Hot Issues in Ethics

Friday, February 1, 2019 | 11:00 am to 12:00 pm &
Saturday, February 2, 2019 | 8:30 am to 9:00 am

Program Description
We will discuss current developments in client confidentiality and the attorney-client privilege; issues that can arise when lawyers make public statements, including through social media; challenges when lawyers travel internationally; the duty to inform clients of lawyer mistakes; and the disciplining and sanctioning of lawyers for “uncivil” behavior.

Lead Facilitator
Bruce Johnson, Davis Wright Tremaine | Seattle, WA

Facilitators
- Susan Grogan Faller, Frost Brown Todd | Cincinnati, OH
- Jan L. Jacobowitz, Director Professional Responsibility and Ethics Program & Lecturer in Law | University of Miami School of Law
- Lyrissa Lidsky, Dean and Judge C.A. Leedy Professor of Law | University of Missouri School of Law
- Ashley Messenger, National Public Radio | Washington, D.C.

Program Materials
Selected Recent Legal Ethics Developments
The following is a summary of some recent legal ethics developments and other current ethics topics which may be of interest to attendees at the Forum Annual Meeting.

Advertising and Solicitation

There have been significant recent developments concerning state restrictions on lawyer advertising and solicitation.

In 2015, the Association of Professional Responsibility Lawyers (“APRL”) proposed major reforms in the ABA Model Rules eliminating many restrictions on lawyer advertising. APRL had established a committee in 2013 to study the various approaches to regulating lawyer advertising throughout the United States and to recommend changes to address practical and constitutional deficiencies in the current Model Rules and to bring rationality and uniformity into regulating lawyer advertising. First Amendment concerns were also triggered by state overregulation.

APRL gathered empirical data through a survey of state regulators regarding the consequences of over-regulation and low level enforcement of complex and inconsistent regulations. In June 2015, APRL issued a report (http://aprl.net/wp-
of its findings, recommending a single rule patterned on Model Rule 8.4(c) that prohibits false and deceptive advertising and standardizing non-disciplinary responses to common lawyer advertising complaints. In May 2016, APRL issued a report recommending a separate rule regulating solicitation patterned on Model Rules 7.2 and 7.3.

The APRL proposals were designed to facilitate access to justice by permitting lawyers to provide consumers with accurate information about the availability and affordability of legal services, as well as the value added of having legal services provided by lawyers. Among the deficiencies in the current regulatory system, APRL noted, were the following:

- Conflicting state advertising regulations create a significant barrier to providing consumers with accurate information about legal services and unreasonably impede innovation in marketing and delivering legal services.

- Survey results show that complaints about lawyer advertising are rare; those who complain are predominantly other lawyers and not consumers; the majority of complaints are handled informally, even when there is a provable advertising rule violation; most cases in which discipline has been imposed involve conduct that constitutes a violation of Rule 8.4(c).

- There is a lack of empirical data showing a correlation between the proliferation of lawyer advertising regulations and those regulations actually protecting the public from consumer harm.

- The trend has been towards greater regulation in an effort to respond to lawyer advertising in the electronic age; however, the increasing
array of inconsistent and divergent state rules have failed to accommodate evolving technology and innovations in the web-based delivery and marketing of legal services and the use of mobile technology.

- Restrictions on accurate information about legal services, imposed by competing lawyers and law firms that function as part of the regulatory governing body, restrain trade and hinder the public's access to useful information, and may run afoul of antitrust laws.

Addressing the breadth and inconsistency of state advertising restrictions, APRL's proposed solution was very simple: Condense the ABA Model Rules governing lawyer advertising and solicitation into two practical rules:

- First, Proposed Rule 7.1 retains the standard of prohibiting false and misleading communications in Model Rule 7.1. Rules 7.2, 7.4, and 7.5 have been merged into the comments in Rule 7.1 to provide guidance to practitioners on appropriate communication under the “false and misleading” standard.

- Second, Proposed Rule 7.2 provides a more straightforward and clear statement of the protections in Model Rules 7.2 and 7.3. The Rule defines prohibited solicitation and regulates certain direct and targeted contact with prospective clients while maintaining the legitimate policy objectives of both rules.

