; the shredding of documents by the
City; undisclosed documents that had not yet been produced, revealing that
defendants had not produced documents as required in discovery; and Mr. Hope’s
potential claims and those claims of other City employees. Next, the court held that
Mr. Hope was a person within the scope of 4.2 because he was a managerial
employee. The court reached this conclusion because: Mr. Hope had authority to
make hiring decisions; he was responsible for investigating internal discrimination;
he trained managers and staff; and he maintained job descriptions. Further, Mr. Hope
was deemed to have speaking authority because he was able to bind the City with
respect to the litigation. Finally, the court held there were no special exceptions that
would have taken the communications outside of Rule 4.2. Because the class did not
exist at the time of the communication, the court would not recognize plaintiff’s
counsel’s argument that an exception should exist because of the attorney-client
relationship Mr. Hope had with them as a potential class member. With respect to the
argument that an individual attorney-client relationship was formed between
plaintiff’s counsel and Mr. Hope, the court held that the relationship arose out of the
ex parte communications and at that point, no further communications should have
ensued. Finally, the court held that no exception was available simply because Mr.
Hope initiated the communication with plaintiff’s counsel. As a result, the court
disqualified plaintiff’s counsel and counsel’s firm (although the court noted Mr. Hope
could retain plaintiff’s counsel individually); the court prohibited counsel from
having further contact with other managerial employees of the City; the court
required plaintiff’s attorney to produce a list of all managerial employees contacted
by plaintiff’s counsel; the court required the plaintiff’s counsel to produce to the court
originals of recording or documents Mr. Hope provided to plaintiff’s counsel; the
court required plaintiff’s counsel to file an affidavit stating whether they directed Mr.
Hope to obtain statements from other employees covered by Rule 4.2; the court
ordered that any evidence obtained by the ex parte contacts be excluded; the court
agreed to award sanctions against the plaintiff’s counsel (in an amount to be
determined after defendant’s counsel submitted an affidavit with reasonable costs);
and finally, the court prohibited plaintiff’s counsel from disclosing any of the
information they gained through the ex parte contacts with Mr. Hope.)

Failure to Supervise

a. In re Geiger, 621 N.W.2d 16 (Minn. 2001)(In addition to neglecting client matters,
charging excessive fees, and providing incompetent representation to his clients, the
attorney failed to supervise subordinate attorneys. Geiger’s firm was retained to
represent a client in a discrimination suit. The case was assigned to a newly admitted
attorney. One of the partners in the firm was suspended and Geiger took over the
operation of the firm. The attorney to whom the case was assigned left the firm. The
partner, although no longer practicing law, assigned the case to another newly admitted attorney who attempted to serve the defendant, then left the firm. Geiger took over the case for a few months, then re-assigned the case to a third newly admitted attorney. At this time, the statute of limitations barred further action on the case. In addition to numerous other violations, Geiger failed to supervise subordinate attorneys in violation of Minn. R. Prof. Conduct 5.1.)(indefinite suspension).

Conflicts of Interest

a. *Attorney Grievance Com’n of Maryland v. Harris*, 810 A.2d 457 (Md. App. 2002)(The attorney was disciplined for two matters, one of which involved the attorney’s representation of a client against his employer in a sexual harassment suit. The attorney and his client were long time friends and the attorney represented the client in bankruptcy proceedings in 1996. The location where the client lived was subject to foreclosure and the attorney purchased it and allowed the client to continue living there, absent any written agreement regarding rent. In 1996 the client was in a car accident. The attorney represented him in the case. On September 3, 1997, a judgment was entered in favor of State Farm in the amount of $11,935. On September 4, 1997, the attorney filed suit against the client seeking back rent. A default judgment was entered for the attorney and on September 15, 1997, the attorney filed a writ of garnishment of wages. In 1997, the client consulted the attorney regarding sexual harassment in the workplace. The client was later discharged and retained the attorney to represent him in his claim for unemployment compensation, sexual harassment and abusive discharge. The attorney settled the claim for $11,000 without his client’s consent. The attorney retained the entire settlement fee, and then he evicted the client from the property the attorney owned. The attorney’s conduct established conflict of interest violations and excessive fee violations, in addition to violations in another disciplinary matter.) (indefinite suspension).

b. *In re Rathjen*, 280 A.D.2d 175 (N.Y.A.D. 2001)(Attorney Rathjen represented his client in a suit against her employer when the employer failed to reinstate her after she sustained an injury. The case settled and the attorney deducted $13,000 from the $39,500 settlement. The client expressed interest in investing in property and the attorney suggested property in foreclosure that a former client owned. The attorney told the client that she could purchase the property by paying $20,000 to stop the foreclosure and then make mortgage payments, and within six months receive the deed and assume the mortgage. The client paid the $20,000 and made payments through the attorney. The attorney conveyed the deed to the client, which did not note the $20,000. When the client called the bank to have the mortgage transferred into her name, she was told the mortgage was not assumable and that the attorney was the mortgagor. The bank advised the client to stop making payments. The bank instituted a foreclosure action against the attorney and client. The attorney had purchased the property from a client, allowed the property to go into foreclosure and then entered into the real estate transaction with the client, without disclosing his
interest in the property or advising her to seek the assistance of outside counsel.)
(disbarment).

