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Conference Report

Advertising and Solicitation

Internet Marketing Raises Ethics Issues But Bar Representatives See Few Grievances

SAN ANTONIO—In the landmark case of *Bates v. Arizona State Bar*, 433 U.S. 350 (1977), the U.S. Supreme Court recognized that the First Amendment protects the right of lawyers to advertise their services, subject to state regulation of commercial speech.

But state bar regulators who drafted post-*Bates* rules did not envision the ''second generation advertising issues'' that would arise when they attempted to apply those rules to lawyer websites, blogs, LinkedIn endorsements, AVVO listings, and other internet-based client development tools, according to Dean Margaret Raymond of the University of Wisconsin Law School.

Raymond moderated a May 31 panel discussion, ''Recent Issues Regarding Lawyer Advertising Rules,'' at the 39th ABA National Conference on Professional Responsibility, which took place May 30-31 in San Antonio.

Panelist Alice Neece Mine, assistant executive director of the North Carolina State Bar, said the attitude of her bar's ethics committee has evolved over the last decade as its members have examined and become more comfortable with lawyers' use of new technologies.

''We are not seeing grievances related to this brave new world.''

ALICE NEECE MINE
NORTH CAROLINA STATE BAR

Mine provided a snapshot of issues at the intersection of lawyer ethics and advertising at the beginning of the 21st century, including lawyers' use of Groupon and similar daily-deal websites, ''hard'' and ''soft'' client testimonials, endorsements on professional networking sites such as LinkedIn, and opportunities for live chat and advertising favorable results obtained for clients on lawyer websites.

Hunter Redux. Most of the discussion centered on the Virginia Supreme Court's recent ruling in *Hunter v. Virginia State Bar*, 2013 BL 55026, 29 Law. Man. Prof. Conduct 161(Va. Feb. 28, 2013), in which the court recognized First Amendment protection for a lawyer's blog postings while upholding the bar's authority to discipline the lawyer for not including a disclaimer about case results.

Two of the principals in that litigation were on the panel: Rodney A. Smolla, who represents the disciplined lawyer, Horace Hunter of Hunter & Lipton in Richmond, Va., and James M. McCauley, the Virginia State Bar's ethics counsel.

The decision ''serves as a fascinating window into the basket of issues we're talking about,'' said Smolla, who is also president of Furman University in Greenville, S.C.

The case centered on Hunter's remarks in the blog on his criminal defense firm's website, ''This Week In Richmond Criminal Defense.'' Hunter's posts address legal matters, primarily narratives of public details of his clients' cases and descriptions of favorable results he obtained for them, although he also uses the blog to criticize the criminal justice system.

The Virginia State Bar took the position that Hunter's blog violated the state's lawyer conduct rules in two ways, Smolla said.

First, the bar charged Hunter with violating Virginia Rule of Professional Conduct 1.6 by failing to obtain his clients' permission before describing their cases on his blog. Second, the bar contended that Hunter's blog entries constituted advertising and, under Virginia Rule 7.2, required a disclaimer that all cases are different and that past results are not indicative of future outcomes.

Hunter declined to comply with the disclaimer request and claimed that the bar lacked authority to regulate his blog because it was political speech and not advertising. The bar filed a complaint and the matter proceeded through multiple levels before ending up in the state's top court.

The Virginia Supreme Court held that Hunter must include a disclaimer about case results on his blog as required by Rule 7.2, but it said application of Rule 1.6 to Hunter's blog was unconstitutional.

Smolla said that he has asked the U.S. Supreme Court to review the decision as to Rule 7.2. McCauley said it is unclear at this point whether Virginia's attorney general intends to file a cross-petition on the Rule 1.6 issue.

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Benign Motivation. Smolla told the audience that ''My client has always been absolutely honest in describing his motivation'' in writing his blog: a mixture of political and commercial reasons.

Hunter acknowledges '' 'Yes, I was marketing myself, promoting myself, and one of my motives was commercial: to attract clients,' '' he said. But, Smolla added, Hunter maintained '' 'I was also expressing my identity, letting people know what I think about issues, expressing my politics, [and disseminating] news about the system and criminal defense.' ''

Hunter fought the disciplinary charges, Smolla said, because he felt '' 'it would cheapen my message to put on my blogs that this is advertising.' ''

Smolla said he ''argued unsuccessfully that Hunter's commercial motivation, which was one of multiple motivations, could not, in and of itself, turn what was otherwise political speech into commercial speech, so this had to be treated as political speech and the bar could not force Hunter to put an advertising disclaimer on it against his will.''

The U.S. Supreme Court has not yet decided whether speech of a business entity, or of a professional with commercial interests, that is facially political can be treated as advertising—and therefore subject to less protection under the First Amendment—whenever one of the speaker's motives happens to be commercial, Smolla stated.

Impact on Clients. McCauley said he was ''surprised'' at the Virginia Supreme Court's holding on Rule 1.6. He pointed out that one of Hunter's posts named a client charged with possession of cocaine and stated, accurately, that she had tested positive for the substance, and that another post named a schoolteacher who had been charged with assaulting another teacher.

''What about the part of Rule 1.6 about not disclosing information that's detrimental or embarrassing to the client?'' McCauley asked.

Unlike Rule 1.6 of the ABA Model Rules of Professional Conduct, Virginia's Rule 1.6 retains the ''confidences and secrets'' concept of the ABA Model Code of Professional Responsibility and, with certain exceptions, prohibits a lawyer from revealing ''information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation.''

What Is 'Public'? McCauley observed that although all of the client information Hunter posted had previously been revealed publicly in court proceedings, but for his blog postings it would not have been readily available to, for example, potential future employers of those clients who might use internet search engines to screen applicants.

Whether information is in the public record, McCauley said, is not always clear.

''Often transcripts [of public court hearings] are not made if they're not needed or not filed with the court, so once the case is over, that information evaporates,'' he said. ''This is clearly not information that is 'generally known' for purposes of Rule 1.9(c),'' which governs a lawyer's duties to former clients, McCauley stated.

The speakers and audience members who joined the discussion came to no clear conclusion as to whether the *Hunter* decision would permit a lawyer to notify a former client's employer of negative, but previously publicly disclosed, information, or whether a contrary result would forbid an appellate lawyer from citing and discussing a publicly reported case the lawyer had handled for a previous client that was favorable authority for a current client.

Few Complaints. The bar representatives on the panel commented that grievances related to lawyers' marketing efforts are—so far, at least—usually not related to internet-based activities.

''We are not seeing grievances related to this brave new world,'' Mine remarked. Instead, she said, most bar complaints about advertising in North Carolina continue to relate to failures to include direct mail disclaimers and result in letters of warning or, occasionally, reprimands.

In Virginia, ''Nearly all the complaints we receive [regarding lawyer advertising] are complaints from the economic competitors of the lawyer they're complaining about,'' not from clients or nonlawyer members of the public, McCauley reported.

Disclaimers. ''We seem to think that we fix a lot of problems with disclaimers,'' Raymond observed to the panel. ''Convinced?''

''I have my doubts,'' Mine admitted. ''We use the internet a lot and use it quickly. I routinely accept all the terms and conditions'' when presented with a terms of use agreement or disclaimer, she said.

''We don't have any empirical evidence,'' McCauley acknowledged. ''We've been challenged by our opponents to produce evidence that the consumer is misled by a statement without the accompanying disclosure. Our bar's response is that if we can establish that the statement is inherently misleading, we win.''

BY HELEN W. GUNNARSSON

Corporate Counsel

In-House and Outside Counsel Often Divided On Issue of Advance Waivers, Panelists Say

SAN ANTONIO—Although large corporations can be lucrative clients for law firms they hire, a corporate client's size can be a negative if the business owns several subsidiaries or affiliates.

