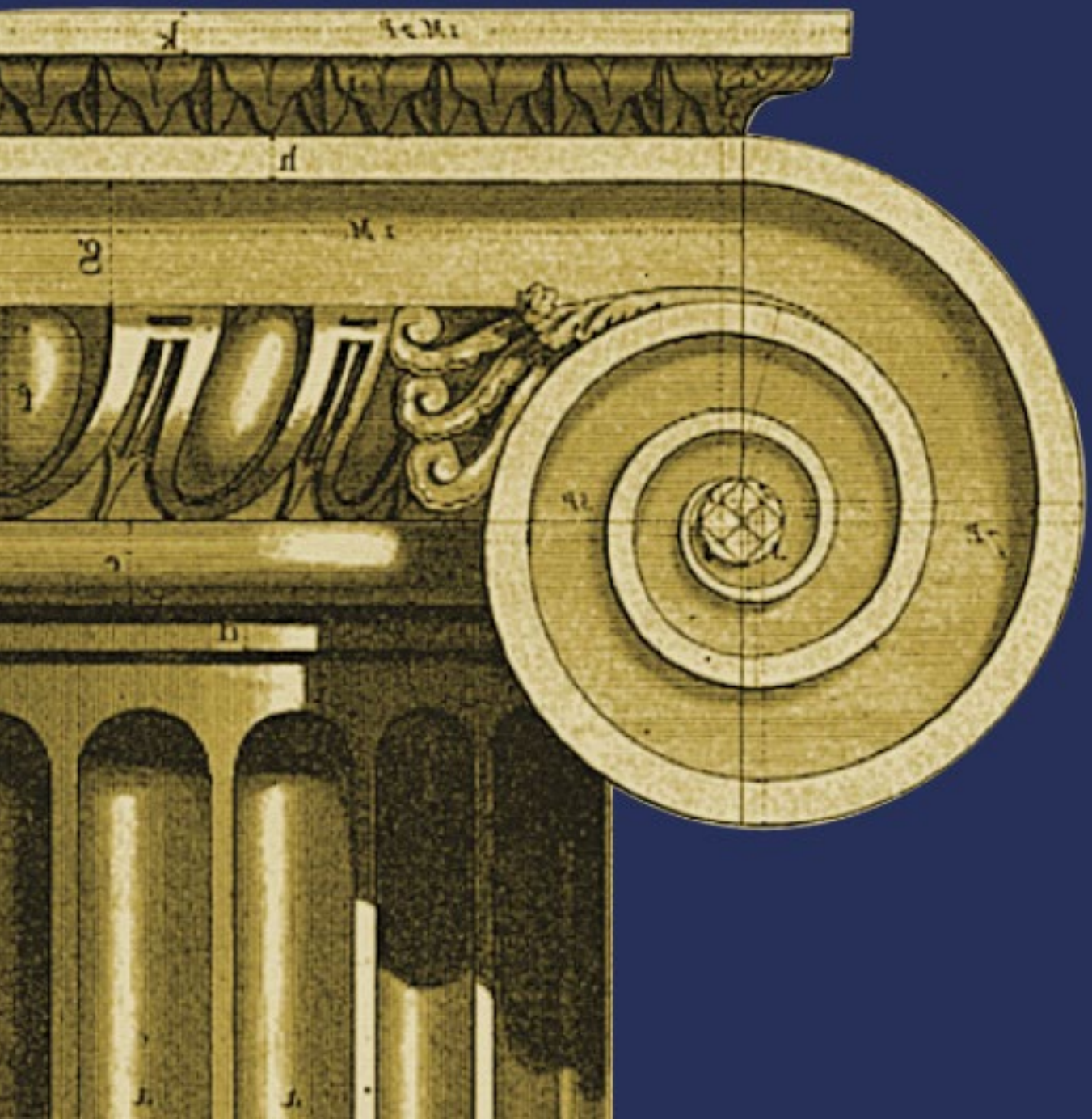
The PROFESSIONAL LAWYER

Volume 24 | No. 3



The Professional Lawyer: Volume 24, Number 3

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Ethics Rules Uniformity: The "Vision Thing"

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Remarks at the 43rd National Conference on Professional Responsibility
Michael Franck Professional Responsibility Award
June 1, 2017—St. Louis, MO

Introduction

For a few minutes today, I invite you all to participate in what the first President Bush, George H. W. Bush (Bush 41), legendarily christened the "vision thing." For today's discussion, the "vision thing" has two aspects: first, recognizing the obvious; and second, anticipating the inevitable. Let's start with the obvious—the current state of ethics rules uniformity.

The Obvious

As we all know, every law student in the United States is required to take "one course of at least two credit hours in professional responsibility that includes substantial instruction in rules of professional conduct…."[1] In virtually every law school, those rules are the American Bar Association Model Rules of Professional Conduct. And everyone seeking admission to the bar in every United States jurisdiction, except Maryland and Wisconsin, is required to pass the Multistate Professional Responsibility Examination (MPRE), which tests the applicant's knowledge of the ABA Model Rules.[2] But when new lawyers are admitted, they are confronted with more than 51 different sets of lawyer ethics rules.[3]

The ABA Model Rules of Professional Conduct have provided some nominal consistency, forming the general basis of the ethics rules now in effect in 49 states and the District of Columbia. But the largest jurisdiction, California, still maintains its own unique set of ethics rules.[4] Almost every other jurisdiction has "improved" its version of the Model Rules to some extent, even though there appears to be no scholarship suggesting that the lack of uniformity in lawyer ethics rules is desirable. And no one has seriously suggested that the lawyers in any particular state are more ethical, or that the public in that state is better protected, because the state's lawyer ethics rules are unlike those of any other jurisdiction.

There are, to be sure, many important provisions that are identical, or functionally equivalent, in most states. But there remain numerous critical differences among the states—and not just in the hopelessly inconsistent advertising rules.[5] Given the proliferation of multi-state transactions and representations, different answers to the same question of a lawyer's duty are likely to occur frequently. Some more obvious, common, and troubling examples include:

- Variations of Model Rule 1.6(b)(2): the rule on a lawyer's option, or duty, to disclose a client's intention to commit a financial crime or fraud using the lawyer's services, can yield four differing and contradictory answers. Three states require the lawyer to disclose the fraud; 29 jurisdictions

permit, but do not require, a lawyer to disclose the fraud; 18 states prohibit disclosure of the fraud; and one state (Tennessee) requires the lawyer to withdraw.[6]

- Variations of Model Rule 1.6(b)(1): the rules on disclosures to prevent reasonably certain death or substantial bodily harm also vary dramatically by state. Seven states require disclosure; 27 jurisdictions permit, but do not require, disclosure; and in 17 jurisdictions, the duty of disclosure depends on whether the relevant conduct may be a crime.[7]
- Variations of Model Rule 1.10(a)(2): the rules, and case law, concerning the screening of lateral lawyers to remove imputation of a lateral lawyer's conflict of interest from a prior firm also give quite different results. Eighteen states have rules that permit "full" screening [personally disqualified lawyer may be screened regardless of level of involvement in the matter at prior firm] of laterals; and 13 states limit the availability of screening based on the personally disqualified lawyer's level of involvement in the relevant matter.[8]

Other common instances of inconsistent rules among the states on basic issues include: the definition of protected client information protected (Model Rule 1.6(a)); whether a written fee or engagement agreement is required, or merely "preferred," for all new clients (Model Rule 1.5(b)); whether consent to a conflict of interest must be confirmed in writing (Model Rule 1.7(b)(4)); permissible financial assistance to clients in connection with litigation (Model Rule 1.8(e)); and permissible communications with persons represented by counsel, especially current and former employees and constituents of entity clients (Model Rule 4.2).

These variations arise from the current American system of the regulation of the legal profession, in which the courts exercise the inherent power to regulate the practice of law.[9] Although typically patterned on ABA models, only the version of the rules adopted by a court are binding.[10] And as Professor Rotunda has observed, this process results in less, rather than more, uniformity among the states. "As states have adopted the Model Rules, there has been a great tendency to adopt nonuniform amendments. Thus, we may expect choice of law problems to increase."[11]

This crazy quilt might not matter if lawyers always lived and worked in one jurisdiction. But we all know that the practice of law is no longer (if it ever was) a purely local matter. In 2002, the ABA formally acknowledged the extent of multijurisdictional practice by amending Model Rule 5.5 to permit temporary practice by out-of-state lawyers in several situations that were not previously allowed. As of May 2016, the latest update by the ABA, at least 47 jurisdictions had adopted some form of amended Model Rule 5.5 that expressly recognize some form of temporary practice by out-of-state lawyers.[12]

In addition to the obvious growth of multijurisdictional practice, there has been a substantial increase in the number of multiple-admission lawyers, lawyers admitted in more than one jurisdiction. Although exact figures on the extent of multiple admissions nationwide are unavailable, it is apparent that many thousands of lawyers admitted in one jurisdiction are also admitted in one or more other states. Registration information from Illinois from 2002 to 2016 is illustrative. In 2002, more than 9,300 lawyers resident in Illinois also reported another admission outside Illinois, and almost 14,000 non-resident lawyers registered in Illinois reported an admission in another jurisdiction. There were about 75,400 lawyers registered in Illinois in 2002, so at least 30 percent of the lawyers registered in Illinois in 2002 were also admitted in another state. The comparable numbers for 2016 (14,463 resident lawyers reported another admission; 19,606 non-resident lawyers reported another admission; 93,662 total registered) show that the number of lawyers registered in Illinois with multiple admissions grew from 30 percent in 2002 to more than 36 percent in 2016.[13] If the Illinois statistics are even remotely representative of the profession generally, it seems reasonable to conclude that about a third of all American lawyers are admitted in more than one jurisdiction.

In sum, at least 47 of the 51 American jurisdictions expressly recognize and permit some form of multijurisdictional practice; and it also seems likely that at least a third of all American lawyers are formally admitted in more than one jurisdiction. Yet there are 51 separate and distinct, but of course all "above average," sets of ethics rules—with each jurisdiction making its own special "improvements" to the ABA Model Rules.

Like most situations that make no sense, the reasons for this disorder are historic. Our current state-centric system of lawyer regulation has its origins in the 18th Century.[14] Thus, the present system's underlying concepts predate Samuel Morse, Alexander Graham Bell, and the Wright Brothers, not to mention Al Gore. Such a state-by-state approach, riddled with idiosyncratic variations, is simply incompatible with the integrated and interconnected national economy of the United States in the 21st Century. That much seems obvious.

The Inevitable

History teaches that systems that outlive their usefulness, or otherwise fail to make sense in their time, will ultimately go away. Sometimes with a bang, sometimes with a whimper; but they go away nevertheless. No one can say just when, or just how, but our current system of unique state ethics rules will ultimately go away. It simply can't survive in its present form.

Given that reality, the question for this group, the thought leaders of the country's professional responsibility bar, is whether this change will be something done *by* us—or something done *to* us. The prepositions matter. If the process is the former, there will of course be some lively debate along the way, but there will be an eventual consensus that we can all accept. If the process is the latter, it's not likely that any of us will be happy with the result.

For many years, it seemed that the most probable catalyst for national ethics rules uniformity would be an international trade agreement that included legal services. But at present, however, it appears that any new international trade agreements involving the United States are unlikely to come about in the near future.

It may sound strange to some, but at this point in time, the most likely actor in achieving national ethics rule uniformity is Congress. Although the regulation of the legal profession has traditionally been left to the states, most scholars and commentators seem to agree that Congress has the power to license and regulate lawyers.[15] That is not to argue that Congress *should* regulate the legal profession, only to remind us that it *could* do so if it chooses.

It is difficult to predict what might prompt Congress into such action, but there are indeed several concerns that might motivate Congress to think about some level of federal regulation of lawyers.

At least three come to mind, in no particular order:
– Concern for perceived "lawsuit abuse." The Institute for Legal Reform of the U.S. Chamber of Commerce advises: "America has the world's costliest legal system. As a percentage of our economy, U.S. legal liability costs are double those of the UK, *three* times higher than those in France and *five* times higher than those in Japan."[16] And there's an App for that![17]
– Concern that the Affordable Care Act did nothing to address medical malpractice litigation, which former Speaker of the U.S. House of Representatives John Boehner, among other legislative leaders, alleges to be "the biggest cost driver" in the nation's healthcare expenditures.[18]

– Concern that federal legislation may be necessary to achieve meaningful reform of multijurisdictional practice and lawyer mobility.[19]

The point is that, as we meet here today, there are serious proposals that Congress "do something" to regulate various aspects of the practice of law on a national level. Action on any of the current proposals would almost certainly impact existing state rules. And once it starts to consider lawyer regulation, Congress might well use the disarray in existing state rules to justify the imposition of uniform national standards where the states have been unable or unwilling to achieve consistency.

Conclusion

The current system of individualized and inconsistent state ethics rules makes no sense in our integrated and interconnected economy. Uniform standards are inevitable. It's not possible to predict when that will happen or what the precipitating factors will be. But it will surely happen. As mentioned above, the question for this group is how to respond to that reality: whether to get ahead of the situation, participate in the process, and help shape the outcome; or to sit back and become bystanders—or perhaps collateral damage.

Thank you for listening.

Endnotes

1 ABA Standards of Approval of Law Schools Standard 303(a)(1) (Feb. 2017).

2 86 The Bar Examiner, vol. 1, Mar. 2017, at 43.