Practicing While Suspended

a. Attorney Grievance Com’n of Maryland v. Fallin, 808 A.2d 791 (Md. App. 2002) (Attorney was indefinitely suspended from the practice of law on January 11, 2001. Prior to his suspension, he agreed to represent a client in a wrongful termination suit. After he was suspended, he failed to refund her money or to discontinue representing her. In another matter, the attorney was retained prior to his suspension to represent a client in a wrongful termination suit. Two weeks after the attorney was suspended, he entered into a fee agreement with the client. The attorney negotiated the client’s check. In both cases the attorney failed to inform the clients of his suspension and failed to withdraw from the representation. In a third matter, the attorney had been representing a client since 1996 on a sexual harassment and a wrongful termination claim. The attorney failed to diligently represent the client, failed to keep the client informed of the status of the case, failed to respond to inquiries from the state and federal agencies regarding the claims, failed to reduce the contingency fee to writing and following his suspension, failed to return any portion of the fee he did receive. The attorney’s conduct violated MRPC 1.1, 1.3, 1.4, 1.5(c), 3.2 and 8.4(a.) (disbarment).

Misrepresentations

a. Florida Bar v. Miller, 863 So.2d 231 (Fla. 2003) (Attorney represented client in employment discrimination and sexual harassment action. In 1997, the attorney filed a complaint with the EEOC. On or about January 27, 1998, the EEOC sent a right to sue letter addressed to the client at her mother’s residence. The notice said that the client had ninety days to file suit in state or federal court. The notice did not contain a date. The client received the notice by February 2, 1998 and faxed it to her attorney’s office. On March 2, 1998, the EEOC sent a second right to sue letter which was dated. On May 29, 1998, 116 days after the client’s receipt of the first notice and eighty-eight days after the second notice was sent, the attorney filed a claim in federal court. At the client’s deposition, the client testified that she never received the first notice and she produced a file that only contained the second notice. The defendant filed a summary judgment motion alleging the claim was time-barred. At an evidentiary hearing held on the defendant’s motion, the client’s former attorney testified that when she reviewed the firm’s file prior to testifying, the file contained the first, undated notice. The magistrate terminated the hearing and rescheduled a hearing where the client would be present. At the next hearing, the attorney informed the court he was abandoning his argument that his client did not receive the first notice. The client then testified that on or before February 2, she had received the notice and had faxed it to her attorney. The attorney testified that he did not recall having received the first notice. The law firm’s file however contained a memo written by the attorney between February 2, 1998 and February 13, 1998, acknowledging receipt of the first notice and including a reminder to draft the
complaint by February 13, 1998. The federal court sanctioned the attorney for concealing critical evidence, advancing spurious arguments, and submitting misleading affidavits and testimony. The attorney was ordered to pay the defendants their excess costs, expenses, and attorney fees as incurred as a result of his concealing the first notice, to pay a fine of $1,000, and to attend five hours of continuing legal education. The attorney was found guilty of violating Rules 3.3(a)(1), 3.4(a) and 8.4(c). Because the attorney did not have prior discipline and had already been sanctioned by the federal court, the supreme court decreased the referee’s recommendation of a two year suspension to one year.)(suspension, one year).

