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Corporate Counsel

Conference Report

ABA National Conference on Professional Responsibility

Corporate Counsel Irked by Reform Proposal That Could Blunt 'Outside Counsel Guidelines'

The members of large U.S. law firms who gathered at an annual ABA ethics conference in St. Louis this month were presented with a proposal that will antagonize their most valuable corporate clients.

The proposal, floated at the 43rd ABA National Conference on Professional Responsibility, was for an ethics rule change that would make it easier for law firms to resist "outside counsel guidelines" (OCGs) that corporations and other large organizational clients increasingly seek to foist upon the firms they hire.

The regulatory proposal was unveiled during a June 2 panel on outside counsel guidelines, which corporations have increasingly used to exert control over various aspects of their relationships with law firms they retain.

Many commentators have said that the ubiquity of OCGs is a byproduct of a recent shift in bargaining power between corporations and the law firms they turn to for legal advice.

"Many of these outside counsel guidelines micro-manage in incredible detail what the law firm may or may not do [and] how it is to manage matters on almost a minute-to-minute basis," said Anthony E. Davis, a partner in the New York office of Hinshaw & Culbertson LLP who advises law firms on ethics and risk management issues.

"[W]hat this proposal seeks to do is to establish professional protection so law firms have a basis to limit the damage of these [outside counsel] guidelines."

The OCGs that have raised the most hackles are clauses that redefine the term "conflict of interest" so

broadly as to prevent a law firm from ever representing a client's competitors, and provisions that require firms to indemnify clients against any losses incurred in connection with an engagement—whether or not those losses were attributable to the firm's negligence.

Collective Action Difficulty Davis implored conference attendees to "collectively push back" against those types of agreements by asking bar regulators to adopt a rule change—an amendment to ABA Model Rule of Professional Conduct 5.6(b)—that could give law firms more leverage in negotiations with clients who demand that OCGs be included in their retention agreements with law firms.

Davis, who moderated the panel discussion, first suggested the proposed rule change in a 2016 article that he coauthored with Noah Fiedler, another Hinshaw partner.

"I think it's very important that [law firms] think about the client first before going forward with something like this."

In an interview with Bloomberg BNA, Davis reiterated his assertion that the proliferation of OCGs poses a threat to the long-term economic viability of law firms. He also expounded on why he believes the profession must mount a collective response—one that involves bar regulators—to this phenomenon.

"While law firms may be constrained by the antitrust laws from taking collective positions, the professional regulators, who are usually state actors, are in a better position to establish standards," Davis said.

Davis was speaking to an audience that could conceivably transform his reform proposal into actual policy. The annual ABA National Conference on Professional Responsibility is attended not only by law firm general counsel and insurance underwriters, but also by bar regulators—individuals with the power to push their supreme courts to enact the rule changes that Davis proposed.

But some critics and neutral observers said the antitrust problems may prove to be more acute than Davis has suggested.

And Amar Sarwal, vice president and chief legal strategist for the Association of Corporate Counsel, said businesses would not be pleased to see the law firms they hire pursue a regulatory initiative that would impede the use of OCGs.

Sarwal said the in-house lawyers he represents, and the businesses those lawyers work for, would resist Davis's proposal if it ever did advance beyond the discussion phase.

"I think it's very important that they think about the client first before going forward with something like this," said Sarwal, who is ACC's vice president and chief legal strategist.

This proposal would "definitely strain [the] relationships" between corporate clients and "the law firms that push it," Sarwal added. "They would say that these law firms are not on our side."

Restraint on Trade? Davis's proposed rule change would alter the black letter of ABA Model Rule 5.6(b), which prohibits lawyers from "offering or making" agreements that restrict "[a] lawyer's right to practice."

As currently written, that provision is limited to settlement agreements that restrict a lawyer's right to practice; it has been invoked to attack the ethical propriety of "non-disparagement" clauses in settlement agreements that require a settling plaintiff's counsel to agree not to represent future clients in claims against the settling defendant.

Under Davis's proposal, the scope of the rule would expand beyond the settlement context—and be transformed into a regulatory measure that could give law firms a stronger hand in their retention negotiations with corporate clients.

Rather than merely prohibiting agreements "in which a restriction on the lawyer's right to practice is part of [a] settlement," the Rule 5.6(b) Davis envisions would forbid lawyers—including corporate in-house counsel—from "offering or making . . . an agreement in which a restriction on the lawyer's right to practice is part of the terms of engagement of a lawyer by a client."

How We Got Here Davis's panel included two attorneys who have acquired expertise on OCGs because they serve as the general counsel of large U.S. firms—roles that put them on the front lines of retention negotiations with corporate clients.

Panelist Stuart Pattison, an insurance executive who underwrites professional liability policies for Endurance International Grp., spent most of his time on the dais telling cautionary tales about how law firms can lose insurance coverage if they acquiesce to some of the more onerous OCGs he has seen in the marketplace.

"Law firms will be incurring increased liability by signing these agreements," Pattison said.

The panelists seemed to agree that OCGs are a by-product of a recent shift in the bargaining power of law firms and the corporations that hire them.

"Up until 2008, it was very clear . . . that the sale of legal services from law firms to clients, however large, was a seller's market," Davis said. "But at the beginning of the recession, clients woke up to the fact that suddenly it was a buyer's market. And the fact that we're never going back is very clear from everything we read every day in the legal press."

Paper Pushback The loss of bargaining power that law firms have suffered—and the increased pressure to acquiesce to outside counsel guidelines—has also been partly attributable to changes in the personnel responsible for managing corporate legal budgets.

"General counsel traditionally managed outside counsel relationships," Davis said. But in recent years there has been more of "a tug-of-war between general counsel and chief financial officers about who controls the spend," he said. "And to at least some degree corporations have wrested control over the spend—or partially wrested control over the spend—away from general counsel, in order to better manage how much money goes out the door."

"And the new players are the procurement officers, in the purchasing department," Davis said.

Those individuals have played an outside role in the rise of OCGs, Davis said.

"Typically, corporations have one department that buys goods and services for the company that controls all procurement decisions, from professional services to paper clips," Davis noted.

And these procurement professionals, who had long demanded that all of their company's other vendors acquiesce to indemnity provisions and other guidelines, made a push for standardization that led to law firms being treated like other vendors.

"They want standardized agreements, and the procurement officers, along with their superiors the CFOs, often say 'why should law firms be any different?'"

"The people in corporate counsel offices are some of the shrewdest and sharpest in the profession, because they have a sense of their clients' industry [and] needs."

The audience Davis spoke to did not include some key stakeholders in the debate over whether and how to regulate the use of outside counsel guidelines: the corporations who use those contractual tools to control their legal spending, and the in-house lawyers, financial officials and procurement professionals who are responsible for overseeing corporate legal budgets.

And the ACC's Sarwal, whose organization speaks for some of those stakeholders, did take issue with some of Davis's narrative regarding how, when, and why law firms lost bargaining power vis-a-vis corporate clients.

Sarwal said the shift in bargaining power began approximately 10 to 15 years before the economic crisis of 2007–08. That shift, he added, was attributable in part to changes in the composition of corporate legal departments—and, more specifically, to an increase in the number of attorneys who left large law firms to work as in-house lawyers for large and medium-sized businesses.

"A lot of sophisticated lawyers went in-house, and they knew where the bodies are buried—they understood how law firms work," Sarwal said. "They looked at [legal] bills and started realizing that these law firms were not delivering the value [companies] expected."

Thomas D. Morgan, a George Washington University law professor emeritus who taught both antitrust law and legal ethics, echoed that observation. In an interview with Bloomberg BNA, he said the attorneys who have made the exodus from law firms to corporate legal

departments have the knowledge and incentives to be tough negotiators when dealing with outside counsel on behalf of their companies.

“The people in corporate counsel offices are some of the shrewdest and sharpest in the profession, because they have a sense of their clients’ industry [and] needs—and they can get promoted in the company by showing how tough they can be in dealing with lawyers, instead of being the person who just facilitated business as usual between law firms and companies,” Morgan said.

As bar rolls grew and economic growth stagnated, those corporate counsel realized the leverage they had to “play law firms off against each other” on a number of fronts. “And one of the areas in which you can see that taking place—but only one—is in these types of [OCG] clauses,” he said.

Morgan said corporations took advantage of the shift in bargaining power to demand concessions on fees. “There are a lot of firms nowadays—very good, mid-sized firms—that will do the work for two-thirds of the price of the big firms, and they’re getting hired on the price basis,” Morgan said.

Corporations also began handling more legal work in-house, Morgan noted, which also affected the bargaining power of the firms that used to get the work that companies were now handling internally.