3 Each state and the District of Columbia has its own unique set of rules. "Although uniformity is desirable for many purposes, lawyer codes in fact differ markedly in certain respects from one jurisdiction to another, and no state follows any nationally promulgated bar-association model in all respects." Restatement Third, The Law Governing Lawyers § 1, Comment b (2000) [hereinafter Restatement Third]. In the federal system, the district courts typically incorporate by reference the state rules of the jurisdiction where the court sits, see Charles W. Wolfram, Modern Legal Ethics § 2.6.3 (1986); but some federal appellate courts have declined to follow the state rules in favor of "national standards" in particular situations, *see, e.g.*, *In re* Dresser Industries, Inc., 972 F.2d 540 (5th Cir. 1992), so the exact number of different sets of ethics rules is difficult to determine.

4 A special commission of the California State Bar submitted proposed new rules, in a format similar to the Model Rules, to the California Supreme Court in March 2017. *See* 33 Law. Man. Prof. Conduct 178 (Apr. 5, 2017).

5 *See 2015 Report of the Regulation of Lawyer Advertising Committee*, Association of Professional Responsibility Lawyers, 5 (June 22, 2015), https://aprl.net/2015-report-aprl-regulation-lawyer-advertising-committee/.

6 *See* Chart on Disclosure of Client Misconduct, *in* Thomas D. Morgan & Ronald D. Rotunda, 2017 Selected Standards on Professional Responsibility 134 (2017) [hereinafter Selected Standards].

7 *Id.*

8 *See* Chart on Lateral Screening, Selected Standards, *supra* note 6, at 157. Many federal courts, as well as a few state courts, recognize lateral screening on a case-by-case basis, which makes it difficult to predict whether a screen will be effective to prevent the disqualification of the lateral lawyer's new firm in any particular situation. The situation in California is a good example of the random results rendered by the case-by-case approach to screening. *See, e.g.*, Kirk v. First American Title Ins. Co., 183 Cal. App. 4th 776 (2010) (lateral screening recognized); Beltran v. Avon Products, Inc., 867 F. Supp. 2d 1068 (C.D. Cal. 2012) (lateral screening rejected).

9 *See* Wolfram, *supra* note 3, at § 2.2.1.

10 *See* Restatement Third, *supra* note 3.

11 Ronald D. Rotunda & Thomas D. Morgan, Professional Responsibility Problems and Materials 45 (9th ed. 2011).

12 *See* ABA Policy Implementation Committee Chart on State Adoption of Rule 5.5, https://www.americanbar.org/content/

dam/aba/administrative/professional_responsibility/quick_guide_5_5.authcheckdam.pdf (last visited July 27, 2017).

13 Information provided by James J. Grogan, Deputy Administrator & Chief Counsel, Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois.

14 "Each colony had its own standards for admission to the bar." Lawrence M. Friedman, A History of American Law 57 (3d ed. 2005).

15 *See, e.g.*, Wolfram, *supra* note 3, at § 2.2.5.

16 *Lawsuit Abuse Impact*, U.S. Chamber Institute for Legal Reform, http://www.instituteforlegalreform.com/issues/lawsuit-abuse-impact (last visited May 26, 2017).

17 Faces of Lawsuit Abuse, available at Apple App Store for iOS devices. http://www.facesoflawsuitabuse.org/.

18 *The Medical Malpractice Scapegoat: Claims That Litigation Is Responsible for Rising Healthcare Costs Crumble Under Scrutiny*, Public Citizen 5 (Feb. 28, 2017), http://www.citizen.org.

19 *See, e.g.*, James W. Jones, Anthony E. Davis, Simon Chester & Caroline Hart, *Reforming Lawyer Mobility—Protecting Turf or Serving Clients?*, 30 Geo. J. Legal Ethics 125, 189-193 (2017) (proposing Congress adopt legislation to recognize rights of practice of all American lawyers engaged in federal or interstate matters in all American jurisdictions).

Internalizing a Fiduciary Mindset to Put the Client First

Neil Hamilton

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Every client needs to trust that his or her lawyer is dedicated to care for the client with all of the lawyer's ability. Deep care for the client is the principal foundation for client trust in the individual lawyer and the profession itself.[1] This is essentially a fiduciary disposition or fiduciary mindset, using "fiduciary" in the general meaning of founded on trustworthiness.[2] Each law student and new lawyer must learn to internalize a responsibility to put both the client's and the legal system's interests before the lawyer's self-interest.[3]

The law of lawyering (including the Rules of Professional Conduct) creates a floor of conduct below which the profession and the courts will discipline (and/or impose liability on) a lawyer, but good faith rule compliance in turn rests upon each lawyer's internalized fiduciary disposition that the lawyer's responsibilities to the client and the legal system must be put before the lawyer's self-interest. If the lawyer has no internalized fiduciary disposition, the lawyer looks for opportunities to "game" the system where he or she may not get caught.

The legal profession also holds out ideals and core principles of the profession that each lawyer should grow into over a career. For example, the Preamble of the Model Rules of Professional Conduct Paragraph 7 states "[a] lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession's ideals of public service."[4] Paragraph 5 urges "[a] lawyer should demonstrate respect for the legal system and all who serve it, including judges, other lawyers, and public officials."[5]

Paragraph 6 explains that "a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of the service rendered by the legal profession," and gives special emphasis that "a lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel."[6]

It is also very important to note that the Model Rules leave vast areas for a lawyer's discretion and professional judgment regarding responsibilities to clients, to the legal system, to the quality of justice, to the lawyer's interest in being an ethical person, and the lawyer's own self-interest in making a satisfactory living. The Preamble's paragraph 9 recognizes that "difficult ethical issues" can arise from conflicts among these responsibilities. Paragraph 9 continues to say that "Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules."[7]

The Preamble's Paragraph 8 provides that "a lawyer is also guided by personal conscience and the approbation of professional peers."[8]

Note that the Model Rules do not specifically address a major goal of every student and lawyer to achieve self-sufficiency (and for some a goal of high income and wealth) except for Paragraph 9 of the Preamble. "Virtually all difficult ethical problems arise from a conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living."[9]

The Model Rules recognize that clients also face many difficult ethical issues, and a lawyer should provide independent judgment and render candid advice to help the client think through decisions that affect others. The comments to Rule 2.1 note "Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant …. It is proper for a lawyer to refer to the relevant moral and ethical considerations in giving advice."[10] The lawyer is not imposing the lawyer's morality on the client, rather the "relevant moral and ethical considerations" clearly include understanding the client's own tradition of responsibility to others and helping the client to think through the issues from the client's own tradition.

All of these paragraphs of the Preamble taken together implicitly define the elements of an ethical professional identity by calling on each lawyer to do the following:

(1) to comply with the *ethics of duty*—the minimum standards of competency and ethical conduct set forth in the Rules of Professional Conduct;[11]

(2) to foster in him or herself and other lawyers the *ethics of aspiration*—the core values and ideals of the profession, including internalizing the highest standards for the lawyer's professional skills and ethical conduct.[12]

(3) to develop and be guided also by personal conscience including the development of "professional and moral judgment," and the meaning of being an "ethical person" in deciding all the "difficult issues of professional discretion" that arise in the practice of law; and

(4) to do public service to improve justice, particularly to provide service to the disadvantaged.

It is clear that a student's and new lawyer's existing tradition regarding the question "what are my responsibilities to others?" is important in the educational process where each student and new lawyer grows out of self-interest toward a fiduciary disposition. Each student's and new lawyer's existing tradition on this question of responsibilities to others also will inform his or her development of personal conscience including the development of "professional and moral judgment," and the meaning of being an "ethical person" in deciding all the "difficult issues of professional discretion" that arise in the practice of law.

In my 2016 fall semester required professional responsibility course (required in the 2L years at the University of St. Thomas School of Law), I started the course by asking students to write a short essay on the following topic: "the general topic is to analyze your tradition and decision-making process with respect to discretionary decisions that involve both responsibilities to others and positive and negative impacts of your decisions on others. How can you help yourself develop further your tradition and decision-making process? Be specific on one or two ideas to help yourself develop your tradition and

decision-making processes."

All fifty-three students submitted an essay focusing on the following traditions to answer the essay question:

7—Catholic

18—Christianity generally

2—Christian/Aristotle synthesis

1—Christian/Buddhist synthesis

1—Jewish

1—Mahayana Buddhist

1—Village elder tradition in home village of Africa

1—Kant/Rawls

3—Golden Rule

1—Golden Rule plus mindfulness

4—Mindfulness. Two of these said they had not thought it through much until this paper.

10—Utilitarian, with six of these combined with a secular social justice theme. Six of the utilitarians said they had not thought it through much until this paper.

3—Not given this topic much previous thought. Three said up front that they had not given this thought, and two said that they were searching for a tradition. They thought I was sending a strong message that they needed a tradition. One student argued that the student should "wing it" on intuition each time a difficult discretionary decision had to be made.

In answering this question, 30 out of 53 looked to a faith tradition, and 23 out of 53 cited a secular tradition or no tradition. I explore all of these traditions in my earlier article, *Professional Formation/ Professionalism's Foundation: Engaging Each Student's and Lawyer's Tradition on "What Are My Responsibilities to Others?,* 12 Univ. St. Thomas L.J. 27 1-338 (2016), *available at* http://ssrn.com/abstract=2566514. Note that all the major faith traditions and nearly all of the secular traditions share extensive common ground that each person should grow from high self-interest toward increasing responsibilities to others.

The key goal is to help students/new lawyers (building on whatever tradition the student brings to the question of what are my responsibilities to others) continue to grow over a career both in his or her fiduciary disposition and in the ability to think through difficult issues of professional discretion.

It is always important to engage students and new lawyers where they are developmentally. Table 1 below outlines the developmental stages for a new entrant to the profession regarding an internalized

responsibility to the client and the legal system. I show this table to students so they understand this growth process occurs over a career.

Table 1—Developmental Stages of an Internalized Responsibility to Clients and the Legal System[13]

Level 1	a. Has self-awareness of own values/first principles regarding responsibilities and service to others. b. Has had previous experience in terms of responsibility to others on matters important to them, and has reflected on how the previous experience is relevant to the practice of law.
Level 2	a. Demonstrates knowledge of basic legal ethics principles and is able to identify legal ethical issues in hypothetical situations. b. Demonstrates understanding of the profession's core values and ideals including the importance and priority of responsibility to the client and the legal system, for example with respect to trustworthiness.
Level 3	a. Consistently recognizes legal ethical issues in the most common and frequent experiential situations and is able to discuss, analyze, and manage such issues. b. Demonstrates progress, in the most common and frequent experiential situations, with respect to integration into student's ethical identity of the profession's core values and ideals including the importance and priority of responsibility to the client and the legal system, for example with respect to trustworthiness (an ethical professional identity).
Level 4	a. Is consistently able to effectively recognize, discuss, analyze and manage legal ethical issues in complicated and challenging experiential situations. b. Demonstrates consistent integration into student's ethical identity in complicated and challenging experiential situations of the profession's core values and ideals including the importance and priority of responsibility to the client and the legal system, for example with respect to trustworthiness.
Level 5	a. Is exemplary in effectively recognizing, discussing, analyzing and managing legal ethical issues in complicated and challenging experiential situations. b. Demonstrates exemplary continuing growth, leadership, and mentorship in all situations in integrating the profession's core values and ideals including the importance and priority of responsibility to the client and the legal system, for example with respect to trustworthiness.

I also show students the data below from practicing lawyers and legal employers showing that trustworthiness and deep care for the client are foundational capacities that legal employers want. The students can see that it is in their own self-interest to keep growing toward a fiduciary disposition and

prioritizing responsibilities to clients and the legal system.

1. Competencies emphasized by Educating Tomorrow's Lawyer's Survey (24,000 lawyers in 2015) as "necessary in the short term."[14] The numbers indicate how the respondents ranked each competency in terms of what is "necessary in the short term." I grouped the various necessary competencies into umbrella categories of Trustworthiness, Respect for Others and Relationship Skills, Strong Work Ethic/Conscientiousness, and Common Sense/Good Judgment.

a. Trustworthiness
1. Keep Confidentiality
3. Honor Commitments
4. Trustworthiness/Integrity
15. Take Individual Responsibility
18. Strong Moral Compass

b. Respect for Others and Relationship Skills
2. Arrive on Time
5. Treat others with Respect
6. Listen Attentively and with Respect
7. Respond Promptly
17. Emotional Regulation and Self-control
20. Exhibit Tact and Diplomacy

c. Strong Work Ethic/Conscientiousness
8. Strong Work Ethic
9. Diligence
10. Attention to Detail
11. Conscientiousness

d. Common Sense/Good Judgment (this was 12th).

The report indicated that Research the Law was 13th, Intelligence was 14th, Speak Professionally was 16th, and Write Professionally was 19th.

2. Competencies emphasized by National Conference of Bar Examiner's New Lawyer Survey (2013)[15] and Hamilton's surveys of MN lawyers (2013-14)[16]:
a. Trustworthiness/Integrity/Honesty
b. Strong Work and Team Relationship Skills
c. Dedication to Client/Responsiveness to Client
d. Good Judgment/Common Sense
e. Habit of Seeking Feedback
f. Initiative/Strong Work Ethic

3. Note that there are very few empirical studies of what competencies clients want. The Shultz/Zedeck study discussed below is the best of these studies, but note that the survey population consists of lawyers imagining they were clients and then indicating what competencies they would most want.

In 2003, Professors Marjorie M. Shultz and Sheldon Zedeck at the University of California at Berkeley

identified 26 factors important for lawyer effectiveness by interviewing people from five stakeholder groups associated with Berkeley Law: alumni, students, faculty, clients, and judges. They asked questions such as "If you were looking for a lawyer for an important matter for yourself, who would you identify, and why?" and "What qualities and behavior would cause you to choose that attorney?"[17] The 26 factors important to lawyer effectiveness that emerged from the interviews are shown in Table 3.

