

Promoting Legal Services Ethically in the Wake of an Accident or Disaster

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"JR" Clary, Jr. is a Louisiana trial lawyer who has represented injured claimants in civil courts for nearly 30 years and an Alumni of the TLC Class of 2002. Over that period of time, he has also developed an expertise in representing lawyers, physicians, nurses and other professionals who are charged with violations of the codes of conduct promulgated by their governing boards or courts. He has been asked to provide The Warrior with regular submissions regarding the applicability of The Code of Professional Conduct in those areas of law highlighted in each issue of this magazine published by the Trial Lawyer's College. TLC is committed to ensuring that its students are among the most ethical practitioners in the country, no matter what techniques we employ. We can't discover our clients' stories until we have ethically formed a relationship with our clients. The stories and articles presented in this issue revolve around mass torts, class actions and other similar legal proceedings following disasters or accidents.

On August 29, 2005, Hurricane Katrina rip-sawed her way out of the warm waters of the Gulf of Mexico. It swirled powerfully throughout southeastern Louisiana and all of Mississippi, propelling a storm surge of water overpowering the poorly engineered levee system spidering around New Orleans. And, a great American city flooded with tremendous loss of life and property.

In the weeks that followed, the class actions and mass joinder claims against insurance companies, the Corps of Engineers and others began.

The disciplinary complaints against the lawyers bringing those claims followed shortly thereafter and continue through the present day.

On April 20, 2010, the Deep Water Horizon drilling rig operated in the Gulf of Mexico by the British Petroleum Oil Company exploded, killing 11 men working on the platform and injuring 17 other workers. The explosion unleashed a swath of destruction impacting thousands of square miles of Gulf fishing areas and oyster beds. The legal claims and class actions seeking compensation for the dead and injured, the financially impacted fishermen and the devastated gulf coast businesses followed within weeks.

Again, disciplinary complaints against lawyers involved in the solicitation of injured plaintiffs followed thereafter in a wave.

Many of the disciplinary complaints against attorneys following accidents and disasters will result in reprimands and suspensions—almost all such sanctions being **public** in character.

What can Warriors do to avoid becoming the target of a disciplinary inquiry and the catastrophic

sanctions which often follow?

Each state has its own Code of Professional Conduct (sometimes referred to as a Code of Professional Responsibility) detailing what rules must be obeyed to prevent a disciplinary inquiry. Any attorney who has been the focus of the disciplinary complaint process (referred to as “bar grievances” in some states) can attest to the Kafka-esque experience such an inquiry entails. Put another way, once you are under the disciplinary microscope, the chance of emerging unscathed by some type of sanction is frankly remote.

In this area, an old phrase is truly relevant: **Knowledge is power.**

Although the codes of conduct for lawyers are slightly different in each state, they all have patterned similarities. Those similarities emanate from the American Bar Association (ABA) model rules for professional conduct adopted by the ABA House of Delegates in 1983. Disciplinary complaints initiated pursuant to these rules in mass joinder claims or class actions fall into several basic categories and those will be briefly explored in this article.

Before doing that, however, all Warriors are encouraged to review their own state’s rules of professional conduct. There will be variances among the states regarding these rules. Even so, the rules usually invoked to discipline lawyers following a large accident or disaster can be catalogued as follows:

1) Competence and Diligence:

The very first section of the ABA model rules codify this threshold requirement. Put simply, lawyers are prohibited from accepting representation of clients in areas where they do not possess the requisite competence or do not have the experience to represent a claimant in a diligent fashion. Representing a group of plaintiffs in a mass joinder or class action environment is *not* a simple matter. The problems faced by many attorneys later disciplined as a result of their involvement in these actions rests squarely upon their inability to move these claims forward in a competent manner after their services were engaged.

Obviously, a recapitulation of the mass joinder and class action procedures are beyond the scope of this article. However, the “take-away” admonition from this section of the Rules is simply this: If you do not have experience in the area of mass joinder and class action litigation, do not attempt to learn the methodology “on the fly,” after you have accepted the representation of various claimants. Instead, affiliate an experienced practitioner to assist you.

During disciplinary inquiries involving lack of competence charges, there are several themes which repeatedly appear:

- a) The claims on behalf of legitimately injured persons are deleteriously affected by lawyers in over their head. In some cases, causes of action are completely ruined.

This gives rise to serious “client harm”—a finding which ramps up the level of discipline, to say nothing of the malpractice suits which have also followed.

- b) Once an inexperienced practitioner has mismanaged a claim, forcing its ultimate reassignment to competent counsel, the mismanaging practitioner almost always **loses** his right to realize any fee for the imperfect “work” delivered on behalf of his clients, which adds financial insult to disciplinary injury.
- c) Moreover, actions of this type are incredibly expensive. Many lawyers facing discipline undertook the representation of numerous plaintiffs and then found themselves without the financial ability to diligently advance the claims. By the time that many of those lawyers realized they did not have the financial horsepower to advance the claims, the damage was done.

You cannot learn to fly a Boeing 757 by reading a book on the subject. You cannot “learn” to be a class action/mass joinder lawyer in the trenches by trial and error. So, DON’T.

