



PROFESSIONAL RESPONSIBILITY COMMITTEE NEWSLETTER

October 2015

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[Business Law Section Fall Meeting](#)

November 20-21, 2015
Washington, DC

Editorial Board

- [Keith R. Fisher](#),
Committee Chair
- [Sarah F. Warren](#), Editor-in-Chief

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Message from the Chair

Dear Professional Responsibility Committee Members and Newsletter Subscribers,

The Second Annual Meeting of the Business Law Section was once again a success. Thank you to those who were able to attend our Committee meeting, either in-person or via teleconference. For those who were unable to attend, we covered a full agenda, discussing plans for the future, including participation by Committee members at the next Annual Professional Responsibility Conference (Spring 2016), and ascertaining interest in a special, standalone Committee dinner at the Business Law Section's fall meeting in November in Washington, D.C. Please let me know if you are interested in either or both of those things.

Both of the programs we sponsored at the Spring meeting -- "Murder, Plunder & Legal Ethics in the Art World" and "Law Firm Bankruptcies and Dissolutions: Legal & Ethical Issues" - were well-attended and received excellent reviews. Our two sponsored programs at the Annual Meeting - "Ethics & Renewed Professionalism" and "Ethics Issues in Bankruptcy" -- likewise were very well received.

Finally, I am honored to report that I was nominated by the Business Law Section for, and recently was appointed by new ABA President Paulette Brown to, the Standing Committee on Ethics and Professional Responsibility. I join our own Professional Responsibility Committee member Bob Creamer on that Standing Committee. Together, we will be able to keep our membership up-to-date on interpretations of the Model Rules of Professional Conduct that will be of interest to members of the Business Law Section.

My best to you all,

Keith

Recent Cases & Opinions

[a. **Lawyer's Consultations with Firm GC About Client Dispute are Privileged, California Court Says**](#)

A recent decision of a California state appellate court evaluated whether a lawyer embroiled in a dispute with a client may maintain privileged communications about that dispute with the law firm's general counsel and claims counsel. In *Palmer v. Superior Court*, the California Court of Appeal held that intra-firm communications concerning a client's accusation that a lawyer breached the terms of the retainer agreement and threat to "hold your firm liable" were privileged and need not be disclosed. One commentator has written that this decision means that "that an attorney who consults another attorney in the same firm for the purpose of securing legal advice may establish an attorney-client relationship." In order to establish such a "genuine" intra-firm attorney-client relationship existed, the firm successfully demonstrated: (1) there was an in-house attorney acting as in-house counsel; (2) the in-house counsel had not done any work for the client in question; (3) the time spent on the in-house communications were not billed to the client; and (4) the communications were made and kept in confidence.

[Article](#)
[Blog post](#)

[Other article](#)
[Decision](#)

b. Extent of Lawyer's Ethical Obligation to Surrender, After Being Fully Paid, Papers & Property to Client

ABA Formal Opinion 471 (July 1, 2015) deals with a request by a client to its former lawyer (who had been fully paid, thereby eliminating any question of retaining liens) to surrender all papers and property. "Model Rule 1.15 provides that a lawyer must safeguard a client's property and promptly deliver it to the client upon the client's request. By its terms, Rule 1.15 applies to a client's and third party's money and to 'other property' that comes into a lawyer's possession in connection with a representation." The ABA Standing Committee on Ethics & Professional Responsibility (the "Ethics Committee") concluded that the term "other property" necessarily includes "original documents provided by the client." The opinion continued, "When a representation ends, ABA Model Rule 1.16(d) mandates that the lawyer take steps that are 'reasonably practicable to protect a client's interests . . . ' 'Reasonable,' when used to describe a lawyer's actions[,] 'denotes the conduct of a reasonably prudent and competent lawyer.' These steps include, but are not limited to, 'surrendering papers and property to which the client is entitled.'" (Footnotes omitted). After canvassing approaches taken by the states and by former opinions of the Ethics Committee, Formal Opinion 471 concludes: "A client is not entitled to papers and property that the lawyer generated for the lawyer's own purpose in working on the client's matter. However, when the lawyer's representation of the client in a matter is terminated before the matter is completed, protection of the former client's interest may require that certain materials the lawyer generated for the lawyer's own purpose be provided to the client."

