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## Conference Report

### *Confidentiality*

#### **Ethics Conference Speakers Warn Lawyers: Technological Ignorance Has Consequences**

**A**ttendees at the 41st ABA National Conference on Professional Responsibility could have been forgiven for thinking they mistakenly registered for a symposium on technology, rather than a forum on broader developments in legal ethics, bar regulation, law firm management and malpractice risks.

Technology issues dominated discussions at five of the 13 panels at the conference, held in Denver May 28-29.

Experts have long predicted that technology would change legal practice. Several speakers expressed a clear view on that issue: the future is now.

Panelists at one session warned about malpractice risks that arise when lawyers fail to understand how social media use can impact clients' cases.

Another panel featured law firms' general counsel with conflicting views on the advisability of allowing firm employees to use personal mobile devices as work tools.

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**“Failure to understand how social media can impact clients' cases could lead to serious damage to a case which might result in a malpractice complaint.”**

JENNIFER ELLIS  
LOWENTHAL & ABRAMS

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Risks to confidentiality—the primary reason for opposition to “bring your own device” policies—were also a recurring concern for speakers on other panels.

A discussion on recent developments in confidentiality featured one speaker who highlighted a pendulum-swinging trend among ethics committees that are revisiting the question of whether lawyers should be required to use encryption when e-mailing clients.

Another expert gave a detailed presentation on Federal Rule of Evidence 502(d), which allows litigation adversaries to enter into court-enforced agreements that

provide for the return of privileged materials unintentionally disclosed in responding to discovery requests for electronically stored information (ESI).

Technology also was a key topic at a panel featuring executives from three new—and reportedly profitable—companies that have leveraged technology to carve out slices of the legal services marketplace. (See 31 Law. Man. Prof. Conduct 327.)

**Lawyers Can't Be Luddites.** In 2012, the ABA amended Model Rule 1.1 (competence) by adopting Comment [8], which states that lawyers must keep pace with technological changes to meet their duty of competence to clients.

The new comment may have been the most frequently cited provision at the conference, whose attendees included bar officials, law firm general counsel, legal ethics consultants and lawyers who defend malpractice and attorney discipline cases.

Charles H. Gardner, a California lawyer and media executive who moderated a panel on “Social Media Policies and Procedures in the Firm Setting,” cited a 2011 case in which a Maryland court declared: “It should now be a matter of professional competence for attorneys to take the time to investigate social networking sites.”

That admonition was seconded by panelist Jennifer Ellis, who defends malpractice and attorney discipline cases for Philadelphia-based Lowenthal & Abrams P.C.

“Failure to understand how social media can impact clients' cases could lead to serious damage to a case which might result in a malpractice complaint,” Ellis wrote in materials prepared for the conference.

**Internet Sleuthing.** Ellis and another Philadelphia panelist—Thomas G. Wilkinson Jr. of Cozen O'Connor—said bar authorities in their home state have taken leading roles in applying the duty of technological competence to specific questions such as whether lawyers may advise clients to remove potentially damaging evidence from social media websites.

The emerging consensus, Ellis said, is that a lawyer can and should counsel clients to purge potentially damaging evidence from the Internet—so long as the lawyer also takes steps to preserve any information that may prove relevant and discoverable.

“Don't destroy the evidence; it's really as simple as that,” Ellis said, citing Philadelphia Ethics Op. 2014-5, 30 Law. Man. Prof. Conduct 468 (2014), and Pennsylvania Formal Ethics Op. 2014-300, 30 Law. Man. Prof. Conduct 620 (2014).

Wilkinson said lawyers should ensure that “a full forensic image” is taken of a website before deletions occur. “Don't just hand that obligation over to your cli-

ent,” he added. “Document each step of that process and the advice you give [to the client].”

Conversely, the panelists stressed the importance of using the Internet to investigate litigation opponents—and of developing sound procedures for authenticating evidence gathered from online profiles.

Ellis said she videotapes herself and provides a running commentary of what she is doing when gathering online material. Such measures are important because social media companies rarely comply with discovery requests and won’t help with authentication, she told attendees.

**B.Y.O.D.** A program titled “Bring Your Own Device” featured speakers who expressed conflicting views on the advisability of allowing law firm employees to use personal mobile devices as work tools.

Gerald J. Ferguson, a partner at BakerHostetler in New York, said the so-called BYOD movement is “here to stay” because clients “expect us to be available 24 hours a day.”

Steven Puiszis, deputy general counsel at Hinshaw & Culbertson LLP in Chicago, agreed that the BYOD trend is irreversible. Given that fact, he said, law firms must develop written policies identifying the risks of BYOD. “And there are many of them,” Puiszis said.

The panelists concurred that the primary risks are data breaches that expose confidential information. They said such breaches can result from lost or stolen devices, storing data with cloud computing vendors that are unable to provide robust security, the use of unencrypted connections at coffee shops and targeted hacking that involves the use of “ransomware.”

Puiszis said law firms can navigate those risks confidently if they develop BYOD policies that include training employees on “computer hygiene” and the implementation of a rapidly deployable “incident response plan” when a device is lost or compromised.

Puiszis said an effective incident response plan should include protocols that allow a firm to remotely “shut down” a device that has been lost or compromised, and erase all data from it.

But Puiszis stressed the importance of disclosing the necessity of that procedure before allowing employees to use personal devices for work purposes. Otherwise, he said, a law firm may need an employee’s consent to wipe a “dual-use” device. If consent is not obtained, Puiszis added, the firm “could be buying [a] claim under the Computer Fraud and Abuse Act.”

The possibility of incurring liability to employees as a result of such security measures was one of several reasons that panelist Michael J. McGuire counseled against BYOD policies.

McGuire, a partner and chief information security officer at Littler Mendelson P.C. in Minneapolis, advised firms to instead adopt a “Corporate Owned, Personally Enabled” (COPE) policy for mobile devices.

That approach, he said, gives a law firm more control over employee-used devices and more flexibility to take security measures when a device has been compromised.

While BYOD policies may limit firms’ capital outlays by passing the costs of devices and calling plans to employees, McGuire said, firms must consider various hidden expenses—such as the possibility that departing employees will store proprietary information on dual-use devices, triggering disputes that may require foren-

sic examinations and litigation. “It’s a lot cheaper to just buy them a new device,” McGuire said.

**Emerging Confidentiality Issues.** University of Georgia law professor Lonnie T. Brown said the consensus on communicating with clients through unencrypted e-mail—driven by a 1999 ABA ethics opinion that approved the practice—may be giving way as authorities reconsider the risks of e-mail interception.

Speaking at a session on developments in confidentiality, Brown said “we have come a long way in [the] 16 years” since the ABA opinion was issued, and that a number of state ethics panels have shown a willingness to impose more onerous security requirements on lawyers.

Brown cited California Formal Ethics Op. 2010-179, 27 Law. Man. Prof. Conduct 15 (2010), which identified six factors to consider when determining whether ethics rules prohibit the use of a particular form of technology to store or transmit client information.

The panel also touched on Federal Rule of Evidence 502(d), which Chicago-based Jenner & Block partner David M. Greenwald described as an underused tool for preventing the inadvertent waiver of attorney-client privilege and work product protections.

The rule, which went into effect in 2008, allows parties in litigation to enter into agreements that provide for the return of privileged materials accidentally disclosed in response to requests for electronically stored information.

Greenwald said Rule 502(d) can help “avoid costly litigation” because it authorizes a court to enter litigants’ predetermined agreements, including any “clawback” provisions, into the docket as an order.

BY SAMSON HABTE

### Private Firm

## **Performing a Law Firm Ethics Audit: Practical Tips From Those Who Do It**

**W**hether termed an “audit,” a “review” or “proactive management-based regulation,” the process of gathering, sorting through and discussing a law firm’s policies, procedures, claims, complaints and results is a time-consuming but valuable exercise that can help a firm improve not only its practice but even its lawyers’ lives, speakers said May 29 at the 41st ABA National Conference on Professional Responsibility in Denver.

Moderator Susan Saab Fortney asked the panelists, who hailed from diverse backgrounds, to describe their respective roles in helping law firms implement and improve their procedures and reduce their exposure to claims and complaints.

Fortney is a professor of law and directs the Institute for the Study of Legal Ethics at the Maurice Deane School of Law at Hofstra University.

**The Insurer.** Panelist Robert L. Denby, a senior vice president for loss prevention at Attorneys’ Liability Assurance Society Inc., said his company performs reviews of its insured law firms—more than 200 of them—about every five years, with the goal of reducing malpractice claims. Each review, he said, is a “huge undertaking, both for us and the firms.”

Data collection and review, Denby said, are the first steps in a law firm review. Before meeting with members of an insured law firm, he said, his team at ALAS assembles and reviews in detail all of the firm's policies and procedures. For some firms, he said, it's a "small stack" but for others it fills "several large binders." The team also collects the firm's claim history for the last five years or so with the aim of identifying recurrent issues and problems to discuss.

Denby emphasized that his goal is "to look for identifiable trends, not to rehash old wounds." For example, he said, a review might reveal that a firm has a problem with its procedures for checking conflicts, "or the Miami group has a disproportionate number of claims filed against it, or the IP group has a docketing problem."

After performing this preliminary review at ALAS offices, Denby's team travels to the law firm to spend about a day and a half meeting with firm personnel.

First on the meetings list, he said, are the firm general counsel, staff in charge of the new business intake system, the head of data security and those responsible for managing firm records. "We go through a lot of minutiae with them. We talk about how they handle their systems and problems," he stated.

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**"We do a tremendous amount of internal auditing."**

MARTIN I. KAMINSKY  
GREENBERG TRAURIG

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Finally, he said, the ALAS team meets with the firm's practice group leaders or management committee to review the insurer's findings and recommendations for improvement.

Denby said ALAS has "only limited power" to impose its recommendations, but the insurer will follow up its review by contacting its insured law firms "to see how they're doing."