The Shultz-Zedeck study did not list the 26 lawyer effectiveness factors in order of importance, so for comparative purposes, the table below lists the 26 lawyer effectiveness factors using the same umbrella categories as the table above on the Educating Tomorrow's Lawyers' competencies "necessary in the short term."

Table 2—Shultz-Zedeck List of 26 Lawyer Effectiveness Factors

Trustworthiness
– Integrity/honesty
– Self-development

Relationship Skills
- Building relationships with clients and providing advice and counsel
- Developing relationships within the legal profession
- Networking and business development
- Listening
- Able to see the world through the eyes of others
- Community involvement and service
- Organizing and managing others
- Evaluation, development and mentoring of others

Strong Work Ethic/Diligence
- Passion/engagement
- Diligence
- Stress management

Common Sense/Good Judgment
- Problem solving
- Practical judgment
- Creativity and innovation

Technical Competencies
- Analysis and reasoning
- Researching the law
- Fact finding
- Questioning and interviewing
- Influencing and advocating
- Writing
- Speaking
- Strategic planning
- Organizing and managing one's own work
- Negotiation

We see convergence that legal employers want these ethical-professional-identity competencies:

1. trustworthiness[18];
2. respect for others and relationship skills including client relationship skills and teamwork;
3. strong work ethic/initiative/conscientiousness;
4. commitment to self-development including the habit of self-evaluation; and
5. good judgment.

Finally, I discuss Table 3 below with students to give them another window on the importance of undertaking a growth process from rule compliance, through preventive law and reputational risk management, toward an internalized ethical tradition in order to develop good judgment, which is of great importance to legal employers. The lawyer can also help a client (individual or organizational) think through the same steps (from their tradition). I emphasize again that a lawyer with a clear tradition of her own that she applies to the difficult discretionary calls of lawyering is not substituting or imposing the lawyer's morality on the client.

Table 3—Factors That Go Into Good Judgments on Decisions That Affect Other People by the Individual Lawyer, the Individual Client or the Organizational Client

LAWYER AND INDIVIDUAL CLIENT DECISION-MAKING	**ORGANIZATIONAL CLIENT DECISION-MAKING**
The lawyer's or individual client's ethical tradition on responsibilities to others. See levels 3-5 of the developmental stages of an ethical professional identity in Table 1.	The organizational client's ethical tradition on responsibilities to others. For organizational clients, the lawyer could refer both to the organizational mission and code of conduct (is it a living document?) and to aspirational business ethics statements like Caux or Minnesota Principles or industry best practices statements.
Other enlightened self-interest considerations that ethical business practices lead to long-term profitability.	Other enlightened self-interest considerations that ethical business practices lead to long-term profitability.
Reputational Risk Management considerations including the lawyer's brand that leads others **to trust** the lawyer with their work or the individual client's brand in terms of trustworthiness.	Reputational Risk Management considerations including the organizational client's brand that leads others like customers or employees to trust the client with their business/livelihood.
Risk Management considerations in terms of possible liability or regulatory investigations and sanctions.	Risk Management considerations in terms of possible liability or regulatory investigations and sanctions.
Preventive Law considerations.	Preventive Law considerations.

Law Compliance. Note that a lawyer must comply with the minimum floor of conduct set by the law of lawyering which includes the concept of service as a fiduciary for a client. A fiduciary relationship is based on **trust** where the fiduciary puts the client's best interests first.	Law Compliance.

Endnotes

1 William M. Sullivan, *Foreword* to Teaching Medical Professionalism at xi, xv (Richard Creuss et al. eds., 2009).

2 *See id.* at ix. *See* William Sullivan, *Align Preparation with Practice,* 85 N.Y. St. B.A. J. No. 7 (Sept. 2013) at 41-43 (where he introduces the concept of fiduciary disposition).

3 Standard 302(c): "A law school shall establish learning outcomes that shall, at a minimum, include competency in the following: (c) Exercise of proper professional and ethical responsibilities to clients and the legal system." ABA Standards & Rules of Procedure for Approval of Law Schools, *available at* https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2016_2017_aba_standards_and_rules_of_procedure.authcheckdam.pdf.

4 ABA Model Rules of Prof'l Conduct Preamble para. 7 (2017).

5 ABA Model Rules of Prof'l Conduct Preamble para. 5 (2017).

6 ABA Model Rules of Prof'l Conduct Preamble para. 6 (2017).

7 ABA Model Rules of Prof'l Conduct Preamble para. 9 (2017).

8 ABA Model Rules of Prof'l Conduct Preamble para. 8 (2017).

9 *Supra* note 7.

10 ABA Model Rules of Prof'l Conduct R. 2.1 cmt. (2017).

11 Lon L. Fuller, The Morality of Law 3-9 (rev. ed., Yale U. Press 1969).

12 *Id.*

13 This table is adapted from "Table 1. Four Selected General Milestones in the Next Accreditation System," *in* Thomas Nasca et al., *The Next GME Accreditation System—Rationale and Benefits,* New Eng. J. Med. 3 (Feb. 22, 2012), https://www.acgme.org/acgmeweb/Portals/0/PDFs/NAS/NEJMfinal.pdf. Note that the Milestones in the original table, which were developed by an ACGME expert panel, reflected the following expected levels of performance that the evaluator assesses: level 2, typical graduating medical student; levels 3 and 4, resident during the program; level 5, graduating resident; level 6, advanced, specialist resident or practicing physician.

14 Institute for the Study of the American Legal System, *Foundations for Practice: The Whole Lawyer and the Character Quotient* (2016), http://iaals.du.edu/educating-tomorrows-lawyers/publications/foundations-practice-whole-lawyer-and-character-quotient.

15 National Conference of Bar Examiners, A Study of the Newly Licensed Lawyer, http://www.ncbex.org/publications/ncbe-job-analysis/ (2016).

16 Neil Hamilton, *Changing Markets Create Opportunities: Emphasizing the Competencies Legal Employers Use in Hiring New Lawyers (Including Professional Formation/Professionalism),* 65 S.C. L. Rev. 547, 557-58 (2014).

17 Marjorie Shultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admission Decisions,* 36 Law & Soc. Inquiry 620, 629 (2011).

18 David Maister defines a trustworthiness quotient with a numerator of Credibility + Reliability + EQ over a denominator of Self-Orientation. In other words, the greater a student's or lawyer's self-orientation, the smaller the person's trustworthiness.

Professional Identity and Professionalism

Benjamin V. Madison III

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I thank John Berry for organizing this panel and for reviewing and offering comments on this piece. I also thank the other members of the panel, identified in note 5 below, each of whom spent considerable time preparing for our presentation.

"This is a battle for the soul of the legal profession."[1] Moderating a panel on professional identity formation at the recent Annual Professional Responsibility Conference, John Berry's opening comment appropriately captured what many of us believe the professional identity movement is all about. The panel, entitled "Professional Identity Formation in Public and Faith-Based Legal Education," demonstrated the growing number of schools innovating in methods that go beyond traditional approaches to professionalism. The phrase "professional identity" had been used by legal scholars before the publication of the Carnegie Institute for the Advancement of Teaching and Learning entitled *Educating Lawyers* (Carnegie Report),[2] and the virtually simultaneous release by the Clinical Legal Education Association in *Best Practices for Legal Education* (Best Practices Report).[3] However the Carnegie Report and the Best Practices Report, now ten years old, have brought the concept of professional identity formation to a place of deserved attention in legal education.[4]

In preparation for the panel, and during the conference, the panel[5] agreed that perhaps the first step in addressing this topic is to distinguish "professional identity" from professionalism and the professionalism movement. In the chapter on professional identity formation in *Building on Best Practices: Transforming Legal Education in a Changing World*, Dean Natt Gantt and I offered the following distinction between professional identity and professionalism:

> Lawyer professionalism has often referred to adherence to standards or norms of conduct beyond those required by the ethical rules, and the focus of the current discussion of professionalism largely remains on outward conduct like civility and respect for others. Civility and respect for others are foundational to emerging lawyers' understanding of professional conduct, but professional identity engages students at a deeper level by asking them to internalize principles and values such that their actions flow habitually from their moral compass.[6]

In this concept, we have struck upon a truth that I believe is a universal one—a principle that can help each person, in his or her chosen job, to understand, perform, and enjoy that job more. That is why I found the story of Steve Kerr's search for his "coaching style" so helpful and related that story in my segment at the conference. Kerr, formerly a National Basketball Association (NBA) player who won championships with Michael Jordan on the Chicago Bulls, later became an NBA coach. His mentors include some of the greats of NBA coaching, including, for instance, Greg Popovich, longtime coach of the San Antonio Spurs, as well as National Football League coach Pete Carroll. Kerr wanted to avoid being a "clone" of Popovich—to find his own approach. He talked with his mentors about how to do that. One of his mentors told him that his coaching style had to come from his "identity." Then the mentor asked a telling question: "Give me one of your core values." After pondering the question, Kerr responded: "Joy." His mentor replied: "O.k., joy. That has to be reflected in your practices every day."[7]

Although at first I was a bit surprised to read about a basketball coach applying principles that mirror what we are seeking to do in professional formation, I recognize now that it makes sense for the approach to apply in any profession. Indeed, it is no coincidence that the Carnegie Institute has chosen to emphasize professional identity beyond law teaching. In studying education of other professions Carnegie has stressed development of professional identity as an integral part of students' professional training.[8] These studies consistently show, in each profession, teaching that leads students to explore their core values.[9] The problem with lecturing students (or lawyers) to "be civil" or "be honest" is that we expect people to follow an external ideal without reflecting on *why* such conduct is likely to be consistent with his or her own value system. Professional identity formation presents students instead with a scenario in which they can act either in a civil way or badly, or in which the person can be honest or deceptive. Then the student reflects, ideally in writing, on the values that are implicated by the scenario, the available courses of action, and the consequences likely to flow from each course of action.[10] Such reflection leads, at worst, to a decision that is at least a considered one and, at best, to a habit of acting ethically. It should be no surprise that a reflect-before-acting approach leads to better choices—and, ultimately, to more professional behavior.[11] The result of this process is usually the same as that promoted by the professionalism movement. The difference is that lawyers are more likely to act in line with professional values when they realize they are following principles in which they are invested.

One of the telling lessons of our panel was that, though two of our members were from law schools with faith-based missions, the two other panelists from public law schools and the one panelist who now works for the Department of Justice (formerly with the Army JAG) all agreed on values that they believed—if students or lawyers were prompted to search themselves—they would find. Some would call these universal values. Thus, Professor Hamilton and I can point to what our faith traditions refer to as "revealed truth," in the Bible and/or in Church teaching for a value. Our colleagues at public universities or in military law teach the same values in different ways. For instance, the virtue ethics of Aristotle provide a rich source for defining values, as Professor McGinnis showed in our panel discussion.[12] Although for reasons of separating church and state, professors in public universities are not advocating any particular faith tradition, the reality seems to be that all students come to law school with some value system. The challenge is to help students, each at different levels of sophistication in their ethical development, to grow as decision-makers guided by a sense of conscience. By pointing students to their internal values, the professional identity movement encourages ownership of one's decisions. Students learn that their decisions have consequences, not only for clients and others in the legal system, but also for the students' own self-respect.

Another important contribution of the panel was to reveal some common misconceptions. The first misconception is that faith-based schools approach this subject rigidly. Professor Neil Hamilton and I explained that our schools relied primarily on Judeo-Christian values, but that we have students consider and discuss the principles at the root of other faith traditions and philosophical systems, including, for instance, virtue ethics of classical philosophers such as Aristotle. Indeed, the panel recognized that Professor Hamilton's article on the manner in which all major faith traditions and virtue ethics emphasize the responsibility of each person to one's fellow human beings is perhaps one of the best examples in scholarship of the breadth of sources available to encourage formation of values.[13] The second misconception is that any of us teaching in this field believe that pointing students to external sources alone will do any good. Instead, the whole point is to have the students reflect on his or her own values and whether they align with these core values. Thus, those of us at faith-based schools have as much of a challenge in cultivating professional identity as those teaching in public schools. If a law student knows biblical passages, he or she has not necessarily (and likely has not by law school) internalized those values. Indeed, most students by the time they reach law school, regardless

of whether it is a faith-based or public school, are at an early stage of moral development.[14] Our job is to use the innovative approaches growing out of the professional identity movement to help them progress. We are seeking to spur students to reflect, to look inside, and to internalize values. As Dean Debra Curtis, Professor McGinnis, and Mr. Ben Grimes demonstrated in their remarks, public schools and the military are likewise cultivating reflection on, and internalization of, values.

The recognition that professional identity formation comes from the inside out thus represents its greatest contribution. In opining that the Carnegie Report would likely have a greater impact on legal education than the well-known MacCrate Report, Dean Bryant Garth recognized that "the most important innovation in the *Carnegie Report* is the focus on the third apprenticeship [i.e., the 'professional identity' apprenticeship]."[15] Dean Garth realized that the professional identity component was developing a meaningful approach to helping ethical growth. Dean Garth's prediction, we hope, is starting to become a reality.