2) Contracts and Referrals:

Another area where disciplinary inquiries in these areas are frequently seen revolve around the contracts effected between lawyers and their clients. Attorney-client contracts in instances following accidents or disasters are almost always taken on a contingency fee basis. The Rules in almost every state require contin-

gency fee agreements to be in writing and there are other specific requirements about what *can* and *cannot* be in those contracts. Once a disciplinary complaint is made, the Disciplinary Counsel will invariably review the contracts utilized by the attorney under scrutiny. It is not unusual for additional formal charges to be levied because of deficiencies in the attorney’s written contingency fee/retainer agreement. Make sure your contingency fee contract comports with the rules of professional conduct in your state. That contract **will** be carefully reviewed during any disciplinary inquiry in this area.

Similarly, there remains a notion among attorneys that one can secure the representation of a number of plaintiffs and then refer them to a class action or mass joinder “trial” counsel for disposition. These “trial” lawyers often refer them up the ladder, as well. Thereafter, the referring lawyers simply wait to later receive what is often referred to as a “referral fee,” although they do no additional work for the client or the case after the referral. Many disciplinary actions focus upon this referral area because a growing number of codes of professional conduct in various states now **prohibit** the payment of such “referral fees” when the lawyers referring injured claimants do not provide any “meaningful legal services.”

Legal fees must be earned. Claimants and causes of action

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are not to be brokered like pork bellies and cotton bales.

Given this evolving reality, the solicitation or receipt of a “referral fee” when the lawyer representing a client has done nothing more than effect a contract of employment and then referred the plaintiff to trial counsel violates the rules in *many* states **unless** the referring lawyer **also** remains actively involved in the causes of action and renders “meaningful legal services.” It is imperative that all Warriors become intimately conversant with this area of the code in their own state so as to make certain that their ongoing involvement with any such referred claim justifies their legitimate participation in the division of the legal fee.

In addition to this, the rules in many states also require that the referral of a plaintiff’s cause of action only occur with clients’ knowledge, permission and informed consent. In Louisiana, the rules are even more stringent: The ultimate division of the fee among the involved lawyers must *ALSO* be approved by the client.

Failure to carefully conform your professional behavior to these rules can have dire disciplinary consequences.

3) Unauthorized Practice of Law By Non-Lawyer Personnel

The expensive nature of diligently advancing a mass joinder or class action has already been noted. In addition to this, however, the proper management of a mass joinder or a class action necessarily requires a competent staff to organize the claims and assimilate the damage documentation in a **very** careful manner. Of course, this requires well trained staff—support personnel who are almost always **non**-lawyers.

Here, many lawyers run afoul of the rules detailing when hands-on involvement of lawyers and **lawyers only** is required. For example:

- a) **Only lawyers can give legal advice.** Non-lawyer support personnel cannot give any legal advice. When interacting with clients or potential clients, there will often be numerous questions about the cause of action, the potential recovery, the lifespan of the case, etc. To the extent that the answer to these questions necessitate providing legal advice, non-lawyer staff personnel cannot be used to “parrot” rote responses to these inquiries. These questions must be answered by a lawyer.
- b) **Only lawyers can negotiate on behalf of third persons, such as clients.** Non-lawyer staff support personnel must **never** negotiate on behalf of the lawyer’s clients, even if they are negotiating with other non-lawyer adjusters. This has been the focus of many disciplinary inquiries in many states and it results in some of the most serious of all formal charges, that being the unauthorized practice of law. The baseline sanction for the intentional unauthorized practice of law is disbarment.
- c) The rule continues to hold for the handling of the client’s money. Many codes of professional conduct require that all transactions involving the client’s money be handled by the attorney. **Non-lawyer support personnel cannot sign checks emanating from the lawyers Client Trust Account, for example.** Also, the detailing

of the disbursement to the client must be memorialized in writing and the attorney must be present during that process to answer any questions which may come up. This should never be left in the hands of non-lawyer support personnel.

4. Solicitation of Plaintiffs:

Sadly, this is very frequent area in which formal charges are levied against attorneys. When a serious accident or disaster occurs, there is an almost predictable “sweeping” of the affected area by attorneys seeking clients. With great regularity, this sort of solicitation results in numerous disciplinary complaints and sanctions against the attorneys involved. It is worth noting that Warriors Andy Vickery and Andy Rubenstein, authors of an article in this issue, DID form their lawyer-client relationships properly.