**The General Counsel.** Martin I. Kaminsky, general counsel of Greenberg Traurig in New York, described what he does as his firm's general counsel to help it implement and maintain good practices.

"We do a tremendous amount of internal auditing," Kaminsky said. "When I started, Greenberg was having a lot of claims. We wanted to turn that around."

To do so, Kaminsky said, "First we reviewed all the claims we had" to determine what sort of matters were causing problems. Then, he said, he and other members of firm management met with Greenberg's practice group heads and asked them what they were happy or unhappy with.

Kaminsky emphasized the need for firm management to have personal contact "with the people who are doing the work for the firm." He said he visits at least one of the firm's offices every month to meet confidentially with the practice group heads and managing shareholders.

Additionally, Kaminsky said he conducts education and training sessions for the firm and invites other lawyers to do so.

Kaminsky also described systems of checks and balances within his firm to ensure adherence to firm policies and good practices.

"We have a group of full-time internal auditors" that include staff with experience at large accounting firms who perform forensic audits, he said. "They look to see whether people are signing engagement letters" and examine firm lawyers' billing practices.

In addition, he said, each of Greenberg's offices has designated members responsible for reporting "issues of cultural conduct" that may or may not constitute ethics breaches.

"When we see people handling things in a way that we don't want the firm to be acting, we address it," Kaminsky said. He said his firm is continually reviewing its own internal practices and activities. "It just doesn't stop and has shown great success for us," he told the audience.

**The Disciplinary Official.** Lisa Villarreal-Rios, special programs coordinator in the Office of the Chief Disciplinary Counsel for the Texas State Bar, said her office offers ethics audit programs as a diversion from formal discipline for lawyers who have engaged in minor misconduct.

Likening such audits to the need for regular physical exercise to maintain good health, she asked "Do you want to review your practice, or do you want it to fail?"

She said the ethics audits she conducts for lawyers are a series of opportunities both for her office and for the lawyers diverted to her program.

For lawyers, she said, they are an opportunity "to stop and think about what's working and what's not working" in their law practices and "what's working but could be improved."

For the state bar, she said, the audits are an opportunity to educate lawyers about law practice and management issues that they may never have learned about, as well as an opportunity "to normalize mental health and impairment issues" and intervene, if necessary, before they have an adverse impact on a lawyer's practice.

Because "everything impacts and relates" to everything else, she said, the profession is best served by a "holistic approach."

Villarreal-Rios said most lawyers get to her program because of misconduct involving communication or neglect, either of which may have been anomalous or may pervade their practices.

Through telephone and e-mail Villarreal-Rios consults with the lawyers, beginning by discussing why they're in the diversion program.

After discussing those circumstances, she said, "I run down a list of law practice management topics with the attorney" and discuss solutions to their problems. "I inundate them with resources" on practice management topics including business plans and contingency planning, she said.

Ethics lapses and substance abuse may be "deeply intertwined," Villarreal-Rios noted. She said she works closely with Texas's lawyer assistance program to make referrals, sometimes anonymously "for those who are super-resistant" so that the LAP program initiates the contact.

Villarreal-Rios said back-and-forth communication with the lawyer being audited "solidifies" the program. Lawyers participate in the program for six months, and

62 lawyers completed the program in the most recent year for which statistics are available, she said.

Pointing to a lawyer self-audit checklist prepared by the Washington State Bar Association in the program materials (see [http://www.wsba.org/~media/Files/Resources\\_Services/LOMAP/Self-Audit%20Checklist.ashx](http://www.wsba.org/~media/Files/Resources_Services/LOMAP/Self-Audit%20Checklist.ashx)), Villarreal-Rios said she anticipates requiring or encouraging a similar written submission from the lawyers in her program in the near future. An ethics audit, she said, benefits lawyers as an effective means to “get an honest, thorough, global picture of your practice.”

**Guidance From Down Under.** Fortney commented that law firm ethics audits may be viewed as a step toward “proactive management-based regulation of lawyers,” which the Australian state New South Wales embraced when it recently revamped its system of lawyer regulation. (See 25 Law. Man. Prof. Conduct 300.)

Fortney told the audience that when the NSW government approved legislation permitting unrestricted nonlawyer ownership of law firms, it included a provision requiring law firms to put into place “appropriate management systems” as a way to address ethics concerns.

Because the legislation did not define that term, Fortney said stakeholders including bar regulators, insurers and law society leaders in New South Wales worked together to provide guidance to practitioners and developed 10 objectives of good law firm management practices.

Those objectives, Fortney said, now assist lawyers in developing good firm management systems. (Fortney’s article, *Promoting Public Protection Through an “Attorney Integrity” System: Lessons From the Australian Experience With Proactive Regulation of Lawyers*, 2015 Prof. Law., no. 1 (2015), was included in the conference materials.)

The NSW regulatory regime now requires a solo lawyer or designated law firm member to complete a form that requires the lawyer to rate the firm’s compliance with each of 10 objectives on a scale ranging from “noncompliant” to “compliant plus.”

If a rating is less than compliant, Fortney said, a regulator will work with the firm to help it achieve compliance. Lawyers who may not have realized what was expected of them now “get guidance from the regulator to get [their] house in order,” she said.

Fortney said study results of proactive regulation have been “very impressive.” Law firms that conducted self-assessments, she said, saw complaints against them reduced by two-thirds.

Fortney said she herself conducted a study to examine the reasons for the diminished complaint numbers and learned that the process resulted in firms’ not only reviewing their current practices but also making improvements in their management. See Fortney & Gordon, *Adopting Law Firm Management System to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation*, 10 U. St. Thomas L.J., no. 1 (2013), available at <http://ir.stthomas.edu/ustlj/vol10/iss1/4>.

For example, she said, 50 percent of law firms ranging from large firms to “two-solicitor firms” stated they had adopted new procedures as a result of going through the self-assessment process and said they believed their new systems had an impact on both their

firm management and on their malpractice exposure. “Even the ones who went through it kicking and screaming indicated it was worthwhile,” she stated.

Fortney said the proactive regulatory system of New South Wales gives meaning to “ethical infrastructure” for large and small and solo firms alike. As a result of NSW’s positive experience, she said, the model has caught on in other states within Australia and is being closely examined in other world jurisdictions, including Canadian provinces such as Nova Scotia and some jurisdictions in the U.S.

**Universal Approach?** An audience member asked whether adoption of a regulatory model similar to New South Wales’s would be welcomed in the United States.

Denby said he’s “agnostic” on whether U.S. jurisdictions should do so. “I would worry that we would run into a situation where Nebraska says you have to do X and Ohio says you can’t do X.”

He opined that the model “might have a lot of value” for small or solo law firms but would impose “a layer of complexity that would not add much value” for large firms.

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### Gauging an audit’s success is “tricky, because you’re measuring the claims that didn’t come.”

ROBERT L. DENBY  
ATTORNEYS’ LIABILITY ASSURANCE SOCIETY

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Kaminsky said he believes regulators should recognize “the problems of small and solo practitioners are very different” from those of large firms. “We don’t need somebody to tell us” what policies should be changed, he said.

But Fortney commented “The standards in New South Wales are very general” and are minimum standards. “They recognize that one size does not fit all.” The NSW system is “not a matter of micromanaging how you handle particular matters,” she said.

**Proving Value.** Are ethics audits worth it? Fortney asked. “How do you measure it?”

Gauging the success of a review is “tricky,” Denby said, “because you’re measuring the claims that didn’t come.”

But he noted that over ALAS’s 35-year history, most claims filed were based on conflicts of interest and “unworthy” clients. After helping insured law firms revise their conflicts checking and new business intake procedures, he said, ALAS has seen a decline in the percentages of claims arising from those problems. “We still have them, but we are seeing that they arise later, after the representation is in progress.”

Kaminsky said his audits at Greenberg Traurig have helped the firm bring in excellent clients as well as excellent lateral hires. And, he said, audits have “helped our lawyers feel good about their firm because they don’t get problems.”

Furthermore, he said, investing the time and money necessary to develop and maintain good ethical systems “does turn into money, because if you’re facing lots of difficulties you’re going to have to spend money to defend them and make changes.”

“Our recidivism rate appears very low,” Villarreal-Rios said of the lawyers who go through her office’s ethics audits.

When a lawyer who has engaged in the diversion program does backslide, she said, the result has generally been “low-level discipline,” including private reprimands.

“Enforcement is essential,” Kaminsky added. “Sometimes we have to ask big producers to leave.” Support from firm top management is also critical to success, he said.

“There’s an interesting tension between education and helping people improve and enforcement,” Fortney remarked. “Lawyers want to be able to be candid and share their concerns without fear that the regulator will then pounce on them.” She asked the panelists to comment on that issue.

“We don’t keep highly detailed records summarizing what was said to whom and when,” Denby said. “Our general view is the risk of discovering the ethics audit and having the lawyer cross-examined about not implementing a recommendation is worth taking.”

Kaminsky said “We encourage associates not to be afraid to come to me. We don’t reveal who associates are when they come to us.”

Villarreal-Rios said she tells lawyers up front that in spite of her dual credentials (she’s also a licensed social worker) she isn’t their therapist and that they should “be mindful about what you tell me.”

She said that her agency’s records are subject to public information statutes if they are requested in discovery but that they would defend them as confidential under HIPAA and other statutes.

**Good Night.** Fortney asked the panelists for their parting thoughts.

“There is real value to having an outsider involved” in an ethics audit, Denby said. Law firms need to know what their problem trends are and what to do to address and arrest them.

By going through ethics audits, Kaminsky said, “You will help your clients. You will act appropriately with them.”

Villarreal-Rios urged that ethics audits include mental health and impairment issues, which are “so often intertwined with law office management issues.” She said she would like to see regulators “become even more proactive in our approach” so that issues can be addressed before problems arise.

Fortney said proactive ethical regulation “can also help with quality of life for lawyers. It helps you sleep at night.”

