Message from the Chair

Dear Professional Responsibility Committee Members and Newsletter Subscribers,

I hope I will see you at our Committee meeting in Chicago next month during the new Section Annual Meeting. The Committee will meet from 9-10:30 a.m. on Friday, Sept. 12, in the Ogden Room, Hyatt Regency Chicago, West Tower - Silver Level. This will be my last meeting as Chair of the Committee and Keith Fisher's first as my successor. It has been a pleasure and a privilege to serve you and the Section as Chair of this important Committee. With your support over the past three years we have launched or re-launched a number of important initiatives, including the following (listed in no particular order):

- Behavioral legal ethics (bringing insights from the behavioral sciences to bear on legal ethics and professional responsibility issues);
- The Firm Counsel Connection (building a regionally-focused nationwide linkage of law firm General Counsel and other in-house counsel);
- Information technology issues in ethics and professional responsibility;
- Multinational and transnational legal ethics and professional responsibility;
- Legal ethics and gatekeeper regulation;
- The Law of Lawyer Graduation Initiative (restructuring and reform of the law of lawyering, including the Model Rules of Professional Conduct);
- Liaisons with state and local ethics and discipline authorities;
- Professional responsibilities of securities lawyers (and, more broadly, the state/federal interface in legal ethics and professional responsibility);
- Liaison to and collaboration with the ABA Center for Professional Responsibility and the Center Committees; and
- Collaboration with the AALS Professional Responsibility Section.

We can and should be proud of these initiatives. Their launch, however, is only the beginning. Next comes the development and build-out phase, in which they should begin to show results in the form of projects, programs, and publications. To do this, we will need to identify and bring together those who will undertake those projects, stage those programs, and produce those publications. Please let me and Keith know if you are willing to play an active role in any of these initiatives, or if you would like to suggest other initiatives. Keep in mind the possibility of collaborating with other Section Committees, or with entities outside of the Section.

Speaking of collaboration, if you are interested in information technology issues in legal ethics and professional responsibility please note that our Committee's Subcommittee in this area (chaired by Juliet Moringiello) is merging with the Cyberspace Law Committee's Task Force on Professional Responsibility and Technology to become a new Joint Subcommittee of both Committees. Plan to attend the first meeting of this Joint Subcommittee on Thursday, September 11, from 11 a.m. - noon in the Hyatt Regency's New Orleans Room, West Tower - Gold Level.

Within the next few weeks I will send you a draft Committee meeting agenda and dial-in instructions for attendance by telephone.

Best wishes to all,

Charlie McCallum
Committee Events & Ethics Programs

a. Committee Meeting - 9:30-10:30 a.m. on Friday, September 12th
   Our Committee Meeting will be held in the Ogden Room, Hyatt Regency Chicago, West Tower - Silver Level. In addition to discussing the Committee’s continuing initiatives, we will be welcoming Keith Fisher as the new Chair of the Committee and thanking Charlie for his stalwart leadership throughout the last three years.

b. *The Road to Abilene, Temporary Blindness, Slippery Slopes, and other Hazards to Ethical Behavior by Lawyers* - 2:30-4:30 p.m. on Friday, September 12th
   This will be our second program on behavioral legal ethics. The first dealt primarily with cognitive biases, aspects of individual psychology that may interfere with sound ethical judgment. The September program will add insights from group, social, and organizational psychology as to ways our environments, and how we interact with them, may result in ethical missteps.

c. *Who Do you Trust? - The Ethics of Lawyers as Gatekeepers* - 8:30-10:30 a.m. on Saturday, September 13th
   This program will discuss the ethical issues raised when lawyers are called upon, perhaps even compelled, to play the role of gatekeeper so as to prevent criminal or treasonous conduct by the lawyer’s clients.

Ethics Programs by Other Committees

a. *Facing the Challenges of Social Media Compliance in Corporations*. Co-sponsored by the Business and Corporate Litigation Committee and the Corporate Compliance Committee
   Thursday, September 11th

   Thursday, September 11th

c. *Dispute Resolution and Finance: Did You Even See the Ethics Issues?* Sponsored by the Project Finance and Development Committee
   Friday, September 12th

d. *Compliance Programs: Best Practices and Ethical Challenges*. Sponsored by the White-Collar Crime Committee
   Saturday, September 13th

Recent Cases & Opinions

a. **Dissolving Firm’s Obligations to Clients**
   An ethics question that is not frequently considered, but perhaps should be given the increasing number of dissolving firms, is the obligations of members of a law firm when the firm dissolves. A recent opinion by the California bar’s ethics committee requires lawyers in a dissolving law firm to take “reasonable steps” to protect the firm’s clients and their interests from foreseeable harm. The opinion explicitly provides that “all attorneys who are employed by or partners of a firm” have this obligation. Some advice that the committee imparts concerns the value of a “dissolution committee” charged with protecting the clients from predictable harm, the special responsibility of partners who have worked extensively with particular clients, and the need to take subsequent action if a lawyer learns that the dissolution poses additional risks to the client.

