# Ethical Coffee Break No. 17 (March-August 2013)

## AROUND THE COUNTRY

**A sensible approach to the "fiduciary duty" and "current client" exceptions to the attorney-client privilege.**

Imagine that an attorney receives notice from client that a malpractice suit is being considered and that attorney consults with in-house ethics counsel at his or her firm to understand how best to proceed before obtaining consent from the client or terminate representation; client later brings a suit and demands production of the communications between attorney and ethics counsel. Should these communications be privileged?

Some opinions have held that the fiduciary-duty exception to the privilege is applicable. Others have concluded that the current-client exception is applicable. With variation, this exception theorizes that the law firm is ethics counsel's client along with the outside client by imputation and the two clients have conflicting interests.

So what should the attorney do? Consult with ethics counsel and risk disclosure? Withdraw? Seek consent from the client? Retain an outside firm? Each option has obvious pitfalls.

A recent opinion (*RFF Family P'ship, LP v. Burns & Levinson, LLP*, 465 Mass. 702 (2013)) has developed a more reasoned and practical approach than some prior case law stating,

> [i]n law, as in architecture, form should follow function, and we prefer a formulation of the attorney-client privilege that encourages attorneys faced with the threat of legal action by a client to seek the legal advice of in-house ethics counsel before deciding whether they must withdraw from the representation to one that would encourage attorneys to withdraw or disclose a poorly understood potential conflict before seeking such advice.

The Court set forth the prerequisites for attachment of the privilege in this context. First, the law firm must formally designate the attorney or attorneys that will serve as ethics counsel. Next, ethics counsel cannot have worked on the matter at issue or a substantially related matter. Third, the time spent by the attorneys cannot be billed to the client – it should be billed to the firm. Finally, the communications must be made in confidence and kept confidential.

For a more detailed analysis of the issue, you can see Nathan Crystal, *Communications with Law Firm In-House Counsel: Does the Privilege Apply?,* Ethics Watch, forthcoming in South Carolina Lawyer, September 2013.

## SOUTH CAROLINA

**Crossing the line: a lay witness offering expert testimony.**

After the 2010 pronouncement about what sort of testimony is exclusively in the province of an expert,[1] now the South Carolina Supreme Court granted reversal in a case

[1] *See* Watson v. Ford Motor Co., 389 S.C. 434, 445-6 (2010).

where a lay witness's testimony "*crossed the line from lay to expert in several particulars.*" *In the Matter of Thomas S,* 402 S.C. 373 (2013).

Generally, an expert can testify about matters not within firsthand knowledge while a lay witness must rely on personal knowledge and cannot render opinion testimony that requires special expertise.

So how was the line crossed in this case? Over objection, a lay witness testified regarding "offense cycles" of sex offenders and their propensity to reoffend when exposed to certain "triggers", and she even defined the triggers unique to the petitioner. None of the testimony was based on firsthand observation or knowledge. In fact, her conclusion -- which went to the heart of the case -- directly contradicted the conclusion of the sole testifying expert. This was not harmless error for the Court.

**Is ineffective assistance of counsel more difficult to establish when the applicant commits horrific acts?**

To prevail in an application for post-conviction relief, the applicant must satisfy the two-prong *Strickland*[2] test. But are courts swayed by the horrific acts committed? It might have been the case *Sigmon v. State*[3] where the applicant brutally murdered two victims and kidnapped and wounded a third. Sigmon, who was sentenced to death, argued that performance of counsel was ineffective in two respects.

First, counsel did not object to the solicitor's closing argument (there are "*mean and evil people who live in this world, who do not deserve to continue to live with the rest of us, regardless of how confined they are.*") The Court noted that the solicitor has certain leeway but is not permitted to inject personal opinions into the deliberations of the jury as though they were evidence, as here. But the Court let the solicitor (and perhaps counsel for petitioner) off the hook on this.[4]

Next, Sigmon argued that counsel failed to obtain a statutory mitigation charge regarding intoxication. The Court observed that where there is evidence that the crime was committed while the defendant was intoxicated, the trial judge is required to submit certain statutory mitigating circumstances. This seems a logical argument - Sigmon consumed alcohol and smoked crack late into the night before the crimes and there was testimony that the effects of these drugs could last up to 28 days based on Sigmon's drug history. However, the testimony did not necessarily indicate, at least to the Court, that Sigmon was in fact intoxicated at the time of the crimes.

**You cannot appeal immediately a motion to disqualify an attorney.**

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[2] 466 U.S. 668 (1984). The applicant must show performance of counsel fell below an objective standard of reasonableness and prejudice.