[Opinion](#)

c. Judicial Encouragement of Pro Bono Service Under Model Rule 6.1

ABA Formal Opinion 470 (May 20, 2015) deals with a request by a unified state bar association to a state supreme court justice to sign a letter encouraging lawyers to meet their obligations under Model Rule 6.1, Voluntary Pro Bono Public Service, and provide pro bono legal services to persons in need. The judge may sign a letter printed on the judge's stationery that is duplicated and mailed by the bar association directed to all lawyers (N.B., not any specific lawyer) licensed in the state encouraging them to meet their professional responsibility under Rule 6.1 of the Model Rules of Professional Conduct and provide pro bono legal services to persons in need and to contact the bar association for information about volunteer opportunities. Rule 3.7(B) of the Model Code of Judicial Conduct reads: "A judge may encourage lawyers to provide pro bono publico legal services." Comment [5] thereto explains, "Such encouragement may take many forms, including providing lists of available programs, training lawyers to do pro bono publico legal work, and participating in events recognizing lawyers who have done pro bono publico work." The opinion notes, "The word 'including' in Comment [5] means that the actions noted are not an exhaustive list of how a judge might encourage lawyers to provide pro bono, but are examples. Therefore, a judge is not limited to the activities noted in Comment [5] when encouraging lawyers to perform pro bono services. Although signing a letter encouraging lawyers to perform pro bono services is not one of the specific activities listed as permissible in Comment [5], the Committee thinks the Rules do not prohibit a judge from sending the encouraging letter described in this opinion." (Footnotes omitted).

[Opinion](#)

d. Legal Advertising on LinkedIn

A recurring challenge for lawyers and ethics bodies alike is how to deal with advances in technology and social networks. In March 2015, an ethics opinion by the New York County Lawyers Association provided detailed analysis about when use of the business networking site LinkedIn veers into legal "advertising," concluding that basic information about a lawyer's education and current or past employment is not advertising. In contrast, information about a lawyer's areas of practices, skills, or endorsements may constitute "subjective statements" and be

considered legal advertising requiring disclaimers under Rule 7.1.

[Ethics Opinion 748](#)

[Blog post](#)

[Another blog post](#)

e. Screening Process Enough to Prevent DQ. Federal Judges Opine

Though seeking disqualification is often thought of as a tactical maneuver in a lawsuit, its basis is in maintaining the ethical behavior of lawyers and law firms. In a controversial March 2015 decision, *Maricultura Del Norte, S. De R.L. De C.V. et al. v. Worldbusiness Capital, Inc. et al.*, a judge in the Southern District of New York did not disqualify Sidley Austin LLP from its representation of certain defendants after a partner who had contact with plaintiffs was screened from the defense representation. According to plaintiffs, a Mexican agriculture company suing Amerra Capital Management LLC and others in connection with a failed seafood joint venture sought legal advice from and provided confidential information to a partner in Sidley's Houston office. After reviewing emails between plaintiffs and the partner, District Judge Colleen McMahon of the SDNY concluded that the partner formed an attorney-client relationship with plaintiffs and was personally disqualified from representing them. However, Judge McMahon also concluded that the partner's conflict was not imputed to Sidley (and its New York office, in particular) because Sidley established an ethical screen and successfully rebutted the presumption of shared confidences with the firm. At least one commentator has criticized this opinion, noting that all of the cases cited by Judge McMahon regarding screening involved situations in which the personally disqualified lawyer had left one firm to join another one.

In a similar decision also from March 2015, a Tennessee federal judge declined to disqualify a law firm from representing a plaintiff despite a "clear" conflict of interest when the firm had an ongoing attorney-client relationship with the defendant, Ford Motor Co. In *Garland v. Ford Motor Co.*, District Judge Kevin Sharp found that the law firm's agreement to terminate its representation of Ford, combined with the erecting of an "ethical wall" between attorneys that worked with Ford and those serving as counsel for the plaintiff dealership, sufficed to avoid disqualification. Though Judge Sharp noted that the concurrent representation clearly violated Tennessee's Code of Professional Conduct and that the firm was aware of the ethical issue, the "appropriate disciplinary action" under the Code was not granting Ford's disqualification motion. The main reason for the decision was that "disqualifying counsel at this late date would pose an undue hardship on [plaintiff], an innocent in this matter who should not be subjected to such a draconian sanction."