“[T]he outside lawyers became people who had to come hat in hand to explain what they could contribute that the corporation couldn’t buy inside,” Morgan said. “And that’s where the change—from a seller’s market to a buyer’s market—really started taking place.”

Morgan also noted that the antitrust concerns about any regulations limiting OCGs may be heightened because the guidelines that firms find so objectionable affect fees as well as other issues like conflicts and indemnification—and could thus be viewed as a concerted attempt to deter price competition.

“[Y]ou can’t assume that antitrust plaintiffs will not see interference with that negotiation as part of an anticompetitive process,” Morgan said.

Arm’s-Length Transactions? Sarwal, the vice president of ACC, was skeptical that the opposition to OCGs is truly driven by concerns that those agreements restrain lawyers’ right to practice.

“When they talk about the effect on [lawyers’] freedom of movement, I really have to roll my eyes,” Sarwal said. There is a “dramatic need” to expand the availability of legal services for the middle class, he noted, and law firms have ignored that market to service large businesses and pursue their “ever-dwindling” corporate coffers.

“They feel like they don’t have market power because they are living on a model that is dying,” Sarwal said. “They have tremendous freedom of movement,” he added “They just choose not to act on it.”

Sarwal also turned around the arguments made in favor of the Rule 5.6(b) amendment. The rule Davis has proposed “would be a restraint on trade itself,” Sarwal said, one that infringes on corporations’ freedom of contract.

Sarwal also said that bar authorities shouldn’t be wasting their resources on measures that would regulate lawyers’ relationships with “more sophisticated consumers.”

“It makes no sense,” Sarwal said. “You should target your regulatory dollars and resources towards those who most need the protection.”

Outside counsel guidelines are the result of arms-length transactions between sophisticated parties, Sarwal said, and proposals to limit them through ethics rule smack of rent-seeking.

“Are they?” Davis replied, when asked to respond to the assertion that OCGs are the result of arm’s-length transactions.

“How is it an arm’s length transaction if in an RFP for legal services, the last box says you agree to [all of our] terms and conditions—especially if the terms and conditions are not attached?” Davis asked. “And even if the terms are attached, they usually explicitly preclude the law firm from proposing any changes if they wish the response to be considered.”

BY SAMSON HABTE

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Model Rules

Professional Responsibility Lawyers Urged To Fix ‘Crazy Quilt’ of State Ethics Rules

The legal profession needs to come up with uniform ethics rules or else Congress may act on its own to regulate lawyers, Cambridge, Mass., attorney Robert A. Creamer told professional responsibility lawyers June 1.

The current “crazy quilt” system of ethics rules makes no sense and will inevitably go away, he said.

Creamer shared what he jokingly called his “vision thing” about uniform ethics rules during the 43rd National Conference on Professional Responsibility in St. Louis during a ceremony where he received the 2017 Michael Franck Professional Responsibility Award.

He set the stage by painting an alarming picture of how much state rules vary on critically important ethics issues. This information on rule variations was put together by Attorneys’ Liability Assurance Society, Inc. (ALAS), Creamer said.

May, Must, Mustn’t Creamer gave three examples to drive home his point about variance in state ethics rules:

Rule 1.6(b)(1)—disclosure to prevent death or substantial bodily harm

- 27 states state permit disclosure but don’t require it (ABA approach)

- 7 states require disclosure

- 17 states make disclosure depend on whether relevant conduct may be a crime

Rule 1.6(b)(2)—disclosure of client’s intent to commit crime or fraud using lawyer’s services

- 29 states permit disclosure but don’t require it (ABA approach)

- 3 states require disclosure

- 18 states prohibit disclosure

- 1 state (Tennessee) requires withdrawal
Rule 1.10(a)(2)—screening to prevent imputation of conflicts of interest

- 18 permit “full” screening (ABA approach)

- 13 permit “partial” screening, depending on the lateral lawyer’s level of involvement in the matter at the lawyer’s prior firm

- 20 states—who knows? For example, cases in California go both ways, he noted.

Rule variations create real headaches for lawyers and law firms in light of increasing multijurisdictional practice, Creamer said.

He said that by 2016, 47 jurisdictions had adopted some form of amended Model Rule 5.5 on multijurisdictional practice.

Many lawyers are admitted in multiple states, Creamer noted. For example, in Illinois 30 percent of lawyers had multiple admissions in 2002, and 36 percent had multiple admissions by 2016. We don’t really know these numbers nationwide, he said.

One Way or Another Creamer said he believes change is inevitable given the variation among state rules.

“A state-centric regulatory system riddled with idiosyncratic variations is simply incompatible with an integrated and interconnected economy,” Creamer said. “History teaches us that systems that outlive their usefulness or otherwise fail to make sense will go away.”

“The important question for this group, as thought leaders in the area of professional responsibility, is whether those changes will be something done by us, or something done to us,” Creamer said.

Creamer said that if the change is done “by us,” then the result—after lots of complaining and perhaps endless meetings—“most likely will be a set of rules that we can all agree with.”

“But if it’s done to us, it’s pretty clear that most of us will be unhappy with the ultimate result,” he said.

Why Congress May Act Creamer said that at one time he thought an international trade agreement that included legal services would be the likely catalyst for eventual uniformity among the states. But that seems unlikely anytime soon, he said.

“I think the most likely actor in achieving ethics rule uniformity is Congress,” Creamer said.

Lawyer regulation has traditionally been the role of the states, but scholars seems to agree that Congress has the power to license and regulate lawyers if it chooses to do so, he said.

Creamer described three concerns on the table now which he said might spur Congress to consider some level of control over the legal profession.

First, concern about “lawsuit abuse” could prompt Congress to act. The U.S. Chamber of Commerce’s Institute for Legal Reform claims that the United States has the world’s costliest legal system, Creamer noted.

A second impetus for Congress to step in is concern that the Affordable Care Act did nothing to address medical malpractice litigation.

A third concern is that federal legislation might be needed to achieve meaningful reform for multijurisdictional practice and lawyer mobility, Creamer said. He mentioned a recent law review article on that subject: James W. Jones, et al., *Reforming Lawyer Mobility—*

Protecting Turf or Serving Clients?, 30 Geo. J. Legal Ethics 125 (Winter 2017).

Get Ahead of Change, or Else “My concern is that once Congress gets interested, it may well look at the current disarray in existing state rules to justify some more consistent and coherent national standards,” Creamer said.

“So the question for us is whether we try to get ahead of this change, or wait to be bystanders, or perhaps collateral damage,” he said.

BY JOAN C. ROGERS

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Conflicts of Interest

Ferguson Unrest Exposed Municipal Court Conflicts, Panelists Say

One lesson from the 2014 unrest in Ferguson, Missouri, is that state courts and the ABA should curtail the conflicts of interest of lawyers who simultaneously hold multiple part-time positions as municipal court judges, prosecutors, and defense counsel in neighboring communities, said panelists at “Confronting Ferguson: Ethical Dilemmas for Lawyers and Judges.” The June 2 program was part of the 43rd National Conference on Professional Responsibility in St. Louis.

In the patchwork quilt of municipalities that makes up the greater St. Louis area, it’s not uncommon for a part-time judge in one city to be a part-time prosecutor in another, or a criminal defense attorney to be a part-time prosecutor a few miles down the road. And small, cash-strapped municipal courts can give rise to other ethical problems, like the use of court fines to generate revenue rather than impose justice, panelists said.

DOJ Report After the 2014 shooting of Michael Brown, an unarmed black man, by a white police officer in the St. Louis suburb of Ferguson, the Department of Justice undertook a comprehensive investigation of the Ferguson Police Department’s law enforcement practices. In its 102-page report dated March 4, 2015, DOJ found that the city’s law enforcement efforts were focused on maximizing revenue, not increasing public safety. And the emphasis on revenue generation, the report said, has “fundamentally compromise[d] the role of Ferguson’s municipal court,” which “does not act as a neutral arbiter of the law or a check on unlawful police conduct,” but rather uses its authority primarily “as the means to compel the payment the payment of fines and fees that advance the City’s financial interests.”

The result, the report said, is “court practices that violate the Fourteenth Amendment’s due process and equal protection requirements.” And those practices “impose unnecessary harm, overwhelmingly on African-American individuals,” and damage public trust in the courts. [Report, at 3.] (Program materials, including the report, are available on the ABA’s website.)

Panelist Peter Joy, professor at Washington University School of Law, said fines and fees assessed against individuals for violating local ordinances have become a significant source of revenue for many poorer municipi-

palities. According to the DOJ report, “the City considers revenue generation to be the municipal court’s primary purpose” and had made that priority “clear” to the judge, who is nominated by the city manager and appointed by the city council to a two-year term subject to renewal. [Report, at 14.] Even though the city lacks the authority to impose a fine of more than \$1,000 for any code violation, the report said, even minor municipal code violations such as parking tickets or failure to remove trash might end up costing individuals even more than that because of the city’s “routine use of arrest warrants to secure collection and compliance when a person misses a required court appearance or payment.” Multiple arrests and jail time, the report said, are not uncommon for minor infractions. [Report, at 42-43.]