BY HELEN W. GUNNARSSON

## *Obligations to Third Persons*

### **Speakers Clash on Whether Rules Forbid Or Should Forbid Secrecy in Settlements**

**T**he professional conduct rule against inducing witness noncooperation makes it unethical for lawyers to propose or go along with settlement agreements that keep clients and their counsel from sharing relevant information with other claimants, according to University of Connecticut law professor Jon Bauer.

Speaking May 29 in Denver at the 41st ABA National Conference on Professional Responsibility, Bauer highlighted a recent Kentucky disciplinary case and several ethics opinions that have applied Rule of Professional Conduct 3.4(f) in this way.

Bauer’s objections to secrecy in settlement agreements were shared by a public interest lawyer on the panel, Leslie A. Bailey, who argued that, as a matter of public policy, ethics rules governing lawyers should prevent secrecy in any cases involving ongoing public harm.

Bailey advocates for public access to court records as a staff attorney with Public Justice P.C. in Oakland, Cal.

But fellow panelist Craig Singer denied that Rule 3.4(f) prohibits confidentiality agreements in settling civil cases.

Confidentiality provisions don’t violate the rules as written, and the rules should not be rewritten to make these agreements unethical, he told attendees. Singer is a partner in Williams & Connolly LLP, Washington, D.C.

**‘Secrecy’ and ‘Confidentiality.’** The discussion focused on whether a lawyer may ethically propose or accept a broad secrecy provision, such as blanket confidentiality clauses that bar any discussion of underlying facts without exception for disclosures of relevant information to other claimants.

In kicking off the panel, moderator Alice Neece Mine, assistant executive director of the North Carolina State Bar, asked the speakers to imagine a plaintiff in a tort action who signs a settlement agreement that includes a confidentiality provision prohibiting both the plaintiff and her attorney from voluntarily disclosing the terms of the settlement to similarly situated claimants. The provision also prohibits the lawyer and client from disclosing evidence they learned in the case and requires them to return all documents.

Mine said that although lawyers routinely accept confidentiality clauses, there are policy arguments for and against them. Confidentiality allows clients to maximize settlement and promotes clients’ interest in protecting their reputations, but secrecy can undermine the justice system and lead to suppression of evidence that could prevent injuries, she said.

The differing views of these agreements are reflected in the names lawyers use for them, Mine noted. Some lawyers call them “confidentiality agreements,” she said, while detractors label them “secrecy agreements.”

**Access to Evidence for Other Claimants.** Bauer said ethics rules provide important tools for the many plaintiffs’ lawyers who oppose secret settlements. Secrecy provisions covering the facts of the underlying disputes are not necessarily unethical, but they need to carve out an exception for sharing relevant information with other claimants, he said.

In particular, Rule 3.4(f) forbids a lawyer to “request a person other than a client to refrain from voluntarily giving relevant information to another party.” The rule allows such a request if the person is the client’s relative, employee or other agent and if the person’s interests will not be harmed by going along with the request. California and New York don’t have this rule, Bauer noted.

There is no exception in the rule for clauses made in settlements, Bauer noted. Several ethics opinions and a

recent Kentucky disciplinary case recognize that the rule applies to settlements, he said. (See box.)

The key question, Bauer said, is what “another party” in Rule 3.4(f) means. If that phrase is read narrowly to mean just the parties in the particular case, the rule doesn’t mean much, he stated.

The word “party” often has a much broader meaning in other usage, such as “aggrieved party” or “a party to an agreement,” Bauer said.

He said “another party” should be construed in that broader way to mean anyone with a current or future legal claim. This interpretation furthers the purpose of the rule, which is to ensure that evidence is marshaled competitively for proper functioning of the adversary system, he said.

Ethics opinions from Indiana and Chicago have read the rule this way, Bauer said.

Bauer also said if a defense lawyer violates Rule 3.4(f) by asking for a confidentiality clause, it’s likewise unethical for that attorney to agree to one under Rule 8.4(a), which forbids a lawyer to knowingly assist another lawyer in violating the rules.

**Other Relevant Rules.** Bauer said he believes a confidentiality clause that shuts off other claimants’ access to evidence may also violate the prohibition in Rule 8.4(d) against conduct prejudicial to the administration of justice.

When secrecy agreements have been challenged, he said, many courts have held them invalid as undermining the system of justice. Therefore, he said, “it’s not a stretch to say these kinds of clauses violate Rule 8.4(d).”

Bauer also pointed out that some terms in a secrecy agreement may violate Rule 5.6(b), which disallows restrictions on a lawyer’s right to practice as part of the settlement of a client controversy. According to most ethics opinions on the issue, he said, a clause that prohibits lawyers from using information in a subsequent representation violates that aspect of Rule 5.6.

(For example, ABA Formal Ethics Op. 00-417, 16 Law. Man. Prof. Conduct 264 (2000), advised that Model Rule 5.6(b) forbids lawyers to negotiate settlement agreements that restrict their use of client information in future representations. However, the opinion gave the opposite advice about agreements not to reveal information acquired in the course of representing a client. Nondisclosure is what the Model Rules require anyway absent client consent, the ABA ethics committee pointed out.)

The most controversial application of Rule 5.6(b), Bauer said, involves clauses that prohibit lawyers from publicizing information relating to the case or disparaging the defendant.

Along these lines, a District of Columbia ethics opinion warned that a settlement agreement may not compel counsel to keep confidential and not disclose in promotional materials or on law firm websites public information about the case, such as the name of the opponent, the allegations set forth in the complaint on file or the fact that the case has settled. District of Columbia Ethics Op. 335, 22 Law. Man. Prof. Conduct 540 (2006).

Most people agree, Bauer said, that keeping the terms of settlement secret is not unethical. The amount of a settlement is not even discoverable in other cases, so it shouldn’t be covered by Rule 3.4(f), he said.

**Public Health and Safety.** To drive home her arguments against secrecy agreements, Bailey described the plight of Montana father Rich Barber, whose son was killed by a gun that fired without the trigger being pulled. Bailey said Barber knew nothing about the rifle’s defect because the manufacturer had been able to seal the records in a key case that had settled years before that.

The case was difficult to find in court records because it was listed only as *Sealed v. Sealed*, but Public Justice ultimately succeeded in getting the records unsealed, Bailey said.

### Resources on Ethics of Settlement Clauses That Clamp Down on Disclosure to Others

*Applying Rule 3.4(f) to confidentiality provisions that prohibit disclosure to others as part of settlement:*

► *Ky. Bar Ass’n v. Unnamed Attorney*, 2013 BL 352410, 414 S.W.3d 412, 30 Law. Man. Prof. Conduct 53 (Ky. 2013) (attorney privately reprimanded for violating Rule 3.4(f) by demanding silence from disciplinary grievant as part of settlement).

► *Indiana Ethics Op. 1 of 2014*, 30 Law. Man. Prof. Conduct 676 (lawyer’s agreement to nondisparagement clause in settlement of client’s civil case violates Rule 3.4(f) if it would prevent lawyer from voluntarily giving evidence to someone investigating or litigating claim or defense; lawyer

may make such agreement only if it is limited to lawyer’s public statements made other than in course of client advocacy, e.g., advertising and promotional materials).

► *Chicago Informal Ethics Op. 2012-10 (2013)* (settlement clause forbidding all disclosures concerning claims made in case and information obtained in discovery, unless under court order, violates Rule 3.4(f)).

► *Connecticut Informal Ethics Op. 2011-1 (2011)* (settlement confidentiality provision that prohibits plaintiff from discussing facts and circumstances giving rise to her claim violates Rule 3.4(f)).

*Other sources:*

► Patrick Malone & Jon Bauer, *When Secret Settlements Are Unethical* (2010, 2015), available at <http://bit.ly/1EOC6YN>.

► Jon Bauer, *Buying Witness Silence: Evidence-Suppressing Settlements and Lawyers’ Ethics*, 87 Or. L. Rev. 480. (2008).

► Written testimony by Public Justice attorney Leslie Bailey on the Sunshine in Litigation Act, available at <http://publicjustice.net/sites/default/files/downloads/Bailey-Testimony-on-Sunshine-Litigation-6-04-09.pdf>

► Susan P. Koniak, *Are Agreements to Keep Secret Information Learned in Discovery Legal, Illegal, or Something in Between?*, 30 Hofstra L. Rev. 783 (2002).

Bailey told the audience defendants use secrecy to keep information about ongoing harm out of the public eye, yet “there’s no one standing up against secrecy” in most civil cases.

Plaintiffs’ lawyers often agree to secrecy out of perceived necessity and the desire to get the best possible settlement, and judges aren’t used to second-guessing parties if lawyers come to them with an agreed order, Bailey said. Lots of settlements don’t even have to be approved by the court, she noted.

**Not Traditionally Viewed as Unethical.** Offering a counterweight to the other panelists’ views, Singer said he suspects law firm general counsel would be surprised to hear that confidentiality agreements are even potentially outside the realm of ethical conduct.

These agreements have not traditionally been understood as unethical, Singer said. “They don’t violate the rules as currently written,” and lawyers would do their clients “a great disservice” to construe the rules this way without an explicit rule on point, he said.

The real question, Singer said, is whether the rules should be rewritten to make confidentiality agreements unethical. “My answer is no,” he said.

Most lawyers and most courts understand that confidentiality agreements are proper, Singer said. While there are instances where corporations have misbehaved and tried to conceal negative information, the vast majority of confidential settlements are not aimed at concealing wrongdoing, he said. A civil case is principally a dispute between private parties, not a basis to open the vast amount of private information produced in discovery to public scrutiny, Singer argued.

Settlement is generally viewed as a good thing, and courts favor it, Singer pointed out. If confidentiality agreements are prohibited, he said, defendants will be less likely to settle and will pay less to get out. More cases will be settled before a complaint is even filed, so the public will get even less information about the issue, and defendants will try to keep cases out of court by going to arbitration, he predicted.

But Bailey disputed what she called “the sky is falling” argument that defendants won’t settle without confidentiality agreements.