- Also, Proposed Rule 7.2 combines the solicitation provisions of Model Rule 7.3 with the provision in Model Rule 7.2(b) of refraining from giving something of value because both provisions involve the solicitation of prospective clients. The Rule carries forward Model Rules 7.2(b) and 7.3(d)
without substantive change. The comments to the Rule are derived from the comments to Model Rules 7.2 and 7.3.

Beginning with Virginia in April 2017 and Oregon in January 2018, state regulators began embracing the APRL reforms. The Washington Supreme Court has proposed the adoption of the APRL revisions, and has distributed its proposed rules changes for public comment. Other states are likely to follow in the wake of these pioneering changes.

Indeed, in response to the APRL developments, the American Bar Association (“ABA”) Standing Committee on Ethics and Professional Responsibility began an evaluation process relating to the APRL advertising and solicitation proposals, which resulted in an August 2018 vote by the House of Delegates to revise the Model Rules. These ABA revisions adopt the APRL proposal that permits lawyer advertising unless it is false or misleading, and the APRL proposal that eliminates restrictions on lawyer solicitations that are directed to “sophisticated consumers of legal services.”

These changes also reflect a recognition that modern digital media have transformed the legal marketplace. Gone are antiquated references to “advertising” via “written, recorded or electronic communication” in favor of a more broadly worded right of attorneys to “communicate information regarding the lawyer’s services through any media.” Also, under the new Model Rules, attorneys are allowed to call themselves “specialists” and can discuss their specialties unless the statements are false and misleading.

**California**

California has finally joined the rest of the United States by adopting the ABA Model Rules. The process had dragged on for many years, but on May 10, 2018, the
California Supreme Court issued an administrative order adopting the rules, with an effective date of November 1, 2018.

And a copy of the new California ethics rules is available here:


Civility

Lawyer civility continues to be a nagging problem for the legal profession. Over many years, courts have reputedly confronted the lawyer-as-jerk problem and have imposed sanctions. A classic case is *Eggleston v. Chicago Journeyman Plumbers*, 657 F.2d 890 (7th Cir. 1981), which deals with offensive questioning about racial ancestry at a deposition.

Another case of interest is *Matter of Kinney*, (2014), 5 Cal State Bar Court Rptr 360, 2014 WL 7046611, where the State Bar Court cited with approval, a judge’s label of a lawyer as a “relentless bully.” He had pursued numerous meritless lawsuits at trial and on appeal and was labeled a vexatious litigant. Notable for this syllabus was the inclusion of “unmeritorious motions” and “tactics that were frivolous or intended to cause unnecessary delay.” See also, *In Re Kinney*, (2012) 201 Cal App 4th 951.

Other civility cases confirm the basic premise, that lawyer sanctions are merited for egregious misconduct. See, e.g., *In re White*, 707 S.E.2d 411 (S.C. 2011) (calling opposing parties a bunch of soulless, brainless, pigheaded pagans); *In Kim v. Westmoore Partners*, (2011) 201 Cal.App.4th 267, 294 (attorney sanctioned $10,000 for lying, bullying, and indicating he will continue the behavior; he falsely accused the opposing counsel of misconduct, then accused the court of error when told he might be sanctioned for the conduct); *Russell v Douvan*, (2003) 112 Cal App 4th 399
(single incident of one attorney grabbing another attorney not adequate grounds for an anti-harassment injunction, since the conduct was isolated, and the evidence indicated that no future contact between the two was likely); United States v. Wunsch, 84 F. 3rd 1110 (9th Cir. 1996) (while declaring the former disciplinary offense of “offensive personality” unconstitutional, the court distinguished prior cases in which sexist comments affected the administration of justice, were made in front of witnesses, other counsel, and court reporter, and thus reversed a sanction award); Lebbos v State Bar, (1991) 53 Cal. 3d 37 (Santa Clara County attorney was disbarred for a veritable smorgasbord of unethical deeds, and several counts of discipline were upheld because she made false, disparaging, comments about a judge in open court); Matter of Disciplinary Proceedings Against Beaver, 181 Wis. 2d 12, 510 N.W.2d 129 (1994) (the court found “offensive personality” worthy of discipline to exist when an attorney threatened to kill an adverse party and smashed his tractor into that party’s vehicle).