Kafkaesque? The report also said municipal court rules and procedures are “ambiguous, are not written down, and are not transparent or even available to the public on the court’s website or elsewhere.” It’s difficult for people to know what they’re charged with, how much the city wants them to pay, or what their rights are, the report said. And attempts to defend against code violations “are met with retaliatory conduct” on the part of the municipal court, including interruptions from the bench and threats to jail a defense counsel who persisted in arguing his client’s case. [Report, at 43-44.]

Chief Justice Patricia Breckenridge of the Missouri Supreme Court told the audience that she and other members of the court were “ashamed and appalled” when they read the DOJ report. She said the supreme court has now imposed “full scale reform” on the municipal courts, including the adoption of minimum standards for municipal courts that require advising defendants of their rights and court rules, and requiring the chief judges to report twice a year on their courts’ compliance with the standards. Additionally, she said, the court has imposed a mandatory CLE requirement on municipal court judges and has administered training on implicit bias to all judges in the state. (Another program at the conference focused on implicit bias.)

Too Many Hats Joy said municipalities often employ part-time judges and part-time prosecutors, many of whom switch roles in neighboring counties. This is a central factor that compromises the integrity of the municipal courts, he said.

When lawyers wear two or even three hats in different municipal courts within a mile radius, it’s not realistic to assume that these lawyers don’t sometimes compromise their clients’ interests when dealing with one another, Joy said.

Joy also said he’s seen instances of lawyers serving as part-time judges in some municipalities and part-time prosecutors in others and advertising on their law firm websites that because of their dual roles they can be very helpful to clients willing to pay them to defend municipal code violations. This, he said, constitutes both “impropriety and the appearance of impropriety. The idea of a fair and impartial judge is compromised when judges can bank on their judicial positions to generate revenue for themselves and their firms.” Breckenridge said the supreme court is taking steps to shut down such advertising.

Joy said states should adopt rules prohibiting part-time municipal prosecutors from representing defen-

dants in other county municipal courts, and part-time municipal judges from prosecuting or defending matters in other county municipal courts. New Jersey, he told the audience, has already adopted such a rule. (See N.J. Sup. Ct. R. 1:15-1(b) and 1:15-3(b); see also N.J. R.P.C. 1.8(k).) “People need to have faith in the criminal justice system.” (Joy’s article, *Lawyers Serving as Judges, Prosecutors, and Defense Lawyers at the Same Time: Legal Ethics and Municipal Courts*, 51 Wash. U. J.L. & Pol’y 23 (2016), was included in the program materials.)

Watching Watchmen The panel also criticized the Ferguson prosecutor’s decision to empanel a grand jury, whose proceedings are secret, to hear evidence and determine whether to bring charges against the officer who shot Brown. Panelist Katherine Goldwasser told the audience that grand jury transcripts obtained by DOJ during its investigation showed “an enormous prosecution bias against the indictment” by, for example, leading questions by the prosecutor to the officer that “sent a strong signal to the grand jurors that in the view of the experts—the prosecutors—[the officer] had done nothing wrong.”

The panelists explicitly refrained from opining on the prosecutor’s decision not to charge the officer. But moderator Paula J. Frederick said, “I absolutely understand the decision to use the grand jury. It is cover” to enable the prosecutor to avoid responsibility for the decision not to charge the officer.

Frederick is General Counsel for the State Bar of Georgia. Goldwasser, a former federal prosecutor, recently retired from her position as a law professor at Washington University School of Law.

Goldwasser asked the audience to consider “the conflict of interest that the prosecutor has when deciding whether to bring criminal charges against an officer from the very police department with which the prosecutor works every day and whose goodwill the prosecutor needs to do his job.” To address this issue, an audience member suggested that the ABA amend Model Rule 1.8 by adding a comment stating that for a local prosecutor to be involved in a decision whether to charge a local police officer with a crime is most likely a conflict of interest.

BY HELEN W. GUNNARSSON

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Multijurisdictional Practice

Calls Mount for Reworking Rules on Lawyers’ Interstate Practice

Some lawyers think it’s time for a fresh look at the legal profession’s standards on multijurisdictional practice, according to a panel discussion during the 43rd ABA National Conference on Professional Responsibility in St. Louis.

“A number of us have seen increasing numbers of issues arise in this area notwithstanding reform,” moderator Lucian T. Pera of Adams & Reese, Memphis, said in kicking off the June 2 program on “Navigating New Developments in MJP and UPL.”

The discussion underscored that deep uncertainties remain about the permissible scope of MJP even though

it's been 15 years since the ABA revamped Model Rule of Professional Conduct 5.5 and its comment to let lawyers engage in limited cross-border practice.

To flush out perplexities in MJP standards, the panelists mulled recurring situations where it can be hard to draw the line between acceptable and prohibited cross-border practice. For example, is a lawyer practicing law "in" a distant state by negotiating by email with someone in that state? Is it unauthorized practice to work on matters for clients in a state where you're licensed to practice law while living in your home in another state?

The speakers also explored possible solutions, including potential changes to Rule 5.5 in the Land of 10,000 Lakes and a bold idea for federal legislation as a wholesale fix.

Helping Mother-in-Law The program was sparked by a Minnesota decision admonishing a Colorado-licensed lawyer who emailed back and forth with an attorney in Minnesota, in an effort to help his in-laws in Minnesota settle a collection dispute with their homeowners association. *In re Charges of Unprofessional Conduct in Panel File No. 39302*, 884 N.W.2d 661, 2016 BL 284077, Minn., No. A15-2078, 8/31/16.

Panel member Eric T. Cooperstein, Minneapolis, represented the Colorado lawyer on appeal. He said he initially believed it was a relatively easy case.

Cooperstein said his analysis was that practicing "in" a jurisdiction in violation of Minnesota Rule of Professional Conduct 5.5 means physical presence, holding out as a lawyer, or having a systematic or continuous presence, or else filing pleadings and thereby entering an appearance.

His brief for the Colorado lawyer said "A lawyer does not practice law 'in' Minnesota merely by engaging in e-mail communications with an opposing attorney or based solely on the location of the parties and the legal matter."

But according to the other side's brief, "Respondent engaged in the practice of law in Minnesota by representing Minnesota residents regarding a Minnesota matter unrelated to his practice in Colorado without being licensed in Minnesota."

The Minnesota Supreme Court split sharply, holding 4-3 that the lawyer practiced "in" Minnesota. The legal dispute wasn't interjurisdictional, and the contacts with Minnesota weren't fortuitous or attenuated, it said. Rather, the matter involved only Minnesota residents and a debt arising from a Minnesota judgment.

Also, the majority held that the UPL safe harbors set out in Rule 5.5(c) didn't apply. It found that the lawyer's representation of the in-laws wasn't reasonably related to his Colorado environmental and personal injury practice, which involved a limited amount of collection-related work. Moreover, he didn't look into the procedures for associating with local counsel or getting admitted in the particular case, the majority said.

What 'Reasonably Related' Means Cooperstein said he advocated a broad reading of the safe harbor in Rule 5.5(c)(4) that allows temporary practice when it's reasonably related to a lawyer's home-state practice.

The three dissenters endorsed that view, saying the Colorado lawyer's conduct came within the safe harbor in Rule 5.5(c)(4). The exceptions in Rule 5.5(c) were meant to accommodate "the increasingly mobile and electronic nature of modern, national legal practice," the dissenting justices said.

Cooperstein pointed out that in the modern world, lawyers have broad multistate and multinational practices, and good lawyers get referrals from all over. Most lawyers practice in multiple states occasionally or frequently, he said.

If your adult child in another state calls you about a landlord-tenant problem, he calls you because you're a lawyer in private practice, Cooperstein said.

"Lawyers' licenses should be more like drivers licenses and less like cosmetologists' licenses," he said.

An audience member spoke up in waggish defense of the Minnesota decision. "We owe Eric a debt of gratitude for establishing precedent that we don't have to help our mother-in-law," he said.

On Beyond *Birbrower* However, panelist Ronald C. Minkoff said the result in the Minnesota case wasn't surprising. There's a solid argument that the exceptions in Rule 5.5 don't save the lawyer, Minkoff said.

He's a partner in Frankfurt Kurnit Klein & Selz P.C., New York, and the author of *Ball of Confusion: Practicing Law From your Second Home in Another State*, N.Y. Legal Ethics Rptr., Jan. 6, 2017.

Minkoff pointed out that the case involved a Minnesota client, a Minnesota adversary, a Minnesota judgment, and Minnesota substantive law.