[SDNY Decision](#)

[News article](#)

[Blog post \(not totally related\)](#)

[Garland decision](#)

[Garland article](#)

f. Pre-litigation Advice Regarding Privacy Settings and the Removal of Information from Social Media

What advice, if any, may lawyers give their clients about social media privacy settings and the removal of information before litigation? In the last year or so, ethics opinions in three jurisdictions have broached this topic, emphasizing that lawyers must preserve evidence and avoid spoliation. In March 2014, the New York County Lawyers' Association Commission on Professional Ethics concluded that lawyers should advise clients about the "adverse effects" of clients' use of social media and may counsel them to raise their privacy settings to the highest level, but must be careful not to destroy evidence by "taking down" material where litigation is anticipated. In July 2014, the North Carolina State Bar issued a formal ethics opinion agreeing with the NYCLA: lawyers "must advise the client of the legal ramifications of existing [social media] postings, future postings, and third party comments," but "in general, relevant social media postings must be preserved." Most recently, in January 2015, a proposed advisory opinion by the Professional Ethics Committee of the Florida Bar Association concurred with the earlier opinions. The Florida opinion concluded

that, because of the importance of documentary evidence to litigation, the record must be preserved; however, a lawyer could advise a client pre-litigation to remove information from a social media page, while ensuring that information or data that is known or reasonably should be known to be relevant to a "reasonably foreseeable proceeding" is maintained. Ultimately, the decision about whether such information is "relevant to reasonably foreseeable litigation is a factual question that must be determined on a case-by-case basis." Despite the ambiguity of factual determinations, these opinions make clear that lawyers must be careful about their advice to clients regarding their social media presence.

[Article](#)
[NYCLA opinion](#)
[NC Bar opinion](#)
[FL opinion](#)

g. Billing Records Without Legal Advice Privileged According to California Court of Appeal

In a legal economy where clients require detailed time sheet entries, law firms are torn between including in-depth analysis of legal work and providing generalizations so that adversaries will not learn about the work if the time sheets are discovered. A recent decision by the California Court of Appeal obviated the stress of such a decision, concluding that billing statements are "confidential communications" within the meaning of the state's attorney-client privilege statute, and therefore are exempt from disclosure under the state's public records law. In the case, *County of Los Angeles Board of Supervisors v. Superior Court*, the ACLU filed an open records request for billing invoices of law firms to which Los Angeles County paid almost \$40 million to defend police brutality lawsuits. The Court found that nothing in the statute, which defines "confidential communications" to include "a legal opinion formed and the advice given by the lawyer in the course of [the attorney-client] relationship," or in its legislative history, indicates that only those communications "containing a legal opinion" could be privileged.

[Article](#)
[Decision](#)

h. New York Clarifies Choice of Law Rules for Disciplining "Dual-Licensed" Attorneys

In Ethics Opinion 1027, issued on October 16, 2014, the New York State Bar Association's Committee on Professional Ethics addresses the question of which jurisdiction's ethical rules apply where a lawyer, licensed and maintaining offices in both the District of Columbia and New York, conducts transactional legal work. According to the Committee, New York Rule of Professional Conduct 8.5 is unclear on the topic, and there is "no simple formula" to determine which jurisdiction's rules will be applied. The ultimate question, based upon Rule 8.5(b)(2)(ii) (which applies to a dual-licensed lawyer's non-court related conduct), is where the lawyer "principally practices" and her conduct "clearly has its predominant effect." The Committee offered various factors to consider when determining where a lawyer principally practices and where a lawyer's conduct has its predominant effect, a recognition that even though there is no bright-line rule, additional guidance will assist practitioners.