Again, the rules vary from state to state but certain major themes are almost always present. For example:

- a) **The in-person solicitation of prospective new clients is strictly prohibited by almost all codes of professional conduct when the lawyer has no family or prior lawyer-client relationship with the potential claimant.** Put another way, it is a serious violation of the Code of Professional Conduct to personally approach a potential claimant with whom the lawyer has no other connexity and seek to become his attorney. It is a violation of the rules to do the same thing by telephone. It is against the rules to use others acting at the lawyer’s request or on the lawyer’s behalf when a significant motive for the lawyer’s approach is the lawyer’s pecuniary gain. Sanctions for violating this rule can be *serious*. The mechanism through which a lawyer can secure a client in this environment requires the **client** to seek the services of the **lawyer**. Once the client has sought the services of the lawyer, the parties can evolve their interaction into a traditional lawyer/client relationship.
- b) **“Runner based” solicitation is a serious crime for both the “runner” and the lawyer.** Unfortunately, there are lawyers who use what have come to be called “runners” to solicit potential clients. The “runner” is promised something of value for obtaining each plaintiff or—in the most egregious instances—is allowed to participate in some way in the fees earned as a result of that representation. **This sort of system is strictly prohibited.** Moreover, many states have criminal statutes which also prohibit this activity. Lawyers engaging in this practice are often committing a crime (in Louisiana, a **felony**) which has the effect of ramping up the disciplinary sanction markedly. The baseline sanction for “runner based” solicitation of plaintiffs is disbarment.
- c) Unsolicited written communications—including unsolicited emails relating to the accident or the disaster—are prohibited in almost all states for a specified period following the date of the accident or disaster.

Each state's Code must be carefully reviewed for such language. In Louisiana, Rule 7.4 (b)(1) of the Rules of Professional Conduct reads as follows:

"A lawyer shall not send, or knowingly permit to be sent, on the lawyer's behalf or on behalf of the lawyer's firm or partner, an associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, an unsolicited written communication directly or indirectly to a prospective client for the purpose of obtaining professional employment if:

- (A) *the written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than thirty (30) days prior to the mailing of the communication;*
- (B) *it has been made known to the lawyer that the person does not want to receive such communications from the lawyer;*
- (C) *the communication involves coercion, duress, fraud, overreaching, harassment, intimidation, or undue influence;*
- (D) *the communication contains a false, misleading or deceptive statement or claim or is improper under subdivision (c)(1) of Rule 7.2; or*
- (E) *the lawyer knows or reasonably should know that the physical, emotional, or mental state of the person makes it unlikely that the person would exercise reasonable judgment in employing a lawyer."*

Later sections of this Rule make it clear that these prohibited communications include email.

- d) Advertisements in the public media (e.g., TV, radio, newspaper, website, etc.) **ARE** permissible immediately following an accident or disaster **BUT** the advertisement must be compliant with the Rules of Professional Conduct requirements.

Lawyers may advertise the availability of their services in the public media following an accident or disaster. That much is clear.

The manner and form of advertising, though, remains immensely problematic throughout all 50 states. Warriors must carefully review their codes of professional conduct to confirm their advertising is compliant with the requirements in their Code. In Louisiana, for example, there are newly adopted advertising rules which severely circumscribe the manner and presentation of lawyer advertising. The number of disciplinary complaints in Louisiana alone for violations of the advertising guidelines are growing. "Lawyer advertising" is an area almost universally blamed for the poor public perception of lawyers. Thus, Supreme Courts in many states are now concentrating on enforcement of disciplinary actions for advertising violations.

In addition, many states (including Louisiana) have "Safe Harbor" provisions in their code. These provisions allow attor-

neys to submit their intended advertising to their disciplinary boards or other committees prior to publicly airing the content. The submission is for the purpose of obtaining approval of the ad. No Warrior should produce and air any advertisement that has not first been run through the "Safe Harbor" committees where such committees are available.

As noted above, many states have "moratorium periods" following an accident or disaster during which unsolicited written communications and emails to potential claimants are prohibited. After the moratorium period (in Louisiana, this is pegged at 30 days) the communications *may* be sent. **However**, there are numerous provisions in many codes about how those written communications can be rendered. For example:

- (1) Many codes require that the written communication bear the words "**ADVERTISEMENT**" clearly marked at the top of each page and the lower left corner of the face of the envelope. Certain minimum print sizes are often specified.
- (2) Many Codes order that the written communication mailed to prospective clients shall not resemble a legal pleading, notice, contract or other legal document.
- (3) Many codes prohibit sending these communications by registered mail, certified mail or other forms of restricted delivery.
- (4) Many Codes require that the written communication must be clear about what lawyer will actually be handling the case or matter.
- (5) Many Codes require that the written communication disclose how the lawyer obtained the information prompting the communication. Any unsolicited written communication prompted by a specific occurrence involving or affecting the intended recipient of the communication or a family member of that person shall disclose how the lawyer obtained the information prompting the communication.
- (6) Most Codes dictate that an unsolicited written communication seeking employment by a specific prospective client in a specific matter shall not reveal on the envelope, or on the outside of a self-mailing brochure or pamphlet, the nature of the client's legal problem in any manner, shape or form.

5. Conclusion:

Disciplinary Boards and Supreme Courts in many states invoke the following time honored admonition: *The practice of law is not a business. The practice of law is a profession.*

The Codes of Professional Conduct existing throughout the states require professional behavior on the part of attorneys. A failure to become familiar with the Rules of Professional Conduct can have consequences which beggar the imagination.

Study these rules in your own state before plunging unprepared into mass joinder claims and class action work. **Knowledge is power.** Or, to quote the redoubtable Oprah Winfrey: *"Once you know better, you can do better."* ⁹⁸