He analogized it to *Birbrower*, the notorious 1998 California Supreme Court case that rocked the legal community and prompted the ABA's initiative to add MJP provisions to Rule 5.5.

The only difference between this case and *Birbrower* is that the lawyer didn't go into Minnesota, whereas the lawyers in *Birbrower* did go to California, Minkoff said.

Lots of post-*Birbrower* cases turn on where the client is and what substantive law was involved, Minkoff said.

Minkoff noted that lots of states have more restrictive MJP rules than Minnesota's standards.

In particular, he said these nine states have modified the "reasonably related" safe harbor in Rule 5.5 so that the lawyer's out-of-state work must be for a specific client in the lawyer's home state: Connecticut, Kentucky, Maine, Nevada, New Jersey, North Carolina, South Carolina, Tennessee, and Virginia.

Minnesota's Possible Changes Cooperstein said the Minnesota bar is working on possible amendments to Rule 5.5 in the wake of the disciplinary case involving the Colorado-licensed lawyer. These changes are under consideration:

- Add to Rule 5.5(c)(4) that "reasonably related" services include services that are within the lawyer's regular fields of practice in a jurisdiction where the lawyer is licensed to practice law.

- Add a new provision (Rule 5.5(e)) saying a lawyer in good standing in another state "may provide legal services in this jurisdiction that are performed on behalf of a person who has a family, close personal, or prior professional relationship with the lawyer."

- Revise Rule 5.5(d) so that a lawyer in good standing in another state "may provide legal services in Minnesota that exclusively involve federal law or the law of another jurisdiction in which the lawyer is licensed to practice law." This change mimics what Arizona and New Hampshire have done, Cooperstein said.

Arizona Rule of Professional Conduct 5.5(d) permits lawyers in good standing elsewhere to "provide legal

services in Arizona that exclusively involve federal law, the law of another jurisdiction, or tribal law.”

New Hampshire Rule of Professional Conduct 5.5(d)(3) allows out-of-state lawyers to provide services through an office or systematic and continuous presence in New Hampshire that “relates solely to the law of a jurisdiction in which the lawyer is admitted.”

Home Work The panelists also discussed situations in which a lawyer is admitted in one state but works from her home in a jurisdiction where she isn’t admitted.

Minkoff noted that New York’s high court held in the *Schoenefeld* case that a New York lawyer’s home in New Jersey didn’t qualify as her office.

But even if a lawyer’s home doesn’t count as an office, the question remains whether the lawyer working outside her state of licensing has a systematic and continuous presence in the state, Minkoff said.

He pointed out that Rule 5.5 prohibits lawyers who aren’t licensed in a jurisdiction from establishing an office or “other systematic and continuous presence” for the practice of law. The rule distinguishes those two concepts, he noted.

Minkoff described what he recommends when a lawyer is affiliated with a firm in a state where he’s licensed but want to work from a home office in another state. He suggests that the lawyer establish his presence in the state where his firm is located, so that anyone looking up that lawyer sees that he has an office in that state and is admitted there.

He noted, however, that New York requires its lawyers to have a physical office in New York for the conduct of law, and Delaware has a similar requirement.

Associates Licensed Elsewhere The panelists also discussed a hypothetical associate who works for a firm in one state, but is admitted only in another state. The lawyer is supervised by a firm lawyer who makes all final decisions in cases the lawyer works on.

Minkoff said this scenario was inspired by District of Columbia UPL Op. 22-17 (3/2/17), which advised that a lawyer’s who’s not admitted to practice in the District of Columbia can’t call himself “associate” or “counsel,” even if a D.C.-licensed lawyer supervises the associate on a full-time basis.

Outside D.C., there’s an issue whether the hypothetical associate is actually practicing law, Minkoff said. We’ve made the argument successfully that the firm itself is the lawyer of record and the lowly associate isn’t practicing law, he said.

An audience member pointed out that even if the associate isn’t practicing law, Rule 5.5 forbids lawyers to hold themselves out as a lawyer in a jurisdiction where they’re not licensed.

Many Conundrums Panelist Carol A. Needham noted that it’s not unusual to have an out-of-state expert in a field be supervised by an in-state lawyer who may not know anything about that particular field. She mentioned experts in securities law as an example.

“That’s one of the conundrums,” Needham said. She’s a professor at St. Louis University School of Law and the author of *The Changing Landscape for In-House Counsel: Multijurisdictional Practice Considerations for Corporate Law Departments*, 43 Akron L. Rev. 985 (2010).

Needham said that historically disciplinary counsel didn’t go after people for unauthorized practice. It’s different now with Rule 5.5 and its safe harbors, she said.

She said there’s a trend toward the position that a lawyer should be licensed by a jurisdiction in order to advise about its law. In particular, Needham said she’s heard from other lawyers that Delaware might crack down on attorneys who aren’t licensed in Delaware but advise corporations on the interpretation of Delaware law.

Needham also mentioned an additional complication. “If you’re practicing law where you’re not authorized and then want to get admitted there, there’s a character and fitness hiccup,” she said.

‘Ancient and Arcane’ UPL Laws An underlying complexity is that state UPL laws vary widely and can be difficult to parse.

Cooperstein described Minnesota’s UPL law, for example, as “ancient and arcane,” with many commas and clauses.

UPL statutes mostly date from many years ago at a time when lawyers practiced on their own and not in law firms, Minkoff said. D.C. UPL Op. 22-17 (noted above) is an example of the many kinds of UPL regulations that lawyers can fail, he said.

A recurring theme during the panel discussion was that practicing without authority to do so in another jurisdiction can result in discipline in a lawyer’s home jurisdiction.

A decision illustrating that danger came out just a week later: *Matter of Schank*, 2017 BL 197341, N.Y. App. Div. 4th Dep’t, 6/9/17 (three-year suspension for New York lawyer who violated Rule 5.5 by drafting proposed bylaws for condominium complex in Florida where he maintained home, and then made false statements during disciplinary investigation).

How Far We’ve Come Pera asked the audience if anyone thought Rule 5.5 is broken.

Speaking up from the audience, Fordham professor Bruce Green defended the MJP provisions in Rule 5.5. He served as reporter for the ABA Commission on Multijurisdictional Practice, which developed the safe harbors in Rule 5.5 and other MJP fixes after *Birbrower*.

“Think back to before Rule 5.5, when everything was governed by UPL and everyone was at risk of UPL for phone calls and emails to another state,” he said.

“Your glass is 7/8 full and you’re crying over 1/8,” Green said. “I think it’s the most significant reform ever.”

Pera noted that “there is much dissent in the land,” as is evident in the ABA charts that show state variations from Model Rule 5.5.

Green responded that the commission got adoption by allowing some ambiguity, “It’s not easy to achieve 50-state uniformity,” he said.

Pera agreed, saying he never expected Rule 5.5 to go through. “But the world has changed dramatically, and demand for multijurisdictional practice has increased,” he said.

Federal Fix Floated Pera highlighted a new proposal to fix MJP through federal legislation.

Under the legislation envisioned in the proposal, lawyers who are licensed in any U.S. jurisdiction would qualify to practice in any other U.S. jurisdiction in all matters pending in federal court or involving federal

law, international treaties, or tribal law and all matters affecting interstate or foreign commerce.

However, attorneys couldn't hold themselves out as lawyers in the other state, and they would be subject to discipline there. No federal agency would be created.

The lawyers—James W. Jones, Anthony E. Davis, Simon Chester, and Carolina Hart—floated their idea in *Reforming Lawyer Mobility—Protecting Turf or Serving Clients*, 30 *Geo. J. Legal Ethics* 125 (2017), which posits that current problems with the regulation of lawyer mobility in the United States require a fundamental change.

From the audience, Anthony Davis spoke up to defend the proposal. The Chamber of Commerce, Association of Corporate Counsel, all corporations, and even nonprofit groups with clients in different states would want lawyers to have this authority, he said.

"Clients don't want 50 lawyers," Davis said. "Clients should be able to choose their lawyers." He's a partner in Hinshaw & Culbertson LLP's New York office.

Davis said that amendments to Rule 5.5, such as those under consideration in Minnesota, would just perpetuate the current situation in which there are many different versions of the rule. "The answers are different in every state," he said.

Devil's Work? Pera didn't denounce or endorse the idea of a federal legislative fix, but he said, "I'm not so convinced it's the work of the devil anymore."

Minkoff said he didn't hate Davis's idea either. "I just don't know, given the current environment, that Congress will put aside health care and taxes to help clients and lawyers," he said.

He said he thinks the best approach is driver's-license approach or compact that would allow lawyers to move freely across state lines.