[Article](#)
[Opinion](#)

i. Lawyer Reprimanded for Using Inappropriate Email from Judge for Client Development

Preexisting relationships and friendships between judges and attorneys appearing before them implicate both the judge's and the attorney's ethical obligations. This reality was showcased recently in a case involving a patent lawyer and a judge on the U.S. Court of Appeals for the Federal Circuit. Both parties faced discipline after the judge emailed the lawyer that his work before another judge was deemed "IMPRESSIVE in every way," encouraged the lawyer "to let others see this message," and signed "Your friend for life," and the lawyer

forwarded that email for the purpose of soliciting clients. The judge, former Chief Judge of the Federal Circuit Randall Rader, resigned from his position as Chief Judge and then from the bench over the summer after recognizing that he had committed an ethical breach by lending the prestige of his office to advance others' private interests. The lawyer was publicly reprimanded in November 2014 because the lawyer's email solicitation "suggest[ed] his retention because his special relationship would help to secure a favorable outcome at the Federal Circuit," thereby "imply[ing] an ability to influence improperly a government agency or official" in violation of ethical rules or other laws.

[Judge resignation article](#)
[Lawyer reprimand article](#)
[Commentary](#)

j. Marijuana Use. Even if Legal. May Violate Ethical Obligations

Following the 2014 elections, the possession of marijuana is now legal in a growing number of jurisdictions, especially for medicinal use, but attorneys should think twice before taking advantage of this new liberty. In Opinion No. 14-02 of the State Bar Association of North Dakota's Ethics Committee, the Committee cautioned that an attorney licensed in North Dakota who wanted to move to Minnesota in order to use legally prescribed medicinal marijuana by a physician in Minnesota would be violating North Dakota's ethical rules. The Committee noted that both North Dakota and federal law provide that marijuana possession and use is a crime, rendering the attorney's conduct both "unlawful and unethical"; therefore, an attorney's engagement in a medical marijuana program would "constitute a 'pattern of repeated offenses' that indicates indifference to legal obligations and constitutes a violation of [North Dakota Rule of Professional Conduct] 8.4(b)." Attorneys must be aware that they may be violating ethical rules even when they use medical (or otherwise legal) marijuana in another jurisdiction.

[Ethics opinion](#)

k. ABA Clarifies Sellers' Ethical Obligations When Selling Firm

An issue that has arisen in legal representation is whether an attorney or firm selling a law practice can continue to "practice" to assist the buyer in the transition of active client matters and, if so, for how long. In ABA Formal Opinion 468, issued October 8, 2014, the Standing Committee on Ethics and Professional Responsibility clarifies ABA Model Rule 1.17 regarding the ethical obligations raised during the sale of a law practice and the resulting attorney-client relationship. Formal Opinion 468 concludes that Rule 1.17(a)'s obligation that a seller "cease to engage in the private practice of law, or in the area of practice that has been sold, does not preclude the seller from assisting the buyer or buyers in the orderly transition of active client matters for a reasonable period of time after the closing of the sale." However, the Formal Opinion explicitly provides that neither the seller nor the purchaser "may bill clients for time spent only on the transition of matters," and instead, the compensation (if any) of the seller for transitioning "should be a matter of negotiation between the seller and the buyer in determining the consideration for the sale." With the issuance of Formal Opinion 468, the ABA has provided a bit more clarity about a selling attorney or law firm's ethical obligations under the Model Rules.

[Opinion](#)
[ABA Press Release](#)
[Law360 article](#)

Recent Articles of Note

a. Analyzing The Human Costs of Model Rule of Professional Conduct 1.8(e)

One difficult aspect of representing indigent clients is grappling with the requirement in 40 states that lawyers not provide financial assistance to clients (including covering living expenses). In Philip Schrag's article, *The Unethical*

Ethics Rule: Nine Ways to Fix Model Rule of Professional Conduct 1.8(e), the author analyzes the history and application of Model Rule 1.8(e) before evaluating nine ways (short of repeal) in which the Rule might be improved. Schrag concludes that it is "unethical" for the Model Rules (and so many states) to prohibit lawyers from providing "small amounts of assistance to truly indigent clients, which appear to be humanitarian gestures by the lawyers." 28 Geo. J. Legal Ethics 39-72 (2015). Among his nine proffered modifications, the author suggests applying this limitation in contingent fee cases, barring only loans but not gifts, removing the bar in pro bono cases, and limiting assistance to certain amounts of money, among others.

b. When Can Lawyer Contact Others Represented by Counsel?