In such instances, conflict of interest rules may preclude a firm from suing or opposing any of its client's component entities. If the client's corporate family tree

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is sprawling, experts say, a law firm will lose significant opportunities that could outweigh the value of the parent company's business.

Law firms can avoid being handcuffed in this way by obtaining advance waivers from prospective and existing corporate clients—but taking that protective measure is much easier said than done.

That lament was voiced repeatedly by speakers at the 39th ABA National Conference on Professional Responsibility, held here May 30-31.

Large companies, the panelists said, are wary of agreements that would allow their outside counsel to attack any members of the corporation's extended family in matters they handle for other clients.

The problem is compounded, they added, by the fact that firm partners engaged in client development are aware of that distaste and reluctant to broach the issue of advance waivers with the corporate executives and in-house counsel.

No Unanimity. The issue of advance waivers was the main topic of conversation at a May 30 panel on ''Conflicts and Other Issues When General Counsel Hire Outside Law Firms.''

The composition of the panel—two in-house counsel for large financial corporations and two partners at multinational law firms—yielded some understandably different viewpoints as to whether it is a good thing that advance waivers are so difficult to obtain.

The discussion was moderated by Simon M. Lorne, vice chairman and chief legal officer of Millennium Partners LP, a New York-based hedge fund. Lorne was joined by Steven A. Bennett, executive vice president and general counsel of financial services group USAA.

Two law firm attorneys—James B. Kobak Jr., partner and chair of the ethics committee at Hughes Hubbard, New York, and Anne E. Thar, conflicts partner at Winston & Strawn, Chicago—rounded out the panel.

Push-Back on Two Fronts. Kobak and Thar cited two main obstacles that have stymied their efforts to ensure that their firms secure advance waiver provisions in engagement letters they sign with existing or prospective corporate clients.

The first impediment is resistance from corporate clients, who they said generally take a dim view of such agreements. General counsel at many large companies categorically refuse to sign engagement letters with advance waiver provisions, Thar said, and subordinate in-house lawyers are ''afraid to deviate'' from instructions to stand their ground when negotiating that issue.

Kobak concurred. He said his law firm doesn't ''get that much push-back'' on ''identity of client'' provisions in retainer agreements—but advance waiver clauses almost always draw objections.

Both Thar and Kobak said they are more dismayed by a second obstacle that they frequently encounter: resistance from law firm colleagues who ignore admonitions to broach the issue of advance waivers when opening matters with existing or prospective corporate clients.

Kobak said he encourages partners at his firm to use form engagement letters that contain relatively weak advance waiver language. He added that he has had only ''mixed success'' in pushing the use of those form retainers. Many partners simply ''hate to have that discussion with their clients,'' he said, and it often ''take[s] a lot of hand holding'' to get them to buy in.

Thar touted one solution that she said has reduced the need for such hand holding at her firm. Partners and associates, she said, are not allowed to ''start billing on cases'' until they get the engagement letter that Thar and other firm leaders want them to get. ''I've also threatened to shut down client [billing] numbers,'' she added.

Crapshoot. Getting an advance waiver into a retainer agreement is just half the battle, the panelists noted, because there is no guarantee that a court will uphold such a provision if a law firm seeks to enforce it.

Judicial reluctance, the speakers said, stems from the importance with which courts view Rule of Professional Conduct 1.7(a), which deals with concurrent conflicts of interest. According to that rule, a prohibited conflict exists where ''the representation of one client will be directly adverse to another client,'' or when ''there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client.''

Although Rule 1.7(b) goes on to state that clients can waive conflicts by giving their lawyers informed consent in writing, case law reflects uncertainty as to whether such waivers will be upheld by courts, the speakers said.

In surveying some of the conflicting authority, the speakers pointed first to ABA Formal Ethics Op. 05-436, 21 Law. Man. Prof. Conduct 358 (2005). That opinion suggested that 2002 changes to Model Rule 1.7 gave attorneys more latitude to seek advance waivers. As revised, the committee declared, Rule 1.7 ''permits effective informed consent to a wider range of future conflicts than would have been possible under the Model Rules prior to their amendment.''

Precedent. Courts did not uniformly adopt that view, the panelists observed, but a few recent decisions may indicate a shift toward its acceptance.

One of those cases is *Galderma Labs. LP v. Actavis Mid Atlantic LLC*, No. 3:12-cv-2038-K, 29 Law. Man. Prof. Conduct 114 (N.D. Tex. Feb. 22, 2013), which held that general and open-ended waivers to future conflicts may be effective under Rule 1.7 under some circumstances.

''Prior to the 2002 Amendment of the Model Rules,'' the *Galderma* court noted, ''informed consent was limited to circumstances in which the lawyer was able to and did identify the potential party or class of parties that may be represented in the future matter.''

But the *Galderma* court chose to follow the lead of the 2005 ABA ethics opinion—which, it said, provided that ''open-ended, general informed consent was likely to be valid if the client is an experienced user of legal services.''

The ABA opinion, the court added approvingly, ''gave significant weight to the sophistication of the client and its use of independent counsel, factors which previously had not been relevant to informed consent.''

Other courts have not been so receptive to the ABA guidance. The panel pointed to *GSI Commerce Solutions Inc. v. BabyCenter LLC*, 618 F.3d 204, 26 Law. Man. Prof. Conduct 529 (2d Cir. 2010). In that case, the Second Circuit held that a waiver provision in a law firm's retainer agreement was worded too generally to permit a law firm to sue an affiliate of one of its corporate clients.

Broad vs. Narrow. The upshot, the panelists said, is that advance waiver provisions are more likely to be upheld if they are drafted as specifically as possible, notwithstanding the view of some authorities that a general and open-ended waiver may also be effective against a sophisticated client.

An audience member asked two panelists for guidance on how to draft such provisions, and received two different answers that reflected the adage that ''where you stand depends on where you sit.''

''You want it as broad as possible and hope that a court will enforce it,'' Thar said.

''You want it as narrow as possible and hope that a court will not enforce it,'' Bennett retorted to laughter.

BY SAMSON HABTE

Private Firm

Speakers Say Anticipate Potential Problems Before Lawyer Leaves Firm or Dies Suddenly

SAN ANTONIO—''Death, destruction, disagreement, and disability'' were some of the unpleasant matters Ronald C. Minkoff warned would be discussed in ''Closing One Door and Opening Another: Legal, Ethical, and Practical Problems with Shutting Down a Law Firm,'' the May 30 program that kicked off the 39th ABA National Conference on Professional Responsibility in San Antonio.

Minkoff, who moderated the session, is a partner in Frankfurt Kurnit Klein & Selz, New York.

Jack of All Files. Panelist and District of Columbia Bar Counsel Wallace E. ''Gene'' Shipp Jr. sketched a hypothetical scenario involving the sudden and unexpected death of ''John Forsyth,'' a 60-year-old small-town solo practitioner who collapsed while duck hunting.

Strong and vigorous, Forsyth ''never saw a case he couldn't handle,'' had an extremely lucrative practice, was certain he'd live to be 100 like his father, and had no succession plan for his firm.

But after his funeral, panicking at all the phone calls from anxious clients, the secretary calls the boss's son, Jack Jr., who is a first-year associate in Steelum and Howe, a 20-person firm in a nearby city. Jack ''rides to the rescue,'' puts all his father's client files in the rear of his red pickup truck, and takes them back to his law firm.

There he begins reviewing each file, looking for deadlines and flagging cases he thinks his firm would want to handle. Jack refers the cases that don't fall within the scope of his firm's practice to other lawyers and everyone is happy with him.

''Having come from a big firm, I doubt many big firms have a succession plan.''

JANIS M. MEYER
FORMERLY OF DEWEY & LEBOEUF

Having obtained ''this fabulous find'' for his law firm, he makes partner in only five years, marries a beautiful wife, and moves into a beautiful home by the local river walk.