From the audience, Steven M Puiszis expressed concern about opening the door to additional action from Congress. "If you go down that road, it's a slippery slope. What makes you think Congress would stop there? Would they, for instance, allow alternative business structures?"

"My concern is if you invite the devil in, you're never going to get the devil out," Puiszis said. He's a partner in Hinshaw & Culbertson's Chicago office.

Time for Fresh Look Pera said, "Personally, based on what I've seen, despite the miraculous success of 5.5, it's time to revisit these issues, and look for a solution, whatever it might be."

In an informal poll, Pera asked the audience for a show of hands on whether the ABA Center for Professional Responsibility should start looking at the subject of MJP. He currently chairs the center's governing body.

Those who raised their hand "yes" carried the day.

BY JOAN C. ROGERS

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Full text of *In re Charges of Unprofessional Conduct in Panel File No. 39302* is at <http://src.bna.com/pHq>. Full text of *Matter of Shank* is at <http://src.bna.com/pKO>.

Malpractice

Speakers Ponder When Lawyers Should Own Up to Their Mistakes

To err is human, so lawyers are bound to blunder. The challenge is figuring out when to own up to an error after one happens.

So said speakers during a June 1 panel on "Mistakes: Coping Ethically and Wisely with the Inevitable" June 1 during the 43rd ABA National Conference on Professional Responsibility in St. Louis.

The panelists used a series of hypotheticals to flesh out when it's advisable—or imperative—to tell clients about an apparent goof. And responses from the audience indicated that the answers were anything but clear-cut.

Moderator Peter R. Jarvis began by invoking Murphy's law—that is, if anything can go wrong, it will.

"We live in a world where we're going to make mistakes," Jarvis said. He's a partner in Holland & Knight's Portland office.

Last-Minute Tickets An initial question is whether a "mistake" occurred at all. For example, what if a lawyer forgets to book airline travel until the last minute, when the ticket costs \$2,000 instead of \$400? Do you have to come clean about it or charge only the lower amount?

Panel member Douglas Richmond said no. The ticket cost \$2000, and you charge the client what the ticket costs you, he said. Richmond is managing director of Aon's Professional Services Group.

Fellow panelist Jeanne Marie Clavere noted that under Rule 1.5 on fees, lawyers can only pass through reasonable costs. She's professional responsibility counsel for the Washington State Bar Association.

Richmond disputed the idea that the actual cost of the ticket isn't reasonable, even if booking earlier would have the made cost cheaper. "I could also get there cheaper by hitchhiking or walking," he said.

Missed Removal Window Suppose you represent the defendant in a civil case in state court and want to remove it to federal court, but you overlook the deadline. Assume too that in your jurisdiction, failure to remove to federal court can't give rise to a malpractice claim. If you didn't discuss the planned removal with the client in the first place, do you have to tell the client about the lapse?

Clavere noted that this scenario implicates a lawyer's duty of communication under Rule 1.4. The question is whether the information is material, and that depends on the facts and circumstances, she said.

"Rule 1.4 speaks to letting the client know everything they should know about to make an informed decision about the case," Clavere said.

Audience members offered a variety of comments about whether the lawyer should or must tell the client. They said:

- The information wasn't material; lawyers make judgments all along that they don't discuss with clients.

- Removing a case to federal court is a strategic question that's up to the lawyer under Rule 1.2 on allocation of authority between lawyer and client. If a client

tells you to remove a case and you say no, that's your judgment.

- One of the things a client gets to decide is whether to keep you as his lawyer, so the client has a right to know information that's material to that decision.

- The lawyer doesn't have to tell the client but should do that anyway. The client may find out and be upset with you if the case doesn't go well and the client hears from someone else that you're better off in federal court.

- The lawyer has to respond truthfully if the client ask about removal.

Richmond said "clients are incredibly forgiving about simple errors." There are lots of reasons from the standpoint of client relations to fall on your sword and tell the client "I let the time run, I don't know what to tell you."

But the facts and circumstances matter, Richmond noted. For example, perhaps the particular judge makes it preferable to be in state court. "I'm a big believer in situational ethics," he said. "I might just pour myself a big cup of shutup."

Mistakes That May Be Fixable What if you don't respond to a complaint, resulting in a default judgment? Can you keep quiet about the mistake while you try to have the default set aside? Does it matter whether it's easy or impossible to get defaults vacated in your jurisdiction?

The problem may be possible to fix right away, Richmond noted. He related that he once got a default set aside the same day when an associate overlooked one count in a massive complaint against a client.

An audience member pointed out that lawyers have a duty to communicate material events that affect the client's matter, not every event. It's best practice to talk to the client, but it's not a breach of fiduciary duty or a conflict to try to remediate a mistake that's not likely to cause damage, she said.

After other attendees also spoke up, Jarvis summed up the comments as mostly saying "if you can fix it, you don't need to tell."

"If you talk about standard of care, most reasonably prudent lawyers wouldn't tell the client about something they can shortly fix with no economic consequence to the client," Jarvis said.

One audience member protested that view. A default judgment can mean the end of a case, so the lawyer has a conflict if there's any significant mistake, he said.

Omitted Clause in Megadeal Suppose you represented a client in negotiating a huge deal. You realize after closing that you left out a crucial clause, but whether the omission will ever cause a problem depends on future circumstances.

Richmond noted that there's some tension between the notion under Rule 1.4 that the lawyer has a fiduciary duty to inform the client of mistakes and the insurer's legitimate concern, enforced by language in the policy, that lawyers not impair the insurer's rights by admitting fault.

You want to be careful about how you say whatever you say to the client, so you can inform the client and still preserve your insurance coverage, Richmond said. Preserving insurance coverage is good for the client, he noted.

Assuming the law firm decides not to tell the client, does it have a duty to report the mistake to the insurer?

Richmond said that if a policy requires the reporting of "circumstances," then yes, the firm would have a duty to report. If it doesn't, most firms would still make a report of circumstances even though there isn't yet a claim, he said.

Assume there's nothing the client can do to prevent a future problem, which may or may not happen. Does the lawyer still have to tell the client?

Richmond said he didn't see a way around reporting it under Rule 1.4. The defect may affect the client's business decisions, he noted. It's not enough just to give the client the deal documents and then say the client should have known about the problem, he said.

An audience member said this question is very fact-specific. If the flaw involves a critical element of the transaction, the client would want to know even if it may never cause a problem, he said.

Change in Law Suppose you're representing a legal malpractice plaintiff and negotiate a settlement based on economic loss, but then you realize that four months ago, the state supreme court said plaintiffs can get emotional injury damages. All that's left is to sign the check. Do you have to tell the client?

It's better for the client to get the bad news from you as their trusted attorney, instead of finding out from someone else, Clavere said.

Richmond said "from both a risk management and client relations standpoint, you are better off confessing error yourself." Even if you can convince yourself there's no duty, there are lots of reasons to tell the client, he said.

"As someone who's made mistakes and had hard conversations with clients, I'm going to tell the client," Richmond said.

But Richmond said that here, he wasn't convinced that the lawyer committed any consequential error. The defendant came to the table with a limited amount of money and damages may have reached that limit even without emotional distress damages, he said.

An audience member noted that telling the client starts the clock on the discovery rule for purposes of the statute of limitations.

Jarvis noted two strands of comments in the discussion. First, collectively we think the client doesn't have to know about a mistake's that simple and not consequential. On the other hand, the needle swings toward disclosure for mistakes with future consequences that are potentially dramatic.

Jarvis asked the audience how many of them think lawyers would disclose the problem with the megadeal to the client, or not. Slightly more than half said not.

New Paper on Apologies Clavere highlighted this new law review article on the subject of lawyers and apologies: Catherine Gage O'Grady, *A Behavioral Approach to Lawyer Mistake and Apology*, 51 *New Eng. L. Rev.* (forthcoming 2017).

The article explores the behavioral principles grounded in social psychology that prevent lawyers from recognizing their mistakes, and applies those principles to lawyering and the practice of law. Medical professionals are being encouraged to apologize, and statistics show that liability claims and payouts decrease when medical professionals own up to mistakes, according to the author.

Of course, apologizing won't always prevent claims. "Amputate the wrong leg and see how forgiving your client is," Richmond said.

But firms have worked hard to cultivate a culture of internal self-reporting, so that lawyers will contact general counsel if they may have made a mistake, he noted.

Jarvis brought up the exception in Rule 1.6 that allows disclosure of client information to obtain legal advice about complying with ethics rules. It's safe to say that exception is read broadly enough to cover internal consultation about a mistake, he said.

Clavere noted that solo practitioners and small-firm lawyers don't have an in-house ethics counsel. It's not easy for many attorneys to admit mistakes and seek the help they need to get because they don't have the resources, she said.