For years the federal court in South Carolina has had a rule in place that forbids sealing of settlements filed with the court, yet the former chief judge who came up with the rule says that settlements have not decreased as a result, she said.

**Are Lawyers on Notice?** Mine raised the issue of notice if lawyers are accused of violating Rule 3.4(f) by proposing or accepting confidentiality agreements. Are lawyers aware that some agreements may violate Rule 3.4(f)?

Bauer said the notice issue is more relevant to the question of sanction than how to read the rule in the first place. He pointed out that in *Ky. Bar Ass’n v. Unnamed Attorney*, 2013 BL 352410, 414 S.W.3d 412, 30 Law. Man. Prof. Conduct 53 (Ky. 2013), a lawyer was found to have violated Rule 3.4(f) by requesting that a person settling a dispute with another lawyer not disclose information to the disciplinary board investigating the other lawyer. (The court found that a private reprimand was appropriate because “undoubtedly many attorneys may engage in similar conduct outside the disciplinary context.”)

When Mine pointed out that the Kentucky case involved a request for noncooperation in a pending disciplinary case rather than a demand for nondisclosure to future claimants, Bauer observed that ethics opinions from Indiana and Chicago have read Rule 3.4(f) as extending to future parties.

Singer disputed the fairness of disciplining lawyers for confidentiality agreements.

“I shouldn’t be reprimanded if I advise the client to enter into a settlement that everyone agrees is okay,” he said. If that’s going to change, lawyers should be on notice beforehand rather than being branded as unethical, he said.

**Does Rule Even Apply?** Speaking from the audience, Washington, D.C., attorney Arthur D. Burger pointed out that Rule 3.4’s title is “Fairness to Opposing Party and Counsel.” In light of that, he asked, is it wrong for a lawyer representing a defendant to tell the client that Rule 3.4(f) is limited to opposing parties?

“I can’t duck the fact that there is an ambiguity in the rule,” but the better interpretation is to read it broadly, Bauer said. The rule ought to be clarified, he said, by changing “another party” to another “person,” as the ABA did with Model Rule 4.2 on ex parte contacts with represented persons.

Another audience member, UC Hastings law professor Richard Zitrin, said he agreed with Singer that Rule 3.4(f) does not affect the issue of secret settlements.

Zitrin described himself as the principal drafter of the Sunshine in Litigation Act pending in Congress. He spearheaded an unsuccessful effort to get the ABA Commission on Ethics 2000 to add a new rule that would prompt lawyers to “just say no” to secret settlements that hide information from the public about substantial dangers to health or safety. See 17 Law. Man. Prof. Conduct 140.

However, Zitrin challenged the idea that discovery is a private process. Years ago everything produced in discovery was filed with the courts, and nothing secretizes discovery itself, he said.

Singer denied contending that everything in discovery should be made confidential. But ordinary civil cases should not be used as a remedy for large public problems, he argued.

Also speaking from the audience, Oregon attorney Peter R. Jarvis said that the issue of confidentiality in settlements is separate from Rule 3.4(f).

Ethics rules must be clear and direct if they forbid lawyers to say something to clients, he said. As a general proposition, Jarvis said, lawyers are always entitled under Rule 1.2 to tell clients what the law is.

Jarvis pointed out that if private parties get together and reach a confidentiality agreement, that’s lawful. If so, he said, by what right do we say that clients are now prevented from making a confidentiality agreement because they were dumb enough to speak with lawyers?

**Disclosure of Wrongdoing.** Singer pointed out that if a client is engaged in an ongoing crime or fraud and someone’s life or health is at risk, most states require or at least permit the client’s lawyer to disclose that information under Rule 1.6. This exception to confidentiality can also apply to financial fraud, he noted. Moreover, if the lawyer is assisting a crime or fraud, “you don’t even need the ethics rules to go after that,” he said.

Bailey apparently didn’t believe the rule on confidentiality goes far enough to protect public health and

safety. Rule 1.6 wouldn't necessarily help bring the client's wrongdoing to light because it says "may" and doesn't require the lawyer to reveal anything, she said.

Jarvis said Washington state has changed its Rule 1.6 to mandate disclosure for clear public health and safety problems and, he said, Rule 4.1(b) requires disclosure if silence will assist the client in crime or fraud.

BY JOAN C. ROGERS

## *Private Firm*

### **Panel on Legal Industry Disrupters Spotlights Venture-Backed Firms With Varied Ambitions**

**V**enture capitalist Jason Mendelson has a message for lawyers who handle employment disputes and divorce cases: Watch your back.

Mendelson invests in technology startups, and he is convinced that Modria Inc.—an online dispute resolution (ODR) company launched in 2012 with \$1.25 million in seed money—will emerge as a low-cost alternative for companies and individuals who want to avoid litigation.

Mendelson was one of three executives who spoke May 28 about companies that are disrupting the legal services industry. The discussion took place at the 41st ABA National Conference on Professional Responsibility in Denver.

Mendelson said he believes "the justice system of the future will look more like ODR than courts," and that companies such as Modria—which created software for online platforms eBay and PayPal use to resolve customer complaints—will displace lawyers who handle disputes that are amenable to mediated resolutions.

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**"If I were an employment lawyer, I'd be pretty afraid of Modria."**

JASON MENDELSON  
VENTURE CAPITALIST

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The other executives on the panel—Rocket Lawyer general counsel Alon Rotem and Counsel on Call founder Jane H. Allen—delivered less combative messages, describing their venture capital-backed companies as entities that fill unmet market needs rather than displace practicing attorneys.

**New Frontier.** Moderator Lucian Pera, a partner at Adams and Reese LLP in Memphis, Tenn., focused his introductory remarks on what he described as the rapid fermentation in the legal services market.

Pera said the previous decade will be seen as "the greatest period of change in the legal services industry since the late 19th and early 20th centuries," which saw the creation of the modern law school, the proliferation of organized bars and the adoption of an ethics code.

That sentiment was echoed by panelist William Henderson, a professor at Indiana University's Maurer School of Law.

Henderson said an industry that once functioned as an "artisan guild" controlled by attorneys has ex-

panded to include several categories of new market entrants that provide "systematized" or "commoditized" services that can be produced more rapidly or more cheaply because of technological advances.

**Different Models.** The panelists highlighted key differences between the business models of Modria, Rocket Lawyer and Counsel on Call.

The most salient distinctions, they said, stem from the extent to which the companies view themselves as direct competitors of attorneys and law firms.

Mendelson, who sits on Modria's board of directors, made no bones about the fact that his company does, in fact, want to displace lawyers.

Mendelson said the software Modria designed to help online retailers settle consumer complaints can be used to target bigger-ticket disagreements.

He pointed to Modria's recent partnership with Dutch authorities who commissioned the company to develop an end-to-end mediation platform that will be used to resolve divorce cases in the Netherlands.

On this side of the Atlantic, he said, Modria recently created an online "resolution center" for the Ohio Board of Tax Appeals. Mendelson said the interface Modria built for the Ohio BTA is now used to resolve "100 percent" of tax appeals "without human interaction."

And he told the audience that Modria is hoping to deepen its penetration of the U.S. legal services market. According to Mendelson, the company believes ODR-inspired methods can be adapted to resolve disputes that are currently adjudicated in court. "If I were an employment lawyer, I'd be pretty afraid of Modria," he said.

**Partners, Not Competitors.** Rotem, by contrast, pushed back against the notion that Rocket Lawyer siphons business opportunities from practicing attorneys.

Rotem said his company—which provides lower-cost online legal services to individuals and small to medium businesses—targets two types of consumers: individuals who would not otherwise retain an attorney, and lawyers who buy Rocket Lawyer's customized documents and use them to service clients.

Rotem said Rocket Lawyer is not just addressing an "access to justice" problem by providing "do-it-yourselfers" with affordable services. It's also "creating new markets," he said, by supplying attorneys with tools that make their jobs easier and by connecting individuals with legal needs with lawyers who can fill them.

**Revolutionizing Temp Market.** Counsel on Call, the oldest entity represented on the panel, was also the venture with the least controversial business model.

Allen, who founded the company in 2000, said it offers large law firms and corporations the opportunity to reduce payroll expenses by hiring experienced lawyers on a temporary basis.

Counsel on Call employs hundreds of lawyers with top-notch credentials who "wanted a different type of career," Allen said.

The company's competitive advantage, she said, derives in part from proprietary databases and software that drive efficiencies and allow its lawyers to cut the time and costs of the transactional and litigation work they perform for clients.

Henderson said that approximately “50 or 60 general counsel control about 10 percent of the spend” on legal services in the country. One measure of Counsel on Call’s success, he said, is the fact that it received a nearly perfect satisfaction score from general counsel at Fortune 500 companies who responded to a survey about legal service vendors.

BY SAMSON HABTE

## *Conflicts of Interest*

### **Speakers Hash Over Common Problems That Haunt Lawyers in Joint Representation**

**I**n common scenarios where lawyers often represent multiple clients in a matter, conflicts of interest can arise like zombies and spawn ghastly complications along the way.

With careful planning lawyers can do their best to lay the groundwork for problem-free representation of joint clients, but sometimes it’s best to just say no, according to speakers at the 41st ABA National Conference on Professional Responsibility in Denver.

In a May 28 program on what’s “old” and what’s “new” in conflicts of interest, ethics experts shared their views on joint representation by discussing three hypothetical situations in which lawyers are often asked to represent multiple clients.

Seattle attorney and moderator Arthur J. Lachman said representation of multiple clients in a single matter is “the most significant issue from a liability standpoint in our practices.”

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#### **Representation of multiple clients in a single matter is “the most significant issue from a liability standpoint in our practices.”**

ARTHUR J. LACHMAN  
PANEL MODERATOR

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University of Toledo law professor Susan R. Martyn also sounded a note of caution. Huge issues can arise in joint representation if things mutate and don’t develop as we expect, she said.