An unexpected reward of this movement ought not to be overlooked. Our panel saw in the professional identity movement hope for problems that have long plagued the profession. Anyone who has paid attention to the statistics on lawyers' substance abuse, depression, and suicide ought to wonder why the rates for these ailments are so much higher for lawyers than the general population. These troubling symptoms, observers have opined, could result from the disconnect between lawyers' internal values and their actions.[16] Unless someone is intentional about reflection, he or she can act in ways that create the disconnection without even realizing what damage it is doing. The theory that lawyers' mental, emotional, and addiction issues derive solely from stress ought to be thoroughly reviewed. Sufficient research and discussion suggest that the lack of internalized and intentional commitment to one's values plays a part in this troubling phenomenon.[17] It may take time for the effect of the professional identity movement to begin showing an impact on lawyer well-being. It does, after all, require a commitment—a commitment to greater reflection, to acting consistently with one's values, and ultimately to be true to oneself. Such is not a quick fix. Yet, as our panel maintained, the internal awareness we are advocating may in time be one of the most significant steps toward improving lawyer well-being in recent memory.

My fellow panelists and I appreciated the opportunity to engage in conversation on this important topic. Some have been part of this movement since even before the 2007 Carnegie and Best Practices Report. The movement has gained a foothold in legal education and we appreciate the American Bar Association providing an opportunity to expose more leaders in the profession to it. My hope is that, through such discussions, the profession will appreciate increasingly the innovation that this concept—and relevant teaching tools—represents.

Endnotes

1 The quote derives from Justice E. Norman Veasey, The Role of State Supreme Courts in Addressing Professionalism of Lawyers and Judges, Keynote Address at ABA Conference: Regulatory Authority Over the Legal Profession and the Judiciary: The Responsibility of State Supreme Courts (March 14-15, 1997).

2 William M. Sullivan, et al., Educating Lawyers (2007) [hereinafter Educating Lawyers in notes and "Carnegie Report" in text].

3 Roy Stuckey, et al., Best Practices for Legal Education (2007) [hereinafter Best Practices in notes and The Best Practices Report in text].

4 At this point, more than 25 schools have curricular initiatives that address cultivation of professional identity. *See* L.O. Natt Gantt, II, and Benjamin V. Madison, III, *Self-Directedness and Professional Formation: Connecting Two Critical Concepts in Legal Education*, 13 Univ. St. Thomas L. J. n.99 & accompanying text (forthcoming 2017) (listing the schools that now have such curricular initiatives). The Institute for the Advancement of the American Legal System, encouraged by Carnegie lead author

William Sullivan, established an initiative called Educating Tomorrow's Lawyers. The criteria for membership require schools to demonstrate a commitment to implement the three apprenticeships recommended in Carnegie. *See* Institute for the Advancement of the American Legal System, *Consortium Information* (Criteria for Membership), http://educatingtomorrowslawyers.du.edu/about-etl/about-our-consortium/consortium-member-criteria/ (last visited June 20, 2017). In short, these schools are among those who have formally declared their agreement with Carnegie's recommendations.

5 In addition to John Berry, who served as moderator, and the author, the following educators spoke on the panel: Deborah Moss Curtis, Associate Dean for Academic Affairs and Professor of Law, Shepard Broad College of Law, Nova Southeastern University; Benjamin K. Grimes, Deputy Director of the Department of Justice Professional Responsibility Advisory Office; Neil W. Hamilton, Holloran Professor of Law at St. Thomas University School of Law and Director of Holloran Center for Leadership in the Professions; Michael S. McGinnis, Associate Professor of Law at North Dakota School of Law.

6 L.O. Natt Gantt II & Benjamin V. Madison, III, *Teaching Knowledge, Skills, and Values of Professional Identity Formation*, *in* Building on Best Practices: Transforming Legal Education in a Changing World 253, (Deborah Maranville et al. eds., 2015).

7 Chris Ballard, *The 25 Leadership Lessons of Steve Kerr*, Sports Illustrated (May 16, 2017).

8 The professions studied in the five Carnegie reports are clergy, engineering, medicine, nursing, and lawyering. *See* Neil Hamilton, *Fostering Professional Formation (Professionalism): Lessons from the Five Carnegie Foundation's Five Studies on Educating Professionals*, 45 Creighton L. Rev. 763 (2012).

9 *See id.*

10 Gantt & Madison, *supra* note 7, at 265-70.

11 Conversely, lawyers who do not stay in touch with their values will often experience the disintegration that occurs when he or she believes that when taking on the "role" of advocate allows the lawyer to discount his or her internal values. Indeed, one scholar has described the kind of disintegration of self (or "dissonance") that occurs when lawyers act according to the belief that they can separate their personal and professional values:

> The lawyer who suppresses moral scrutiny can fall prey to a kind of self-loathing that those with integrity can resist. By ignoring early dissonance, a lawyer suppresses her moral identity instead of silencing it. She may overcome alienation by subtly reshaping who she is as a person. Incrementally, these changes are almost imperceptible. This is human character in moral drift. Although personal change can signify moral progress, not all fluidity is compatible with integrity. Moral development emerges from braving the discomforts of self-scrutiny. It arises from caring about personal betterment and moral knowledge. Self-protective maneuvers produce dissonance and alienation instead. Eventually, the lawyer adapts to avoid discomfort and remove moral impediments. Instead of humble, she becomes servile. What was at first professional inauthenticity slips into a newly authentic, lesser self. Self-loathing emerges because squelching the moral self leaves lingering guilt and regret.

Reed Elizabeth Loder, *Integrity and Epistemic Passion*, 77 Notre Dame L. Rev. 841, 877 (2002); *see also* L.O. Natt Gantt II, *Integration as Integrity: Postmodernism, Psychology, and Religion on the Role of Moral Counseling in the Attorney-Client Relationship*, 16 Regent U. L. Rev. 233, 251 (2004) (offering evidence of how "sharp separation between lawyers' professional and personal identities can actually lead to emotional maladjustment.").

12 Michael S. McGinnis, *Virtue and Advice: Socratic Perspectives on Lawyer Independence and Moral Counseling of Clients*, 1 Texas A & M L. Rev. 1 (2013).

13 *See* Neil Hamilton, Madeline Coulter & Marie Coulter, *Professional Formation/Professionalism's Foundation: Engaging Each Student's and Lawyer's Tradition on the Question "What Are My Responsibilities to Others?*," 12 U. St. Thomas L.J. 271 (2016).

14 Neil Hamilton & Verna Monson, *Legal Education's Ethical Challenge: Empirical Research on How Most Effectively to Foster Each Student's Professional Formation (Professionalism)*, 9 U. St. Thomas L.J. 325 (2011) (relying on renowned psychologists Lawrence Kohlberg, James Rest, and others to show that the process of forming one's ethical professional identity is not likely to be fully developed in law school, but that law school can have a significant impact spurring the person to grow).

15 Bryant G. Garth, *From MacCrate to Carnegie: Very Different Movements for Curricular Reform*, 17 J. Legal Writing Inst. 261, 267 (2011).

16 Lawrence S. Krieger, *The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness*, 11 Clinical L. Rev. 425 (Spring 2005).

17 *See, e.g.*, Joseph Allegretti, The Lawyer's Calling 19, 68 (1996) (contending that lawyers who separate their personal morality from their professional role suffer from "a kind of moral schizophrenia," which ultimately causes the lawyers' professional amorality to "infect" their personal life).

Ball of Confusion: Practicing Law from Your Second Home in Another State

Ronald C. Minkoff

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Practicing law has been very, very good to you. Through lots of hard work over 40 years, you have built up a stable of good, steady clients, and have earned enough money to start thinking seriously about retirement. You have always lived and worked in the same Northern state—the only state in which you are admitted to practice. Nevertheless, despite global warming, the Northern winters seem to get longer and more depressing each year, so you've decided to spend the winter months in your second home near a beautiful golf course in a nice, warm Southern state. You still feel too young and healthy to retire completely, but you have little desire to go through the grueling process of getting admitted in the Southern state, including (Heaven forbid!) sitting for the Bar exam, unless someone says you must. Your longtime firm is willing to let you practice remotely from your second home, as long as doing so will not get you or the firm into trouble.

What are your options? Can you follow your heart and work from your second home? Or are you stuck with the brutal winters of your home state?

Defining the Problem

The problem, of course, is that practicing in the Southern state—no matter how circumscribed—might constitute the unauthorized practice of law (UPL). Every state and territory in the U.S. has a statute prohibiting UPL, and most if not all make it a criminal offense. When most lawyers think of UPL, they think of a fraudster who has never been licensed in *any* jurisdiction taking advantage of innocent people by practicing law without a license. But that is just one kind of UPL. The other kind is when a lawyer who has been licensed in one state practices in a state or territory where he or she has not been admitted. Both types of UPL are treated the same under most UPL statutes, as well as the Model Rules. *See* Model Rule 5.5(a) ("A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so").

This second kind of UPL—let's call it "interstate UPL," though it applies equally to lawyers admitted in other countries—is at issue when practicing from your second home. Interstate UPL did not receive much attention until 1997, when the California Supreme Court issued its landmark decision in *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 17 Cal. 4th 119 (1998). There, the Court found that a New York law firm engaged in UPL, and thus could not enforce its fee agreement, because the firm had its New York admitted lawyers come to California to represent a California client in preparing for a California arbitration based on a contract governed by California law. Most significantly, the Court found that lawyers can be found to have engaged in interstate UPL even if they hired local counsel and *even if they never set foot in the state*, but only made telephone calls or sent faxes or emails into the state.

This led to a great deal of handwringing, as lawyers who regularly practiced across state lines—particularly transactional lawyers who cannot obtain *pro hac vice* admission—worried that their actions would result in disciplinary or fee payment problems. This caused the ABA to spearhead a series of rules over the past 15 years that have allowed lawyers to practice across state lines more freely.

We will discuss these rules in their proper contexts later. But the problem of interstate UPL has still not ceased being a threat. Just earlier this year, the Minnesota Supreme Court, in *In re Charges of Unprofessional Conduct in Panel File No. 39302*, 884 N.W.2d 661 (Minn. 2016), disciplined a Colorado-admitted lawyer who agreed to represent his in-laws in a debt collection matter in Minnesota. Though he never set foot in the state, he negotiated by telephone and email, but was unable to get the matter settled. To add insult to injury, his opposing counsel—who had warned him about UPL when first contacted by him—filed an ethics complaint, and he ended up being subjected to private discipline. The reason, said the Court, was that the dispute "was not interjurisdictional: it involved only Minnesota residents and a debt arising from a judgment entered in a Minnesota court." *Id.* at 666. In short, as in *Birbrower*, the Court found that a lawyer can commit interstate UPL without ever setting foot in the state where the improper practice takes place.

Addressing Specific Scenarios

Now that we have defined the issue, we want to answer the questions you may ask when considering whether you should try to practice from your second home in a jurisdiction where you are not admitted to practice.

Q: Why don't I just get admitted? Can't I just waive in?

This may be an option, depending on the state in which your second home is located. In 2012, the ABA adopted a Model Rule on Admission by Motion, which allowed a lawyer in good standing in all U.S. jurisdictions (states, territories or the District of Columbia) in which they are admitted to practice, and not subject to any pending disciplinary complaints, to be admitted on motion (*i.e.*, without taking the state's Bar exam) in another jurisdiction as long as they can show that they had "engaged in the active practice of law" in one or more U.S. jurisdictions for three of the past five years. (Some states, including New York, require practice for five of the past seven years [*see* 22 NYCRR §520.10(a)(2)]; Arizona, one of those states, recently recommended shortening this period to conform to the ABA Model Rule.) While the vast majority of jurisdictions allow some form of admission on motion, there are still several which do not: for example, California, Louisiana, South Carolina and Florida, concerned about competition from "snowbird" lawyers, require anyone seeking admission to the Bar to take the state Bar exam, no matter how many years they have practiced. In any event, obtaining Bar admission, whether by motion or through the more traditional process, can take several months—it generally will require a review of your character and fitness to practice—and thus requires a great deal of advance planning.

Q: If I'm an experienced lawyer, won't they let me practice in the state while my Bar admission is pending?

Again, the ABA took the lead on this in 2012, adopting a Model Rule for Practice Pending Admission. This would allow you to practice in a state for up to one year following your submission to state regulators of proof that you have applied for admission in that state. The Model Rule requires lawyers to show they are in good standing in their home jurisdiction, that they have no pending complaints against them, that they will be supervised by local counsel, and that they have applied for bar admission within 45 days of establishing "an office or other systematic and continuous presence for practicing

law in the state." Only eight states have adopted a version of this rule applicable to all lawyers, while approximately 20 others have limited it to military personnel and their spouses, who often have to move on short notice. Many states are continuing to study practice pending admission, but some—including New York—have rejected it outright because of the concern that it circumvents the authority of state Bar Examiners and does not require a sufficient character and fitness check. Even where practice pending admission is available, it is just a temporary solution: you must successfully complete the admissions process within the designated time frame or lose your eligibility to practice.

Q: Hey, I really don't want to go to all this trouble of getting admitted. Isn't there a rule that allows me to practice temporarily where my second home is located?

This brings us to the most important result of *Birbrower*: the ABA's adoption of the temporary practice rule contained in Model Rule 5.5(c). With New York's recent adoption of a court rule on the subject, 47 states now permit temporary practice along the lines suggested in the Model Rule. That Rule continues to prohibit interstate MJP, but creates four safe harbors that allows lawyers to "provide legal services on a temporary basis" in a jurisdiction where they are not admitted: (i) when they associate with local counsel who actively participates in the matter; (ii) when they are assisting or participating in an actual or potential legal proceeding, generally by obtaining *pro hac vice* admission; (iii) when they are participating in an arbitration or mediation; and (iv) where the legal services in the second state "arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice."