   **Opinion**

b. **Lawyer Reprimanded for Responding to Online Review with Confidential Information**
The Internet provides an efficient means to provide feedback on various goods and services, as well as individuals, from restaurateurs to plumbers - and even to lawyers. With increasing frequency, though, lawyers find themselves embroiled in disciplinary proceedings because they have made public comments on the Internet. In May, the Georgia Supreme Court ordered public reprimand for a lawyer who, after being fired by a client (who also negatively reviewed the lawyer online), posted personal and confidential information about the client that the lawyer had learned through her professional relationship with the client. The lawyer was charged with a number of alleged ethics violations, but found to have violated only Rules 1.4 (Communication) and 1.6 (Confidentiality) of the Georgia Rules of Professional Conduct. The court declined to issue more severe discipline, as other jurisdictions have done, because "the improper disclosure of confidential information was isolated and limited to a single client, it does not appear that the information worked or threatened substantial harm to the interests of the client, and there are significant mitigating circumstances."

Opinion

c. Oregon Supreme Court Rejects "Fiduciary Exception" to Attorney-Client Privilege

Several states have recently considered whether there should be a "fiduciary exception" to the attorney-client privilege, requiring a law firm to disclose communications between in-house ethics counsel and firm attorneys where the conversations concern potential liability to a current client. In the most recent decision, Crimson Trace Corp. v. Davis Wright Tremaine LLP (May 2014), the Oregon Supreme Court rejected a "fiduciary exception," reasoning that such conversations are privileged. The Crimson decision is consistent with recent Georgia and Massachusetts decisions, where courts similarly declined to adopt the "fiduciary exception."

Oregon Decision
Georgia Decision
Massachusetts Decision
d. D.C. District Court Expands Privilege Protection for Internal Corporate Investigations

In a March 2014 decision, the District of Columbia District Court found that no attorney-client privilege or work product immunity attached to documents that were created during an internal corporate investigation into a qui tam plaintiff's allegations of corruption related to government subcontracts. United States ex rel. Barko v. Halliburton Co., Case No. 1:05-CV-1276, 2014 U.S. Dist. LEXIS 36490 (D.D.C. Mar. 6, 2014). Following an en camera review of the internal documents, the court found that the documents were "eye-openers" in showing that employees of the company, Kellog Brown & Root ("KBR") had steered business and otherwise provided preferential treatment to a specific third party that, despite poor performance and alleged double-billing practices, continued to receive contracts. On appeal, the U.S. Court of Appeals for the District of Columbia held that the district court's decision was "irreconcilable" with the protections afforded to companies under Upjohn. Interestingly, the Court of Appeals took the opportunity to articulate that Upjohn does not require any "magic words" to put employees on notice that the purpose of the investigation is to obtain legal advice.

The Court of Appeals rejected the District Court's reliance on a "but for" test, applying instead a "primary purpose" test. In relying on the "but for" test, the District Court focused on the fact that KBR's investigation was conducted pursuant to regulatory obligations, rather than to obtain legal advice. In applying the "primary purpose" test, the Court of Appeals determined that there need not be only one investigatory purpose for the attorney-client privilege to apply. According to the Court of Appeals, providing or obtaining legal advice must be one the significant purposes - but not the only - of the investigation. The attorney-client privilege protects investigative materials regardless of whether required by regulation or company policy.
Opinion e. **Lawyer Can Advise Client to Take Down Facebook Posts**
The ubiquitous use of Facebook and other social media means that lawyers are sometimes required to advise clients about their social media footprints. Several bar associations are grappling with the question of what an attorney should do when she learns about information on social media that could damage her client's case. A recent ethics opinion by the Philadelphia Bar Association concluded that attorneys may counsel clients to delete potentially damaging materials from social media, but only if the deletion would not violate any law or regulation and if the lawyer has taken "appropriate action to preserve the information in the event it should prove to be relevant and discoverable." At least two other bar committees are currently faced with similar issues.

