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- Note from Editor-in-Chief

Dear Committee Members,

Welcome back to *The Ethical Business Lawyer*! I am privileged to be the new Editor-In-Chief of the Committee's Newsletter. I look forward to hearing your feedback on this issue, as well as ideas for future issues, and to meeting many of you in person at upcoming Committee meetings.

Sarah F. Warren
Editor-in-Chief, ABA/BLS Committee on Professional Responsibility Newsletter *The Ethical Business Lawyer*

- Business Law Section Spring Meeting April 10-12 Los Angeles, California Committee Events & Ethics Programs

  - Committee Meeting - 2:30-4:30 p.m. on Friday, April 11th
  - "The Ethics of Whistleblowing by Lawyers under the SEC Rules."
    8-10 a.m. on Friday, April 11. Panel: Brad Brian (qui tam litigator, partner at Munger Tolles & Olson); Mark Cahn (former General Counsel of the SEC, now partner at WilmerHale); Cathy Dixon (former Chief Counsel of CorpFin, now Chair of the FedReg Committee and partner at Weil Gotshal & Manges); Tom Karr (SEC Assistant General Counsel for Litigation and Professional Misconduct); and Bob Mundheim (former General Counsel of the US Treasury, former General Counsel at Salomon Smith Barney Holdings, now Of Counsel at Shearman & Sterling).
  - Beyond the Privilege: The Ethical Duty of Confidentiality for the Business Lawyer
    10:30 a.m.-12:30 p.m. on Saturday, April 12. Panel: Jeff Krause (Vice President and Loss Prevention Counsel at ALAS); Lois Mermelstein (partner at Farney Daniels); Ellen Pansky (past president of APRL, member of ABA Standing Committee on Ethics and Professional Responsibility, and partner at Pansky Markle); and Jackie Unger (associate at Carney Badle Spellman).

- Ethics Programs by Other Committees

  - The Ethics of Internal Anti-Corruption Investigations. Co-sponsored by the Professional Responsibility Committee and the Corporate Counsel Committee
    2:30-4:30 p.m. on Thursday, April 10
  - The Ethics Behind an Ethical Business Culture: What to Do When The Client Rejects Your Advice? Sponsored by the Corporate Counsel Committee
    2:30-4:30 pm on Saturday, April 12

Recent Cases & Opinions:

- "Ownership" of Attorney-Client Privilege in the Context of Mergers

  While mergers and acquisitions are often complex enough in their own right, a recent Delaware decision compounds the inherent complexity by adding another dimension: the attorney-client privilege. In *Great Hill Equity Partners IV v. SIG Growth Equity Fund I*, the Delaware Chancery Court adopted a bright-line rule that attorney-client privilege falls within "all property, rights, privileges, powers and franchises" that belong to the acquirer after a merger (unless the agreement provides otherwise). This marks a complete rejection of the New York rule from *Tekni-Plex v. Meyner & Landis*, where the Court of Appeals applied New York privilege law to a Delaware corporation's merger and concluded that pre-merger attorney-client communications did not pass to the acquirer.

  *Great Hill Equity Partners*

  *NYLJ Article*

- In-Firm Attorney-Client Privilege

http://apps.americanbar.org/buslaw/committees/CL290000pub/newsletter/201403/
In two recent decisions, *RFF Family Partnership* (Massachusetts) and *St. Simons Waterfront* (Georgia), courts have upheld the attorney-client privilege for communications between firm members seeking risk management and ethical advice from law firm general counsel or in-house counsel. The cases establish prerequisites for protecting confidential communications between law firm attorneys and the firm's in-house counsel from disclosure to a client who has asserted malpractice against the firm. Both courts also explicitly reject the assertion that principles of conflicts of interest or fiduciary duties to current clients are reasons not to apply the privilege. In a November 4, 2013 NYLJ article, Anthony E. Davis discusses the significance of *RFF Family Partnership* and *St. Simons* and sets forth helpful "best practices" for extending the privilege protections of in-firm communications.

- **Selective Waiver Limited in S.D.N.Y.**

  A circuit split regarding "selective waiver," under which a party may voluntarily produce some privileged material to an adversary while maintaining the privilege as to others, recently became even starker. In *Gruss v. Zwirn*, the district court for the Southern District of New York extended the Second Circuit's decision in *In re Steinhardt Partners, L.P.* by further limiting the selective waiver doctrine. Despite a confidentiality agreement with the SEC, the district court's opposition to "strategic and manipulative" abuse of this doctrine led the court to order, for *in camera* inspection, production of interview notes prepared by outside counsel for a hedge fund during an internal investigation.