[3] Opinion No. 27233 (refiled May 8, 2010).

[4] The opinion seems to stop just short of holding that the only comments that are objectionable in this context are those where the solicitor compares his or her initial decision to seek the death penalty with the jury's decision to impose it.

Denial of a motion by a company to disqualify an attorney is not immediately appealable. This attorney had previously represented the company in a variety of employment law matters, terminated representation, and later represented a former employee of the company in defending a suit brought by the company. The Court reasoned that the dangers presented can be redressed on appeal or an appeal may become unnecessary depending on the outcome of the case. *Enersys Delaware, Inc. v. Hopkins*, 401 S.C. 615, 738 S.E.2d 478 (2013)

**Reduce it to writing: a real estate closing attorney makes a mistake when relying on an oral agreement with the attorney for a lien creditor.**

An attorney in *Inglese v. Beal*[5] was hired to close a real estate transaction and discovered a large judgment lien when conducting a title search. The attorney claimed that he reached an oral agreement with creditor's attorney to resolve the lien. After closing, the creditor's attorney denied that any agreement existed and refused to release the property from the judgment lien. The buyer made a claim on the title insurance policy and the title insurance company paid a sum to the judgment creditor to release the lien. The insurance brought suit against the attorney and the latter reimbursed the insurance to settle the suit. The attorney brought a suit against the seller on theories of unjust enrichment and equitable indemnity. After setting forth the principle that the role of an attorney in a real estate transaction is to protect the participants from various dangers, the court held that the attorney failed to establish the elements of either unjust enrichment or equitable indemnity. The court cites the attorney's fault in dealing with the lien throughout its opinion. V*erba volant scripta manent*, they said in the ancient Rome.

**An acquittal followed by an indictment on a separate charge is not enough to raise a presumption of prosecutorial vindictiveness.**

A defendant was indicted for murder, exercised her right to a jury trial, and the jury found her not guilty verdict. *State v. Blakely*, 402 S.C. 650 (S.C. Ct. App. 2013). After the acquittal, the defendant was indicted for accessory after the fact to a felony, was tried without a jury, and was convicted and sentenced. The court noted that there are rules in place to protect against vindictive prosecution in response to a defendant asserting a statutory or constitutional right, such as the right to a jury trial. However, only certain limited circumstances raise a presumption of prosecutorial vindictiveness. The court held that an acquittal by a jury on one charge followed by an indictment on a separate charge, without more, does not raise a presumption of prosecutorial vindictiveness. Further, the defendant failed to show actual vindictive prosecution. This is in line with the settled law on prosecutorial vindictiveness. See on this Nathan Crystal's Professional Responsibility: Problems of Practice and the Profession, 2012, Fifth Edition, section "Charging and other discretionary decisions", p. 410-11.

**The South Carolina Bar welcomes affiliates.**

Proposed amendments to the South Carolina Bar Constitution were approved by an Order dated March 27, 2013. The amendments allow for certain lawyers licensed in other jurisdictions ("Lawyer Affiliates") and law students ("Law Student Affiliates") to become

[5] 742 S.E.2d 687 (S.C. Ct. App. 2013).

affiliated with the Bar. Affiliation confers no privilege to practice law in South Carolina and affiliates are not Bar members.

**The Ethics Advisory Committee okays a law firm's arrangement with a real estate company.**

The SC Carolina Ethics Advisory Committee was presented with the inquiry of whether a law firm and a real estate company can form a title insurance company and split the profits. *Ethics Advisory Opinion No. 13-03*.

The law firm would rent space next to the real estate agency, the parties would create an LLC to act as title insurance agent, the title insurance agent would write title insurance on each real estate transaction in which the law firm participated, and the law firm and the brokerage company would split the title insurance according to their ownership interests in the LLC.

The Committee concluded that (1) the law firm could rent space from the real estate agency to become one of the agency's "*preferred attorneys*" so long as the rental agreement was commercially reasonable and fair market rent was paid. Indeed, the "*give anything of value*" language of Rule 7.2(c) would not be implicated under this mutually beneficial arrangement; (2) the law firm could ethically create the LLC and split the profits without violating Rule 5.4 because the activities would not constitute the practice of law and legal fees would not be collected. The conclusion is straightforward enough: premiums are not legal fees.

**Parameters for lawyers retained by nonprofits to represent third-party clients.**

The SC Ethics Advisory Committee answered several questions related to attorneys retained and paid by a nonprofit organization to represent a client. *Ethics Advisory Opinion No. 13-04*.