**Ancient Duty, New Road Map.** Martyn said what’s “old” in this field is the concept of fiduciary duty. Conflicts rules for lawyers stem from 19th-century agency law, which in turn can be traced back to medieval and even biblical times, she said.

The basic idea is that when an advocate undertakes someone’s business, he has to be loyal to the client. “It seems to be the slipperiest and most difficult rule to enunciate,” Martyn said.

What’s “new,” Martyn said, is the framework in ABA Model Rule of Professional Conduct 1.7 for analyzing conflicts. Comment [2] to Rule 1.7, she said, provides a “road map” for analyzing conflicts of interest. The comment indicates that a lawyer must:

- clearly identify the client or clients;

- determine whether a conflict of interest exists; if it does,

- decide whether the conflict is consentable; and, if it is,

- consult with the clients affected and obtain their informed consent, confirmed in writing.

The road map helps lawyers avoid the blindness that might otherwise afflict them when it comes to conflicts of interest, Martyn said.

The first step—and a crucial one—is identifying the client, Martyn noted.

Another important step is determining “consentability,” which Martyn said “is intended as a speed bump” for the lawyer contemplating whether to take on the representation. The question is whether it’s possible to provide diligent and competent representation despite the conflict, she said.

Other comments to Rule 1.7 discuss multiple representation in litigation (Comments [23]-[25]) and in transactional matters (Comments [26]-[28]), and address “special considerations in common representation (Comments [29]-[33]).

**Corporate Client + Constituents.** In one of the scenarios speakers discussed, a corporation asks outside counsel to represent three defendants in a former employee’s suit alleging hostile environment and retaliation: the company, the sales manager accused of sexually harassing the plaintiff and a top executive in the human relations department.

None of the speakers expressed doubt that this situation would present a conflict of interest. Panelist Marcy G. Glenn said that, when it came to settlement discussions, divergent interests may present a material limitation conflict. And if the prospective clients have divergent interests at the outset in a litigation matter, that conflict is not even consentable, she said. Glenn is a partner of Holland & Hart in Denver.

Martyn pointed out that in an article on conflicts waivers, the authors said the best definition of “materiality” is when a lawyer believes the client won’t agree if certain risks are disclosed. See Peter Jarvis, Allison M. Rhodes & Calon Russell, “Clearly Enforceable Future Conflicts Waivers, 30 Law. Man. Prof. Conduct 692.

Lachman asked panelist Douglas R. Richmond how to draw the line in a proposed multiple representation between aligned interests and a material limitation conflict.

“I don’t know,” Richmond declared. “The problem with experience is that you never get it until right after you need it,” he joked. Richmond is a managing director of Aon Professional Services in Chicago.

**‘Things May Go South.’** On a more serious note, Richmond said a lawyer considering joint representation needs to question the prospective clients at the outset. “One thing you can’t do is to accept at face value that everyone’s interests are aligned,” he said.

According to Richmond, the attorney needs to keep in mind that “things may go south later.” For example, he said, the alleged harasser in the hypothetical might later confide that “I didn’t retaliate but I did walk by her desk and lick her neck.”

Richmond said that it’s hard for people to believe a colleague may have made some bad judgments, and it’s easy for the defendants to say the allegations are merit-

less. But “I’ve tried a number of meritless cases to judgment and lost them, and had the judgment affirmed on appeal,” he noted.

If the lawyer is going to accept the joint representation, Richmond said, think about confidentiality between the co-clients, and create an exception that anything one client says can be shared with the other. The lawyer also should get a conflict waiver that would allow her to stay in for one client and not for the other. “You have to look down the road,” he said.

Richmond said that in the hypothetical under discussion, there was no possibility he would represent both the company and the harasser. I would sell that decision, he said, by saying I don’t know what’s going to come out.

“If it costs me the representation, that’s why God invented Scotch,” he said.

**Information-Sharing.** Lachman asked whether the lawyer, having embarked on the joint representation, would have to keep quiet if the alleged harasser confides that his memory has been jogged and he now remembers that he “may have done some things that other people could misinterpret.”

In electronic audience polling, a few members of the audience answered unconditionally that the lawyer could disclose this new information to the other clients, with a larger number saying absolutely not. About half of those responding found disclosure permissible if the clients had given advance consent to the conflict or information-sharing.

Martyn described the default rule for this problem as follows: The duty of confidentiality in Rule 1.6 trumps the duty to communicate information under Rule 1.4, subject to your jurisdiction’s version of the exceptions in Rule 1.6.

A valuable case on this subject, she said, is *A. v. B.*, 726 A.2d 924, 15 Law. Man. Prof. Conduct 155 (N.J. 1999). The decision cites opinions from Florida and New York, she said.

Lachman noted that according to Section 60 of the *Restatement (Third) of the Law Governing Lawyers* (2000), disclosure is permitted. But the authorities aren’t uniform on this point, he said.

Martyn observed that the Restatement provision addresses the disclosure issue in the context of fraud. Although not articulated in the Restatement, she said, “it comes down to what your Rule 1.6 says.”

Richmond pointed out that the lawyer in the hypothetical doesn’t know yet what the alleged harasser is going to say. For the client’s own benefit, he said, the lawyer has to insist on hearing the details and can’t avoid knowing what the harasser has to say. “There ought to be a rule of evidence that says no bad facts come in,” but that’s not so, he said.

Lawyers need to reach an understanding and get informed consent about confidentiality between the joint clients, Martyn said. Most practicing lawyers prefer an agreement that “anything you say or I learn will be shared,” she stated.

**Staying on for One Client.** Suppose that the two individual defendants in the hypothetical hire new lawyers and move to disqualify the lawyer who had represented them along with the corporate defendant. The individuals acknowledged in the original engagement letters that the lawyer may continue to represent the company

in the event a conflict of interest developed among the jointly represented clients.

Will the court enforce that provision and allow the lawyer to keep representing the corporation? Lachman asked.

In electronic polling of the audience, some said the court would enforce the agreement, while twice as many said it wouldn’t.

Glenn said there’s no right answer without knowing more about the facts and circumstances, such as if the clients were advised to consult independent counsel.

She drew attention to *Zador Corp. v. Kwan*, 37 Cal. Rptr. 2d 754 (Cal. Ct. App. 1995), as a frequently cited case on the issue. The court there enforced a long advance consent, saying it fully specified the risks, including the possibility that the joint clients’ interests would diverge and that the lawyer would not be able to continue the representation.

The more commentary included in an advance consent, the better, “so long as you don’t include the universe,” Glenn said.

Lachman asked Glenn whether this type of consent is an advance waiver under Comment [22] to Rule 1.7, which addresses consent to future conflicts of interest.

Instead, Glenn cited Comment [1] to Rule 1.9, which states that a lawyer who has represented multiple clients in a matter may not represent one against the others after a dispute arises in the matter “unless all affected clients give informed consent.”

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## On the issue of information-sharing in joint representation, “it comes down to what your Rule 1.6 says.”

SUSAN R. MARTYN  
UNIVERSITY OF TOLEDO

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An audience member asked whether it’s risky for the advance consent to specify how the clients’ interests might diverge if the risks described aren’t the problem that actually emerges.

Martyn said that if the lawyer did a good-faith job, a court would be inclined to uphold the agreement. In cases where these clauses have not been enforced, there was very little disclosure, she said.

**Forming Entity With Several Founders.** In another hypothetical, a lawyer’s longtime client wants to launch a business with two other people—a man who will provide sweat equity as the chief executive officer and a woman who owns the patent that’s key to the business plan.

Richmond said he would not handle the matter as counsel for the entity-to-be, as some case law envisions, but instead would represent the longtime client with the other two people as awkward nonclients.

I’d go to these people and say “I’m representing the longtime client and my advice may incidentally benefit you,” he said.

Martyn suggested that if the lawyer goes ahead and represents the three founders, the lawyer becomes the “option giver” and the clients have to be responsible for

discussing the options among themselves and deciding on them.

For example, she said, the lawyer must explain the options of either assigning the patent or licensing it to the business, and the option of having an employment agreement.

Martyn emphasized that the lawyer must review all the options with the affected parties, some of which may favor one client or the other. “You can’t not provide options because they might fight about it,” she said.

She also noted that according to Comments [29] and [32] to Rule 1.7, the lawyer should make clear that he will have to remain impartial and that the clients will have to assume greater responsibility for decisions than when each client has separate counsel.

An audience member said he would steer clear of this joint representation. “I don’t believe you can be a lawyer for the situation,” he said, adding that he’s seen hundreds of cases where this scenario turns into litigation. “The person who gets the short stick will have a great malpractice suit,” he said.

Martyn related that when her nephew was going into business with other young people and they were too broke to hire multiple lawyers, they retained one attorney to set up the business—and now, she said, they’re rich.

“We’re not in a world where everyone has access to lawyers,” she said. Martyn acknowledged, however, that Richmond’s approach is less risky.

**‘Accidental’ Clients.** In a third scenario, the speakers considered a lawyer’s longtime client who wants to buy a shopping mall, with others providing the money. Without getting consent to conflicts presented by the situation, the lawyer drafts a joint venture agreement. The lawyer also frames the venture favorably to the original client, with only the other parties signing personal guarantees for the loan.

This scenario was drawn from *Nelson Bros. Prof'l Real Estate, LLC v. Freeborn & Peters, LLP*, 2014 BL 342848, 773 F.3d 853, 30 Law. Man. Prof. Conduct 774 (7th Cir. 2014), where a jury award of over \$1 million was upheld against a law firm that provided legal services for a longtime client’s joint venture without being equally loyal to all members of the venture.

Martyn suggested the lawyer in the hypothetical may not have recognized that the additional parties were new clients. This is the “accidental client” problem, she said.

The lawyer may not have realized, Martyn said, that as set out in Section 14 of the Restatement, the existence of an attorney-client relationship is determined from the viewpoint of the client.

In his opinion in *Nelson Brothers*, Judge Richard Posner had no trouble concluding that the other parties were the lawyer’s clients too, Martyn noted.