- **Attorneys' Ethical Obligations and Whistleblower Rewards**

  Payments of bounties to whistleblowers who report corporate wrongdoing to the U.S. Securities and Exchange Commission ("SEC"), the Department of Justice, ("DOJ") or the Commodity Futures Trading Commission ("CTFC") are authorized by the Dodd-Frank Wall Street Consumer Protection Act of 2010 (the "Dodd-Frank Act"). This fact raises questions as to the ethical implications of an attorney's acceptance of a whistleblower bounty in exchange for providing information to a government agency, and has caused both courts and ethics bodies to examine an attorney's ability to reap rewards while being subject to professional ethical obligations. In October 2013, the New York County Lawyers' Association ("NYCLA") Committee on Professional Ethics issued a formal opinion (NYCLA Ethics Opinion 746) concluding that disclosure of a client's confidential information through a whistleblower program under the Dodd-Frank Act "would give rise to ethical issues that would presumptively prevent a New York lawyer, acting as a lawyer for a client, from receiving whistleblower bounties in situations in which the lawyer reveals client confidences." In a December 17, 2013 New York Law Journal ("NYLJ") article, Michael Rogoff, Paula Ramer, and Deborah Liben discuss recent decisions by the Second Circuit and NYCLA Ethics Opinion 746, concluding that "there is likely no situation in which an attorney could act as a bounty-seeking whistleblower against a current or former client without violating countervailing ethical obligations." Similarly, in his November 6 NYLJ article, Barry Temkin concludes that "lawyers presumptively may not reveal client confidences in exchange for whistleblower bounties."

- **Drunk "Tipping" Leads to SEC Enforcement Action**

  At social events, lawyers may "forget" their ethical obligations to maintain client confidences, which can lead to trouble for the lawyers and for those with whom they share information. In a recent case in the federal district court in the Southern District of Florida, a law firm partner, following several drinks at dinner, allegedly shared with his friend (who was also his investment advisor) non-public information about a planned acquisition of one of the law firm's clients. After the advisor allegedly engaged in aberrational trading the next day by investing in the target company, the SEC sued the advisor (but not the law firm partner) for misappropriating information in violation of a duty of trust and confidence.

- **Discoverability of Social Media Information**

  In a world where over 1 billion people are registered users of Facebook, the implications of social media content in court proceedings continue to evolve. In a December 17, 2013 Bloomberg Law article, Michael B. Pullano and Matthew G.
Laver review recent decisions involving social media in several states. The authors conclude that judges frequently consider social media content to be akin to physical documents and photographs, so courts will require production of such online content as part of a liberal discovery process "if a litigant can demonstrate a connection between the discovery sought and the claims raised."

**Article**

- **Florida Firm Sues Bar Association Over Website/Blog Restrictions**

  Legal advertising has long been restricted by state bar associations, but with the advancement of social media and the ever-changing forms of "speech," new issues are surfacing with regularity. Recently, a Florida law firm sued the Florida Bar claiming that recent amendments to ethics rules restricting law firm website content and blog posts by attorneys is unconstitutional. In addition to seeking a declaratory judgment that the ethics rules are unconstitutional, Searcy Denney Scarola Barnhart & Shipley seeks an injunction preventing the bar from enforcing the rules because requiring that any legal communication (including the firm's entire legal website) be "objectively verifiable" is extreme. The firm also claims that the rule violates their First Amendment rights and is unconstitutionally vague.

  [Article 1](#)
  [Article 2](#)
  [Complaint](#)

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**Recent Articles of Note:**

- **Martin I. Kaminsky, Legal and Ethical Issues Involved in Representing Affiliates or Principals of Clients, The Journal of the Legal Profession**

  A constant ethical issue for both in-house and outside counsel is the potential for a conflict of interest when an attorney seeks to represent a client in a matter adverse to an affiliate or principal of an existing client. In Martin I. Kaminsky's recent article, *Legal and Ethical Issues Involved in Representing Affiliates or Principals of Clients*, the author delves into various scenarios where such conflicts could arise, and how courts treat them. Kaminsky describes how courts have recognized the complexity and fact-intensive nature of these potential conflicts, and he concludes that a lawyer must undertake a "pragmatic and realistic evaluation of what is fair and reasonable" under the circumstances.