Many disciplinary cases feature older male lawyers repeatedly harassing women lawyers. See, e.g., Principe v. Assay Partners, 154 Misc.2d 742, 586 N.Y.S.2d 182 (N.Y. Sup. Ct. 1992) (“As documented on the transcript of the deposition, Mr. Clarke directed to his colleague the following comments: ‘I don’t have to talk to you, little lady’; ‘Tell that little mouse over there to pipe down’; ‘What do you know, young girl’; ‘Be quiet, little girl’; ‘Go away, little girl.’ Ms. Rex states these comments ‘were accompanied by disparaging gestures * * * dismissively flicking his fingers and waving a back hand at me.’ The transcript contains the remarks and an attorney for another party corroborates the description of the gestures. The affidavit in opposition justifies the comments as ‘name-calling’

Not surprisingly, in recent years, regulating the civility problem has focused on harassment related to lawyer sexism and racism. Thus, ABA Model Rule 8.4(g), adopted in 2016, states that it is “professional misconduct for a lawyer to … engage in conduct that the lawyer knows or reasonably should know is harassment or
discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.”

There is significant resistance to Model Rule 8.4(g). Thus far, only Vermont has adopted the reform. Some states, such as Washington, have created their own versions of Rule 8.4(g), stating that it is professional misconduct to “commit a discriminatory act prohibited by state law on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, honorably discharged veteran or military status, or marital status, where the act of discrimination is committed in connection with the lawyer's professional activities. In addition, it is professional misconduct to commit a discriminatory act on the basis of sexual orientation if such an act would violate this Rule when committed on the basis of sex, race, age, creed, religion, color, national origin, disability, honorably discharged veteran or military status or marital status.”

Several states (Arizona, Idaho, Nevada, South Carolina, and Tennessee) have rejected the proposed Model Rule 8.4(g).

Confidentiality and Privilege

In recent years, American courts have advanced and protected attorney-client privilege with consistent rulings appropriately protecting attorneys’ rights and duties of confidentiality. But, in 2016, there were two state court rulings that deviated from prior case law and significantly limited the scope of privilege protections. Currently, these two holdings are likely outliers, but if adopted by other courts could result in unexpected and dangerous privilege restrictions.

First, in June 2016, New York’s highest court eliminated the common interest privilege except in circumstances where there is litigation or the prospect of litigation.
In *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 57 N.E.3d 30 (2016), the court ruled that the common interest doctrine applies only where shared information relates to the parties’ legal interest in a pending or threatened litigation.

Ambac Assurance Corp. (“Ambac”) issued insurance policies to Countrywide Home Loans, Inc. (“Countrywide”), which guaranteed payments on certain residential mortgage-backed securities. As a result of the collapse in home prices that accompanied the global financial crisis, Countrywide called upon Ambac to make payment under the policies. Ambac then brought an action against Countrywide, alleging that Countrywide had misrepresented the quality of the underlying loans to induce Ambac to issue the insurance policies.

Ambac also named Bank of America (“BofA”) as a defendant, arguing that, because of a 2008 merger between BofA and Countrywide, BofA was responsible for Countrywide’s liabilities. During discovery, BofA withheld from Ambac several hundred relevant documents based on an assertion of privilege. Those documents had been exchanged between BofA and Countrywide pursuant to the terms of the merger agreement but before the merger was closed.

In a split ruling rejecting the common interest privilege, the Court of Appeals distinguished between parties that share a common interest in a litigation and those that share a common interest in the commercial context. The majority explained that “[w]hen two or more parties are engaged in or reasonably anticipate litigation in which they share a common legal interest, the threat of mandatory disclosure may chill the parties’ exchange of privileged information,” and, therefore, application of the common interest exception in that situation “promotes candor that may otherwise have been inhibited.” The majority held that “[t]he same cannot be said of clients who share a common legal interest in a commercial transaction or other common problem
but do not reasonably anticipate litigation.” The majority stressed that it saw no harm caused by the pending-or-threatened litigation requirement:

In short, we do not perceive a need to extend the common interest doctrine to communications made in the absence of pending or anticipated litigation, and any benefits that may attend such an expansion of the doctrine are outweighed by the substantial loss of relevant evidence, as well as the potential for abuse. The difficulty of defining “common legal interests” outside the context of litigation could result in the loss of evidence of a wide range of communications between parties who assert common legal interests but who really have only nonlegal or exclusively business interests to protect. Even advocates of a more expansive approach admit that “in a non-litigation setting the danger is greater that the underlying communication will be for a commercial purpose rather than for securing legal advice”.