An audience member noted that mistakes may lead not only to a malpractice claim but also to disciplinary complaints. A lawyer's chances of getting lesser discipline are enhanced if the lawyer falls on his sword, he said.

Gray Area—Former Clients Do lawyers have to tell former clients about mistakes?

Richmond said he didn't know whether or not, in fiduciary duty or agency law, there's some disclosure obligation he can't find in the Model Rules.

But in the rare situation where you can prevent future harm, lots of reasons—risk management, malpractice avoidance, the ability to sleep at night—weigh in favor of disclosure, Richmond said.

Jarvis said he couldn't find any duty of disclosure to former clients either. "I think it's strange that we don't really have a clear answer on the former client situation," he said.

Clavere pointed out that Rules 1.2 and 1.4 are about duties to existing clients. The ethics rules themselves don't speak to the duty to disclose when it's a former client, she said.

It would be a real stretch to say that nondisclosure to former clients is dishonesty, fraud, deceit or misrepresentation under Rule 8.4, Jarvis said.

How to Tell Client If a lawyer must or chooses to communicate with the client, how should a lawyer go about it?

Clavere said she would definitely have an in-person or Skype consultation, followed up by memorializing it. It's a difficult conversation, and not something we learn in law school, Clavere said.

Jarvis agreed the talk should be in real time, in person or by phone, and then documented afterward.

Richmond said "as a general rule, you are better off having a conversation face to face, and then documenting the conversation later."

But lawyers may want to send a letter if the client is sufficiently untrustworthy that he won't give an accurate account of the conversation, he said.

BY JOAN C. ROGERS

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Impairment

Break the Silence on Attorney Substance Abuse, Panel Urges

Two recent surveys on substance abuse in the legal profession—one on law students and the other on practicing lawyers—should be a call to action to avoid a bleak future, according to a panel discussion entitled "Policy, Process & Prevention: A Systems Approach to Improving the Health and Well-Being of the Profession."

Tracy Kepler, Director of the American Bar Association's Center for Professional Responsibility, moderated the June 2 panel, a joint program of the 43d National Conference on Professional Responsibility and the National Forum on Client Protection in St. Louis.

Many lawyers, Kepler said, are "too exhausted, impaired [or] disengaged . . . to develop into their best selves," and as a result "our profession is not living up to its full potential."

"How do we build a more relevant and resilient regulatory framework for our profession?" she asked.

Kepler identified three reasons why well-being is a professional priority:

1. Organizational effectiveness. "Attorney well-being contributes to organizational success," Kepler said, citing retention, job satisfaction, and turnover rates.

2. Ethical integrity. "Attorney well-being affects ethics and professionalism," Kepler said. She cited not only the rules themselves, for example the obligations of competence and diligence, but also the language of the preamble.

3. "It's the right thing to do." This, Kepler said, is the reason that makes the most sense to her: "How about just being a human being?" Too many of us, she said, have "a profound ambivalence about what we do day in and day out."

'Suffering in Silence' The panel began by looking at the data from two recent national surveys. The first dealt with law-student well-being, and the second with substance abuse and mental health concerns among practicing lawyers. Neither the data nor the report titles augur well.

Panelist Bree Buchanan, who directs the Texas Lawyers' Assistance Program, started with the law student data. See Jerome M. Organ, David B. Jaffe, & Katherine M. Bender, *Suffering in Silence: The Survey of Law Student Well Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns*, 66 J. Legal Educ. 116 (Autumn 2016). The authors describe their survey of 15 law schools across the country as "the first multischool study in more than 20 years to address law student use of alcohol and street drugs, and the first-ever multischool study to explore prescription drug use and the mental health concerns and help-seeking attitudes of law students."

"Suffering in silence sums up what's going on in the law schools and in the profession," Buchanan said.

Thirty-seven percent of law students screened positive for anxiety; among other graduate students the rate was 5 percent. "When the brain is anxious," Buchanan said, "we're not doing our best learning of complicated material."

An appalling 6 percent of law students have thought seriously about suicide within the past year. “Lawyers all too often choose that as a way out,” she said.

Only 4 percent of the students had actually consulted a health professional for help. What’s keeping them from asking for help? Buchanan said “It’s really about stigma. . . . Fear of [it] being found out that you have a problem, and maybe you are ‘less’ than those other students. And fear that if I seek help it’ll hurt my chances for admission.” Half the students felt they’d have a better chance at admission if they simply hid the mental or substance abuse problem, she said. “And the longer the student has been in law school the more likely the student is to say, ‘I need to hide this.’”

Teaching Drinking? From the audience John T. Berry emphasized how dangerous it is that law students are learning to mask their vulnerabilities. “From law school on you can’t show heart or soul,” he said.

Buchanan pointed out that aside from the humanitarian reasons there are two public-protection reasons why law student substance abuse and mental health issues must be addressed. First, “These are diseases, and their nature is progressive.” Second, law school is “a profound formation experience; law students are being radically transformed from emerging adults into professionals.” They’re learning not only the rules but also what she called the unspoken codes of behavior. “Don’t admit vulnerability; don’t ask for help.”

“The coping mechanism they teach us [in law school] is drinking,” a law student in the audience said. Buchanan welcomed the observation. “So [what does that mean about] who needs to change what they are doing? Maybe the administration should adopt a wellness policy, or deans of student affairs can help students who do disclose vulnerabilities. A big piece of it falls upon the faculty,” she said, citing the need to “create a space within the classrooms to be able to talk about these issues and give the overt message that it’s OK to ask for help and you should ask for help.”

Panelist Robert Denby also welcomed the student’s comment, adding that law school drinking “flows right into the law firms. The big firms make heavy use of alcohol for summer associates.” Denby heads the Loss Prevention department at Attorneys’ Liability Assurance Society (ALAS) in Chicago.

Paul Paton spoke from the audience about the wellness initiative at University of Alberta, where he is the Dean of Law. He reported that since becoming dean in 2014 he has made mental health and wellness his priority; he even has an onsite psychiatrist at the university. [Some law firms have hired onsite mental health professionals. See Steven J. Harper, *The Real Reason for Big Law’s Mental Health Problem*, *The American Lawyer Daily* (June 2, 2017).]

“Make [mental health care] easily accessible, Paton said.” But what’s more important, he added, is addressing the stigma issue. Sometimes the challenge is with “the profession and the alumni who remember the drinking culture.”

Young Attorneys, Higher Risk Panelist Patrick R. Krill of Krill Strategies, who is the former director of the Hazelden Betty Ford Foundation’s program for legal professionals, then introduced his recent study on practicing lawyers. See Patrick R. Krill, et al., *The Prevalence of Substance Use and Other Mental Health Concerns*

Among American Attorneys, 10 *J. Addict. Med.* 2016;10: 46-52. Funded by the Hazelden Betty Ford Foundation and the American Bar Association Commission on Lawyer Assistance Programs, the study is based on self-reporting by 12,825 licensed, employed attorneys who filled out questionnaires assessing alcohol use, drug use, and symptoms of depression, anxiety, and stress.

Perhaps not surprisingly, the study found “substantial” rates of behavioral health problems among lawyers, and a rate of problem drinking twice as high as that of the general population. But the surprise, Krill said, is that “No longer is it the older attorneys who are most likely to have problems.” Respondents 30 years of age or younger were more likely than their older peers to score high on the Alcohol Use Disorders Identification test. “This is a reversal of what we thought we knew about lawyers. We thought it was older lawyers who engaged in the most problem drinking.” And this is not just the result of younger people drinking more—young lawyers drink more than others their age, Krill said.

To change attorney behavior, it’s best to “[f]ocus on the upside, the benefits of living a healthier lifestyle,” Krill encouraged. “The lawyer’s own mental clarity will benefit.”

Public Interest William Slease, New Mexico’s chief disciplinary counsel, said the profession needs a more proactive understanding of what it means to regulate the practice of law.

“Our courts traditionally tell us the purpose of attorney discipline and regulation is to protect the public,” he said. “This sounds a little paternalistic and condescending to me, like patting the clients on the head and saying we know how to take care of them.”

He formulates his regulatory goal as “the promotion of the public interest,” meaning the delivery of quality legal services at a reasonable price, and access to justice. This goal, he said, requires him to “pay attention to the whole lawyer, not just wait for the lawyer to get into trouble and then play whack-a-mole.”

Slease believes that the lack of interaction between lawyers’ assistance programs (LAPs) and lawyer regulation may be an impediment, and a more collaborative approach would help. He endorsed the possibility of disability/inactive status for lawyers who might be at risk, and the availability of conditional admission. But the biggest component is education, he said. “We do programs with our LAP director so lawyers will think of him less as the Grim Reaper and more of a resource” for help, he said.

