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Competence: When Mental Health Interferes
By Tamara Nash

Many attorneys are motivated to enter the practice of law by the desire to help others. Early on, most of us learned that we might encounter a detour or obstacle that may change the course of our journey. For some, that detour represents struggles with addiction, battling depression, or coping with anxiety. Unlike other challenges we encounter in the profession, these obstacles are often fought alone.

While the research and statistical data surrounding mental health and addiction specific to our profession is often cited, many times we fall short of sufficiently addressing these challenges. Some may find the discussion uncomfortable and some may find that it hits far too close to home. Despite the reason for not engaging in the conversation, the result remains the same.

Model Rule 1.1 of Professional Conduct charges, in part, that “a lawyer shall provide competent representation to a client....” Traditionally, competence is viewed from the perspective of preparation or legal knowledge. However, we must alter our perception and recognize the impact addiction and mental illness can have on a person and as a result, their practice. Too often, those who most need our help walk their journey alone.

This is not to suggest that every attorney experiencing depression or increased anxiety is potentially incompetent. In reality, the opposite is true. Everyone will experience these situations at some point in life and most are able to address the issues and fulfill their professional responsibilities at the same time. Nor is this to suggest that we must be hyper-focused vigilantes monitoring the mood of our coworkers.

I encourage us all to shift our focus and remember why we entered this profession. We have the obligation to help when we see the need and reach out when we are struggling. Seeking and finding support will make any obstacle easier to conquer. Ensuring we are the best version of ourselves and that we support our colleagues can only enhance our personal practice and enrich our profession.

Tamara Nash is a Special Assistant United States Attorney with the United States Attorney’s Office, District of South Dakota in Sioux Falls, South Dakota. She is also an ABA YLD Scholar.
Hackers Target Law Firms to Gain Insider Information
By Alanna Clair

In late December 2016, the United States Government indicted three Chinese nationals for insider trading based on information the hackers had obtained from law firms via the use of malware. The hackers made approximately $4 million in ill-gotten gains based on the insider corporate information they had stolen from two law firms and allegedly attempted at least 100,000 attacks on five other target law firms in 2015.

This indictment marks a big step by the U.S. Attorney’s Office in pursuing foreign hackers who manipulate the markets based on information gleaned from United States users. For many hackers looking to trade on inside information, law firms are considered the next big target. Law firms routinely maintain highly confidential information on their servers, whether it is draft patent applications, documentation of potential corporate deals, or even social security numbers obtained in a class action or healthcare suit. Law firms, however, do not always maintain the same level of internet security and protocols as do their clients, notwithstanding the ethical obligation to maintain client confidences.

According to the ABA, it is not a question of whether law firms will be hacked, but when. Indeed, in 2015, the ABA estimated that 80% of the 100 largest law firms had suffered a breach of their systems. Therefore, it is critical that law firms take steps to identify and manage the risks associated with cyber security. For many, this will include a review of internal procedures and the development of an “incident response plan,” to be utilized upon a breach or a suspected breach, which will help a firm have a game plan and minimize panic or knee-jerk reactions to a breach. It may involve training employees on recognizing suspicious e-mails, phishing attempts, and malware. It also usually involves basic data protection, such as the mandatory use of passwords on smartphones, tablets, and laptops, and security protocols (such as encryption) for the storage and use of confidential data.

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Investing in Your Client’s Start-Up: What You Need to Know Before You Get in Bed with Business

By Colleen Migl

As any transactional associate at a law firm knows, people get creative when they want to do business. However, what happens when you notice the other side’s lawyer on the list of investors for your client’s deal? At first, you do a double take. Did I read that right? Opposing counsel is investing in this, too? I mean, it is as good of an idea as any, but is that even allowed? How could it possibly be allowed?

Well, the short answer is yes. It is allowed, or better phased – not prohibited. The simple fact is that under the right circumstances, and with the right amount of disclosure, an attorney can grab a bit of the honey pot, too. Therefore, below are the basics of what you need to know before getting too creative with your client. It should be noted, this article is based on the Texas Rules of Professional Conduct. Please check your state’s own rules as they may differ.

So what is so wrong about investing in a client’s business, anyway?

First, investing in a client’s business can be tricky business. Should you and the Client ever have a disagreement, you will be placed in a position of competing interests – your vested economic interest versus what would have been independent professional judgment for the Client. Put simply, a financial stake in a Client’s company can give rise to a conflict of interest under Rule 1.06(b) of the Texas Disciplinary Rules of Conduct. It can additionally be difficult to maintain the fiduciary duty to the Client in this context.