**Philadelphia Ethics Opinion**
**Florida Bar Proposed Advisory Opinion**
**North Carolina Proposed Ethics Opinion 2014-5**

f. **Intersection of Duties of Confidentiality and Loyalty to Former Client Lead to Lawyer’s Preclusion from Representation**
One of the possible ethical tensions for lawyers involved in transactional work is future representations dealing with those parties. In *Avra Surgical v. Dualis*, Judge Cote in the Southern District of New York disqualified a lawyer who had previously served as general counsel for Avra and negotiated a licensing agreement with a third company on behalf of Avra and Dualis, then subsequently left Avra and then represented it against Dualis. Though the lawyer protested that he had not breached any duties of confidentiality because nothing confidential was at issue, Cote held otherwise: "[i]t is [the lawyer's] duty of loyalty that prevents him for [sic] representing Avra against Dualis here, irrespective of any confidentiality concerns."

**Article Decision**

**g. Whistleblower Protection Extended to Lawyers**
In its October 2013 term, the Supreme Court considered whether "employee" under the Sarbanes-Oxley Act of 2002 included employees of contractors and subcontractors working for a public company in addition to those actually employed by a public company. *Lawson v. FMR LLC*, 134 S. Ct. 1158 (2013). The Court held that private contractors and subcontractors were included. In doing so, the Court extended broad whistleblower rights to lawyers. The decision will have a significant impact in New York, where lawyers are not generally recognized as whistleblowers. Permitting lawyers to act as whistleblowers may contradict a lawyer's duty to maintain client confidentiality, a tension that is especially pronounced under New York's stringent ethical rules. While NYCLA Ethics Opinion 746 prevents lawyers from disclosing confidential information "in order to collect a whistleblower bounty" under Lawson, New York attorneys may now be able to bring unlawful retaliation claims if they believe they were fired in retaliation for their whistleblowing activities.

**Opinion**

**h. Law Firm’s Use of Prospective Client’s Confidences Triggers Mandatory Disqualification**
In a March 2014 decision, the New York Supreme Court granted plaintiff Matthew Mayers' motion to disqualify defendant's attorneys, Quinn Emanuel Urquhart & Sullivan LLP in which Mayers challenged his termination from defendant Stone Castle Partners. *Mayers v. Stone Castle Partners, LLC*, No. 50461, slip op. (Sup. Ct. N.Y. Mar. 28, 2014). Mayers contacted a Quinn Emanuel attorney, Jonathan Pickhardt, seeking his representation in litigation against Tropic CDO IV trustee. Pickhardt declined, citing a conflict of interest. When Stone Castle retained Quinn Emanuel, Pickhardt was not part of the team representing Stone Castle, but discussed Mayers' call with Kevin Reed, Stone Castle's lead counsel at Quinn Emanuel. Reed used information Pickhardt told...
him in Stone Castle's filings. Mayers argued that Pickhardt's discussion with Reed, and Reed's use of the information meant that the court had to disqualify Quinn Emanuel. The court agreed: "[e]ven where, as here, no attorney-client relationship existed between the movant and the law firm, disqualification is warranted when an attorney violates his 'fiduciary obligation to preserve the confidential secrets of prospective clients' pursuant to Rule 1.18 of the New York Rules of Professional Conduct [regulating a lawyer's duties to prospective clients]." As a result, when Quinn Emanuel used Pickhardt's discussion with Mayers, they triggered a mandatory disqualification.

Opinion

i. Evolving Ethics and ESI
Discovery of electronically stored information (ESI) is part and parcel of litigation work, but it can be a slippery slope for attorneys who are not well-versed in dealing with ESI. A recent ethics opinion by the California State Bar sought to explain an attorney's ethical duties in handling discovery of ESI. The opinion examined the duties of competence, and how a failure to be competent in ESI can lead to breaches of the duties of confidentiality, candor, and not suppressing evidence. As to competence, the opinion states that "generally, and under current technological standards, attorneys handling e-discovery should have the requisite level of familiarity and skill to, among other things," implement ESI preservation procedures (e.g., litigation holds), analyze and understand a client's ESI systems and storage, identify relevant custodians and conduct proper searches of ESI, and produce responsive ESI appropriately. An attorney can become competent in ESI by acquiring sufficient learning and skill in advance or associating with or consulting technical consultants, or else the attorney can decline the representation.

However, an attorney incompetent in ESI can unwittingly sabotage his ability to follow other ethical duties. First, regarding confidentiality in the realm of ESI, "the law does not require perfection by attorneys in acting to protect privileged or confidential information, [but] it does require the exercise of some level of reasonable care" to protect the client's ESI. Next, an attorney can end up suppressing evidence because of the "significant potential" for ESI to be lost, mutated, deleted, or altered. Finally, an incompetent attorney may not realize that he has not adhered to court-imposed discovery obligations, and thereby may make incorrect assertions or assurances regarding his compliance. In short, attorneys need to be very careful that they are competent to handle modern, ESI-heavy litigation.