Observing ''This happens all the time,'' Shipp asked his fellow panel members ''Did Jack act properly after his father died? What mistakes did he make? What should Jack have done?''

Plan Ahead. ''Jack waited too long to act,'' replied Judith D. Equels, director of the Florida Bar's Law Office Management Assistance Service.

Waiting until days after the funeral, a week or more after Jack's father died, Equels said, is ''ridiculous.'' In that time, she explained, ''there could have been missed appearances and missed deadlines.''

Instead, referencing Rule 28 of the ABA Model Rules for Lawyer Disciplinary Enforcement, she said ''Jack should immediately have notified the state bar of his father's demise, obtained instructions on how to be appointed'' to inventory his father's client files, and then notified the clients of their rights and options.

Equels asked ''Does [Jack] even have all the files?'' Concerned for the ''potential pitfalls'' that could be ''lurking'' in his father's closed files, Equels also noted ''Jack has done nothing about gathering up his father's calendar and task list. Instead, he wastes even more time reviewing each and every file.''

Turning to Shipp's last question, Equels said ''In hindsight, Jack and his dad should have discussed making Jack an 'of counsel' partner,'' designating Jack as the chosen inventory attorney for his father's firm. ''Then father John would have had a shadow.''

Equels also wondered who, if anyone, Jack's father authorized as an additional signatory on his client trust account. ''In most states, once you're appointed inventory attorney you can start transferring trust account funds back to the clients,'' she said.

Equels praised a Washington State Bar Association program (http://www.wsba.org/Resources-and-Services/Ending-Your-Practice/Sell-a-Practice) on selling or transitioning a law practice as ''one of the most innovative'' in the country. She said it gives lawyers the opportunity to hire someone who will eventually take over their practices.

Remember Rule 1.6. ''These issues come up in a variety of contexts,'' commented Minkoff. ''We shouldn't limit our thinking to when an attorney dies. Attorneys also become disabled, either permanently or temporarily.'' Or, he noted, lawyers may be suspended or disbarred. ''It's the same situation: the clients are left hanging.'' And without advance planning, those picking up the pieces may ''find the practice shut down.''

Client confidentiality, Minkoff noted, is a major issue in winding down a law firm's business. ''There's no exception in Rule 1.6 that deals explicitly with this problem.'' Though agreeing with Equels that ''You can't wait days to go through the [client] files to figure out what's happening,'' Minkoff said ''Somebody like Jack, a grieving relative who happens to be an attorney, has no right to look at those files'' containing confidential client information.

There are only two ethically compliant ways out of this dilemma, he said: an explicit succession plan already in place with another lawyer, or, in the absence of such a plan, court appointment as an ''assisting,'' ''advisory,'' or ''inventory'' attorney, depending on the jurisdiction's procedures and nomenclature, as Model Rule for Lawyer Disciplinary Enforcement 28 provides.

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Without one or the other, he said, ''you don't have the right to look at those files.''

Mentioning an 84-year-old lawyer client of his who has every intention of dying in the saddle, Minkoff said ''You don't have to retire before you die. You just have to have a plan.'' And the plan need not include making the inventory attorney a member of the firm but could, he said, be an agreement with a power of attorney.

Minkoff advised that a succession agreement should be broad in scope and time to enable the inventory attorney to take whatever action is necessary for the practice. It should provide for the inventory attorney to collect the firm's fees and be compensated, he said.

The lawyer should make arrangements with the firm's bank for the inventory attorney to obtain power over trust and escrow accounts, Minkoff stated, and should notify office staff whom the inventory lawyer will be and the extent of the lawyer's authority.

''There are a lot of complicated pieces that have to fit together in order to make this work, and the way they fit together depends on whether there's a death, disability, or a suspension or disbarment,'' Minkoff told the audience.

In the hypothetical scenario, ''Jack had none of that,'' he observed. And, although his father's failure to plan wasn't his fault, Jack still ''did some bad things'': he improperly solicited clients. ''Almost all state rules require giving clients [in this situation] a choice,'' Minkoff said. ''Jack didn't do that.''

Telling Clients. Turning to another problem with Jack's actions, Minkoff noted ''There are all kinds of liability risks you're taking on when you take over cases willy-nilly'' as Jack and his firm did in Shipp's hypothetical. Those risks are magnified, he said, when clients are not familiar with the new lawyer and firm. ''They're less likely to be loyal when you're wrong.''

Must lawyers with succession plans notify their clients? an audience member asked. ''That's a great question,'' said Minkoff, noting that his jurisdiction had not addressed that point. He suggested that lawyers might include a provision in their engagement letters informing clients of the existence of their succession agreements, the identity of the inventory attorneys, and the extent of their authority. ''The other way to handle it is a court order afterwards, which will protect the lawyer coming in.''

Panelist Janis M. Meyer said she suspected small firms and solo practitioners are more likely to have succession plans in place than their large-firm colleagues. ''Having come from a big firm, I doubt many big firms have a succession plan,'' said Meyer, who was general counsel to Dewey & LeBoeuf, which dissolved and wound up its affairs over the last year.

Meyer said ''Yes, Jack should have been appointed the inventory person, but when these sorts of things happen, people often don't have time.'' She said ''I'm not excusing Jack's not having followed the rules, but often you have to figure out what's the best thing to be done for the clients. You have to see whether anybody needs to be in court the next day.''

Minkoff agreed that in Jack's situation ''There's a short term problem. You have to get someone in to make sure that deadlines are met and statutes aren't blown. You try to notify clients, let them know what's going on, and give them a choice, but you also have some immediate, urgent things that you need to do. If you put that in the retainer agreement, the client is deemed to have consented.''

An audience member commented ''The cost of winding up a practice is a lot of money. There should be a serious discussion of how this is going to be paid for,'' whether through increasing bar dues or assessing costs against a lawyer's estate, for example.

''There is actually insurance that you can get to cover the cost of a transition like this,'' Minkoff said. ''Also, the fees that the lawyer is owed from clients can be a source of funding'' for windup costs that, he noted, include compensation for not only the inventory attorney but also office staff.

Curb Service. ''God bless Jack,'' Shipp declared. ''We have people calling saying 'the files are on the curb, the office has been closed for six or eight months, there's an eviction.''

In the District of Columbia, he said, the office of bar counsel would appoint a lawyer to wind up the deceased lawyer's affairs. ''My worst case was a traffic lawyer who died. He had 2,500 open traffic cases for $300 each and he had already spent all of it. We had to go in and get somebody and pay them'' to clean up the mess. ''It's game on at that point. You just have to deal,'' he remarked.

The potential of discovering malpractice, Minkoff pointed out, is yet another concern for the lawyer who takes on the responsibility of closing another lawyer's practice.

''What if the assisting attorney comes in and starts reading the files and says oh my god, this guy hasn't done anything in six years? Or the duck hunt got paid for through the sale price on some real property? The attorney then takes on another obligation: reporting. That might not be an issue with a dead person, but it will be an issue with a disabled person'' who may wish to reapply to the bar in the future, Minkoff said.

Conflicts. An audience member wondered whether Jack and his firm had bothered to check for conflicts before going through the client files. ''Is the attorney who goes in and does the rescue representing the clients?''

Minkoff said ''The first thing Steelum and Howe should do is run a conflicts check.'' The more difficult question, he said, is ''who are you representing?'' Bar rules and reports, he said, do not generally address that issue. ''You have to decide. Are you just being a good Samaritan, which means you're representing nobody, are you representing the estate, or are you representing clients?''

''Don't feel like you're a bad lawyer because you can't find authority in your jurisdiction. It's just not there.''

RONALD C. MINKOFF
FRANKFURT KURNIT KLEIN & SELZ

The rescuing lawyer's obligations will differ depending on the answers to those questions, Minkoff said. ''If you are not representing the clients, you have no obligation to report the malpractice'' of, say, six years of

neglect. ''If you are, then you do,'' because of the lawyer's loyalty, confidentiality, and fiduciary obligations toward clients, he said.