Lachman mentioned another “accidental client” conflicts case, *Yanez v. Plummer*, 2013 BL 306835, 64 Cal. Rptr. 3d 309, 29 Law. Man. Prof. Conduct 741 (Cal. Ct. App. 2013).

In that case, the court held that a former employee deposed in connection with a co-worker’s personal injury suit may pursue claims for malpractice, breach of fiduciary duty and fraud against in-house counsel who failed to disclose the conflict of interest created by his dual representation of the employer and the employee.

That case is an example of the many occasions in which litigators representing corporations end up with the company’s employees as clients, Lachman said.

BY JOAN C. ROGERS

*For additional discussion of this topic, see “Conflicts of Interest in Multiple Representation: Part I,” 31 Law. Man. Prof. Conduct 167, and “Conflicts of Interest in Multiple Representation: Part II,” 31 Law. Man. Prof. Conduct 193.*

## Conduct Prejudicial to Justice

### **ABA May Add Ethics Rule Prohibiting Bias Against Certain Groups, Speakers Say**

**A** comment accompanying ABA Model Rule of Professional Conduct 8.4(d), which forbids conduct prejudicial to the administration of justice, indicates that in representing clients lawyers shouldn’t engage in conduct betraying certain types of bias or prejudice. Is it time for the bar group to strengthen that prohibition by moving it up into Rule 8.4 itself, or even creating a standalone standard?

Paula Frederick, general counsel to the Georgia State Bar, chaired an ABA working group that soon will advise the ABA Standing Committee on Ethics and Professionalism on this question.

At a May 29 program during the 41st ABA National Conference on Professional Responsibility in Denver, Frederick led panelists’ discussion on whether a black-letter rule is needed and, if so, what it should say and how it should be enforced—if at all.

**First Things First.** Panelist Natasha Martin, a professor at the University of Seattle School of Law, suggested several questions that should be answered first.

#### **One Model, Not Without Variations**

Comment [3] to ABA Model Rule 8.4 provides:

A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

As with most of the ABA models, some states opted to vary or omit the recommended language of Comment [3] when they embraced the ABA’s recommendations overall. See [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_8\\_4\\_cmt\\_3.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_4_cmt_3.authcheckdam.pdf).

For background on the adoption of Comment [3], see 14 Law. Man. Prof. Conduct 392 (1998).

“What is the problem that the rule is targeting?” Martin asked. She distinguished between discrimination by lawyers in their representation of clients and discrimination in the legal workplace. If a rule prohibiting bias included a lawyer’s personal conduct outside the practice of law, Martin said, it would be difficult for courts and disciplinary officials to determine violations.

Martin said an aspirational rule that would “frame the values of the profession” would itself be valuable and suggested that if such a rule is adopted, comments might “flesh out the concept of what bias is.”

She said many judges take codes of civility seriously, and suggested “Perhaps one of the consequences of adopting a rule like this, whether heavily enforced or not, would be to spur some self-reflection on the part of those in the profession.”

**Mind Games?** Martin’s fellow panelist, Wake Forest University law professor Gregory Parks, zeroed in on the word “knowingly” in Comment [3] to ABA Model Rule 8.4.

Many people of all races, including law students, witnesses, prosecutors, capital defense lawyers and judges harbor biases that manifest themselves in behavior as well as thoughts, he said. Those biases may affect prosecutorial and judicial discretion and even how witnesses remember facts.

But that doesn’t necessarily mean those actors are knowingly engaged in bias, Parks said. “To what extent do we want to sanction people for their thoughts?” he asked. As Frederick later put it, “We can’t look into someone’s mind.”

Still, Parks said he believes a black-letter rule prohibiting bias would announce that the ABA and the legal profession are “egalitarian” and “focused on the good of our community and our clients.”

**National Consensus Lacking.** Panelist Robert Creamer of Cambridge, Mass., who was a member of Frederick’s working group, pointed out that Comment [3] wasn’t added to Rule 8.4 until 1998 and that corresponding state rules are even more recent.

“We don’t really have much experience to know what works. There’s no national consensus,” he said.

Creamer said the working group agreed that any proposed misconduct rule should require a mens rea. Accordingly, he said, the group will recommend that the word “knowingly” from Comment [3] should be retained.

Additionally, he said, the group has retained the exception for “legitimate advocacy” and reached a general consensus that any proposal should include language stating that a lawyer should not engage in prohibited conduct manifesting bias through the acts of another, consistent with the concept expressed in Model Rule 5.1.

**Who Deserves Protection?** Creamer said the group is leaning toward retaining the current list of protected groups in any proposal, although some members expressed concerns about the categories of disability and socioeconomic status. “Socioeconomic status is undefined almost anywhere,” he explained, and there are those who fear it “might be interpreted by some to limit lawyers’ ability to restrict their clientele to those who can pay.”

Additionally, he said, some were concerned about opening the door to an “appearance of impropriety” or “I know it when I see it” standard for discipline.

As to retaining disability in the list of protected categories, Creamer said some members of the working group expressed concern that lawyers might be disciplined for “nonconduct” for failing to make what a disciplinary administrator might deem a reasonable accommodation for a disability.

Creamer said there was a general consensus, however, that gender identity, ethnicity and marital status should be added to the list of protected categories.

BY HELEN W. GUNNARSSON

## Conflicts of Interest

### **Oregon Case Illustrates Complexity Of Taming Aggregate Settlement Bronco**

**L**awyers who enter the rodeo-like arena of nonclass aggregate litigation need to brace for a whole lot of bucking twists and turns on the road to settlement, according to a May 28 panel discussion at the 41st ABA National Conference on Professional Responsibility in Denver.

Lawyers who have counseled attorneys in aggregate litigation explained to attendees the complexity of representing multiple clients in mass tort cases under individual contingent fee agreements rather than in a class action.

As an example of what can get complicated and go wrong, the panelist discussed *In re Gatti*, 2014 BL 232079, 334 P.3d 448, 30 Law. Man. Prof. Conduct 596 (Or. 2014), in which an Oregon lawyer was suspended for violating the rule on aggregate settlements in a group resolution of clergy abuse cases.

**Meaning of ‘Aggregate Settlement.’** In *Gatti* the Oregon Supreme Court adopted the American Law Institute’s definition of “aggregate settlement” in deciding when a lawyer must comply with Rule of Professional Conduct 1.8(g)’s requirements for multiple settlements of that sort. (*See box.*)

The court rejected the lawyer’s argument that Rule 1.8(g) applies only to “all or nothing” settlements in which clients are not free to reject their individual allocation. Instead, it held that the rule on aggregate settlements applies whenever the resolution of individual clients’ claims is interdependent, as set out in Section 316 of the ALI’s *Principles of the Law of Aggregate Litigation* (2009).

In discussing that aspect of *Gatti*, several of the panelists made the point that the term “aggregate settlement” first showed up in 1969 when the ABA adopted the Model Code of Professional Responsibility with a provision on that subject.

An ABA ethics opinion on Rule 1.8(g) spoke of “an aggregate settlement or an aggregated agreement” but did not distinguish between a group settlement of any sort and an aggregate settlement, said speaker Lynn A. Baker, a law professor at the University of Texas.

**ALI Definition—Too Broad?** All the panelists appeared to endorse the first prong of the ALI’s definition of aggregate settlements, which says that a resolution is interdependent (and thus constitutes an aggregate settle-

### What's an 'Aggregate Settlement'?

ABA Model Rule 1.8(g) provides:

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

The American Law Institute adopted this definition in Section 316 of the *Principles of the Law of Aggregate Litigation*, which the ALI approved in 2009:

A non-class aggregate settlement is a settlement of the claims of two or more individual claimants in which the resolution of the claims is interdependent.

Under the ALI definition, the resolution of claims is interdependent if:

(1) the defendant's acceptance of the settlement is contingent upon the acceptance by a number or specified percentage of the claimants or specified dollar amount of claims; or (2) the value of each claimant's claims is not based solely on individual case-by-case facts and negotiations.

ment) when "acceptance of the settlement is contingent upon the acceptance by a number or specified percentage of the claimants or specified dollar amount of claims."

However, they split into two camps on the second prong, which characterizes a settlement as aggregate if "the value of each claimant's claims is not based solely on individual case-by-case facts and negotiations."

Under that prong, speaker Peter R. Jarvis said, settlement of multiple claims against a defendant will always be an aggregate settlement, because the settlement will never be "based solely on individual case-by-case facts and negotiations" as required for a nonaggregate settlement under the ALI definition. Jarvis is a partner in Holland & Knight's Portland, Ore., office.

In a forthcoming article, *Aggregate Settlements: The Road Not to Take*, Jarvis and co-author Trisha M. Rich argue that "the definition of what is an aggregate settlement needs to be pared significantly back from what is stated in *Gatti* and the ALI definition." That definition is overbroad and will harm plaintiffs, they contend.

Baker agreed with Jarvis's criticism of the second prong of the ALI definition, calling it unhelpful and problematic.

Moderating the discussion, Professor Nancy J. Moore of Boston University law school had a different opinion about the ALI definition, saying she finds it helpful.

Moore said the second prong captures what all lawyers should understand—that when you come up with a formula or matrix, taking a group of cases and saying here's how much money is on the table, the plaintiffs' lawyer is inevitably involved in the allocation.

Nine times out of 10, she said, you'll know an aggregate settlement when you see it.

**Scope of Disclosure.** The written materials for the panel included a Maryland appellate case, *Scamardella v. Illiano*, 727 A.2d 421 (Md. Ct. Spec. App. 1999), which held that clients received appropriate disclosure when they agreed to accept the total amount of available insurance in settlement of personal injury claims even though they had not yet decided how to divide the settlement proceeds.

Baker said that for an aggregate settlement, Rule 1.8(g) requires that clients eligible to participate must be informed of (1) the total amount of the settlement; (2) how many clients are going to share in it; (3) who's getting how much; and (4) what the variables of the claim are that produce the individual allocations.