Kepler then asked Denby to consider the “incognito” alcoholic in the law firms. “We’ve been trying to show law firms that this problem is endemic,” he said. “Some firms agree, but some firms say that . . . if it were true we’d see lawyers falling down drunk in the hallways every day.”

“It’s hard to argue with this,” Denby said. “It’s hard to walk down a hallway and do a field sobriety test and come up with meaningful data,” especially given that lawyers are very good at “hiding problems and covering them up.”

What’s standing in the way of change? Denby identified three obstacles:

1. Firms don’t want to deal with attorney substance abuse. It’s a bad time for private law firms, with many of them under intense cost pressures.

2. Lawyers don't want to talk about substance abuse problems. They don't want to admit it to themselves, let alone anyone else.

3. Even if firms wanted to do something about substance abuse, they have "no idea what action they could take."

Denby thinks regulators and insurance companies could work together to design programs to help, though. Start with taking the stigma out, Denby said. "Have that message come from management: 'We understand some of you may feel driven to self-medicate. We know that's an issue and it's an issue we can cope with.'"

Firms could give their members self-assessments to fill out on their own, Denby said, to help them think about how much they drink. "A few firms are doing that."

"Let's make more use of the data," Denby said. "We have compelling data, more than we've ever had before, but lots of the profession still doesn't have any clue."

What's Next? A promising development is coming soon. Slease said that after the 2016 report came out, the ABA's Commission on Lawyer Assistance Programs began working collaboratively with the Association of Professional Responsibility Lawyers, the National Organization of Bar Counsel, and the Conference of Chief Justices on a task force on lawyer well-being. Buchanan and James Coyle, Attorney Regulation Counsel for the Colorado Supreme Court, are co-chairing the task force. The task force expects to release a report later this year, Slease said, and "it will include lots of recommendations about how to address the wellness crisis proactively."

BY ELIZABETH J. COHEN

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Fitness to Practice

'F' Is For 'Fitness to Practice'

All attorneys remember dreading the "character and fitness" portion of the process for admission to the bar. For the vast majority, their anxiety is wildly out of proportion to the risk of actually failing the character and fitness screening. For the unfortunate few, however, failing the screening can mean crushed dreams and crushing loan burdens.

But just what is "character and fitness"? And does the screening serve any useful purpose? Donald R. Lundberg of Lundberg Legal in Indianapolis tackled these questions June 2 as moderator of a panel called "Fitness to Practice Law: What Is It Good For; Absolutely Anything?" at the 43rd National Conference on Professional Responsibility in St. Louis.

Although the panel focused on character and fitness in the admissions context, Lundberg noted that fitness also comes up in the disciplinary process, specifically in Rules 8.4(b) and Rule 8.3(a). See Donald R. Lundberg & Caitlin Schroeder, *Fitness as a Lawyer: What Is It?*, 60 Res Gestae 9 (May 2017) (forthcoming). And even though the reinstatement provisions in the ABA Model Rules on Lawyer Disciplinary Enforcement "may not expressly say the 'F' word," he said, fitness is part of the reinstatement process.

The Standard of Character and Fitness of the Code of Recommended Standards for Bar Examiners declares:

A lawyer should be one whose record of conduct justifies the trust of clients, adversaries, courts, and others with respect to the professional duties owed to them. A record manifesting a significant deficiency in the honesty, trustworthiness, diligence, or reliability of an applicant may constitute a basis for denial of admission. [Standard 12].

For the text of the Code, along with a list of each state's character and fitness requirements and an explanation of each state's screening procedures, see ABA Section of Legal Education and Admissions to the Bar & National Conference of Bar Examiners, *Comprehensive Guide to Bar Admission Requirements*, published annually and available on www.americanbar.org.

History in a Nutshell Panelist Douglas Ende, who is director of the Office of Disciplinary Counsel at the Washington State Bar Association, gave a quick history of the concept of fitness.

Ende said the notion that good moral character and fitness are conditions for admission is "ubiquitous, and I'd always assumed it came from somewhere." As he traced it back, he identified four phases of its development in the United States.

1. Even before the Revolutionary War, there was always a sense that character and fitness should serve as prerequisites for admission to the bar. Courts had discretion over admission, Ende explained, so there isn't much positive law from the period. But he found evidence that courts were thinking about qualities like probity and honor – pretty similar to how we understand character and fitness.

2. With increased European immigration in the late 19th and early 20th centuries, he said, race and class issues started to enter into the inquiry. "Practitioners started to band together into bar associations; the ABA was formed in 1878. Some bar associations were given governmental authority over admission to practice." By 1928, he said, "all U.S. jurisdictions had some kind of positive law" on bar admission.

3. Ende dates the third phase to 1931, when the National Conference of Bar Examiners was formed "to raise standards as to knowledge of the law and fitness of character" of prospective lawyers. Ende emphasized that the phrase was fitness of character, not fitness and character. "They weren't two separate ideas."

4. The advent of the character and fitness inventory was the fourth phase. The questionnaires are lengthy and detailed, Ende said, but "character and fitness remains an amorphous concept." Ende noted that many of the inventory questions simply betray the values of the inquirers: why else ask about membership in the communist party, for example, or mental health problems?

There are more contemporary and more enlightened notions of character and fitness, Ende said, but there are also more ancient ideas. He found historical evidence suggesting the notion sprang fully formed from the brow of Edward the First, the Hammer of the Scots, who is called the English Justinian. Upon returning from the Crusades, one of his first jobs was to create a system of justice that would protect the public, Ende said. Ende quoted a 1259 writ to the Justiciary of Ches-

ter: “If common justice is denied . . . we lose the favor of both God and man and our lordship is diminished.”

Rationale Lundberg then asked panelist James C. Coyle, who is the Attorney Regulation Counsel for the Colorado Supreme Court, to discuss the conceptual and practical underpinnings of screening for fitness (beyond competence). “It’s not at all self-evident,” Lundberg said. “The rejection rate is extraordinarily low, and trying to predict future misbehavior is unreliable and costly.”

Lundberg noted Deborah Rhode’s groundbreaking study of the screening process, which led her to conclude that the character and fitness inquiry is a fool’s errand and that “resources should be pushed towards regulating post-admission” rather than screening. Deborah Rhode, *Moral Character as a Professional Credential*, 94 Yale L.J. 491 (1985). “But this view has not won the day,” Lundberg said.

Coyle is uniquely positioned to assess fitness screening. His office used to function solely as disciplinary counsel; in 1998 it became a regulatory agency as well. Then in 2011 the courts also assigned the admission process to his office. Although he’d been counsel to the Board of Law Examiners, Coyle hadn’t been involved in the preliminary processes. “But I became a character and fitness wonk.”

Coyle believes that character and fitness screening requires applicants to “focus on inventorying your past conduct.” “Self-assessments are kind of new” in the regulatory world, he said, but that’s what character and fitness screening does. “Just going through the process is a heads-up educating the person he’s now becoming part of a different kind of profession.”

Coyle said he uses character and fitness as “a proactive process.” “We don’t keep out lot of people out due to character and fitness issues,” he said; of some 1600 new lawyers admitted in a year, perhaps 3 to 5 are kept out. Coyle’s approach fits well with his office’s embrace of Proactive Management Based Regulation [PMBR]. See Joan C. Rogers, *Illinois Kicks Off Era of Proactive Lawyer Regulation*, 33 Law. Man. Prof. Conduct 65.

Panelist Sophie Martin, Executive Director of the New Mexico Board of Bar Examiners, agreed with Coyle about the value of self-assessment. “I remember filling out the application and wondering, ‘Is this going to keep me out?’ and having to do a lot of reflecting” about her past. “In New Mexico we are pretty explicit about what we are looking for,” she said, and “we give applicants the opportunity to provide information to help us understand the context of what they’ve done and what’s happened in their lives.” For example, she said, having debt is not a problem; the question is how you are managing that debt.

What comes up most frequently? “Lying, drinking, cheating, and stealing,” she said. And these issues matter, she believes, because when the court admits an applicant it is in effect saying, “Attorney, I will believe you.”

Predictive Value? Lundberg then asked panelist Leslie Levin of the University of Connecticut School of Law how useful the character and fitness inquiry is. Levin was principal investigator for the Law School Admissions Council’s study of the predictive value of the character and fitness inquiry (discussed at 28 Law. Man. Prof. Conduct 357). See Leslie Levin, et al., *The Ques-*

tionable Character of the Bar’s Character and Fitness Inquiry, 40 Law & Soc. Inquiry 51 (2015).

Does the inquiry flag applicants who are more likely to have disciplinary problems later on? What about the people who are weeded out—either the tiny number whose applications are denied, or the unknown number who may have been deterred from becoming lawyers at all by the prospect of screening?

Levin noted that the screening process has been criticized for being too early, too late, too intuitive, and completely inaccurate as a predictive tool. She was interested in figuring out what might be different about the people denied bar admission, she said.