- **Christopher J. Whelan & Neta Ziv, Law Firm Ethics in the Shadow of Corporate Social Responsibility, Georgetown Journal of Legal Ethics**

  In the past few years, much attention has been devoted to corporate social responsibility, the idea that corporations should engage in "responsible" and "respectful" activities with regard to their communities. In Christopher J. Whelan & Neta Ziv's article, *Law Firm Ethics in the Shadow of Corporate Social Responsibility*, the authors analyze how corporate social responsibility could affect the ethical requirements of outside counsel. In particular, Whelan and Ziv describe how Outside Counsel Guidelines can impact legal professionalism and independence in a globalized corporate world. Reflecting upon the global economy, the authors warn that corporate social responsibility and other policies "may transform the substantive norms as well as the regulatory framework under which lawyers work."


  As so-called "Millenials" have grown, they have become an increasing proportion of legal practitioners. In Brittany Stringfellow Otey's article, *Millenials, Technology, and Professional Responsibility: Training a New Generation in Technological Professionalism*, the author analyzes the ethical implications of technological change in light of Millenials' use of those technologies. Otey discusses evolutions throughout the legal profession, from legal education to ethical and privacy considerations in practice to office technology, all within the context of the habits and interests of "Millenials." Ultimately, Otey concludes that legal educators "must rise to the occasion" to "capitaliz[e] on the unique strengths of the Millenial generation."

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**Committee/Subcommittee News:**

- **Firm Counsel Connection Continues to Expand its Reach**
The Firm Counsel Connection is now active in the following cities: Birmingham, Boston, Cincinnati, Cleveland, Dallas, Los Angeles, Minneapolis/St. Paul, New York, Philadelphia, Richmond, St. Louis, San Diego, San Francisco, Seattle and Washington, D.C. If you are interested in learning more information and/or joining the Firm Counsel Connection contact Co-chairs Lucian Pera at lucian.pera@arlaw.com and Philip Schaeffer at pschaeffer@whitecase.com

- **Network of State and Local Bar Ethics Committee Liaisons**

  Allen Sparkman, of Sparkman Foote Minor, LLP, Houston, Texas, has agreed to take on the job of organizing a group of State and Local Liaisons whose role will be to bring to the attention of the Committee significant ethics opinions, disciplinary rulings, judicial opinions, statutory developments, and changes in rules of professional conduct in their respective jurisdictions. As of early February Allen has signed up Liaisons in Alabama, Colorado, Connecticut, Florida, Iowa, North Dakota, Tennessee, and Texas. If you are interested in becoming a Liaison, please contact Allen, who is Chair of the new Subcommittee on State and Local Liaisons, at Sparkman@sfmlawgroup.com

- **Multinational Ethics & Professional Responsibility Subcommittee**

  Co-chairs Jim Tallon and Jim Rosenhauer report that their Subcommittee is at work on a questionnaire designed to elicit input from a number of law firms as to the most common ethics issues encountered in multinational practice and how firms deal with those issues.

- **Behavioral Ethics - behavioral ethics program planned for Section Annual Meeting in September 2014**

  The Committee’s new Subcommittee on Behavioral Legal Ethics will be chaired by Michael Herman, a partner in the Toronto office of Gowlings. In light of how well-received the Committee's behavioral ethics program was at the 2013 Annual Meeting (Cognitive Biases, Blind Spots, and Other Impairments of Ethical Vision: How Good Lawyers Can Go Astray), a behavioral ethics program is planned for the Section Annual Meeting in September 2014. This program will focus on what social psychology, group psychology, and organizational psychology have to teach us about the context in which ethical decisions are made.

  If you majored in psychology, or are otherwise interested in the interface between psychology and the law, then consider joining the Behavioral Ethics Subcommittee. Michael would welcome your membership on the Subcommittee and your interest in this area, and can be reached at michael.herman@gowlings.com

- **Committee Meeting at 2014 National Conference on Professional Responsibility**

  7-9 a.m. on May 31 at the ABA’s 40th National Conference on Professional Responsibility (May 29-30, 2014 at the Hyatt Regency in Long Beach, California).

  Program topics include:
  - Keeping Client Data Confidential in a Digital Era
  - Ethics & Federalism Issues with Money Laundering & Marijuana Laws
  - Triage of Troublesome Cases

  Hope to see you in Long Beach!

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