Second Act. Shipp turned the panel's attention to ''Act II'' of Jack's drama, taking place 10 years later. Jack's firm's founder, Mr. Steelum, has died and Jack's wife has left him. As a result of the ensuing nasty, juicy, and very public custody fight, Jack's partners convened and discussed lowering Jack's profile and reducing his pay, upon which Jack left the firm—taking a couple of partners with him—and set up a new firm with the name ''Steelum.'' The remaining partners renamed their firm, also using ''Steelum.''

The original partnership agreement made no provision for the firm's dissolution, let alone the use of the firm name, which, Shipp added, ''is money.'' As to the inevitable litigation over the firm's name, phone number, website, library, furniture, and other assets, Shipp asked the panel, ''What up?''

''Unless the deceased partner is going to be present by séance,'' opined Meyer, ''Jack can't use that name'' under Model Rule 7.5, although the other firm, as the successor firm, might be able to do so. Meyer also took the position that Jack could not talk to his former firm's clients ''until he's left the premises.''

But ''When you have a split like this,'' said Minkoff, ''it's not always clear who the real successor firm is,'' and which firm, therefore, is entitled to use the Steelum name.

Firm names, phone numbers, and websites are all ''assets of the firm that have to be valued, and that value has to be divided up among the partners. If somebody keeps the phone number, they have to pay the other partners for their share of the value of that phone number,'' Minkoff stated.

Out the Door. Panelists also discussed at what point Jack might inform clients of his departure. Citing *Graubard Mollen Dannett & Horowitz v. Moskovitz*, 653 N.E.2d 1179 (N.Y. 1995), Minkoff said ''The way to balance the fiduciary obligations you owe to your partners and those you owe to your clients is to create a level playing field. The partners must be told first. Then everyone can compete for business fairly.''

Although the *Graubard* court did not prohibit departing lawyers from speaking to their clients first, Minkoff said, ''you are taking risks if you do, because if that client is one the other side can say they had a relationship with, it looks like you're taking a firm asset.''

An audience member asked ''What happens to the warehouse of 30 years of old files? Or if Firm B dissolves and Firm A hires all of the lawyers and they arrive with 30 years of old files?''

''First, you determine who owns the files,'' Equels responded; this, she said, will depend on the law of the individual jurisdiction. That task, she said, belongs to the inventory attorney ''and it's a big one'' which can devolve into a game of ''hot potato, hot potato.''

''Never enroll old files in the new firm's system,'' Equels advised, before checking them for conflicts and being certain that the new firm wants and is authorized to take possession of them. Once the firm does, ''You have to decide what happens to each closed file, and the inspection can't be perfunctory.''

Another audience member commented: ''Another reason to leave them [the old files] on the truck is that if you take them, you have the conflicts ball and chain of having confidential client information.''

Equels responded that ''If we're going to warehouse'' a collection of client files from a transferring lawyer, ''it gets warehoused under that lawyer's name and charged to them. Those closed files are fraught with danger. If it comes into our firm, then it goes through our inventory system and a conflicts check.''

Describing a situation he's seen among his own clientele, Minkoff said ''What happens is Partner A wants to leave his firm and gets a huge offer from Firm XYZ. He'll never be able to earn back his guarantee. He comes with all of his files, two and a half years pass, and then he leaves [Firm XYZ],'' presumably for an even more attractive offer. ''Firm XYZ is upset because they've been overpaying him'' all that time. ''Then, the attorney doesn't take his files with him and his [former] firm doesn't want to keep them.''

Minkoff said that in one of his cases ''We ended up in a fight for three and a half months over who was going to take the files. I convinced my client he had an obligation to keep his files. He convinced his next new firm to take and pay for them.''

As an aside, Meyer interjected ''In my next life I'm going to come back as a warehouse owner, because the money those people make is unbelievable.''

Finale. Moving to the third and final act of the Forsyth saga, Shipp said ''Jack's new firm is now 300 lawyers,'' and doing very well until the recession hits. ''All the partners have their kids in private schools and are in country clubs. They don't want their draw reduced. So they go to the bank and give personal guarantees. What happens to the firm?''

Equels was adamant: ''Never, ever, ever, borrow money to pay the partners.'' Dismissing the idea that partners might vote to reduce their compensation with ''We all know how that's going to go,'' she suggested the firm might employ a ''white knight'' strategy and consider ''What firms out there are like us?'' Such considerations, she said, ''should be part of the vision and direction of a three hundred lawyer firm.'' But Minkoff commented ''The number of firms who have borrowed to keep their compensation levels high would shock you.''

''What if the bank is made trustee?'' Shipp asked. ''I've seen bankers want to see the client files,'' said Equels. ''It's push, push, push. You have to push back.'' Said Minkoff, ''The banker is not a lawyer and is not supposed to be privy to confidential information. There may be matters affecting collection actions that you can't tell the bank about because of confidentiality. The Citibank guy doesn't really care about your license.''

Additionally, Equels said, ''The same [ethics] rules that govern money govern property. If you're supposed to do an inventory every 30 days on money and reconcile it, where's the inventory on the property? It's a huge, huge issue. The problem comes up in both paper and electronic formats, every time a lawyer passes away, becomes disabled, or is disbarred.''

Minkoff concluded the session by providing some words of warning as well as comfort for lawyers involved in the messy work of winding down a law firm's business.

''Everything is done in arbitration,'' he said, so ''there's very little authority for what you can and can't do in these circumstances.'' Therefore, he told the at-

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tendees, lawyers must use ''basic principles and basic common sense.'' So, he counseled, ''Don't feel like you're a bad lawyer because you can't find authority in your jurisdiction. It's just not there.''

Still, Minkoff said, lawyers shouldn't lose sight of the light at the end of the tunnel. ''Most of the time when firms split up, things get resolved. People realize they don't want to fight because there's too little to fight over'' as well as the risk of loss. So, he said, ''Realize there's a long term view. It's hell for a couple of months, but then things resolve.''

BY HELEN W. GUNNARSSON

Confidentiality

Law Firms Are Hopeful About Pending Rulings In Closely Watched 'Intrafirm Privilege' Cases

SAN ANTONIO—A handful of closely watched cases currently under review by state supreme courts may signal the fate of a long-running campaign to expand protection for internal law firm communications regarding potential malpractice suits.

For over two decades, courts routinely rejected law firms' efforts to shield internal communications about potential malpractice liability to their clients.

Lower courts have in recent years bucked that trend, and some of those cases are now pending before the highest tribunals in several jurisdictions.

A May 31 panel at the 39th ABA National Conference of Professional Responsibility, held here May 30-31, said the forthcoming decisions could deal a blow to the ''fiduciary duty exception,'' which has been cited in dozens of opinions that declined to recognize an ''intrafirm'' privilege in malpractice actions. The speakers highlighted those cases, and offered tips about how law firms can avoid compelled disclosure of internal discussions even without judicial protection.

The program was moderated by Mark L. Tuft, a partner at Cooper, White & Cooper, San Francisco, and rounded out by three other participants who focus on attorney liability matters: John C. Koski, general counsel of Dentons US, Chicago; Merri A. Baldwin, a partner at Rogers Joseph O'Donnell, San Francisco, and Allison D. Rhodes, a partner at Hinshaw Culbertson in Portland, Ore.

Waiting Game. The ''fiduciary duty exception'' was first recognized in *In re Sunrise Sec. Litig.*, 130 F.R.D. 560 (E.D. Pa. 1989). The *Sunrise* court held that allowing law firms to shield internal communications about their possible malpractice liability to clients would ''creat[e] a conflict between the law firm's fiduciary duties to itself and its duties to the client seeking to discover the communication.''