Ambac’s pending-or-threatened litigation requirement narrows the availability of this important privilege protection, at least in New York. For media lawyers, this decision could affect important legal tasks, such as vetting, which involve multiple contributors with common interests and are most efficiently handled with a common interest agreement.

Second, in October 2016, the Washington State Supreme Court (in a 5-4 decision) ruled that the attorney-client privilege does not shield post-employment communications between corporate counsel and the corporation’s former employees. In *Newman v. Highland School District No. 203*, 186 Wash.2d 769, 381 P.3d 1188 (2016), the majority concluded that because the former employee no longer has an ongoing principal-agent relationship with the corporation, communications between former employees and corporate counsel are freely discoverable and not shielded by privilege.

The case arose out of a head injury sustained by Matthew Newman in 2009 when he was a student at Highland High School. Newman (and his parents) sued the district for negligence because the coaches employed by Highland permitted Newman
to play in a game after he exhibited symptoms of a concussion. Before trial, Highland’s counsel represented former employee coaches at depositions. Newman then sought discovery concerning communications between Highland’s counsel and former employee coaches.

The Washington Supreme Court acknowledged that it had previously adopted the flexible test for determining the scope of the attorney-client privilege recognized by the leading U.S. Supreme Court case, *Upjohn Co. v. United States*. However, the court noted, *Upjohn* did not expressly answer the question of communications with former employees. This presented a question of first impression in Washington. The court stated:

Today, we reject Highland’s argument that *Upjohn* and *Youngs* support a further extension of the corporate attorney-client privilege to postemployment communications with former employees. The flexible approach articulated in *Upjohn* presupposed attorney-client communications taking place within the corporate employment relationship. *Upjohn*, 449 U.S. at 389, 101 S.Ct. 677 (the purpose of the attorney-client privilege is “to encourage full and frank communication between attorneys and their clients”); see also *Youngs*, 179 Wash.2d at 661, 316 P.3d 1035 (noting corporate employees may sometimes be corporate clients). We decline to expand the privilege to communications outside the employer-employee relationship because former employees categorically differ from current employees with respect to the concerns identified in *Upjohn* and *Youngs*.

Thus, the *Newman* court’s majority emphasized the principal-agent relationship between employers and employees. When the employer-employee relationship ends, this generally terminates the agency relationship as well. As a result, the former employee “can no longer bind the corporation and no longer owes duties of loyalty, obedience, and confidentiality to the corporation.” According to the *Newman* majority, without an ongoing obligation between the former employee and employer giving rise to this principal-agent relationship, “a former employee is no different
from other third-party fact witnesses to a lawsuit who may be freely interviewed by either party.”

Thus, to expand the privilege to former employees would be unjustified, according to the Newman court. The purpose of the attorney-client privilege is to foster full and frank communications between counsel and client, and this purpose is preserved by limiting the scope of the privilege to the duration of the employer-employee relationship. This limitation also preserves the predictability of the privilege in that the attorney and client will be able to predict with some degree of certainty whether particular discussions will be protected. The court, however, also reiterated that any privileged communication between counsel and the former employee before employment ended remains privileged.

Finally, another ethics issue that regularly arises is the risk of privilege waiver involving the use of technology to transmit confidential attorney-client information without taking appropriate safeguards. The most comprehensive discussion of these risks is found in ABA Formal Opinion 11-459 and ABA Formal Opinion 11-460.

**Conflicts of Interest**

Conflicts of interest are addressed by Model Rules 1.7 and 1.9. There have been several interesting developments involving lawyer conflicts.

One topic is joint representation. For example, corporate lawyers sometimes represent corporate executives in court proceedings and depositions. This is an area that may present dangers.