Opinion

Recent Articles of Note

a. Changing Behavior at Law Firms
In the hypercompetitive legal market, law firms are always looking to maximize efficiency and efficacy. In an article by Nancy B. Rapoport titled "Nudging" Better Lawyer Behavior: Using Default Rules and Incentives to Change Behavior in Law Firms, the author suggests that incentives and rules can be modified to improve the quality of legal services that a law firm provides. Rapoport examines both economic and psychological influences on behavior, including billing habits, pro bono work, mentorship, and a willingness to raise ethics issues, particularly at large law firms. While acknowledging that there are significant barriers to change, the author concludes, "If a law firm wants to change [attorneys'] behavior, then it needs to spend some significant time figuring out which of its many incentives triggered that behavior. . . . Once we figure out what's driving certain behavior, then we can start thinking about developing ways to alter the incentive structure." (St. Mary's Journal of Legal Malpractice & Ethics 2014.)

b. Requiring Civility Between Adversaries
Considering the adversarial nature of legal proceedings, it is no wonder that some attorneys are unable to maintain collegial relations with their adversaries. As some commentators have viewed civility in decline among legal practitioners, experts have contemplated whether it is worth enshrining a civility requirement in ethical codes. In David A. Grenardo's article, Making Civility Mandatory: Moving from Aspired to Required, the author argues in favor of "mandatory civility rules that include specific acts and set forth the conduct required" because such rules would "ensure the most effective manner to reduce incivility, which will increase efficiency in the legal process and increase the public's confidence in, and perception of, the legal system." (Cardozo Public Law, Policy and Ethics Journal, Spring 2013). In contrast, Mary T. Robinson, in Mandating Civility: Wisdom or Folly?, concludes that "mandating civility is not the answer," and argues that lawyers should take a wider view of the "bigger world" in which lawyers belong, and make "honest assessments" about how to improve the systems where lawyers act uncivilly, in the cause of making the legal practice "a reasonably sane undertaking." In any event, practitioners should consider how relations between attorneys can be made more civil and collegial, whether civility is "mandated" or not. (ABA Center for Professional Responsibility, The Professional Lawyer 2014.)

c. A Duty of Candor to Clients
The ABA Model Rules of Professional Conduct identify several instances where an attorney's duty of candor is implicated, but there is no rule establishing and defining an attorney's duty of candor to a client. In Raymond J. McKoski's article, The Truth be Told: The Need for a Model Rule Defining a Lawyer's Duty of Candor to a Client, the author suggests that an additional rule explaining an attorney's duty of candor to a client. The author proposes that Model Rule 1.4, regarding communications with one's client, be supplemented with a subsection (based on the Restatement (Third) of the Law Governing Lawyers) providing that an attorney "shall not knowingly make a false statement to a client and shall make disclosures to a client necessary to avoid misleading the client." McKoski ultimately concludes that, even if the bar does not agree to a standard of truthfulness in communicating with a client, a comment in the Model Rules should "explain why a client is not entitled to know the level of truthfulness he has a right to expect from his lawyer."

d. Debating Uniform Ethical Rules
While one of the hallmarks of American democracy and law is federalism and the various levels of authority, one may think the legal profession would benefit from a universal ethical code instead of a single "model" ethical code and at least 51 versions of ethical rules in the 50 states and District of Columbia. In Uniform Legal Ethics Rules? Yes - National Norms for a National Economy, author Robert A. Creamer argues for a uniform set of rules concerning legal ethics because "every lawyer, judge, and regulator in every jurisdiction would know, or be able to determine, what the rules are," thereby promoting "the effective administration of justice and the protection of the public." (ABA Center for Professional Responsibility, The Professional Lawyer 2014). In contrast, Stephen Gillers, in his article Uniform Ethics Rules? No - An Elusive Dream Not Worth the Chase, contends that there is no "plausible path to uniformity" because of the difficulty of changing any ethical rules anywhere, let alone everywhere, because many state court judges will hesitate to overrule the objections of local lawyers, and especially because "judges and lawyers will resist subordinating their historical prerogative to a national compromise." Gillers concludes that "our energy is demanded elsewhere," concerning the "inevitable disruptions in the legal services marketplace . . . that technology and cross border practice invite." (ABA Center for Professional Responsibility, The Professional Lawyer 2014).