A nearly unbroken line of cases adopted that reasoning for more than two decades. See 28 Law. Man. Prof. Conduct 662.

A reversal began in 2011 and 2012, however, when *Sunrise* was criticized by trial and appellate courts in Georgia, Illinois, Massachusetts, and Ohio. See *Garvy v. Seyfarth Shaw LLP*, 966 N.E.2d 523, 28 Law. Man. Prof. Conduct 140 (Ill. App. Ct. 2012); *Hunter, Maclean, Exley & Dunn v. St. Simons Waterfront LLC*, 730 S.E.2d 608, 28 Law. Man. Prof. Conduct 433 (Ga. Ct. App. 2012); *RFF Family P'ship LP v. Burns & Levinson LLP*, No. 12-2234-BLS1 (Mass. Super. Ct. Nov. 21, 2012); and *TattleTale Alarm Sys. Inc. v. Calfee, Halter & Griswold LLP*, 772 F. Supp.2d 893, 27 Law. Man. Prof. Conduct 106 (S.D. Ohio 2011).

The Georgia and Massachusetts cases have been fully briefed and are awaiting supreme court review.

The panelists expressed hope that those rulings would be upheld, but they eschewed predictions. Instead, they focused their conversation on measures law firms can take to avoid being forced to turn over damaging internal communications absent judicial recognition of an intrafirm privilege.

Withdraw . . . or Get Consent. A series of hypothetical scenarios framed the panel's discussion. The first involved a lawyer who receives word that her client's case has been dismissed as untimely. The lawyer believes that the ruling is erroneous but is also concerned that it may not be and that her firm may be accused of negligence for allowing the statute of limitations to lapse.

In this scenario, the speakers agreed that the lawyer should inform the client about the unfavorable ruling, explain that he may have a malpractice claim, and advise him to retain independent counsel for advice on that matter.

The lawyer and her firm's in-house counsel, the panelists added, should then do one of two things to ensure that any subsequent discussions about the firm's potential liability will remain confidential if a negligence claim is filed.

The first is to withdraw from the matter. Terminating the representation would be advisable, Rhodes explained, because conflict of interest rules that might lead a court to reject a privilege claim over any subsequent internal discussions would only apply to current clients.

However, Rhodes conceded that withdrawal is not always possible, and may also be undesirable if the matter is a contingency case and the firm is confident that the unfavorable ruling was in fact erroneous.

ABA May Address Intrafirm Privilege

The ABA's Tort Trial and Insurance Practice Section (TIPS) is planning to introduce a resolution supporting the protection of ''confidential communications between law firm personnel and their firms' designated in house counsel,'' according to materials from the bar group's Spring Leadership Meeting, which was held in Washington, D.C., April 27-28.

The resolution has not been finalized, but five proposed drafts were circulated at the TIPS conference. Those documents, and other agenda items, can be found at: http://www.americanbar.org/content/dam/aba/administrative/tips/Spring_2013/Council/13_spring_all_files.authcheckdam.pdf.

The proposal has been slotted as Item 103 on the Preliminary Agenda for the ABA House of Delegates at the bar group's Annual Meeting in San Francisco Aug. 12-13.

The law firm may thus want to take a second tack: writing a letter that asks the client to consent to the firm's engaging in internal, privileged communications about its potential liability. ''That letter, if properly drafted, also solves the problem,'' Rhodes said.

Law firms increasingly seek such consent before problems arise, the panelists noted. ''I'm seeing some engagement letters now that do that prospectively,'' said Rhodes. That preemptive step is wise, she added, and law firms may want to consider asking clients to ''consent[] to those conversations being privileged at the outset'' of a representation.

Initial Review Protected. According to the panelists, law firms can generally rest assured that preliminary discussions with in-house counsel regarding how to proceed in the above-described scenario will be protected from discovery if a professional negligence claim were pursued.

Any ''initial reviews of the case'' conducted before a firm concludes that it is potentially negligent are ''generally recognized to be protected by the privilege,'' Baldwin said.

That proposition, she noted, is supported by ABA Formal Ethics Op. 08-453, 24 Law. Man. Prof. Conduct 616 (2008), which stated that a client's consent ''is not required before a lawyer consults with in-house ethics counsel, nor must the client be informed of the consultation after the fact.''

Rhodes added that preliminary discussions would not implicate conflict of interest concerns ''because the adversity is not yet clear.''

Open Separate Matter. The speakers said that the law firm, after informing the client of its mistake and advising him to obtain independent counsel, should open a new file to handle the potential malpractice claim.

In doing so, they warned, the firm should clearly establish that it is the client, and it should make sure that the firm's internal counsel has not had any involvement with the matter in which the possible negligence was committed.

The firm also should make sure that the client is not billed for the internal review, said Koski, who added: '' 'Miscellaneous GC' is the most common entry in my [time sheets].''

Rhodes noted that a law firm's failure to bill internal discussions about a possible negligence claim to itself, rather than to its client, was a significant factor in one recent opinion that declined to repudiate *Sunrise*. See *E-Pass Techs. Inc. v. Moses & Singer LLP*, No. C09-5967 EMC (JSC), 28 Law. Man. Prof. Conduct 662 (N.D. Cal. Aug. 26, 2011).

BY SAMSON HABTE

Disciplinary Procedure

Survey Shows Differences Among States On When Discipline Proceedings Are Deferred

SAN ANTONIO—One looking for uniformity in how attorney discipline systems react when a lawyer charged with disciplinary rule violations is at the same time subject to a related malpractice action or criminal case will search in vain.

Each jurisdiction handles this situation differently, according to speakers on ''Managing Disciplinary Proceedings and Malpractice Actions,'' a May 31 panel at the 39th ABA National Conference on Professional Responsibility.

Variations exist across the state on such issues as whether the disciplinary proceedings will be stayed, whether disciplinary authorities share information with parties to the parallel action, and the effect that the legal and factual findings in one proceeding will have on the other, they said.

Panelist Tracy L. Kepler of the Illinois Registration and Disciplinary Commission shed some light by revealing for the first time the preliminary results of a seven-question survey she conducted among lawyer disciplinary authorities in almost every U.S. jurisdiction. She indicated that because some jurisdictions are still working on their replies, the study must be considered a work in progress.

Kepler said the overarching question is this: Are disciplinary proceedings routinely deferred—or stayed or, in Texas, abated—while another case involving similar allegations is pending?

In most jurisdictions, she reported, the disciplinary authority has the discretion to stay—or, again depending on the jurisdiction, to ask the board, commission, committee, or court to stay—a disciplinary proceeding for good cause shown.

Why Wait? Kepler listed the advantages, from the disciplinary authority's perspective, of holding the disciplinary proceeding in abeyance: it conserves limited office resources, it protects the discipline process from being misused, and, if the other case involves criminal charges against the lawyer personally, it protects against any possible interference with the lawyer's due process rights.

In criminal cases the conservation of office resources can be dramatic, she said. A conviction or plea agreement may supply all the proof the disciplinary authority will need to prove the disciplinary charges, while a not guilty finding still leaves the disciplinary authority free to proceed independently, she explained.

When the lawyer was not himself the criminal defendant but served as defense counsel, and the client's complaint against the lawyer is essentially one of ineffective assistance of counsel, the issues of the lawyer's conduct may well be resolved in a post-conviction petition or appeal, Kepler added.

No matter what the parallel proceeding entails, she said, there's always the concern that a private litigant may be trying to misuse the disciplinary process as leverage—particularly when the complaint comes from opposing counsel in the parallel case.

Why Not? On the other hand, Kepler continued, the evidence may get stale, the disciplinary authority may already have all the evidence it needs, the issues may be straightforward, and the result in the civil or criminal case may be of no use in the disciplinary proceeding.