b. *Iowa Supreme Court Bd. of Prof'l Ethics and Conduct v. Murphy*, 669 N.W.2d 254 (Iowa 2003)(Attorney began representing client in her employment discrimination claim after the client’s previous attorney withdrew. The client had filed a pro se response to the defendant’s motion for summary judgment. After the client hired Murphy, the court requested a supplemental response to the motion for summary judgment. The attorney failed to file anything additional on the client’s behalf. The court subsequently granted the defendant’s motion. The client wished to appeal the claim and Murphy agreed to represent her. Prior to the due date for the appellant’s brief, Murphy engaged in settlement discussions with the defendant’s counsel. The defendants offered to settle the claim for $5,000. Murphy later telephoned the defendant’s attorney. The defendants claimed that Murphy’s voicemail unequivocally accepted the settlement offer; Murphy claimed that he had been ill and was groggy when he made the call and though he did not remember exactly what he said, he knew he had not accepted the settlement. The attorney for the defendant wrote to Murphy confirming the settlement; he contacted the court and explained the case had settled and therefore he would not be filing a brief; and he sent a check to Murphy for $5,000. Thereafter, Murphy did not respond to opposing counsel’s letter, and he did not inform his client of the settlement. Murphy contacted the court and explained that the case had not been settled. The federal court of appeals directed the federal district court to hold a hearing to determine whether settlement had occurred. After the hearing, the court held that Murphy had settled on behalf of his client. Thereafter, the federal court of appeals ordered the parties to show cause why the appeal should not be dismissed. Murphy did not advise his client of the federal court’s decision or of the court of appeal’s show cause order. The court of appeals subsequently dismissed the case. The client received a 1099 tax form from the defendant stating they had paid her the $5,000 settlement. The client had her niece contact Murphy and he claimed that the form was a computer generated response to a check that was issued in error during the appeal. Later, Murphy denied having spoken to his client’s niece. Murphy ignored the client’s requests for information. The client eventually contacted the court and was advised that her appeal had been dismissed. The grievance committee found that Murphy violated DR 1-102(A)(4)(misrepresentation), DR 7-101(A)(3)(prejudicing a client during the course of a professional relationship); and DR 9-102(B)(4)(failing to distribute funds to which client is entitled).)(suspension, sixty days).
c. *Nebraska State Bar Ass’n v. Scott*, 564 N.W.2d 588 (Neb. 1997) (Attorney Scott agreed to represent a client before the Nebraska Workers’ Compensation Court in a suit against the client’s former employer. A few weeks before the trial date, the attorney filed for a continuance stating his client was out of the state and would not be able to attend. On the new date of the trial, the attorney failed to appear and sent another attorney, not his employee or partner, to attend. The substitute attorney did not know Scott would not be in attendance. The client also failed to attend. The substitute attorney requested another continuance which was denied, and the case was dismissed, which Scott failed to tell his client. The client had also retained Scott to assist him with a social security claim. During this time, the Department of Veterans Affairs contacted Scott regarding the workers’ compensation claim. During the following year, from January 1995 until October 1995, Scott misrepresented the status of the workers’ compensation claim by stating that it was still pending before the court. Scott failed to inform his client and Veterans Affairs that the workers’ compensation case had been dismissed. By misrepresenting to the Workers’ Compensation Court that his client was out of the state and unable to attend the trial and by misrepresenting the status of the workers’ compensation claim to a representative of Veterans Affairs, Scott violated DR 7-102(A)(4), (5) and (8). (suspension, one year).

Confidential Investigation

Often times lawyers perform investigations of employment related claims. However, an investigation performed by an attorney may not be confidential. *See Upjohn Co. v. United States*, 449 U.S. 383 (1981). In the context of an internal investigation, and assuming the attorney is performing the investigation in his capacity as legal representative of the entity, the attorney-client privilege would extend to counsel’s notes and memoranda as well as written responses to questionnaires that the lawyer circulated for response. *See* Stephen F. Black, *Internal Corporate Investigations* in AA Sommer, Jr. *Securities Law Techniques*, 119-53 to 119-58 (1995). *See also* District of Columbia Bar Legal Ethics Committee Opinion No. 269 (1997), *Obligation of Lawyer for Corporation to Clarify Role in Internal Corporate Investigation*.

When a corporation discloses the results of an investigation, the disclosure serves as a waiver of the protection of the privileges. However, when a corporation discloses the results of an investigation to a government agency under a voluntary disclosure program, there is a split of opinion as to whether the privileges have been waived. Some courts recognize a “selective waiver” that enables the corporation to maintain the attorney-client privilege with respect to third parties, despite the disclosure to the government. *See Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977). Some courts refuse to recognize the selective waiver in any

During the course of an investigation, an attorney will be dealing with numerous individuals, some of whom do not have representation. In dealing with unrepresented people, an attorney is required to state that the attorney is representing a client, and the attorney may not imply the attorney is disinterested. Model Rule 4.3 Dealing with Unrepresented Person. The attorney shall not give advice to the unrepresented person, and when the attorney knows or should know there is a misunderstanding regarding the attorney’s role, the attorney must make reasonable efforts to correct the misunderstanding. Id.

27 The First and Seventh Circuits have not expressly prohibited or adopted selective waiver, but have left the door open to selective waiver conditioned on the presence of a confidentiality agreement. See Dellwood Farms, Inc. v. Cargill, Inc. 128 F.3d 1122 (7th Cir. 1997) and United States v. Billmyer, 57 F.3d 31 (1st Cir. 1995).