Nevertheless, attorneys for years have been obtaining an interest in a client’s start-up business for a multitude of reasons: 1) the start-up would otherwise not be able to afford the legal services; 2) the existence of the attorney as a member, partner, or stockholder adds legitimacy to the business and can serve a purpose to attract investors; 3) it provides the attorney a competitive edge against another attorney who will only agree to cash payment.

What do I need in order to make this work?

Know that you are not the first, nor will you be the last, to encounter this issue. In fact, the Texas Disciplinary Rules of Professional Conduct (the “Texas Disciplinary Rules”) provides a framework from which an attorney can enter into a business transaction with a client. Rule 1.08(a) of the Texas Disciplinary Rules states the terms of the business transaction must be fair and reasonable to the Client, the terms must be fully disclosed in a manner, which can be reasonably understood by the Client, the Client must have the reasonable opportunity to seek independent counsel, and the Client consents in writing.

The list that follows is by no means exhaustive, but here are some key considerations when investing in a client’s business:

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1 Tex. Disciplinary R. Prof. Conduct R. 1.06(b).
2 Tex. Disciplinary R. Prof. Conduct R. 1.08(a).
1. **Consult the Rules of Professional Conduct for your Jurisdiction.** Your starting point should be to review the Rules of Professional conduct for your jurisdiction. These rules provide intentionally broad guidance in an effort to address as many ethical dilemmas as possible. Certainly, while a business transaction is permissible under Rule 1.08 of the Texas Disciplinary Rules, an attorney must be careful not to violate any of the other rules, including, but not limited to, Rule 1.06, Rule 2.01, and Rule 1.04, which are addressed below.

2. **Be Wary of Conflicts of Interest.** Rule 2.01 states that “In advising or otherwise representing a client, a lawyer shall exercise independent professional judgment and render candid advice.” Where there is a conflict of interest, the attorney is more likely to be impaired in his or her ability to provide independent professional judgment. Note, however, Rule 1.06(c) of the Texas Disciplinary Rules is also at play here: A lawyer may represent a client regardless of Rule 1.06(b) if (1) the lawyer reasonably believes the representation of each client will not be materially affected; and (2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any. For instance, consider whether there is an ongoing relationship versus one-time relationship with the Client. Are you only performing the formation of the entity, or will you provide ongoing legal services? In another scenario, consider a merger or a business acquisition as the business grows. How will the representation during a particular business transaction affect the value of the interest or the relationship with the client generally? Keep in mind circumstances may change. Rule 1.06(e) states that when representation becomes improper, the lawyer shall promptly withdraw to the extent necessary to provide for proper representation under the Rules. The utility of independent counsel in these circumstances cannot be overstated.

3. **Protect the Privilege!** As an attorney forming or representing the interests of the Client, it is almost inevitable that the attorney has in his or her possession confidential information at one point or another. If the attorney then uses the confidential information of the Client or the former Client for the attorney’s betterment, the attorney may then be in violation of the Texas Disciplinary Rules. An attorney with confidential information cannot turn around and use the confidential information to the detriment to the Client without the consent of the client after consultation.3

4. **Bartering is Not Prohibited, but Don’t Seek It Out.** In short, bartering on a one-on-one basis is permitted, and it will not be going anywhere anytime soon. However, pursuant to Ethics Opinion 4354 and Ethics Opinion 410,5 issued under the Texas Code of Professional Responsibility,6 operating within a bartering exchange association is not ethical. The reasoning behind this, among numerous other ethical concerns, is that a bartering exchange association may be used to promote the attorney’s services, and it may be considered the sharing of legal fees, as an association may take a percentage of the purchase paid. Hence, while bartering is permitted, it is best not to be a part of larger bartering arrangement.

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3 Tex. Disciplinary R. Prof. Conduct R. 1.05.
6 The Texas Code of Professional Responsibility was superseded by the Texas Disciplinary Rules.
5. **Do not Be Greedy. Rules Concerning Fee Agreements Still Apply.** Rule 1.04(a) states that the fee agreement must be conscionable. Because the determination of whether a fee agreement is “conscionable” is subject to the interpretation of a trier of fact, attorneys investing in a client's business typically aim for a nominal slice of the pie. This, of course, is done in an attempt to ensure compliance; however, like everything else in life, there no guarantee a nominal slice equates to conscionable. Furthermore, any contingency fee agreement is still subject to Rule 1.08(h) of the Texas Disciplinary Rules.\(^7\)

6. **Is it Worth the Risk? Perform Additional Research.** We are lawyers. Performing due diligence is in our nature. Besides ensuring the investment is a good business decision, reading over the American Bar Association's Standing Committee on Ethics and Professional Responsibility's Formal Opinion 00-418, which is based on the *Model Rules of Professional Conduct*, is helpful to those in Texas who are looking for how same or similar language has been interpreted in an ethical context.\(^9\)

The Model Rules of Professional Conduct, like the Texas Disciplinary Rules of Professional Conduct, do not prohibit a lawyer from obtaining an ownership interest in a client’s business, either in lieu of a fee for providing legal services or as an investment opportunity, so long as the lawyer complies with Rule 1.8(a), Rule 1.5, Rule 1.7(b), and Rule 2.1 of the Model Rules, which follow a similar general framework for this issue as the Texas Disciplinary Rules by requiring a fair and reasonable fee, a full disclosure by the attorney, a reasonable opportunity for the client to consult with independent counsel, and of course, the client’s consent in writing.