One of the most interesting, significant, and long-running conflict of interest problems grows out of the Penn State University child abuse scandal involving Jerry Sandusky. It arose in 2011, after the Sandusky news broke and several Penn State
officials were subpoenaed to testify to a local grand jury. The resulting ethics scandal has continued into 2018, and likely will persist through 2019.

The most recent development was on October 26, 2018, when a three-person Pennsylvania disciplinary panel rejected disciplinary charges that Cynthia Baldwin, the Penn State general counsel in 2011, failed to tell Penn State’s president (Spanier), vice-president (Curley), and athletic director (Schultz) that she was representing the University and the three officials as “agents of the university,” and not them personally, during their grand jury testimony in the Jerry Sandusky sex abuse scandal. After Sandusky's arrest, she would turn into a star prosecution witness, helping to develop the state's case that Spanier, Curley and Schultz had lied to investigators both about what they knew about 1998 and 2001 allegations against Sandusky, and the actions that they took at that time. Spanier, Curley and Schultz were ultimately charged with perjury, obstruction of justice and other charges as a result.

In a 43-page opinion, the Disciplinary Board of the Supreme Court of Pennsylvania cleared former Penn State general counsel and former Pennsylvania Supreme Court Justice Cynthia Baldwin of any ethics violations in a 43-page opinion finding that she did disclose all relevant conflicts of interest when it came to her representation of Penn State officials during the Jerry Sandusky scandal. The panel wrote that the Office of Disciplinary Counsel had failed to prove Ms. Baldwin committed professional misconduct.

Based on the evidence, the Disciplinary Board found that Baldwin clearly made Spanier, Curley, and Schultz aware of the potential conflict of interest with the University and that all three consented to joint representation. The panel stated: “We find that she investigated and properly disclosed the potential conflict in the interests of the individual employees and PSU and that they effectively consented to a joint representation.”
The Disciplinary Board also said: “While respondent’s failure to clearly advise the individual employees of the limitation she intended to place on her representation of them is inconsistent with her duty to do so under [ethics rules], we do not find that her failure to explain this limitation created a conflict in her de facto representation of them and the university jointly because we find that they were reasonably informed of the nature of a joint representation and they effectively consented to it....” The Disciplinary Board also found that Baldwin did not reveal confidential information during her own grand jury testimony. Here is a copy of the Board’s opinion: https://assets.documentcloud.org/documents/5023558/Baldwin-HC-Report-Public-Version-C1-C3.pdf

Conflict of interest concerns also are triggered when a media entity vets stories about its own operations. Should conflict consents be negotiated for such situations? What obligations do media lawyers (inside and outside counsel) have when addressing such risks?

Data Breaches

On October 17, 2018, the ABA issued Formal Opinion 483, which discusses lawyers’ obligations after an electronic data breach or cyberattack. The ABA ethics opinion states: “When a breach of protected client information is either suspected or detected, Rule 1.1 requires that the lawyer act reasonably and promptly to stop the breach and mitigate damage resulting from the breach. How a lawyer does so in any particular circumstance is beyond the scope of this opinion. As a matter of preparation and best practices, however, lawyers should consider proactively developing an incident response plan with specific plans and procedures for responding to a data breach. The decision whether to adopt a plan, the content of any plan and actions taken to train and prepare for implementation of the plan should be made before a lawyer is swept up in an actual breach.”
Delegation-Supervision

In the Fall of 2017, in connection with the early reporting on the #MeToo movement by *The New Yorker* and *The New York Times*, specifically coverage of allegations of sexual harassment and sexual abuse by Hollywood mogul Harvey Weinstein, we learned that Weinstein’s law firm, Boies, Schiller & Flexner LLP had retained Black Cube, a group of former Israeli spies to assist the firm, according to the contract signed by David Boies, “to completely stop publication of a new negative article in a leading NY newspaper,” apparently a reference to *The New York Times*, which was then one of the firm’s media clients.

The Black Cube project apparently involved deceptive conduct. According to news reports, one Black Cube investigator met with a journalist while posing as a woman who might have an allegation against Weinstein to try to find out which women were coming forward with information. The same investigator also posed as a women’s rights advocate while befriending actress Rose McGowan, who later went public with a rape allegation against Weinstein. Black Cube later gave Weinstein detailed descriptions of a book McGowan was writing titled Brave.