She noted that in the \$4.85 billion nationwide Vioxx settlement in 2007, a calculator at <http://officialvioxxsettlement.com> enabled plaintiffs to type in their injury characteristics and calculate their share. Baker served as ethics counsel for plaintiffs' lawyers in the Vioxx settlement.

Moore said she and Baker were in agreement that in cases involving strangers the plaintiffs' lawyer doesn't have to disclose the clients' names. What's useful for clients in assessing the fairness of the allocation are the characteristics of the claims, she said.

Jarvis balked at categorically saying that disclosure of names is never required. What if clients want additional information about the other claimants? he asked.

**Supermajority Rule.** Another panelist, Arthur D. Burger of Jackson & Campell P.C. in Washington, D.C., pointed out that Rule 1.4 (communication) requires lawyers to provide clients with enough information to make an informed decision about settlement, and Rule 1.7 (conflicts of interest: current clients) obligates lawyers representing multiple clients against a defendant to remain loyal to all of the clients and not favor some over others.

The problem that Rule 1.8(g) creates, Burger said, is not so much that it requires disclosure—a requirement possibly redundant of the lawyer's duty under Rule 1.4—but that it seems to preclude the possibility that clients can agree in advance.

Jarvis mentioned that the ALI Principles propose that a supermajority of clients can agree on an aggregate settlement. He said that's a positive facet of the ALI's approach.

**Withdrawal From Dissenters.** A huge problem in non-class aggregate litigation arises when some clients refuse to accept the proposed settlement. The plaintiffs' lawyers often don't want to continue representing clients who reject the settlement, Moore noted.

Burger observed that according to Comment [29] to Rule 1.7, a lawyer ordinarily is required to withdraw from representing all of the clients if the common representation fails. The plaintiffs' lawyers can never accept a settlement demand to withdraw from representing the dissenters or not represent other clients against the defendant, Burger said.

Jarvis questioned the viability of an "unreasonable financial burden" argument for withdrawing from the dissenters under Rule 1.16. That argument may not fly if counsel has just made a jillion dollars in settling the other cases, he said.

And even if you get out of the dissenters' cases, financial hardship won't be a defense to a breach of contract claim, he added.

Moore discussed the withdrawal issue in a recent article, *Ethical Issues in Mass Tort Plaintiffs' Representation: Beyond the Aggregate Settlement Rule*, 81 *Fordham L. Rev.* 3233 (2013).

In the article, Moore proposed the idea of getting consent at the outset under Rule 1.2(c) to a limited-scope representation in which the attorney and client agree that if there is no longer a sufficiently large group to warrant the costs of the litigation, the attorney will be permitted to withdraw, or the client will pay the necessary expenses to pursue the client's case.

Moore acknowledged in her article that her proposal would prove controversial and, true to that prediction, some eyebrows went up in the program audience when she mentioned the idea.

BY JOAN C. ROGERS

## Judges

### Supreme Court's Judicial Discipline Ruling Sparks Debate on First Amendment's Role

**D**oes the Supreme Court's recent affirmance of a Florida lawyer's public reprimand for signing a fund-raising letter while she was running for judicial office signal a shift in the court's view of First Amendment protection of judicial campaign speech?

According to one prominent attorney who fights restrictions on campaign speech, the answer is: not necessarily.

At the 41st ABA National Conference on Professional Responsibility in Denver, James Bopp Jr., of The Bopp Law Firm in Terre Haute, Ind., said May 29 there are significant differences in the case from Florida—*Williams-Yulee v. Fla. Bar*, 2015 BL 123637, 31 *Law. Man. Prof. Conduct* 256 (U.S. April 29, 2015)—that may explain why the justices didn't see a First Amendment violation as they did in a case Bopp argued, *Republican Party of Minn. v. White*, 536 U.S. 765, 18 *Law. Man. Prof. Conduct* 402 (2002), which struck down restrictions on speech of candidates for elected judicial office.

(Bopp was also lead counsel for the petitioners in *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010), which struck down certain restrictions on corporate participation in elections.)

**Parsing the Language.** Analytically, Bopp said, the big difference is that *Williams-Yulee* recognizes a second compelling interest that would require strict scrutiny of a restriction on judicial speech: judicial integrity.

In *White*, the only interest advanced was impartiality, he said, which the court found to be an insufficient support for the ban on judges announcing their views.

"As litigation goes forward on the multiplicity of canons [in the Code of Judicial Conduct] affecting campaigns by judicial candidates," Bopp said, "one side will say it's under *White*" because what they're doing is tantamount to announcing their views, "and the other side will say it's under *Williams-Yulee* because it's about integrity."

In *Williams-Yulee*, attorney Lanell Williams-Yulee was charged under Florida's Rule of Professional Con-

duct 4-8.2, which requires lawyers to abide by the state's judicial code if they are running for judicial office.

In affirming the state supreme court's decision to discipline Williams-Yulee for violating that rule, the Supreme Court upheld the validity of the Florida judicial code provision that prohibits lawyers running for judicial office from personally asking for campaign contributions.

It rejected Williams-Yulee's argument that the code provision violated her right to freedom of speech. Applying what it described as strict scrutiny, the court held that the provision was narrowly tailored to serve a compelling state interest in preserving the integrity of the judiciary and maintaining the public's confidence in an impartial judiciary.

Bopp said he believes two passages in Chief Justice John Roberts's majority opinion in *Williams-Yulee* actually endorse *White*.

In one passage, Bopp said, Roberts acknowledges that the First Amendment protects the right of judges to speak about their campaigns, and in the other he writes that the CJC canons permit judges to talk about any issue at any time.

"So now we have a unanimous Supreme Court on what was a very contested issue in *White* in 2002 on whether announcing your views is somehow violating your oath," Bopp told the audience.

The majority opinion in *Williams-Yulee* settles another hotly contested issue, Bopp said, by clearly declaring strict scrutiny to be the applicable standard. "We have seven of the nine justices saying that now," he said.

But according to Bopp's fellow panelist Matthew Menendez, although *Williams-Yulee* endorses the strict scrutiny standard there is some question as to whether the court actually applied it. Menendez is counsel for the Brennan Center's Democracy Program, and coordinated the filing of amicus briefs in *Williams-Yulee*.

**'Judicial Integrity.'** Bopp also said readers should scrutinize what the Supreme Court meant when it identified a compelling interest that states have in ensuring the public's confidence in judicial integrity.

"What do you mean by judicial integrity?" he stated. "It's not inherently a phrase people understand. Practically, what is it that you can and cannot do to be someone who has judicial integrity?"

If you look at the CJC canons, Bopp said, "they seem to be talking about personal characteristics—honesty, character, probity. The majority in *Williams-Yulee* had a sense there was something untoward about a judicial candidate asking for contributions, [something] that somehow implies he would give favors to contributors."

Judicial integrity, in Bopp's view, seems to mean character and fitness, which he said are concepts "much different than discussing issues or announcing views."

**Who's Asking?** Moderator and ABA Ethics Counsel Dennis Rendleman asked Menendez if he thinks it's realistic to rely, as Florida law does, on the distinction between the judge and the campaign committee making the actual "ask" for money. "How, going forward, will there be an ability to maintain that distinction?" he said.

Menendez replied that *Williams-Yulee* was not necessarily the best case for the Supreme Court to have taken up to address the issue. But at least for the lawyers and

## How are Federal Judges Disciplined (Other Than by Impeachment)?

Moderator Dennis Rendleman asked Tenth Circuit Judge David Ebel for a primer on the disciplinary process in the federal judicial system.

Ebel listed three major points:

1. Anybody can complain if he/she thinks a federal judge is unethical or incompetent. This applies to bankruptcy judges, magistrates, district court judges and circuit court judges—but not Supreme Court justices, Ebel noted.

Up until a few years ago, Ebel said, every complaint essentially had to do with ethics, but complaints about incompetency have started to come in.

2. There is no standing needed to complain about a federal judge.

3. Complaints are directed to the clerk of the appropriate circuit court of appeals.

Ebel said at the appellate level the chief judge of the relevant circuit reviews every complaint. Most go no further than this, he said, principally for one of two reasons.

First, Ebel said, the disciplinary system does not exist to correct a judge's errors. "A complaint about an error in the law should be raised as part of the appeal process," he stated.

Second, if a complaint is "not capable of [being established by] discovery" it will not go ahead, he said. For example, if the complaint is that a judge is generally nasty, he said, it will not proceed unless the complainant "can come forward with some evidence that we can receive."

The chief judge may also appoint a special committee to investigate the complaint and make recommendations to the judicial council, Ebel said.

The result may be a public or private censure, but, Ebel said, it also may be a decision that cases will not be assigned to the judge in question until certain conditions are met—for example, unless the judge gets medical care.

And if the judge at issue is the chief judge, or has an administra-

tive role, that can be taken away, Ebel said. But "You cannot take all of the judge's docket away because that would be tantamount to impeachment," he added.

The result could also be a recommendation that Congress begin impeachment proceedings. But, Ebel noted, only seven or eight federal judges have ever been impeached.

All proceedings result in written opinions, Ebel said, but he called them "maddeningly obtuse." There will be a public record that the complaint was filed, but the judge's name will not be part of the record. It used to be, Ebel added, that the courts made these opinions available in hardcopy, and only if you physically went to the court. In the Tenth Circuit, his committee has made sure they're now available online. See <http://www.ca10.uscourts.gov/ce/misconduct>.

frequent litigators who are being asked to contribute, he said, it's "more fair if they're dealing with a representative of the judge, not the judge himself."

Rendleman said Justice Anthony Kennedy's dissenting opinion in *Williams-Yulee* seems to rely on the importance of transparency in the "ask." But *Citizens United*, he said, "seems to undercut transparency. . . . Can we still rely on transparency even if there's no direct 'ask'?"

Menendez said that it's "early days yet" and that these compelling state interests "can seem a little inchoate." He said he believes judicial integrity refers to the public's confidence in two different factors: impartiality (no bias) and independence (not being beholden to anyone).