This fourth safe-harbor covers a great deal, allowing transactional lawyers in particular a lot of leeway to practice across state lines. But when considering practice from your second home, you should take care not to treat Model Rule 5.5(c) or its local equivalent too cavalierly. For example, some states, such as Florida, prohibit you from opening a permanent law office, or from offering legal services to local residents you had not previously represented (a bad idea whether the rules specifically prohibit it or not). *See, e.g.*, *Gould v. Harkness*, 470 F.Supp.2d 1357 (S.D. Fla. 2006) (New York licensed lawyer may not advertise in Florida for prospective clients who might need help with New York legal matters or federal administrative practice). Others require you to state on correspondence that you are not admitted to practice in that state. Still others, like Connecticut, permit temporary practice only if your home jurisdiction does. No matter which state you are in, you should avoid hanging a shingle outside your second home, setting up a storefront legal office nearby, or listing yourself in a local telephone book. These are signs that you are looking to go beyond "temporary practice," and Bar prosecutors will not be amused.

Moreover, the requirements of Model Rule 5.5(c)(iv) must be taken seriously. This is another lesson from the recent Minnesota case discussed earlier. The lawyer argued that his work for his in-laws was "reasonably related" to his practice in Colorado. The Minnesota Supreme Court did not buy it. Citing Comment 14 to Minnesota's version of Rule 5.5 (which is identical to the Model Rule comment, but not found in New York), the Court noted that the work has to have *something* to do with the lawyer's work in his home state, *i.e.*, the client may be a resident of that state, or have hired the lawyer to work in the foreign state before, or the lawyer has a national practice in a specialized area, or the client's activities are multijurisdictional. 884 N.W.2d at 668. None of these applied to the lawyer's in-laws.

On this point, however, I want to end on a more hopeful note. If all you do in your second home is work for your former home state clients, applying only home state law, and do not attempt to solicit local clients, it is dubious that state disciplinary authorities will care.

But once again, in New York there is a special caveat. Under N.Y. Jud. Law §470, a lawyer admitted to practice in New York who is not a New York resident must still maintain an "office for the transaction of law business … within the state." The New York Court of Appeals made clear that this must be an actual, physical law office; a mail drop will not do. *Schoenefeld v. State*, 25 N.Y.3d 22, 25 (2015). The Second Circuit recently rejected a challenge to the constitutionality of this statute under the Privileges & Immunities clause. *Schoenefeld v. Schneiderman*, 821 F.3d 273 (2d Cir. 2016). While this outmoded statute may someday be amended, until then New York lawyers practicing New York law in another jurisdiction still must arrange to maintain a physical office in New York.

Q: What if I am an in-house lawyer? Does that change anything?

Yes, it does, especially if you are locating to a state that has adopted a version of the ABA's Model In-house Counsel Registration rule. This allows an in-house lawyer admitted in another jurisdiction—even a foreign country—to register with state authorities and be admitted to practice in the second state on a limited basis. The lawyer may represent only his or her employer and may not appear in court, except if performing pro bono services.

New York was one of the first jurisdictions to adopt such a rule. 22 NYCRR §522.1 *et seq*. Nevertheless, in-house lawyers moving to New York must act quickly: they have just 90 days to register. 22 NYCRR §522.7(a). It is astonishing the number of New York in-house lawyers admitted only in other states who have missed this deadline, and equally astonishing the difficulty of setting this straight with New York Character and Fitness authorities. Still, the lawyer must fix the problem: the alternative is to try to fly under the radar, practicing illegally, and make it impossible to later become admitted here because of the inability to comply with the "five out of seven" rule discussed earlier.

In short, as a lawyer, you are permitted a lot more mobility now than when *Birbrower* was decided. But you still must learn the rules of the jurisdiction where your second home is located to ensure that you do not engage in interstate UPL. Close adherence to those Rules, and the self-discipline to not establish a permanent law office or solicit local clients, should allow you to work from your second home without resistance from local or home state disciplinary authorities.

Prevention and Response: A Two-Pronged Approach to Cyber Security and Incident Response Planning

By Steven M. Puiszis

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Introduction

Today the issue is not if a law firm will suffer a cyber intrusion, but when, and what type. Therefore, the critical question for any law firm is how well it will respond when the inevitable happens. A law firm's response to a cyber security incident can be the difference between keeping and losing a client, and maintaining the reputation or perhaps even the stability of the firm. Clients are mandating that their law firms have safeguards in place to prevent a data breach. But technology is far from foolproof, and even the strongest technical, administrative, and physical safeguards are no guarantee that a law firm will not be breached.

A client may be willing to forgive a lawyer who was fooled by a phishing exploit and clicked on a link that launched malware onto the lawyer's computer. A client may understand how an iPhone or laptop computer could be lost or stolen. But a client may not forgive a firm that fumbles an opportunity to prevent this type of security incident from turning into a full-fledged breach resulting in the exfiltration of the client's sensitive information. A law firm's unsuccessful efforts to prevent the compromise of client or third-party data will be critically reviewed after the fact, by those clients and third parties as well as their lawyers.

A two-pronged approach addressing both prevention and response is critical to this area of law firm risk management. Law firms should: (1) implement strong safeguards to prevent cyber intrusions and data breaches; and (2) prepare to promptly address such an incident when one occurs. While some might suggest that developing an incident response plan as part of a two-pronged approach is not ethically required under the reasonable efforts standard of Model Rule 1.6(c), client guidelines are increasingly requiring them. To the extent a response plan may assist in preventing an actual breach, it could be considered a reasonable step under Rule 1.6(c).[1]

How well a law firm responds to a security incident or cyber intrusion depends on how prepared the firm is when one occurs. Security experts believe the hours immediately following a cyber intrusion are the most critical. Accordingly, the time to prepare for a breach is *before* one occurs. Trying to determine what steps should be taken under the stress of a potential breach is far from ideal and can potentially result in delays, missteps and mistakes. The cardinal rule of law-firm risk management is to never make a problem worse, and not having measures in place to address a potential breach is inconsistent with that principle.

Cyber security sits at the intersection of law and technology. Because even tech-savvy General Counsel may not be familiar with critical features of a law firm's network architecture and its latest cyber

security measures, a strong working relationship between the firm's General Counsel (or the equivalent position), and its Chief Information Officer (CIO), Chief Security Officer (CSO), Director of Information Technology (IT), or an outside IT vendor (depending on the firm's structure) is critical to this area of risk management for law firms.

There is no "one-size-fits-all approach" to how a law firm should protect the data in its possession, and the same is true when it comes to developing an incident response plan. Security professionals speak of "defense in depth" or layers of security, but what those layers may consist of can depend on a variety of factors such as a firm's size, geographic footprint, organizational structure, practice areas, technological sophistication, culture and available resources. Those same factors will also influence the processes and steps outlined in the firm's incident response process.

While incident response plans may vary from firm to firm, their goals are the same and similar concepts are consistently found in various incident response plans to achieve those goals. The primary goal of any incident response plan is to have a process in place that will allow the firm to promptly respond in a coordinated manner to any type of security incident or cyber intrusion. The incident response process should promptly: identify and evaluate any potential network anomaly or intrusion; assess its nature and scope; determine if any data or information may have been accessed or compromised; quarantine the threat or malware; prevent the exfiltration of information from the firm; eradicate the malware, and restore the integrity of the firm's network.

Incident response plans should identify the team members and their backups; provide the means to reach team members at any time an intrusion is reported, and define the roles of each team member. The plan should outline the steps to be taken at each stage of the process, designate the team member(s) responsible for each of those steps, as well as the team member charged with overall responsibility for the response.

Evidence as to how the breach occurred may prove to be critical if litigation, or an administrative or a criminal investigation, subsequently occurs and should be preserved in a forensically sound manner. The response plan should identify a team member designated by the firm's General Counsel to record information about the intrusion or breach. The record should include how and when the intrusion occurred; who, when, and how it was discovered; the nature of any malware involved; each step taken to contain the intrusion and eradicate the threat; when those steps were taken; and the team member(s) or third parties involved in each step of the process. The response plan should also address how to handle media inquiries, the firm's potential statutory and ethical reporting obligations, and procedures for notifying law enforcement when appropriate.

With the growing recognition of in-firm privilege[2], the law firm's General Counsel should play a key role in the response process. An outside counsel equivalent may play the same role for firms that do not have a general counsel. General Counsel should be involved in contacting any third-party vendors participating in the response process to assist in the provision of legal advice to the firm in an attempt to shield those communications and work product from later discovery if necessary. *See In re Target Corp. Customer Data Security Breach Litigation*, 2015 WL 6777384 (D. Minn. Oct. 23, 2015) (recognizing and applying attorney-client privilege and work product protection following a data breach); *Genesco,Inc., v. U.S.A., Inc.*, 307 F.R.D. 168 (M.D. Tenn. 2014) (applying attorney-client privilege and work—product protection to bar deposition, records, and communications of forensic investigator following the investigation of a cyber attack). General Counsel should also be involved in assessing any statutory or ethical reporting obligations, and in the drafting process should it be

determined if a notification needs to be sent.

The following sections will provide a checklist of concepts that law firms should consider in developing an incident response plan and the risk management steps to consider before a cyber intrusion occurs. A checklist of considerations for when a cyber intrusion occurs is also provided.

1. Risk Management Steps Law Firms Should Consider Before a Security Incident Occurs

There are risk management steps that a law firm should consider before a cyber intrusion occurs that may impact the firm's incident response plan and its strategic security considerations:

- Evaluate how information enters, moves through and exits the firm's network.
- Evaluate where information is stored and how it can be accessed by lawyers and staff. Don't overlook third party vendors, the Cloud, personal devices and home computers.
- Identify sensitive, highly sensitive, or confidential information in the firm's possession.

Since not all this information may be of equal value or importance, identify where sensitive or confidential information is stored and evaluate if additional safeguards should be applied to these categories of information.

Sensitive, highly sensitive or confidential information will frequently include personally identifiable information (PII); personal health information (PHI); nonpublic financial information; trademarks; trade secrets; patent or M&A information; customer data and any other information that client indicates should be treated as highly confidential.

- Identify those persons or entities that have physical or electronic access to your network and those that have potential access to sensitive and confidential information. Evaluate if they need or should have access to sensitive or confidential information and block access for those who do not need access. When third parties have electronic access to the network, evaluate segmenting the area of the network they can access.
- Identify potential vulnerabilities at each data access point.
- Evaluate the firm's existing physical, administrative and technical safeguards at each data access point.
- Take steps to remediate vulnerabilities or weaknesses at each access point.
- Prioritize remediation steps addressing the most critical vulnerabilities first in light of available resources.
- Consider an outside IT forensic or network security vendor if necessary to assist with identifying vulnerabilities or prioritizing remediation steps.

Measures that firms should consider to mitigate common attack vectors include: applying newly released patches to close identified vulnerabilities; controlling the use of unsecured public Wi-Fi and the use of dual factor authentication for remote access; encrypting laptop computers; mobile devices; back up and portable storage media; limiting and protecting administrative privileges over firm equipment and its network; training lawyers and staff about phishing and social engineering exploits, and properly disposing of digital equipment.

- Evaluate your cyber coverage for data breaches or security incidents. Cyber insurance isrelatively new and carriers' forms and terms can vary widely between different insurers.
- Review your firm's computer policies and log-on banners to ensure they include consent to real time monitoring of any email traffic or network use.
- Become familiar with the reporting obligations imposed by state data breach notification laws[3] and under HIPAA if the firm qualifies as a Business Associate. *See* 45 CFR §§ 164.400-.414(2014).

HIPAA includes reporting obligations to the Secretary of HHS in §164.408 and to the news media in §164.406 (when the breach involves more than 500 residents of the state).
- Check any outside counsel guidelines and business associate agreements for additional reporting obligations.
- Train lawyers and staff on data security and cyber issues including recognizing phishing and social engineering exploits, signs that a computer may be infected and who to contact at the firm in that event. Once the response team and the process or plan have been developed, consider running tabletop exercises (hypothetical or simulated cyber incidents) to identify gaps in the plan and to insure team members are aware of the steps that each need to take.

Establishing an Incident Response Plan and Team

In planning how to deal with a cyber intrusion a firm must consider both the steps to be taken and the personnel who will take them.

The Incident Response Team

A firm's response team should be interdisciplinary because of the various issues potentially raised by a data breach or a security incident.
- Response team members assigned to particular security incidents or cyber intrusions can vary depending on the nature of the incident and the type of information or data involved.
- Each team member should have at least one designated backup person capable of performing the same function to ensure availability around the clock, 365 days a year.
- Communications between team members should be addressed in the response plan as team members should not attempt to use a potentially compromised network or phone system (or one that is not functioning) to communicate with one another about the incident or their response activities.
- Response teams frequently include internal and external members. Depending on the size and structure of the internal team, members can include: firm General Counsel or the firm's equivalent officer; a member of the firm's Management Committee; the firm's CIO, CSO, or Director of IT (or some combination thereof depending on firm structure); members of the firm's IT and Human Resources (HR) Departments (when HR data is compromised); and, members of the firm's Public Relations or Marketing Department(s).

A firm should evaluate required skill sets to complete each potential step in the response process, and if any firm employee has that skill. If not, determine, identify and evaluate outside vendor candidates. For example, there are third party vendors available to handle forensic investigations of the firm's network and equipment, support services vendors that handle mailings of breach notifications and track responses. The firm may set up outside toll-free hotlines or call centers and offer free credit/identity theft monitoring and restoration services. The firm may also consider outside communications/PR support when appropriate. A firm should consider developing law enforcement and third-party vendor contacts as a preparatory step.