In a large number of litigations and transactions, the parties are represented by counsel, and many relevant nonparties and witnesses are either represented or (formerly) affiliated with entities or individuals who are represented. In a recent two-part article by Martin I. Kaminsky and Maren J. Messing, the authors write about the complicated scenarios in which a lawyer is permitted to contact individuals who are or were represented by counsel. The authors focus on New York law (though reference other ethical rules and laws) to explain how the general "no contact" rule applies and the consequences for those failing to follow that rule, and also note certain exceptions to the rule. Overall, the authors conclude, lawyers must "proceed with caution" when they consider contacting another party whom they "know[] to be represented by another lawyer in the matter." Even outside of "the matter," the authors warn, lawyers should "avoid such communications, particularly a conversation, lest it later raise questions in the mind of a jury or judge as to what was really said."

[Part One](#)

[Part Two](#)

c. The Evolving Duty of Competence

As technological change has exploded, the Model Rules of Professional Conduct have tried to keep up. In his recent article, *The Twenty-First Century Lawyer's Evolving Ethical Duty of Competence*, Andrew Perlman writes about recent changes to the Model Rules and describes new skills and knowledge that lawyers need. Perlman begins with Comment 8 to Model Rule 1.1 (Duty of Competence), which requires "keep[ing] abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." According to the author, lawyers increasingly must develop and maintain competencies in cybersecurity, electronic discovery, Internet investigations, and Internet marketing. These increasingly pivotal fields have vast implications for practicing attorneys. As the author concludes, an attorney's failure to be competent in these fields could cause "a heightened risk of discipline or malpractice as well as formidable new challenges in an increasingly crowded and competitive legal marketplace."

[Article](#)

d. Lawyers' Social Media Investigation of Potential Jurors

According to a recent survey by the Federal Judicial Center, it is difficult for judges to detect and quantify the frequency of attorneys' use of social media to investigate potential jurors during voir dire. In fact, most of the 494 judges who responded stated that they did not know whether attorneys accessed the social media profiles of potential jurors, and most judges did not address the issue of attorney social media use with attorneys. It is not surprising that, as judges differ on their treatment of social media use by attorneys appearing before them, so too do different jurisdictions' ethics opinions vary. For example, ABA Formal Ethics Opinion 466, issued in April 2014, discusses a lawyer's review of a juror's or potential juror's Internet presence, concluding that a lawyer may review publicly available information but may not personally or through another person communicate with the juror. Thus, an attorney sending a Facebook friend request to a prospective juror whose profile is private would be an impermissible ex parte communication under Model Rule 3.5(b), but reviewing that juror's public tweets would be allowed. It is also notable that, unlike the New York City Committee on Professional Ethics and New York County Lawyers' Association

Committee on Professional Ethics, the ABA opinion concluded that a review of a juror whereby the juror becomes aware, through a website notification, of the identity of the viewer would not constitute communication with the juror. The lack of awareness by judges, combined with the split opinions, suggests that perhaps trial judges should be involved in the social media component of voir dire to prevent any misconduct or misperceptions that misconduct is occurring.

One commentator, Anthony E. Davis, recently wrote an article seeking to reconcile the seemingly contradictory New York ethics opinions. In his article, *Internet Investigation of Jurors*, the author notes many congruencies between the opinions, but also the material difference denoted above concerning whether an automated notification to the juror constitutes an impermissible "communication" with the juror. Davis laments that the New York City Bar's opinion (and by analogy, the NYCLA's opinion) creates a "Catch 22" problem where lawyers have an obligation to investigate jurors but may face professional discipline for conducting that investigation (if the juror was notified). He concludes that "the better advice in this instance clearly comes from the ABA opinion."

[Survey](#)

[ABA opinion](#)

[NYC Committee on Professional Ethics opinion](#)

[NYCLA Committee opinion](#)

[Davis article](#)

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