Panelist David Ebel, a senior judge on the U.S. Court of Appeals for the Tenth Circuit, said he believes disclosure won't solve the problem.

With donors using names that invoke truth and justice but don't give specifics, "the public has become desensitized," he said. Ebel has served on the Codes of Ethics Committee for United States Judges and on the Judicial Conference Committee on Judicial Conduct and Disability.

**Recusals.** When it comes to what a judicial candidate can and can't say, Ebel said, "the line-drawing in most of these cases doesn't make a lot of sense."

"If a judge says 'I hate abortion and think it's like murder'" he won't get disqualified, but if a judge says "When an abortion case comes before me I will rule in this way" then he's going to be disqualified, Ebel stated.

"And now *Williams-Yulee* says the judge can't personally call you and ask for money, but if you give" in response to the campaign committee's public solicitation the judge can personally write you a thank-you note. "Who would say there's a difference?" Ebel said.

"The United States Supreme Court," answered Rendleman.

Speaking from the audience, Lucian Pera, who served on the ABA Ethics 2000 Commission, said the ABA's single biggest failure is its inability to come up with any disqualification rules for judges. He said in his home state of Tennessee, "one of our most interesting debates came when we did this." See <http://www.judicialrecusal.com/tennessee/>.

Menendez added that he is troubled that the decision on whether a judge should remove himself or herself from a case is left solely to the discretion of the challenged judge. "It would be much better to have some rules with objective criteria," he said.

"What does make sense," Ebel said, is a bright-line disqualification rule. "And it has to come from the ABA if it's going to come from anybody," he added.

By ELIZABETH J. COHEN

## Supervisory and Subordinate Lawyers

### History Helps Explain How Lawyers Can Be Pressured to Act Irresponsibly

**B**oth historical examples and behavioral studies illuminate how perfectly ordinary lawyers can be motivated—or cajoled—to do extraordinarily bad things.

So said speakers during two programs at the 41st ABA National Conference on Professional Responsibility, held in Denver May 28-29.

Andrew Perlman, moderating “Behavioral Legal Ethics,” examined the latest research into how perceptions and behaviors are affected by context and situation.

Perlman, a professor at Suffolk University Law School in Boston who is also its newly named dean, joked that his alternative title was “Why Good Lawyers Do Really Bad Things.”

Perlman first introduced behavioral legal ethics to attendees at the same conference in 2008 at a panel called “Unethical Obedience by Subordinate Lawyers.” See 24 Law. Man. Prof. Conduct 302.

**The Paradigm of Evil.** Lisa Lerman of Catholic University School of Law in Washington, D.C., moderating “Ethics in the Third Reich: A Cautionary Tale for 21st Century Lawyers,” said she was “shocked” to learn that so many of the 15 senior Nazi officials who met to authorize a plan to murder 11 million people were lawyers. Lerman said she could not stop wondering: “Were they monsters? Sociopaths? All of them?”

“Rational deliberation often doesn’t have much to do with our conduct,” answered Lerner’s fellow panelist Stephen L. Pepper of the University of Denver Sturm College of Law.

“If you’re assuming that because you’re a person of good character you’ll be OK ethics-wise, you’re probably mistaken,” Pepper said. The same, he said, goes for analytical ability, which is such an important part of a lawyer’s training: “Most of the time there’s no analysis.”

This is partly because individuals simply don’t perceive the ethical dimension and partly because they are so influenced by the group they are in, especially by the authority figures in that group, Pepper said. “Nobody wants to be the squeaky wheel.”

**Where There’s Smoke. . .** Pepper described an experiment in which the smell of smoke started to fill the testing room. If the subject was alone in the room, 75 percent of the time the subject reacted to the smoke smell. But if there were two other people in the room and—as instructed by the experimenters—they weren’t paying any attention to the smoke smell, only 10 percent of the time did the subject try to do anything. “We flatter ourselves if we assume we’re within the 10 percent,” he told the audience.

“Context can override perception” was how Perlman put it during his session.

Using optical illusions, Perlman showed that sometimes people can only see clearly when the context is removed: a long skinny tabletop and a square tabletop that were actually the same; letters written in apparently different colors that turned out to be the same once the different backgrounds were removed.

“The goal of behavioral legal ethics is to draw the line connecting the two,” he said.

**Mental Shortcuts.** “The heuristics and biases literature of behavioral economics has ended any notion that it is safe to assume that people are rational decision-makers,” according to Perlman’s co-panelist Robert Prentice of the University of Texas, where he is faculty director of the Ethics Unwrapped video series. See <http://ethicsunwrapped.utexas.edu/>.

#### Heard/Used Any of These Lately?

In the programs devoted to behavioral ethics, there was a consensus among the speakers that lawyers are very good at rationalizing. In his written materials, panelist Robert Prentice described scholarship that separates common rationalizations for corrupt behavior into six categories:

1. I’m not responsible (“What can I do? My arm is being twisted.”) The person is consciously doing something unethical, but it is someone else’s fault.
2. It’s not like anyone’s being seriously harmed.
3. They deserved it.
4. Other firms are far worse. Compared to them, we’re almost heroic.
5. I had a higher duty. (“I couldn’t betray the firm; I couldn’t report him and ruin his career; I couldn’t let my family starve.”)
6. After all I’ve done for them, and how badly they’ve treated me, I’m entitled (a/k/a the ledger metaphor, the running scoreboard or the moral equilibrium).

People who keep a running scoreboard, according to Prentice’s materials, are “comparing the kind of person they envision themselves being with their actions. If they do something bad, like tell a little lie, they may look to compensate for that by finding an opportunity, maybe to donate to charity, to put their scoreboard back in equilibrium. On the other hand, if they do something good, their scoreboard is now in surplus and they may give themselves license to fail to live up to their own standards. Moral compensation + moral licensing = moral equilibrium.” Robert A. Prentice, *Moral Equilibrium: Stock Brokers and the Limits of Disclosure*, 2011 Wis. L. Rev. 1059, 1094-1104 (2011).

Prentice’s article, *Behavioral Ethics: Can It Help lawyers (and Others) Be Their Best Selves?*, 29 Notre Dame J.L. Ethics & Pub. Pol’y 35 (2015), was part of the program materials.

Prentice defined biases and heuristics as “mental shortcuts that can systematically cause people to make nonoptimal decisions.”

His first example was undue optimism and overconfidence. Prentice said that every year he asks students taking one of his courses how many of them expect that they will ever get divorced; he said in 30 years he has not seen one student raise a hand.

Similarly, he continued, “most people think they are twice as likely to follow the Ten Commandments as other people are,” and more likely to go to heaven than Mother Teresa.

Fully 80 percent of people consider themselves more ethical than their peers, and half of business people consider themselves “in the top 10 percent morality-wise,” he stated.

The next example Prentice cited was the fundamental attribution error: “He did a bad thing; he must be a bad person. I’m a good person; I would not do that bad thing.”

But in fact, a person’s behavior is far likelier to be the result of situational factors, Prentice said. For example, he said, when people are asked to take self-graded tests, they are more likely to lie about their results if the room is darker.

Prentice explained that situational factors most likely to give the lie to fundamental attribution involve the conformity bias (“We do what people around us do”) and obedience to authority. See “Lawyers, Scientists Explain How Decisions on Behavior Aren’t Always Made Deliberately,” 23 *Law. Man. Prof. Conduct* 307.

**Follow the Leader.** Panelist Catherine Gage O’Grady said she believes new lawyers are particularly influenced by organizational culture. “They have taken the oath [as lawyers], but at the same time they often work within entrenched hierarchies that make them employees,” said O’Grady, of the Sandra Day O’Connor College of Law at Arizona State University.

O’Grady concentrates her research on the behavior of new lawyers and is the author of the forthcoming article *Behavioral Legal Ethics, Decision Making, and the New Attorney’s Unique Professional Perspective*.

A junior lawyer given a questionable directive from a senior lawyer—and remember, she said, “if there is an ethically ambiguous job it will go to the lowest member of the team”—may think “it must be OK; he’s such a great guy; he’s so knowledgeable; everyone respects him; I guess I just don’t understand.”

She described this as a combination of “motivated blindness and bounded ethicalness.”

“Obedience is closely related to conformance pressures,” O’Grady noted. And the junior lawyer’s status as a newbie or a subordinate will not help, she said; Rule of Professional Conduct 5.2 (Responsibilities of a Subordinate Lawyer) offers no protection, since it presupposes the subordinate lawyer is acting in accordance with a supervisory lawyer’s “reasonable resolution” of an “arguable question of professional duty.”

In addition, she said, a senior lawyer and a new lawyer will have very different understandings of their firm’s ethical culture; the greatest influence on a junior lawyer will be what his own work group does. “People fall in with what their peer group is doing,” she said.

O’Grady cited a study in which subjects were asked to look at two lines of obviously different length and to estimate if they were the same. Subjects who were alone gave an accurate estimate. But if the subject was in a group and others were estimating the lines to be the same length, she said, 36.8 percent of the time the subject went along with the group and said the lines actually matched.

Consider also, she said, the economic pressures. The newest lawyers are carrying student debt of approximately \$180,000, and the median starting salary of 2013 law school graduates in private law jobs was \$62,467. To make minimum loan payments, O’Grady said, a new lawyer would need an average annual salary of \$100,000.

Tigran Eldred of New England Law School in Boston focused on how he teaches behavioral legal ethics to his law students.

“We seek out and interpret information in a manner consistent with our beliefs,” he said he tells them. “We have to use confirmation bias because thinking is hard, especially when you’re under pressure and you’re sleep-deprived.” We are cognitive misers, he explained; “we conserve our cognitive energy by engaging in confirmatory processes.”

Eldred co-hosts two blogs: Behavioral Legal Ethics (<http://behaviorallegalethics.wordpress.com>), which has just added a podcast, and

The Continuing Duty (<http://thecontinuingduty.wordpress.com>).

By ELIZABETH J. COHEN