Firm General Counsel should designate a team member to record relevant information about the cyber intrusion including steps taken to contain and eradicate the malware. Team members should be instructed to report information to the plan's scrivener and other designated team members on a daily basis and trained on what to say and how to say it.

General Counsel should consider designating the firm's spokesperson in the event of a breach and identifying how media inquiries should be handled, and who is responsible for working with internal or

third-party communications or PR professionals.

If the firm has cyber coverage, check with the carrier about preapproved third-party vendors to handle these functions and consider adding the vendors to your response plan. Cyber carriers frequently have designated lawyers to serve as a "data-breach coach," and many provide coverage for PR assistance.

The Incident Response Plan and Process

A firm's response plan should be flexible and ideally be capable of addressing any type of cyber intrusion or security incident ranging from a lost smartphone or laptop computer to an industrial or state—sponsored intrusion or a distributed denial-of—service (DDoS) attack on the firm. The plan should include steps to address security incidents or breaches stemming from the mishandling of paper records, too.

Here are some steps to conisider incorporating into the plan:

- Determine the persons at the firm who receive notifications of these cyber alarms, how they are notified and how quickly they can react. Have more than one person receive these notifications.
- Identify and list each internal and external team member and each member's backup. Contact information, including the home, cell phone numbers and personal email address of each team member and backup should be included in the plan.
- Identify the roles and responsibilities of each team member so that every team member knows who is responsible for each step outlined in the plan. Distribute the plan to each team member and evaluate storing the plan in a secure network location that each team member can access.
- Designate a team member to record relevant information about the cyber intrusion including the steps taken to contain and eradicate the malware. Team members should be instructed to report information to the plan's scrivener and other designated team members on a daily basis and trained on what to say and how to say it.
- Identify the team members to whom a suspected incident or intrusion should be reported, and the team member(s) responsible for initially evaluating the intrusion and classifying the incident.
- Set up an 800 phone number and an email address to report suspected cyber incidents or data beaches such as: breach@[insert law firm name].com.
- Designate the firm's spokesperson in the event of a breach and identify how media inquiries should be handled, and who is responsible for internal or external communications, and for working with PR professionals.

Whenever possible, a law firm should avoid responding to press inquiries or making a public announcement before it can answer:

How and why the intrusion or incident occurred;
Whether information was acquired or compromised by a hacker or third party;
What the firm is doing to prevent it from happening again;
What the firm is doing to mitigate the harm to anyone affected by the breach and to protect its clients' interests.

The goal is to make a single response, not multiple ones, to limit the reputational harm resulting from the incident. If the firm receives a press inquiry before it is ready to provide answers, an appropriate response is that the firm is aware of the incident and is investigating.

Also, if the initial evaluation does not classify the intrusion as a false alarm, the plan should outline the next steps to be taken depending upon what the evaluation reveals about the nature of the intrusion, the

malware involved and the scope of the impact on the network. Appropriate team members should be deployed depending upon the nature of the incident and the extent of the compromise.

The process outlined in the plan should include periodic or continuous evaluations of the threat and permit or require a change in the response if it is determined that the threat is greater or less than originally evaluated.

The plan should also consider:

- preserving critical information such as server and network logs.
- requiring that the team scrivener record when and how the security incident or cyber intrusion occurred, who discovered it and when it was discovered, the type of malware involved, when team members were deployed, and the steps taken to confirm, quarantine and eradicate the threat.
- having a breach communications outline in place, which takes into account state and federal reporting obligations, obligations imposed by client agreements or guidelines, as well as applicable ethical standards.
- outlining at what point in the process the firm's management should be made aware of the intrusion or incident. The contact or relationship partner for any client whose information was compromised should be notified once that determination has been made. That partner will assist with communications to the affected client.

2. Risk Management Steps Once an Actual Cyber Intrusion or Security Incident Is Confirmed

After an intrusion or security breach is confirmed, there are also steps that a firm should take in response:

- Any infected equipment should be disconnected from the network, but not otherwise disturbed. If the equipment is powered off, leave it off and if on leave it turned on. Don't forget to disconnect any WiFi connection. The infected equipment should be secured pending a forensic analysis.
- Any lost or stolen mobile device should be remotely wiped, to the extent the firm has the technological capability to do so, promptly after notification of the loss or theft. In a BYOD environment, be sure to obtain the prior written consent of the device owner to wipe any personally owned mobile device.
- Internal or external team members responsible for forensically examining any infected equipment and the network should be immediately dispatched to further evaluate the nature and extent of the intrusion.
- Critical logs from firewall, routers, servers, and network access should be preserved in a forensically sound manner.
- Details and information about the intrusion and the firm's response should be recorded as they become known.

The response team should:

- Complete the forensic analysis of any compromised equipment and the network.
- Evaluate if any client or firm information was acquired or accessed during the intrusion. Identify the clients, third parties or employees that own any data that was accessed or compromised, or who may be affected as a result of the intrusion.
- Identify, locate and eradicate any malware in the network or on the equipment and restore the integrity of the network.
- Consider retaining a third-party forensic expert to determine if any "back doors" were built into the network and that it is secure. This information may be of critical importance when notifying a

client.
- Evaluate the need to contact law enforcement and how to protect client confidentiality.
- Attempt to retrieve any compromised data and take steps to potentially mitigate any harm.
- Restore any exfiltrated information, or in the case of ransomware, any encrypted data or files from backup media.
- Evaluate and address any reporting obligations under state or federal law, client guidelines or agreements, and any ethical obligation to report under Model Rule 1.4 or a state's equivalent provision.
- Evaluate if the intrusion or incident triggers a personal interest conflict for any affected clients under Model Rule 1.7 or a state's equivalent provision.
- Provide notice of the incident to the firm's professional liability or cyber carrier. Preferably this should occur promptly after confirmation of an actual cyber intrusion or security incident.
- Determine what to tell clients, employees or the public about the breach.
- Consider retaining outside counsel specializing in ethics, cyber security and/or the defense of law firms
- Consider retaining third-party support services vendors for credit monitoring, toll-free hotline, etc.

Post-Incident Evaluations Once the Response Process Is Complete

After a response team has gone through these steps, it should then:
- Critically evaluate how the intrusion occurred and what steps can be taken to prevent a reoccurrence.
- Address and remediate any vulnerability that caused or contributed to the intrusion or breach.
- Evaluate, address and remediate any other weaknesses or deficiencies uncovered during the response process in the firm's administrative, physical or technical safeguards.
- Review the response process and evaluate the performance of the team members and determine if the process or their performance can be improved.
- Identify any gaps or weaknesses in the response plan and if necessary modify the plan. Then train team members on any revisions.
- Evaluate the need for additional or specific training for lawyers and staff to address the cause of the intrusion or breach.
- Periodically review and test the plan.

3. Ethical Reporting Obligations

Model Rule 1.4(a) addresses a lawyer's duty to communicate with a client, and among other things, requires a lawyer to keep the client reasonably informed about the status of a matter, promptly comply with reasonable requests for information, and promptly inform the client of any circumstance to which informed consent may be required. This includes the "duty to inform the client of material adverse developments, including those resulting from the lawyer's own errors." Colo. Bar Ass'n, Formal Op. 113 (2005).

That does not mean a lawyer must volunteer every mistake or error that occurs during the course of representing a client. State ethics opinions recognize that "[p]rofessional errors exist along a spectrum." *Id*. These opinions recognize:

> [W]hether an attorney has an obligation to disclose a mistake to a client will depend on the nature of the lawyer's possible error or omission, whether it is possible to correct it in the pending

> proceeding, the extent of the harm resulting from the possible error or omission, and the likelihood that the lawyer's conduct would be deemed unreasonable and therefore give rise to a colorable malpractice claim.

N.Y. State Bar Ass'n, Ethics Op. 734 (2000); Colo. Bar Ass'n, Formal Op. 113 (2005) ("At the other end of the spectrum are errors and possible errors that may never cause harm to the client, either because any resulting harm is not reasonably foreseeable, there is no prejudice to a client's right or claim, or the lawyer takes corrective measures that are reasonably likely to avoid any such prejudice."). Obviously, whether an ethical duty to report exists will turn on the relevant facts. However, when a lawyer makes "a serious and irremediable error," an ethical duty to report that error to the client is triggered. N.Y. State Bar Ass'n, Ethics Op. 734 (2000).

These general principles should help guide the lawyer's ethical considerations about reporting a security incident or cyber intrusion. A lawyer does not have an ethical duty to report every time the lawyer clicks on a link and malware is launched onto a computer, or every time a hacker gains access to the law firm's network. When a client's data is not accessed or acquired during a security incident, a client has suffered no harm and no ethical duty to report the incident has been triggered. This view is further supported by ethics opinions that have addressed breaches of confidentiality by non-lawyers who are granted access to a law firm's computer network or a lawyer's database. ABA Formal Opinion 95-398 explained:

> Where the unauthorized release of confidential information could reasonably be viewed as a significant factor in the representation, for example where it is likely to affect the position of the client or the outcome of the client's legal matter, disclosure of the breach would be required under Rule 1.4(b).

ABA, Formal Op. 95-398 (1995); s*ee also* Vt. Bar Ass'n, Advisory Ethics Op. 2003-03 (2003) ("if the breach would affect the outcome of the client legal matter in any fashion, the lawyer would be obligated to tell the client of the breach by the non-lawyer");Ill. State Bar Ass'n, Advisory Op. 10-01 (2009) ("a lawyer may be obligated to disclose this breach to its client if it is likely to affect the position of the client or the outcome of the client's case"). Take care to also review your agreements and outside counsel guidelines for they may impose a reporting obligation upon the firm when there may be no ethical obligation to report.

A lawyer's duty is to act in the client's best interests in fulfilling a client's expectations for information. Model Rules of Prof'l Conduct R. 1.4 cmt. [5] (2013). Thus, should a data breach occur that results in the unauthorized acquisition of a client's information, Rule 1.4 requires the client be notified about that breach. While a lawyer may be justified in temporarily delaying notifying a client in order to investigate the breach and determine how it occurred, to identify the specific information involved, or at the request of law enforcement, a lawyer "may not withhold information to serve the lawyer's own interest or convenience." Model Rules of Prof'l Conduct R. 1.4 cmt. [7] (2013).

Complete candor is a must. A law firm must be reasonably certain that the information provided is accurate, which can be difficult before a forensic examination is completed. A firm should endeavor to avoid any claim that the information provided in a breach communication was only partially true or misleading. Also keep in mind that how a lawyer informs the client of a mistake can be as important as what is said. Attempts to hide a mistake or even a perceived misrepresentation in a breach notification could trigger a claim that Model Rule 8.4(c) was violated. It is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Model Rules of Prof'l Conduct R. 8.4(c) (2013).

Rule 4.1 prohibits making false statements of material fact to third persons. Model Rules of Prof'l Conduct R. 4.1 (2013). Rule 4.3 explains that when dealing with an unrepresented person a lawyer shall not state or imply that the lawyer is disinterested and shall not provide legal advice, other than to secure counsel, if the lawyer reasonably should know that the interests of the person have a reasonable possibility of conflicting with the interests of the lawyer's client. Model Rules of Prof'l Conduct R. 4.3 (2013).

State data breach notification laws require that notice be provided to the individuals whose personal information was acquired or materially compromised and a number also require that notice be provided to third parties including credit reporting agencies and governmental officials. Some states have specific requirements to include in a breach notification, which should be carefully followed when drafting breach notifications. Because breach notifications frequently must be sent to third parties, Model Rules 4.1 and 4.3's requirements will be triggered when notices are required to be sent under state breach notification laws.

Even when no duty to report is triggered under a state's data breach notification law, a lawyer should carefully evaluate whether under his or her state ethical rules, the client should be advised of the significance of the mistake or the potential for a claim against the lawyer as a result of the data breach. The reported decisions and advisory ethics opinions that have addressed this reporting issue in other contexts are not uniform in their approach or conclusion.

For instance Colo. Bar Ass'n, Formal Op. 113 (2005), states: "The lawyer need not advise the client about whether a claim for malpractice exists, and indeed the lawyer's conflicting interest in avoiding liability makes it improper for the lawyer to do so." See also *Fitch v. McDermott, Will & Emery, LLP*, 929 N.E.2d 1167, 1184 (Ill. App. Ct. 2010) ("We similarly find no case that would require an attorney to affirmatively advise his client of his negligence and the statute of limitations for suing him"); *Expansion Pointe Properties Ltd. P'ship. v. Procopio, Cory, Hargraves & Savitch, LLP*, 61 Cal.Rptr.3d 166, 176 (Cal. Ct. App. 2007) (holding no duty to discuss "types of recovery a client may obtain in a potential malpractice action").

However, the *Restatement (Third) of the Law Governing Lawyers* § 20 cmt. C (2000), takes the position: "If the lawyer's conduct of the matter gives the client a substantial malpractice claim against the lawyer, the lawyer must disclose that to the client." Similarly, Wisconsin Ethics Opinion E-81-12 (1998), concluded: "an attorney is obligated to inform his or her client that an omission has occurred which may constitute malpractice and that the client may have a claim against him or her for such an omission." See also *Olds v. Donnelly*, 696 A.2d 633, 643 (N.J. 1997) ("The Rules of Professional Conduct still require an attorney to notify the client that he or she may have a legal—malpractice claim even if notification is against the attorney's own interest"); *Matter of Tallon*, 447 N.Y.S. 2d. 50, 51 (N.Y. App. Div. 1982) ("An attorney has a professional duty to promptly notify his client of his failure to act and of the possible claim his client may thus have against him."); N.Y. City Bar Ass'n, Formal Op. 2015-3 (2015) ("A lawyer who discovers he has been defrauded in a manner that results in harm to other clients of the law firm, such as the loss of client funds due to an escrow account scam, must promptly notify the harmed clients.").