How useful the result is depends on which specific facts will have been found or agreed to in the other proceeding, according to panelist Susan Brotman, who represents lawyers in disciplinary matters in New York and Texas. Therefore, she said, great care must be taken in entering into any stipulations of fact if settling the parallel case.

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Panelist W. William Hodes, of The William Hodes Law Firm in Lady Lake, Fla., explained why the results may not be useful.

Nonmutual collateral estoppel is available in every state and federal jurisdiction, both offensively and defensively, Hodes said, but there are ''two huge caveats.''

First, he said, it can be applied only in favor of—never against—someone who was a stranger to the other proceeding. Second, the burden of proof in the other case may not be high enough to satisfy the standard in the disciplinary proceeding. (The burden of proof for disciplinary proceedings in most jurisdictions is clear and convincing evidence.)

How They Decide. According to Kepler, these are the variables disciplinary authorities consider in deciding whether a stay of ethics proceedings is appropriate:

- How serious is the alleged offense?
- Is the conduct related to the practice of law?
- Does the conduct involve fraud or misappropriation?
- Would the conduct violate Rule 8.4 or the rule on candor to the court?
- Was the matter referred to the disciplinary authority by a court?
- Does the conduct indicate a substance abuse problem requiring prompt action?
- How quickly is the other case moving forward?
- Is the conduct already the subject of a pending motion to disqualify or a motion for sanctions?
- Who gets to see the lawyer's response?

Of course, Kepler's data showed, if the respondent lawyer is considered to pose any harm to the public, disciplinary authorities in every jurisdiction can seek an interim suspension immediately.

Access to Lawyer's Response. In the vast majority of jurisdictions if the complaint comes from a client the disciplinary authority will share the lawyer's response with the complainant, Kepler said, either upon request or within some period specified by rule or established by practice. In some jurisdictions the onus is on the respondent lawyer, rather than the disciplinary authority, to send a copy of the response to the complainant.

Even when the complainant is entitled to see the response, Kepler said, sharing the lawyer's response does not necessarily mean sending the complainant a photocopy.

One reason, she explained, is that the response may include information that is irrelevant and/or protected by the attorney-client privilege. This is particularly likely when a complaint comes from an opposing counsel rather than a client or former client, she noted.

Second is the potential ''inflammatory'' effect. For example, she said, the response may make certain allegations about the complainant's mental health. Or it may simply be ''not very well thought out,'' such that nothing positive could come of sending it on to the complainant, she said.

Kepler's survey results show that a significant number of jurisdictions send the complainant a summary only, or a redacted copy, of the lawyer's response. A few jurisdictions even ask the respondent for two separate responses, with privileged information stripped from one version. The full response goes into the disciplinary file while the other version goes to the complainant.

Some jurisdictions reported to Kepler that they will provide the response if and when asked, and some make a distinction based on whether the complainant is a client. Kepler also noted that there have been instances in which the lawyer has asked that certain information not be shared with the complainant.

In California, if the lawyer's response serves as the basis for dismissing the complaint, the disciplinary authority is required to send a summary of the response to the complainant.

Kepler noted that in New Mexico, South Carolina, and Vermont, the lawyer's response is not shared with the complainant, although in Vermont there may be a follow-up interview with the complainant. This is a matter of preserving confidentiality and candor, she explained.

Hodes said he is ''not a particular fan of giving the actual response to the grievant,'' because it ''gives the wrong impression of what the disciplinary proceeding is.'' ''The grievant is a witness, not a party,'' he emphasized.

Confidentiality. When it comes to letting others have access to disciplinary files ''we are definitely not sharers,'' Kepler said, reporting that disciplinary authorities in 26 jurisdictions ''never share voluntarily.''

But ''we certainly are fighters,'' she remarked. Disciplinary authorities in ''virtually every jurisdiction'' will oppose any disclosure of confidential materials, she said. Typically the disciplinary proceeding is confidential up to the filing of formal charges or, in some jurisdictions, up to the imposition of public discipline, and it is only the charges, answer, findings, and court decision that become public.

In opposing disclosure, Kepler said, disciplinary authorities argue that any probative value is outweighed by the interest in protecting the confidentiality of the proceedings, that the information is available from other sources, and that they are ''loath to be used as discovery tools.''

''We'll ask to present in camera, and if disclosure is ordered, we'll ask for a protective order,'' Kepler said.

Panelist Alison Moore, speaking from the point of view of counsel for the defendant lawyer in a parallel malpractice proceeding, said she takes a pragmatic approach about getting information from disciplinary authorities.

''Most of our evidence is already out there,'' she said, but there may be other materials, such as depositions or witness statements. She said her approach is not ''I am entitled to it under the rules,'' but rather ''here's what I need, what I can't get from anywhere else.'' Moore is with Thompson, Coe, Cousins & Irons in Dallas.

According to Kepler, disciplinary authorities in many jurisdictions report that the issue ''never comes up—the subpoena comes, I explain why it needs to stay confidential, and they withdraw the subpoena.''

Disciplinary authorities in two jurisdictions responded that their files are not subject to the provisions of the jurisdiction's open records act, but disciplinary authorities in one jurisdiction noted that they will pro-

vide material if requested under the state's Freedom of Information law.

Hodes pointed out that the panelists were discussing whether the information could be obtained from the disciplinary authority. If the lawyer and the person seeking the information are both parties in a civil proceeding, either party's sworn statement would be available in the ordinary course of discovery, he said.

Fifth Amendment. If the respondent lawyer is the defendant in a parallel criminal proceeding, the lawyer may well assert the Fifth Amendment in the disciplinary proceeding.

Some jurisdictions permit an adverse inference to be drawn from this in the disciplinary proceeding, but no jurisdiction will disbar based solely on the lawyer's invocation of the Fifth Amendment, Kepler stated.

In Kansas, Kepler noted, a respondent does not have to cooperate if his cooperation involves criminal liability. But, she continued, disciplinary authorities in other jurisdictions specify that if the lawyer asserts the Fifth Amendment in bad faith—for example, if the statute of limitations has run or the lawyer has been granted use immunity—the disciplinary authority may add a charge of failure to cooperate.

BY ELIZABETH J. COHEN

Further information about the survey is available by contacting its author, Tracy Kepler, at tkepler@IARDC.org.

Conflicts of Interest

Estate Lawyers Tout Value of Commentaries That ACTEC Added to Attorney Conduct Rules

SAN ANTONIO—Ethics issues that lawyers who practice in specialized areas of the law face are often peculiar, or peculiarly common, to those fields, and commentators have long complained that certain standards in the Model Rules of Professional Conduct are ill-suited when applied to the day-to-day work of specialists.

Members of the estate and probate bar—among the loudest of these complainants—chose to do something about this two decades ago.

The American College of Trust and Estate Counsel (ACTEC) published supplementary commentaries on selected Model Rules in an effort to provide targeted guidance to estate lawyers regarding their professional responsibilities.

That landmark effort and the impact of the ACTEC Commentaries in the years since their publication were the focus of a May 31 session at the 39th ABA National Conference on Professional Responsibility, held here May 30-31.

Special Guidance. Karen E. Boxx, a professor at the University of Washington Law School, said the commentaries were a response to grumblings among specialists who were rankled by the organized bar's seeming failure to recognize that some ethics rules that may be appropriate tools for regulating the behavior of general practitioners are ill-fitted mechanisms for regulating the conduct of lawyers who focus on trust, estate, and guardianship matters.

''Estate lawyers look at the disciplinary rules and say, 'Bah, these are written for litigators,' '' Boxx said.

The ACTEC Commentaries, she added, sought to fill some gaps and harmonize the incongruities created by the characteristics of estate work.

Boxx moderated the panel and was joined by three other probate and estate experts: Patricia H. Char of K&L Gates, Seattle; Terry W. Hammond, founder of Terry W. Hammond & Associates, El Paso, Tex.; and Bruce S. Ross of Holland & Knight, Los Angeles.