When these activities were revealed by Rowan Farrow’s reporting in *The New Yorker*, ethics commentators suggested that the firm’s Black Cube relationship potentially triggered violations of NYRPC 1.7 (conflicts of interest with current clients); NYRPC 4.1 (“In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.”); NYRPC 5.3 (“law firm shall ensure that the work of nonlawyers who work for the firm is adequately supervised, as appropriate” and managerial lawyers “shall be responsible for conduct of a nonlawyer employed or retained by or associated with the lawyer that would be a violation of these Rules”); and NYRPC 8.4(c) (lawyers shall not “engage in conduct involving dishonesty, fraud, deceit or misrepresentation”).
Mistakes

ABA Formal Opinion 481 (April 17, 2018) discussed lawyer mistakes. “Even the best lawyers may err in the course of clients’ representations. If a lawyer errs and the error is material, the lawyer must inform a current client of the error. Recognizing that errors occur along a continuum, an error is material if a disinterested lawyer would conclude that it is: (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice.”

No similar duty to inform, the ABA commented, existed with regard to mistakes affecting former clients.

Social Media

On March 6, 2018, the ABA issued Formal Opinion 480, entitled “Confidentiality Obligations for Lawyer Blogging and Other Public Commentary.” The ABA opinion states:

Lawyers who communicate about legal topics in public commentary must comply with the Model Rules of Professional Conduct, including the Rules regarding confidentiality of information relating to the representation of a client. A lawyer must maintain the confidentiality of information relating to the representation of a client, unless that client has given informed consent to the disclosure, the disclosure is impliedly authorized to carry out the representation, or the disclosure is permitted by Rule 1.6(b). A lawyer’s public commentary may also implicate the lawyer’s duties under other Rules, including Model Rules 3.5 (Impartiality and Decorum of the Tribunal) and 3.6 (Trial Publicity).

Online public commentary provides a way to share knowledge, opinions, experiences, and news. Many online forms of public commentary offer an interactive comment section, and, as such, are also a form of social media. While technological advances have altered how lawyers communicate, and therefore may raise unexpected practical questions, they do not alter
lawyers’ fundamental ethical obligations when engaging in public commentary.

These risks, moreover, are “not avoided by describing public commentary as a ‘hypothetical’ if there is a reasonable likelihood that a third party may ascertain the identity or situation of the client from the facts set forth in the hypothetical.”

The ABA opinion also discussed First Amendment concerns, especially given that lawyers frequently are asked to comment on client matters of public record:

Here lawyer speech relates to First Amendment speech. Although the First Amendment to the United States Constitution guarantees individuals’ right to free speech, this right is not without bounds. Lawyers’ professional conduct may be constitutionally constrained by various professional regulatory standards as embodied in the Model Rules, or similar state analogs. For example, when a lawyer acts in a representative capacity, courts often conclude that the lawyer’s free speech rights are limited.

From the ABA’s standpoint, ethics duties limited what lawyers can discuss even involving matters of public record, and of public concern:

The plain language of Model Rule 1.6 dictates that information relating to the representation, even information that is provided in a public judicial proceeding, remains protected by Model Rule 1.6(a). A lawyer may not voluntarily disclose such information, unless the lawyer obtains the client’s informed consent, the disclosure is impliedly authorized to carry out the representation, or another exception to the Model Rule applies.

Finally, in another ethics opinion, ABA Formal Opinion 479 (Dec. 15, 2017), the ABA reminded lawyers that, while they can discuss client information that is “generally known,” it is a narrow exception to the lawyer’s duty of confidentiality, stating:

The “generally known” exception to the duty of former-client confidentiality is limited. It applies (1) only to the use, and not the disclosure or revelation, of former-client information; and (2) only if the information has become (a) widely recognized by members
of the public in the relevant geographic area; or (b) widely recognized in the former client’s industry, profession, or trade. Information is not “generally known” simply because it has been discussed in open court, or is available in court records, in libraries, or in other public repositories of information.