This should not be confused with an admission of liability. Clearly when an ethical duty to report is triggered by the unauthorized acquisition of information, a lawyer should disclose the facts and circumstances surrounding the data breach, and evaluate if there is a need to suggest to the client that "it may be advisable to consult with an independent lawyer with respect to the potential impact of the error on the client's rights or claims." Colo. Bar Ass'n, Formal Op. 113 (2005).

Conclusion

A cyber intrusion raises a series of complex and challenging issues for law firms that involve a variety of disciplines. Further complicating the problem is the myriad of ways a security incident or cyber intrusions can occur. While the best defense against a breach is a robust data-security program, being prepared when a cyber intrusion occurs is a critical consideration for law firms. A poorly handled incident response can cause reputational harm to the firm as well as the loss of clients and client trust. The steps and considerations outlined above should help lawyers and law firms to be ready when the inevitable happens.

Endnotes

1. Model Rule 1.6(c) requires lawyers to "make reasonable efforts to prevent the . . . unauthorized access to information relating to the representation of a client." Model Rules of Prof'l Conduct R. 1.6(c) (2013). Comment 18 to Rule 1.6 lists a series of six factors to consider in assessing whether reasonable efforts were taken including the sensitivity of the information, the likelihood of disclosure if additional safeguards are not adopted, the cost and difficulty of implementing additional safeguards, the extent to which the safeguards adversely affect the lawyer's ability to represent a client, and whether the client required special security measures be taken or provided informed consent to forego measures that might otherwise be required under the rule. Model Rules of Prof'l Conduct R. 1.6 cmt [18] (2013).

2. *See, e.g.*, Garvy v. Seyfarth Shaw LLP, 966 N.E.2d 523 (Ill. App. Ct. 2012); *St. Simons Waterfront LLC v. Hunter, McLean, Exley & Dunn*, 746 S.E.2d 98 (Ga. 2013); RFF Family P'ship. LP v. Burns & Levinson LLP, 991 N.E.2d 1066 (Mass. 2013); *Crimson Trace Corp. v. Davis Wright Tremaine LLP*, 326 P.3d 1181 (Or. 2014); *Edwards Wildman Palmer v. Superior Court*, 180 Cal. Rptr. 3d 620 (Cal. Ct. App. 2014).

3. Forty-eight (48) states, the District of Columbia, the Virgin Islands, Puerto Rico and Guam have adopted data breach notification laws that potentially apply to data breaches involving lawyers and law firms. See State Security Breach Notification Laws, National Conference of State Legislatures, (Jan. 12, 2015), http://www.ncsl. org/research/telecommunications-and-information-technology/ security-breach-notification-laws.aspx. Currently, only Alabama and South Dakota have not enacted a data breach notification law. Id. While state data breach notification laws have many common elements, there are significant variations between them. It is critical to carefully review the law of a particular state. Generally, state data breach laws focus on unencrypted computerized data that includes personally identifying information.

While the definition of personally identifying information varies between states, frequently it is defined as a combination of a person's first name or initial and last name, coupled with one or more of the following: the person's social security number; driver's license number or other state identification number; financial account number; credit or debit account number in combination with any required security code; access code or password that would permit access to a financial account. Several states include biometric data in the definition of personal information, as well as certain types of health insurance information such as policy or subscriber numbers, or information in the person's application or claims history. Publicly available information from federal, state or local governmental records is frequently excluded from the definition of PII under these laws. Several states also encompass the compromise of paper records in their breach notification laws.

Ethics Issues in the Use of Expert Witnesses

By Neil J Wertlieb

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This article is based on written materials presented by Neil J Wertlieb as a Panelist on "Ethics Issues Relating to the Use of Expert Witnesses," presented at the American Bar Association's National Conference on Professional Responsibility in St. Louis, MO, on June 2, 2017.

Ethical Issues for Litigators Who Engage Experts

Fees for Expert Witnesses

The rules of professional conduct in virtually every state are based on the Model Rules of Professional Conduct adopted by the American Bar Association. The ABA Model Rules include a rule that indicates the payment of a contingency fee to expert witnesses is prohibited:

> **ABA Model Rule 3.4, Fairness to Opposing Party and Counsel:**
> A lawyer shall not:
> (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
> (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
> ...

Selected Comments

> [3] With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

As noted in Comment [3] to Model Rule 3.4, the law in most jurisdictions prohibits the payment of contingency fees to expert witnesses. *See, e.g.*, *Person v. Ass'n of Bar of City of New York*, 554 F.2d 534 (2d Cir. 1977) [experts should be unbiased and objective witnesses, not swayed by the incentive of receiving a higher payout if their testimony is "successful"].

It is important to note that this prohibition does not prohibit the payment of reasonable fees and expenses for the professional services of an expert witness. And, because the prohibition relates to witnesses, it probably does not prohibit contingency fees to consulting experts who do not testify

(i.e., an expert that has not been, or at least not yet been, designated as a testifying witness). *See, e.g.*, *Wilhelm v. Rush*, 18 Cal.App.2d 366 (1937) [suggesting contingency fees may be paid to consulting expert who does not testify]. (See below for further discussion regarding consulting experts.)

Procuring Favorable Testimony from Expert

Litigators are also prohibited from making false statements to a tribunal, and are prohibited from encouraging their experts to make false statements to a tribunal. ABA Model Rule 3.3 is illustrative on this issue:

> **ABA Model Rule 3.3, Candor Toward the Tribunal**
> (a) A lawyer shall not knowingly:
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
> (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
> ...
>
> ***Selected Comments***
> [2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

This prohibition extends to suborning perjury. *See, e.g.*, *Nix v. Whiteside*, 475 U.S. 157 (1986) ["The suggestion sometimes made that 'a lawyer must believe his client, not judge him' in no sense means a lawyer can honorably be a party to or in any way give aid to presenting known perjury."]. *See also In re Jones*, 5 Cal.3d 390 (1971) ["Under the circumstances shown disbarment would be appropriate.... [Respondent] practiced a wilful deception upon the court and upon the public.... The crimes of which respondent was convicted involve moral turpitude.... It is utterly reprehensible for an attorney at law to actively procure or knowingly countenance the commission of perjury .... Knowingly offering as genuine and true a written instrument fraudulently antedated and fraudulently fabricated is equally reprehensible."]

Interaction with Adverse Experts

Although it may surprise and/or disappoint many litigators, there are ethical limitations on how they may interact with expert witnesses engaged by the opposing side in their cases. For example, while litigators may view it as their responsibility to zealously attempt to discredit or impeach an adverse

expert, there may be ethical issues where the discrediting facts or assertions bear no relationship to the truthfulness of the expert's testimony. Litigators should consult the rules relating to Respect for Rights of Third Persons and Fairness to Opposing Party and Counsel:

> **ABA Model Rule 4.4, Respect for Rights of Third Persons**
> (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.
> ...
>
> ***Selected Comments***
> [1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons....
>
> **ABA Model Rule 3.4, Fairness to Opposing Party and Counsel**
> (e) A lawyer shall not ... in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused ....

These prohibitions extend to intimidation and witness tampering. *See, e.g.*, *Sutch v. Roxborough Mem'l Hosp.,* 2016 BL 380025, No. 1836 EDA 2015 (Pa. Sup. Ct. 2016) [intimidation of opposing party's expert warranted disqualification and monetary sanction]; and *Erickson v. Newmar Corp.*, 87 F.3d 298 (9th Cir. 1996) [witness tampering].

Litigators should also be cautious about contact with experts outside of the courtroom. *See, e.g.*, *Lewis v. Telephone Employees Credit Union*, 87 F.3d 1537 (9th Cir. 1996) [testimony may be excluded based on ex parte contact with expert witness]. *See also County of Los Angeles v. Sup. Ct. (Hernandez)*, 222 Cal.App.3d 647 (1990) [disqualification may be mandatory where plaintiff's counsel who employed expert previously employed (but subsequently withdrawn) by defendant was disqualified from representing plaintiff as a result of access to work product of defendant's counsel (expert's report)].

Privilege, Work Product and Confidentiality

The application of the important issues of privilege, work product and confidentiality with respect to experts often depends on whether the expert is a testifying expert or a consulting expert. Consulting experts (i.e., those experts not designated as testifying witnesses) are those experts hired to help the litigators who hired them understand the complexities of a case; whereas testifying experts are hired to help the trier of fact understand the complexities of a case.

Generally speaking, communications with consulting experts are confidential and privileged, and their work product is not discoverable by the opposing party. Consulting experts, however, may (and often do) switch to testifying experts. It is not uncommon for an expert to be engaged originally as a consulting expert, and then later be designated as a testifying expert. In which case, the discovery rules with respect to testifying experts apply.

Generally speaking, communications with testifying experts are NOT confidential or privileged. The

following are generally discoverable with respect to testifying experts: all evidence used by the expert in forming his or her opinions; all notes, outlines and memoranda prepared by the expert; and all communications between the testifying expert and the litigator who engaged them—including, if applicable, when the expert was a consultant before being designated as a testifying expert.

The applicable Federal Rules of Civil Procedure are as follows:

> **Federal Rules of Civil Procedure 26(a)(2)(A):**
> A party must disclose to the other parties the identity of any witness it may use at trial to present evidence under [certain specified] Federal Rule of Evidence.
>
> **Federal Rules of Civil Procedure 26(b)(4)(B):**
> [D]rafts of any report or disclosure [are protected.]
>
> **Federal Rules of Civil Procedure 26(b)(4)(D):**
> Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. . . .

The American Bar Association issued an opinion in 1997 that opined that attorneys who serve as consulting experts are akin to co-counsel:

> **ABA Formal Opinion 97-407:**
> "The lawyer as expert consultant occupies the role of co-counsel in the matter as to the area upon which she is consulted and as such is subject to all of the Model Rules of Professional Conduct."

See, e.g., *Shadow Traffic Network v Superior Court* 24 Cal.App.4th 1067 (1994) ["As for the work-product doctrine, codified in Code of Civil Procedure section 2018, reports prepared by an expert as a consultant are protected until the expert is designated as a witness."; "privilege is lost upon designation of the expert as a witness because the decision to use the expert as a witness manifests the client's consent to disclosure of the information"; a law firm risks vicarious disqualification when it retains an expert witness who was previously interviewed (even if not retained) by the opposing party, if confidential info was shared]. *See also DeLuca v. State Fish Co., Inc.,* 217 Cal.App.4th 671, 690-691 (2013) [once an expert is designated as a trial witness, the expert's opinions are no longer subject to the attorney-client privilege or work product protection, even if the expert was initially employed as a consultant; as a result, the testifying expert is not in possession of confidential information and can be retained by opposing counsel].

While the applicable rules may protect draft reports, the protection does not extend beyond the drafts themselves, and testifying experts may be compelled to testify regarding the preparation of their reports. *See, e.g.*, *In re Application of Republic of Ecuador*, 280 F.R.D. 506 (N.D. Cal. 2012) ["notes, task lists, outlines, memoranda, presentations, and draft letters authored by . . . testifying experts . . . must be disclosed as they are not protected as draft reports and are not independently protected as work product."]. *See also Tessera Inc. v. Sony*, No. C-11-04399 EJD (HRL), 2013 U.S. Dist. Lexis 150427 (N.D. Cal. Oct. 18, 2013) [citing Rule 26(b)(4)(B), the court distinguished between draft report & the facts surrounding the preparation of the draft report, concluding that work product privilege applies "only to the draft itself in recorded form, not any information related to the preparation of the report"]; and *Wechsler v. Hunt Health System*, 2003 U.S. Dist. LEXIS 2589 (S.D.N.Y. 2003) [no prohibition against having an expert work on a single version of a single electronic document (no obligation to

create drafts of reports)].

The designation of a testifying expert is not always dispositive on the issue of discoverability—e.g., the designation may be withdrawn. *See, e.g.*, *Shooker v. Superior Court (Winnick)*, 111 Cal.App.4th 923 (2003) ["The designation of a party as an expert trial witness is not in itself an implied waiver of the party's attorney-client privilege because his initial status is that of a *possible* expert witness. If the designation is withdrawn before the party discloses a significant part of a privileged communication . . ., or before it is known with reasonable certainty that the party will actually testify as an expert, the privilege is secure; if the party provides privileged documents or testifies as an expert (such as by stating his opinion in a declaration or at a deposition) the privilege is waived."].

A related privilege issue may arise when the litigator communicates with his or her client in the presence of the expert. If and when the expert is designated as a testifying expert, the communication may not be privileged. *See, e.g.*, *United States v. Kovel*, 296 F.2d 918 (2nd Cir. 1961) [suggesting that the presence of a consulting expert does not constitute a waiver of privilege].