Uniquely Different. The ACTEC Commentaries were conceived in the late 1980s, Ross said, and a first edition was published in 1993. Drafters put out a fourth edition in 2006, he added, and periodic annotations are appended to the Commentaries.

There are four ''overarching themes'' to the Commentaries, Ross said. Those themes, he noted, are set forth in a Reporter's Note:

> (1) the relative freedom that lawyers and clients have to write their own charter with respect to a representation in the trusts and estates field; (2) the generally nonadversarial nature of the trusts and estates practice; (3) the utility and propriety, in this area of law, of representing multiple clients, whose interests may differ but are not necessarily adversarial; and (4) the opportunity, with full disclosure, to moderate or eliminate many problems that might otherwise arise under the [Model Rules].

After setting forth that predicate, the panelists used a series of hypotheticals to illustrate the ways that the distinctive characteristics of probate and estate practice can give rise to confusion when traditional ethics rules are imposed on lawyers in those fields.

All in the Family. Although joint representation can be a risky proposition in most fields of law, ACTEC's position is that it is less problematic in estate matters.

According to the Reporter's Note, the ACTEC Commentaries ''reflect the role that the trusts and estates lawyer has traditionally played as the lawyer for members of a family.'' The Commentaries, the Note continues, recognize that ''while the representation of multiple clients by a single lawyer involves some risks, it often provides the clients with the most economical and effective representation—particularly where the clients are members of the same family.''

Estate lawyers are thus given more leeway to represent multiple persons, the panelists contended. They added, however, that attorneys who choose to engage in joint representation are not absolved of their obligations to ensure that they maintain independent judgment, protect client confidences, and resolve any conflicts of interest between related clients who, although less likely to be adverse to each other, can in some instances have divergent goals.

''Estate lawyers look at the disciplinary rules and say, 'Bah, these are written for litigators.' ''

KAREN E. BOXX
PROFESSOR, UNIVERSITY OF WASHINGTON LAW SCHOOL

The panelists fleshed out these complications by setting up a hypothetical scenario involving an estate law-

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yer who represents a family business, the two parents who own that business, and a daughter who takes an active role in the operation.

The parents intended to leave the business to their two children, Boxx said, but the lawyer advised them instead to gift the business to their daughter. Doing so would minimize the parents' tax liability, Boxx noted, and the lawyer was thus acting in line with his fiduciary obligations by making the suggestion.

The parents agonized over the decision because they were concerned that their daughter's rocky marriage might end in divorce—and that their gift could be subject to a marital distribution that they did not want to see happen.

The parents eventually followed the lawyer's advice, Boxx said, but their qualms subsequently proved prophetic. Shortly after the gift was made, the daughter approached the lawyer, revealed her marital problems, and sought advice about how to best arrange her assets in preparation for a possible divorce.

But the daughter told the lawyer not to reveal to her parents any of what he had been told because, Boxx said, she was afraid they ''might pull the plug on the gift.''

That request put the lawyer ''between a rock and a hard place,'' Boxx said, because his obligation to keep the daughter's confidences under Rule 1.6 conflicts with his duty to disclose what he had learned to her parents, who are entitled under Rule 1.4 to be informed about all aspects of the legal matter that they hired the lawyer to handle.

Engagement Letters and Client Identity. Ross told the audience that the scenario demonstrates the heightened importance that detailed engagement letters take on in trust and estate cases.

The ''first question'' to ask when thinking about the lawyer's problem, Ross said, is ''what does the engagement letter say.'' If the lawyer wanted to be able ''to keep [the daughter's] communications confidential,'' Ross added, he should have stipulated as much in his retainer agreements with the daughter and her parents.

Ross noted that Rule 1.6 sets forth a few narrow circumstances under which a client's confidences can be breached with the client's consent—none of which is directly applicable in the hypothetical scenario. Moreover, he said, the ABA's comments to Rule 1.6 do not address whether joint representations—which are more common in estate cases than in other types of matters—create any additional considerations that must be weighed when assessing the scope of a lawyer's duty of confidentiality to one client when that duty runs counter to an obligation to another client.

However, the ACTEC Commentaries do fill that gap, the panelists said.

Ross pointed to the ACTEC Comment to Rule 1.6, which includes the following guidance—directly relevant to Boxx's hypothetical—that is not addressed directly in the Model Rules:

> [A] lawyer may represent more than one client with related, but not necessarily identical, interests (e.g., several members of the same family, more than one investor in a business enterprise). . . . When the lawyer is first consulted by the multiple potential clients, the lawyer should review with them the terms upon which the lawyer will undertake the representation, including the extent to which information will be shared among them. In the absence of any agreement to the contrary (usually in writing), a lawyer is presumed to represent multiple clients with regard to related legal matters jointly with resulting full sharing of information between the clients.

In this way, Ross said, the ACTEC Commentaries stress the heightened importance of using engagement letters to prospectively delineate how one client's right to confidentiality may be eroded by competing duties to a jointly represented client. A well thought-out engagement letter, he explained, would have foreseen the possibility that the lawyer's duty of confidentiality to the daughter might conflict with his duties to the family business and to the parents.

Annotative Guidance. Ross's admonition to use engagement letters as a prophylactic tool for avoiding the pitfalls that arise in joint representations did not completely satisfy Char, who pushed the panelists to offer suggestions as to how the lawyer should proceed if he did not have such a letter.

The responses to Char's question highlighted another component of the ACTEC Commentaries: annotations that list a series of relevant court decisions and ethics opinions after each comment to a specific rule of professional conduct.

One case highlighted under the ACTEC Comment to Rule 1.6 was particularly relevant to the issues in the hypothetical case of the family business lawyer, Ross said.

The facts of that case, *A. v. B.*, 726 A.2d 924, 15 Law. Man. Prof. Conduct 155 (N.J. 1999), similarly pitted a law firm's duty of confidentiality to one client against its ethical obligations to disclose important information to a co-client.

The clients in that case were a husband and wife who retained estate planning attorneys at the law firm Hill Wallack to help them draft their wills. Shortly thereafter, a woman with whom the husband fathered an illegitimate child hired lawyers in the firm's family practice group to represent her in a paternity action.

A clerical error precluded Hill Wallack from discovering the conflict of interest inherent in the firm's representation of the ''other woman'' against the husband, whom the firm was still representing in the estate matter.

When Hill Wallack discovered the conflict it promptly withdrew from the paternity action. The firm then wanted to inform the wife about the existence of the husband's illegitimate child. The firm explained that it felt ethically obligated to do so because the wills it had executed on behalf of the couple created the possibility that a child of one spouse, legitimate or not, could acquire the property of the other.

The court ultimately determined that the firm could disclose to the wife the existence of the husband's out of wedlock child. The ACTEC annotation of that case explained:

> The court reasoned that the husband's deliberate failure to mention the existence of this child when discussing his estate plan with the law firm constituted a fraud on the wife which the firm was permitted to rectify under MRPC 1.6(c). . . . The court also based its decision permitting disclosure on the existence of a written agreement between the husband and wife, on the one hand, and the law firm, on the other, waiving any potential conflicts of interest with the court suggesting that the letter reflected the couple's implied intent to share all material information with each other in the course of the estate planning.

The panelists noted that the court's opinion cited extensively the ACTEC Commentaries.

BY SAMSON HABTE

The ACTEC Commentaries are available on the organization's website at http://www.actec.org/public/commentariespublic.asp.

Admissions

'Remorse' Expected From Flawed Applicants Depends on Specific Context, Panelists Say

SAN ANTONIO—For bar applicants and lawyers who have engaged in misconduct, showing remorse can be key to gaining bar admission or readmission or to avoiding harsh disciplinary sanctions.