Levin acknowledged that if an applicant is kept out it’s impossible to predict how he or she would have behaved as a lawyer. Martin said that in New Mexico “we’ve started Googling people who were kept out. One is now in prison, and one is dead.” But an audience member noted that “we have no idea how being denied the license” affected the applicant’s life.

Silos Lundberg said that once a lawyer is disciplined, it is difficult to reevaluate his or her application with the benefit of hindsight. “One of the problems we all suffer with is the ‘silo’ approach to regulating the bar,” he said, explaining that there may be no interaction between the admissions people and the discipline people. Once a lawyer has been disciplined “very few lawyers do a post-mortem and say ‘let’s go back and look at that lawyer’s application and see what we could have figured out.’ ”

But siloing is not a problem in Coyle’s office, which performs both admission and disciplinary functions. “We share all information,” Coyle said.

Since 2011, he said, his office has retained all applications. But most lawyers don’t get into trouble until they’ve been practicing for about 10 years, he said, so the application process may not have raised any red flags. His office also shares everything with the lawyers’ assistance program. “We can tell them everything but they can’t tell us anything.” The lawyer can get help faster this way, he said.

Consistency From the audience Nancy J. Moore of Boston University Law School said that character and fitness “seems to be arbitrary.” Two applicants with the same profile may well be treated differently in different jurisdictions, she said.

Martin said the lack of uniformity among states means, “An applicant who’s been admitted in another state has to relearn how it all works.” There are some commonalities, she said, but each state regulates itself.

There is necessarily a tension between uniformity and preserving the differences among states, and we need to decide which is more desirable, she said. She noted there’s a “healthy discussion online asking questions like, ‘I couldn’t get into Florida; can I get into New Mexico?’ ”

From the audience Mary Robinson of Robinson Law Group LLC in Illinois, former administrator of the Illinois Attorney Registration and Disciplinary Commission, pointed out that even within a jurisdiction two panels may treat similarly situated applicants differently. In Illinois, she said, there are over 100 lawyers participating on panels, and there are no written decisions. “Are there simply too many lawyers involved in the process? If five people with license suspensions are

admitted and one isn't, how do I find out what the differences were, other than maybe they got a bad panel?"

"Consistency is super-important," Coyle agreed. In Colorado, "we've kept track of the denials since the mid-1990s, and we cleanse the information and give it to applicants." To give the applicant's counsel an idea of whether the client's conduct would fit, his office will convey information such as, "For 2010 there were five denials; these were the reasons, these were the aggravating and mitigating factors."

Coyle has also found it helpful to include nonlawyer professionals on panels; in Colorado, he said, forensic psychiatrists and organizational psychologists have served.

BY ELIZABETH J. COHEN

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Government Employment

Government Attorneys Need Clarity on Who the Client Is

For a government lawyer, the key to complying with ethics rules is knowing who the client actually is, according to a June 2 panel discussion at the 43rd National Conference on Professional Responsibility in St. Louis.

"[G]overnment lawyers must have a clear understanding of who their client is and who speaks for their client," moderator Stacy Ludwig said. She is director of the Department of Justice's Professional Responsibility Advisory Office.

The answers to those questions determine who holds authority to direct litigation and approve settlements, and what information is confidential, the panelists agreed.

But most of the Rules of Professional Conduct, Ludwig noted, were drafted with private lawyers in mind. And a multitude of other laws governing disclosure can further complicate the government lawyer's duties, panelists said.

Who Says? Who is the government lawyer's client, and does it make a difference whether the governmental official is elected or appointed?

Panelist Patricia Weiss, who is professional responsibility counsel for the Securities and Exchange Commission, said she takes Model Rule 1.13 as her starting point: "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." In a state with an elected attorney general, she said, the rule might lead to a conclusion that "the attorney general has been duly authorized by the public to make the calls for the client." In a state in which the attorney general has been appointed, some of that authority might remain with the appointing authority, who is usually the governor, she said.

When faced with the question of who has the authority to consent to settle a matter or to waive a conflict, a DOJ attorney may not even know the extent of his or her own authority.

So a lawyer "might have to do some sleuthing" to figure out how to obtain client consent in compliance with

the ethics rules and even "sit supervisors down and make them think through who it is that has the authority to make this decision."

Panelist Kathleen Clark recommended looking to case law for guidance on issues of conflicts and attorney-client privilege, since "supervising lawyers may not have given much thought" to these issues. That's especially true for state attorneys general, given the degree of autonomy they have to take positions that may diverge from those of other constitutional officers or state agencies that may be their clients, she said. Clark is a professor of law at Washington University in St. Louis.

Confidentiality Clark thinks that confidentiality rules may apply differently to government attorneys. She noted that at least two jurisdictions, Hawaii and the District of Columbia, have adopted confidentiality rules for government lawyers that differ from those applicable to lawyers for private clients. (Hawaii RPC 1.6(b)(5) permits government lawyers to disclose information relating to the representation of a client "to prevent a public official or public agency from committing a criminal or illegal act that a government lawyer reasonably believes is likely to result in harm to the public good" or "to rectify the consequences of a public official's or a public agency's act which the government lawyer reasonably believes to have been criminal or illegal and harmful to the public good." District of Columbia Rule 1.6(e)(2)(B) permits government lawyers to disclose a client's confidences and secrets "when permitted or authorized by other law.")

But even when there's not a specific rule, "government clients are different from private clients in ways that are relevant to the duty of confidentiality," Clark said. She said common law and statutes demonstrate that "while it is perfectly acceptable for private clients to keep their own wrongdoing secret, it is the opposite for government entities." Unlike private entities, she said, "sovereigns are not allowed to act selfishly," and "government officials are encouraged to disclose government wrongdoing through whistleblower statutes and others that encourage reporting official corruption and wrongdoing." In fact, she said, governmental entities are actually required to make certain disclosures by freedom of information laws. She believes those statutes constitute effective consent to the disclosure of client information under Model Rule 1.6.

"This is a huge hornet's nest," Weiss commented, "because there are so many laws that compel confidentiality" and "compet[e] in the hierarchy of how you decide what you can disclose." Clark acknowledged the complexity of those "slews of statutes that prohibit government officials from disclosing certain types of information" such as people's tax returns, the disclosure of which may lead to criminal penalties.

But panelist Thomas B. Mason, chair of Harris, Wiltshire & Grannis LLP's Legal Ethics and Malpractice Group in Washington, took a different view on consent to disclosure.

"I don't think a statute passed [say] in 2003 can provide informed consent under the meaning of the rules in 2017," Mason said. To properly obtain informed consent, he said, "you go to the client and say, 'can I do this, this is what I'm thinking of, here's how it might help, here's how it might hurt.'" On the other hand, he agreed "the government is free to regulate and pass

laws with respect to the conduct of its lawyers under the state ethics rules,” and federal statutes such as whistleblower laws will preempt state ethics rules and permit even lawyers to disclose information that is confidential under state ethics rules.

Higher Standards? Ludwig and Mason emphasized the problems that can occur when ethics rule drafters do not consider government lawyers’ obligations and interests, citing as an example a recent amendment to New Jersey Rule 4.4(b), regarding a lawyer’s obligations with respect to “wrongfully obtained” information covered by attorney-client privilege.

“We attorneys often get information from whistleblowers who believe that people in their corporation or other individuals have been engaged in wrongful conduct,” Mason said—and it’s not uncommon for the whistleblower to have taken that information in violation of a confidentiality agreement or corporate code of conduct. As originally drafted, the rule amendment would have required prosecutors and even *qui tam* counsel to disclose such information to the subject of an investigation, thereby alerting witnesses, risking destruction of evidence, and foreclosing the opportunity to try to covertly confirm or refute what the whistleblower said.

Additionally, he noted, disclosing the possibly wrongfully obtained information might well result in revealing

the whistleblower’s identity, with “potentially negative consequences for the whistleblower, including safety.” That, in turn, would deter potential whistleblowers from coming forward with information about serious violations of public policy. Mason said after the New Jersey Supreme Court was briefed on those issues, it addressed them in the Comment by exempting such information from the rule’s definition of “wrongfully obtained.”

Ludwig asked, “Are government lawyers held to a higher standard” than lawyers in private practice?

“As a client, the government is held to a higher standard,” Mason responded. The government “shouldn’t simply be looking to win every case and extract every advantage” possible under the law, he said. Furthermore, “every prosecutor should operate at a higher standard” because “a prosecutor’s main goal should be to do justice,” he said.

“I believe [Model Rule] 3.8(d) reflects that we expect the government to be fair in a way that we don’t expect of private parties,” Clark said. “The legitimacy of the government depends on its engaging with its citizens in a fair manner.”

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