Criminal Matters

Special rules apply to the use of expert witnesses by litigators in criminal matters. The American Bar Association has adopted rules relating to criminal lawyers' relationship with experts (the rules being dependent on whether the lawyer is on the defense side or on the prosecution side):

> **ABA Criminal Justice Standards for the Defense Function, Standard 4-4.4, Relationship with Expert Witnesses:**
> (a) An expert may be engaged to prepare an evidentiary report or testimony, or for consultation only. Defense counsel should know relevant rules governing expert witnesses, including possibly different disclosure rules governing experts who are engaged for consultation only.
> (b) Defense counsel should evaluate all expert advice, opinions, or testimony independently, and not simply accept the opinion of an expert based on employer, affiliation or prominence alone.
> (c) Before engaging an expert, defense counsel should investigate the expert's credentials, relevant professional experience, and reputation in the field. Defense counsel should also examine a testifying expert's background and credentials for potential impeachment issues. Before offering an expert as a witness, defense counsel should investigate the scientific acceptance of the particular theory, method, or conclusions about which the expert would testify.
> (d) Defense counsel who engages an expert to provide a testimonial opinion should respect the independence of the expert and should not seek to dictate the substance of the expert's opinion on the relevant subject.
> (e) Before offering an expert as a witness, defense counsel should seek to learn enough about the substantive area of the expert's expertise, including ethical rules that may be applicable in the expert's field, to enable effective preparation of the expert, as well as to cross-examine any prosecution expert on the same topic. Defense counsel should explain to the expert that the expert's role in the proceeding will be as an impartial witness called to aid the fact-finders, explain the manner in which the examination of the expert is likely to be conducted, and suggest likely impeachment questions the expert may be asked.
> (f) Defense counsel should not pay or withhold a fee, or provide or withhold a benefit, for the purpose of influencing an expert's testimony. Defense counsel should not fix the amount of the fee contingent upon the substance of an expert's testimony or the result in the case. Nor should defense counsel promise or imply the prospect of future work for the expert based on the expert's testimony.

(g) Subject to client confidentiality interests, defense counsel should provide the expert with all information reasonably necessary to support a full and fair opinion. Defense counsel should be aware, and explain to the expert, that all communications with, and documents shared with, a testifying expert may be subject to disclosure to opposing counsel. Defense counsel should be aware of expert discovery rules and act to protect confidentiality, for example by not sharing with the expert client confidences and work product that counsel does not want disclosed.

ABA Criminal Justice Standards for the Prosecution Function, Standard 3-3.5, Relationship with Expert Witnesses:

(a) An expert may be engaged for consultation only, or to prepare an evidentiary report or testimony. The prosecutor should know relevant rules governing expert witnesses, including possibly different disclosure rules governing experts who are engaged for consultation only.

(b) A prosecutor should evaluate all expert advice, opinions, or testimony independently, and not simply accept the opinion of a government or other expert based on employer, affiliation or prominence alone.

(c) Before engaging an expert, the prosecutor should investigate the expert's credentials, relevant professional experience, and reputation in the field. The prosecutor should also examine a testifying expert's background and credentials for potential impeachment issues. Before offering an expert as a witness, the prosecutor should investigate the scientific acceptance of the particular theory, method, or conclusions about which the expert would testify.

(d) A prosecutor who engages an expert to provide a testimonial opinion should respect the independence of the expert and should not seek to dictate the substance of the expert's opinion on the relevant subject.

(e) Before offering an expert as a witness, the prosecutor should seek to learn enough about the substantive area of the expert's expertise, including ethical rules that may be applicable in the expert's field, to enable effective preparation of the expert, as well as effective cross-examination of any defense expert on the same topic. The prosecutor should explain to the expert that the expert's role in the proceeding will be as an impartial witness called to aid the fact-finders, explain the manner in which the examination of the expert is likely to be conducted, and suggest likely impeachment questions the expert may be asked.

(f) The prosecutor should not pay or withhold any fee or provide or withhold a benefit for the purpose of influencing the substance of an expert's testimony. The prosecutor should not fix the amount of the fee contingent upon the expert's testimony or the result in the case. Nor should the prosecutor promise or imply the prospect of future work for the expert based on the expert's testimony.

(g) The prosecutor should provide the expert with all information reasonably necessary to support a full and fair opinion. The prosecutor should be aware, and explain to the expert, that all communications with, and documents shared with, a testifying expert may be subject to disclosure to opposing counsel. The prosecutor should be aware of expert discovery rules and act to protect confidentiality and the public interest, for example by not sharing with the expert confidences and work product that the prosecutor does not want disclosed.

(h) The prosecutor should timely disclose to the defense all evidence or information learned from an expert that tends to negate the guilt of the accused or mitigate the offense, even if the prosecutor does not intend to call the expert as a witness.

Attorneys in the U.S. Department of Justice should also be aware of the following policy from the United States Attorneys' Manual:

U.S. Attorneys' Manual, 3-19.111—Expert Witness

> An expert witness qualifies as an expert by knowledge, skill, experience, training or education, and may testify in the form of an opinion or otherwise. (*See* Federal Rules of Evidence, Rules 702 and 703). The testimony must cover more than a mere recitation of facts. It should involve opinions on hypothetical situations, diagnoses, analyses of facts, drawing of conclusions, etc., all which involve technical thought or effort independent of mere facts.

Ethical Issues for Attorneys Acting as Expert Witness

It is important for litigators to be familiar with the rules, if any, that may be applicable to the conduct of their expert witnesses. If the expert is licensed or certified (whether as an attorney, doctor, accountant or otherwise), the expert's compliance with the rules applicable to their profession may be relevant to their performance as an expert—e.g., failure to comply may result in disqualification, or in the expert being embarrassed and/or their testimony impeached.

It is also important for attorneys who act as expert witnesses to be aware of the possible application of the Rules of Professional Conduct to their conduct in that capacity.

Attorney-Client Relationship

As noted above, the American Bar Association has opined that consulting experts may be akin to co-counsel. In that same opinion, the ABA opined that testifying experts are not acting pursuant to an attorney-client relationship, and therefore, may not be subject to the Rules of Professional Conduct.

> **ABA Formal Opinion 97-407:**
> "A lawyer serving as an expert witness to testify on behalf of a party who is another law firm's client, as distinct from an expert consultant, does not thereby establish a client-lawyer relationship with the party or provide a "law-related service" to the party within the purview of Model Rule 5.7 such as would render his services as a Testifying Expert subject to the Model Rules of Professional Conduct. However, to avoid any misunderstanding, the testifying expert should make his limited role clear at the outset. Moreover, if the lawyer has gained confidential information of the party in the course of service as a testifying expert, the lawyer may as a matter of other law have a duty to protect the party's confidential information from use or disclosure adverse to the party."
> "[A]s long as the lawyer's role is limited to service as a testifying expert and this is explained at the outset, the client of the law firm which has engaged the testifying expert's services cannot reasonably expect that the relationship thus created is one of client-lawyer. A lawyer who is employed to testify about requirements of law or standards of legal practice, for example, acts like any non-lawyer expert witness."
> "[T]estifying expert services are not "law-related services" under Model Rule 5.7."

See, e.g., *Televisa, S.A. de C.V. v. Univision Communications, Inc.*, 2009 U.S. Dist. LEXIS 33689 (C.D. Cal. 2009) [attorney expert witnesses do not have a client]; and *Commonwealth Ins. Co. v. Stone Container Corp.*, 178 F.Supp.2d 938 (2001) ["when a law firm undertakes the role of testifying expert for a client, this undertaking, or 'engagement,' does not form an attorney-client relationship and thus does not constitute a representation within the meaning of the ethical rules."].

Other ethics opinions are also on point. *See, e.g.*, District of Columbia Ethics Op. 337 (2007) [lawyer serving as expert witness has no lawyer-client relationship with party hiring lawyer].

Despite the above authority supporting the position that attorney testifying experts are not subject

to the Rules of Professional Conduct, there is authority for application of certain Rules to the actions of attorney expert witnesses. *See, e.g.*, *Attorney Grievance Commission of Maryland v. Breschi*, 340 Md. 590, 667 A.2d 659 (1995) [willful failure to file income tax return on time justifies disbarment, supporting the notion that a lawyer who serves as a testifying expert is nevertheless subject to rules of professional conduct that govern lawyers generally].

Certain Rules do not apply to attorney expert witnesses by the very nature of the engagement. For example, because expert witnesses are not advocates, there are no obligations with respect to zealous representation. Expert witnesses (including attorney experts) are not advocates in litigation, but rather sources of information and opinions who assist the trier of fact in understanding the relevant evidence.

On the other hand, certain Rules do apply, either because of strong public policy reasons or as the context makes clear. For example, the duty of confidentiality applicable in many jurisdictions is paramount, and attorney experts are cautioned to abide by these rules in their professional work even absent an attorney-client relationship. In addition, attorney experts should consider the following Rules:

Conflicts of Interest and Disqualification

As all attorneys should know, attorneys (acting as such) owe a duty of loyalty to their clients. With respect to current clients, attorneys cannot accept or continue representation of more than one client if the representation involves a concurrent conflict of interest (absent informed consent, confirmed in writing):

ABA Model Rule 1.7, Conflict of Interest: Current Clients
(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
(1) the representation of one client will be directly adverse to another client; or
(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
(2) the representation is not prohibited by law;
(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
(4) each affected client gives informed consent, confirmed in writing.

Selected Comments

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client....
[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively....

> [10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. ... Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client.

With respect to former clients, attorneys cannot represent a person in a matter if the attorney formerly represented another client in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client (absent informed consent, confirmed in writing):

> **ABA Model Rule 1.9, Duties to Former Clients**
> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
> (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
> (1) whose interests are materially adverse to that person; and
> (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;
> unless the former client gives informed consent, confirmed in writing.
> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
> (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
> (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Selected Comments

> [1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule....

The Rules provide that the conflict of interest of one attorney in a firm is imputed to all attorneys in the firm:

> **ABA Model Rule 1.10, Imputation of Conflicts of Interest: General Rule**
> (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless
> (1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or
> (2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer's association with a prior firm, and
> (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;
> (ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the

> screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and
> (iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.
> ...

The duty of loyalty of an attorney to a current or former client may extend to the obligations of an attorney acting as an expert witness, even though the expert does not have an attorney-client relationship with the party or legal counsel who has engaged them. As a result, an attorney may be ethically barred from acting as an expert witness on behalf of a party that is adverse to a current client or to a former client with respect to a matter substantially related to the matter in which the attorney (or his or her law firm) represented the former client. *See, e.g.*, *Oasis West Realty v. Goldman*, 51 Cal.4th 811 (2011) [subsequent matter need not be an attorney-client engagement].

Similarly, experts may be disqualified from working with one side in a dispute if they had previously worked with the opposing side in the same case. *See, e.g.*, *W.R. Grace & Co., et al. v. Gracecare, Inc., et al.*, 152 F.R.D. 61 (D. Md. 1993) [lawyer patent expert for defendant disqualified because of earlier consultation with plaintiff's counsel in the same case, intending to retain the lawyer to advise on patent law as well as a possible rebuttal expert]. *See also Brand v. 20th Century Ins. Co./21st Century Ins. Co.*, 124 Cal.App.4th 594 (2004) [expert witness barred as a result of prior legal representation of opposing party in substantially related litigation, even though representation was 12 years earlier]; and *Conforti & Eisele, Inc. v. Div. of Building Constr.*, 405 A.2d 487 (N.J. Super. Ct. Law Div. 1979) [nonlawyer expert disqualified as witness for plaintiff when defendant had used the expert to advise it earlier in the same litigation, reasoning that the expert may have been the agent of defendant's counsel and his testimony therefore might violate the lawyer-client privilege, that defendant's counsel was upholding its obligations to preserve client confidences, and that plaintiff's use of the expert "would be fundamentally unfair"].

But not all authorities are in accord. *See, e.g.*, *Stencel v. Fairchild Corp.*, 174 F.Supp.2d 1080 (2001) [conflict of interest where attorneys testify as witnesses do not raise the same concerns that are present when the conflicts involve prior legal representation]. *See also Paul v. Rawlings Sporting Goods Co.*, 123 F.R.D. 271 (S.D. Ohio 1988) [plaintiff's nonlawyer expert not disqualified from testifying that the cause of injuries was defective design of defendant's baseball helmet on which the expert previously had advised defendant, rejecting the presumption of disclosed confidences under the lawyer rules and finding that defendant failed to prove any discussion about plaintiff's injury occurred between the expert and the defendant]; and *Great Lakes Dredge & Dock Co. v. Harnischfeger Corp.*, 734 F. Supp. 334 (N.D. Ill. 1990) [nonlawyer expert for defendant not disqualified where he worked closely with plaintiff's expert at the same research center, rejecting use of an analogy to the predecessor Code of Professional Responsibility and refusing to apply vicarious disqualification as if the two experts were lawyers in the same law firm].

Client Trust Accounts

An interesting question arises for attorney experts with respect to advance fee retainers. The Rules in many jurisdictions require that attorneys deposit advance fee retainers in a client trust account until such fees are earned. Such Rules generally require that the funds be segregated from the attorney's or

law firm's funds, and may not be deposited into a firm operating account until earned. *See* ABA Model Rule 1.15:

> **ABA Model Rule 1.15 Safekeeping Property**
> (a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property....
> (b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.
> (c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.
> ...
>
> ***Selected Comments***
> [2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b) provides that it is permissible when necessary to pay bank service charges on that account....

Attorney experts may, and often do, receive advance fee retainers in connection with the work they do as expert witnesses. There is little authority to provide guidance on whether such funds must, or even may, be deposited into a client trust account. The fact that such funds do not belong to the attorney expert until earned suggests that such funds should be so deposited for the protection of the expert's client. On the other hand, the prohibition on commingling may suggest otherwise, especially since that there is no attorney-client relationship between the expert witness and the client, and as ABA Formal Opinion 97-407 (cited above) opined, expert witnesses are not even providing a "Law-Related Service."

There is authority that advance fees paid to an attorney for mediation services need not be deposited into a client trust account, because the mediator attorney has no attorney-client relationship and is not acting as an advocate. *See* Arizona State Bar Assoc. Op. No. 03-07 (2003) [lawyer serving as mediator does not represent clients and should not deposit into trust advance fees received for mediation services].

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