Here, the nonprofit would deposit funds into the attorney's trust account for expenses related to the representation. The Committee opined that (1) it is for the nonprofit and the client to agree on who has the ownership of the funds; (2) guided by the goals of representation, the attorney decides how to use the funds and the nonprofit cannot direct the representation or determine goals; (3) the attorney must inform the client about the arrangement, obtain informed consent from the client, protect client confidences, and keep the client informed about the amount and status of the funds; and (4) the nonprofit can only place limitations on use of the funds to the extent it requires the funds be used for actual expenses incurred as to a particular matter and (5) the attorney's professional judgment cannot be compromised.

This is absolutely consistent with Rule 5.4(c)[6] and Rule 1.8(f).[7]

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[6] SC Rule 5.4(c): "*A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.*"

[7] SC Rule 1.8(f):

> A lawyer shall not accept compensation for representing a client from one other than the client unless:
> (1) the client gives informed consent;
> (2) there is no interference with the lawyer's independence of professional judgment or with the

**Lawyer succession planning encouraged.**

SC Rule 1.19 (effective July 1, 2013) urges lawyers to prepare for orderly protection of clients, in the event the lawyer dies or is disabled from practicing law, through a written succession plan.

> RULE 1.19: SUCCESSION PLANNING
> (a) Lawyers should prepare written, detailed succession plans specifying what steps must be taken in the event of their death or disability from practicing law.
> (b) As part of any succession plan, a lawyer may arrange for one or more successor lawyers or law firms to assume responsibility for the interests of the lawyer's clients in the event of death or disability from practicing law. Such designation may set out a fee-sharing arrangement with the successor. Nothing in this rule or the lawyer's designation shall prevent the client from seeking and retaining a different lawyer or law firm than the successor. The lawyer to be designated must consent to the designation.
> (c) A registry shall be maintained by the South Carolina Bar. The successor lawyer(s) shall be identified on the lawyer's annual license fee statement.

## NEW YORK

**Beware of using "Specialties" labels in social media.**

Under NY Rules of Professional Conduct 7.4(c) basically a lawyer cannot advertize he is "specialized" unless he has been certified as such. [8]

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> client-lawyer relationship; and
> (3) information relating to representation of a client is protected as required by Rule 1.6."

[8] NY Rule 7.4(c):

> A lawyer may state that the lawyer has been recognized or certified as a specialist only as follows:
> (1) A lawyer who is certified as a specialist in a particular area of law or law practice by a private organization approved for that purpose by the American Bar Association may state the fact of certification if, in conjunction therewith, the certifying organization is identified and the following statement is prominently made: "The [name of the private certifying organization] is not affiliated with any governmental authority. Certification is not a requirement for the practice of law in the State of New York and does not necessarily indicate greater competence than other attorneys experienced in this field of law;"
> (2) A lawyer who is certified as a specialist in a particular area of law or law practice by the authority having jurisdiction over specialization under the laws of another state or territory may state the fact of certification if, in conjunction therewith, the certifying state or territory is identified and the following statement is prominently made: "Certification granted by the [identify state or territory] is not recognized by any governmental authority within the State of New York. Certification is not a requirement for the practice of law in the State of New York and does not necessarily indicate greater competence than other attorneys experienced in this field of law."

The NYSBA Committee on Professional Ethics has recently opined that law firms can never use a section titled "Specialities" in a social media site (for example, they refer to LinkedIn) to list the firm's areas of practice, while a lawyer can but only if he or she has been properly certified in those areas pursuant to Rule 7.4(c). For the Committee it is irrelevant that it is impossible for a user to modify the title of the Section. *NYSBA Opinion 972*.

However, the opinion expressly does not take a stand on whether a lawyer or law firm may list areas of practice under a section titled "Skills & Expertise" of a social media site (as for example LinkedIn):

> We do not in this opinion address whether the lawyer or law firm could, consistent with Rule 7.4(a), list practice areas under other headings such as "Products & Services" or "Skills and Expertise."

In my opinion the NYSBA got it right: under NY law you cannot list yourself as a "specialist" if you do not meet the requirements of Rule 7.4(c). The label "Skills and Expertise" is more ambiguous. Strictly speaking Rule 7.4(c) does not prohibit the use of the term "expert" in NY. However, a prudent lawyer, to avoid a claim that listing areas of practice under LinkedIn "Skills & Expertise" might be misleading advertisement under Rule 7.1(a)(1), should use a disclaimer as I explain in my video "*Ethical issues of lawyers use of LinkedIn*" (available at http://www.youtube.com/watch?v=C-BNtJiX880)

**For further information, please contact info@nathancrystal.com.**