But remorse can mean different things—and can be subject to different methods of proof—depending on the context in which it is raised, according to speakers on ''Proving Remorse in Bar Application, Lawyer Discipline and Lawyer Reinstatement Settings,'' a May 30 program at the 39th ABA National Conference on Professional Responsibility.

Panelist Donald R. Lundberg, of Barnes & Thornburg in Indianapolis, noted in an article he wrote on this topic that remorse comes up at three junctures in the lawyer admission and discipline process: the bar application, the sanctions phase of a disciplinary proceeding, and the petition for reinstatement after suspension or disbarment. See Donald R. Lundberg, *I'm Sorry, So Sorry: The Element of Remorse in Professional Regulation*, Jan./Feb. 2013 Res Gestae 20.

Words or Deeds. Is remorse a state of mind, Lundberg asked, or is it conduct? He said his personal view is that it is ''a pure state of mind.'' But it may not even matter, he said, because while one may not know what remorse is, ''we do have an idea of what remorseful people do.'' As he wrote in his materials, ''Remorse *im*pels action directed toward the victims of bad conduct, but it does not *com*pel it.''

''Remorse is directed outward,'' Lundberg explained, so he said he will ''work with the [lawyer-]client on identifying who the victims of the misconduct were.''

Speaker Mitchell Simon of the University of New Hampshire School of Law told the audience remorse ''is about making things right.''

Simon cited *In re Dortch*, 860 A.2d 346, 20 Law. Man. Prof. Conduct 540 (D.C. 2004), denying admission to an applicant who was still on parole for the felony murder of a police officer 30 years ago. Acknowledging that Dortch, who attended law school after his release, had been a model prisoner and had engaged in many public service activities, the court took pains to note that he had never made an effort to apologize or make amends to the dead officer's family.

All Apologies. Actual remorse may not be as important as the apology, according to Nick Smith, Simon's colleague at the University of New Hampshire Law School, with whom Simon and Nicole Negowetti coauthored *Apologies and Fitness to Practice Law: A Practical Framework for Evaluating Remorse in the Bar Admission Process*, 2012 Prof. Law. 37.

Smith believes that apologizing is not a binary proposition, according to a videotaped interview he had with Simon. Smith's research has led him to identify no fewer than 13 components of a truly effective, or ''categorical'' apology.

Simon summarized them this way: has the applicant confessed with sufficient specificity, explained what she did, accepted blame, promised not to do it again, and tried to make things right?

Who's Sorry Now?

Panelist Mitchell Simon and moderator Mary T. Robinson acted out a scenario exploring the ethics of advising a bar applicant who in fact is not remorseful. Simon played a concerned law school graduate with a misdemeanor record, and Robinson played the lawyer he consults about his upcoming appearance before the character and fitness committee. Here are snippets:

Simon: I didn't do anything wrong; it was all a stupid mistake on the part of the arresting officers.

Robinson: Are you aware that you pled guilty to certain facts?

Simon: I'm not sure what I pled to.

Robinson: Do you understand that your plea is binding?

Simon: The court said I was guilty of resisting arrest, but I didn't do anything wrong. So what could I do to improve my chance of getting in?

Robinson: I can tell you what you can do that would make your chances much worse. You could refuse to accept responsibility for what you did, and you could blame others.

Simon: Are you telling me I won't get in unless I apologize? Because if that's what you're telling me, now that I think about it I'm actually pretty sorry.

Admissions. Simon said that in the admissions context, the big issues are:

- past misconduct that is criminal or that indicates an alcohol or drug problem;
- academic dishonesty, especially plagiarism; and
- creditworthiness.

It's ''amazing how much character and fitness committees are looking into creditworthiness'' now, he said. The issue is not ''having the debt, but how you handle it.''

Compared to the applicant, Simon said, the people who sit on admission committees or represent the applicants ''come from a different time,'' and ''we're evaluating people based on our perception of what somebody would do.''

Evaluating bar applicants is a ''very impressionistic process—good people trying to do their best,'' he said. But one constant Simon said he has discovered in reading 20 years' worth of these impressions is that ''lack of candor is a death sentence, and a lack of remorse is of-

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ten treated as a lack of candor.'' Lack of remorse can also present itself as denial, he added, which is then also treated as a fatal lack of candor.

Mitigating the Sanction. ''Part of the headwind we have as lawyers in the disciplinary context is a fundamental skepticism about the genuineness of remorse,'' Lundberg said. One typically hears about ''genuine remorse,'' he noted, rather than ''just plain remorse'' without the intensifier.

''People are skeptical about remorse,'' he said, and it ''proves very little'' anyway.

''At the end of the day a disciplinary case is about the sanction,'' Lundberg said. And it is at the sanctions stage that proving remorse becomes most difficult.

He explained the two major challenges. First is the ''compression of time,'' he said. Not much time may have elapsed between the misconduct and the hearing; compared to the applicant for reinstatement, the respondent has only a short time in which to demonstrate remorse as a mitigator. Second is that ''in most jurisdictions the lawyer must put on his defense and his mitigating evidence at the same hearing.'' In other words, Lundberg explained, the respondent's position will be '''I really didn't do it, but if I did, gosh I'm sorry.' ''

Reinstatement. Remorse in the reinstatement context is different because more time will have elapsed, according to the panelists.

On one hand this means the applicant has had more opportunity to show a change in character. On the other hand, Lundberg explained, remorse is like grief: it presents itself differently in a person as the years go by.

''As time goes by you build a life and you feel better,'' he explained. ''It's harder to present a stereotyped remorse face following a mature rehabilitation process.'' The applicant may be wearing his rehabilitation as a badge of distinction because he is proud of how he has turned his life around, and this may strike the fact-finder amiss if the fact-finder ''just wants to see the expected presentation of remorse.''

Lundberg advised applicants and their counsel to ''Educate the decision-maker that remorse doesn't look that way several years in.''

In Simon's videotaped interview with him, Eric Y. Drogin, a lawyer-psychologist at Harvard, explained that one can't reach a determination ''based on how the applicant presents himself in front of you.'' Then ''what can people look to to learn how to show remorse?'' Simon asked him. If the applicant has the time and money, Drogin said, ''psychology is one path to gain insight.''

Lundberg cited *In re Gutman*, 599 N.E.2d 604 (Ind. 1992), to underscore the importance of insight.

Gutman had been convicted of accepting bribes while he was president pro tem of the state senate. After serving his sentence, Gutman still ''never gave a credible explanation of why'' he had taken the money, Lundberg said, and as to making things right, his argument was that ''it doesn't make sense to give the money back to the bribers.''

Underlying the opinion denying reinstatement is the court's concern that ''You can't tell us what you've discovered about what caused you to act the way you did,'' Lundberg said.

Panelist Kellie Johnson of the Oregon State Bar pointed out that apart from time and money issues, there are problems with this kind of evidence.

''There are people who've been taught never to apologize or cry,'' whether as a matter of culture or a matter of gender, she said. There also are ''medications that produce a flat affect, and there are psychological disorders that prevent people from understanding the impact they have on others,'' she continued.

Conversely, as moderator Mary T. Robinson, of RobinsonNiro in Chicago, proposed along similar lines, it is possible that ''the wider the range of emotion [applicants] display in expressing remorse, the likelier it is that they are faking.''

Simon cited *In re T.J.S.*, 692 A.2d 498 (N.H. 1997), in which admission was indeed denied because the statements of remorse and insight were just ''too studied.''

Here is what Johnson said she would do to evaluate an applicant seeking reinstatement after stealing from his partners, serving time, and seeing his wife divorce him in the process: ''I'd talk to the ex-wife, and I'd request a psychological evaluation.''

Robinson urged the American Bar Foundation to do some research into assumptions about remorse, in the hope of making evaluations that will be more useful in lawyer admission and discipline.

BY ELIZABETH J. COHEN