Finally, while most people are not a fan of “hotlines,” the State Bar of Texas provides an excellent resource known as the “Ethics Hotline for Lawyers.” If reading ethics rules gives you a headache or makes you sleepy, the ethics hotline is just a phone call away. Note this hotline is not confidential, and the advice is not binding, but they can point you in the right direction.

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\(^7\) Tex. Disciplinary R. Prof. Conduct R. 1.04(a)
\(^8\) Tex. Disciplinary R. Prof. Conduct R. 1.08(h).
Challenges to the Adoption of New ABA Model Rule of Professional Conduct 8.4(g)
By Karuna Davé

In 2016 the ABA Standing Committee on Ethics and Professional Responsibility revised Rule 8.4(g) of the Model Rules of Professional Conduct to add language that engaging in “conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law” constitutes an ethical violation. Prior to that amendment, twenty-five jurisdictions had already included anti-discrimination and/or language prohibiting harassment to their respective Rules of Professional Conduct. Thirteen jurisdictions addressed the issues of discrimination or harassment in the comments to their Rules of Professional Conduct.

The revision has drawn criticism as states consider whether to adopt the new model rule. The generally stated reason why states are resisting the adoption of this new rule is concerns that the number of ethics complaints will increase. However, the states that adopted similar rules prior to the revision to Model Rule 8.4(g), do not report an associated increase in ethical complaints.

A new basis for opposing the language of revised Model Rule 8.4(g) has been raised in Texas. In a December 20, 2016 opinion, the Attorney General of Texas, Ken Paxton, is objecting to the rule on constitutional grounds. Paxton argued that Model Rule 8.4(g) is in violation of the First Amendment because the rule “would severely restrict attorneys’ ability to engage in meaningful debate on a range of important social and political issues,” and impinge upon attorneys’ ability to represent interests based on sincerely-held religious belief, or regarding social issues like sexual orientation and gender identity. Paxton also challenges Model Rule 8.4(g) on grounds of vagueness and overbreadth and concludes the adoption of the model rule would violate the Constitution.

It is unclear how restricting Model Rule 8.4(g) would be in practice. The comments to amended subsection (g) explain that knowledge is required; comment four defines “conduct related to the practice of law,” with a specific exclusion for conduct undertaken for promoting diversity. Rule 2.3 of the Model Code of Judicial Conduct has encompassed similar language guarding against bias and discrimination since 2007.

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NEWS AND ANNOUNCEMENTS >>

ABA Standing Committee on Lawyers’ Professional Liability and Long & Levit LLP Ed Mendrazycki Essay Contest

Entry deadline: March 3, 2017
Award: $5,000 cash prize and an all-expense-paid trip to the Spring 2017 National Legal Malpractice Conference in Boston, MA, April 19-21, 2017

The legal writing contest, open to only law students and young lawyers who are members of the American Bar Association, encourages innovative and original research and writing on issues in lawyers’ professional liability. Visit http://ambar.org/LPLEssayContest for entry information and rules.

2017-2018 YLD Scholarships

YLD scholarship application process opened on January 1. Please spread the word to interested young lawyers and invite them to apply. The YLD Scholarship program provides partial conference funding, publishing opportunities, and special assignments to Division boards, teams, and committees. Scholarship categories include Solo, Small Firm, and General Practice Division (GPSolo), Government, Public Sector and Military Lawyers, and Minorities in the Profession. Deadline for applications is April 15.

If you or your affiliate is interested in participating, please contact logan.murphy@hwhlaw.com no later than 7 days before the Conference.

ABA Everyday Initiative

The ABA Everyday Initiative provides daily podcasts, publications, webinars, CLEs, and other resources. Check out the calendar here: http://www.abaeveryday.org

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We are accepting articles for publication in our quarterly newsletter on an on-going basis on a wide variety of topics and subject matters. It is an easy way to get your work published and build up your reputation. Please submit submissions or inquiries to Melissa Lessell, Newsletter Editor, mlessell@deutschkerrigan.com.