Ethical Coffee Break No. 14 (June-August 2012)

NATIONAL

ABA amends Model Rules of Professional Conduct 1.6, 1.18, 7.3, 7.1, 7.2, and 5.5 and certain Comments to the Rules

During its August 2012 Annual Meeting, the ABA House of Delegates approved the recommendations sponsored by the ABA Commission on Ethics 20/20. The amendments substantially recognize the evolving use of technology in the advertisement and practice of law and the increasing mobility of lawyers.

1. ***Reasonable efforts to protect confidentiality in the use of technology.***
   In an effort to provide guidance to lawyers regarding confidentiality and technology, Model Rule 1.6 adds subsection (c) which states that a lawyer "*shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.*" Comment 16 to the Model Rule is amended to add a non-exhaustive list of factors to be considered when evaluating whether the lawyer's efforts to prevent disclosure are "reasonable". The factors weigh the sensitivity of the information and the efforts used against the cost or difficulty of implementing additional safeguards and the practical adverse impact additional safeguards may have in client representation.

2. **Lawyers' use of technology and client development.**
   Model Rules 1.18, 7.3, 7.1, 7.2, and 5.5 are amended to address lawyers' use of technology and client development.
   The amendments to Model Rules 1.18, 7.1, and 7.2 address a lawyer's use of email, of other forms of Internet communication, and of a lawyer's Internet presence as it pertains to advertising and communication with the public.
   The amended versions of Model Rules 7.3[1] and 5.5 replace the term "prospective client" with more inclusive terms or phrases aimed to enlarge the range of what is solicitation.[2]

[1] The title of Model Rule 7.3, formerly "Direct Contact with Prospective Clients", is amended to read "Solicitation of Clients".

[2] Rule 7.3, Comment 1, defines a solicitation as "a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer's communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches."

3. **More stringent rules on the outsourcing of legal work.**
   More stringent requirements regarding outsourcing (i.e., retaining individuals outside the firm to work on client matters), are provided in the amended comments to Model Rules 1.1, 5.3, and 5.5. Lawyers must take reasonable measures to ensure that outside lawyers (and outside non-lawyers) are competent. The individuals must operate in a manner compatible with the delegating lawyers' ethical obligations in their jurisdiction. Informed consent should be obtained from the client prior to outsourcing.

4. **Exception to confidentiality for purpose of conflicts check.**
   Amendments to Model Rule 1.6 permit a lawyer to divulge information relating to the representation of a client in certain instances to detect and resolve conflicts of interest when the composition of a law firm has changed or when a lawyer changes employment.

5. **Practice of law pending admission.**
   A Model Rule on Practice Pending Admission was adopted to allow an attorney licensed in one U.S. jurisdiction who has worked in the practice of law for three of the previous five years or a lawyer licensed in a foreign jurisdiction to provide legal services in a new jurisdiction where certain (actually many) requirements are met.

6. **Shortened previous practice requirement for admission on motion**.
   Finally, the Model Rule for Admission by Motion was amended to shorten the timeframe a lawyer must have practiced in a different state, territory, or District of Columbia from five of the previous seven years to three of the previous five years.

The Ninth Circuit held that a law firm commits "egregious" ethical violations when it represents clients with conflicting interests and, therefore, forfeiture of fees is appropriate.

In *Rodriquez v. Disner*, decision no. 10-55309 (August 10, 2012), the Ninth Circuit upheld a district court ruling that law firm McGuire Woods LLP ("MGW") was not entitled to $12 million in attorney fees from the class fund in a $49 million settlement.

The underlying suit lodged claims against West Publishing and Kaplan.[3] At issue were incentive agreements[4] with five contracting class representatives which provided that MGW was authorized to apply to the court for compensation for each client on a sliding scale based on recovery; $10,000 if the recovery was $500,000 or greater, $25,000 if the recovery was $1.5 million or greater, $50,000 if the recovery was $5 million or greater, or $75,000 if the recovery was $10 million or greater.

In reviewing the district court's decision to deny fees for abuse of discretion, the Ninth Circuit took issue with the incentive agreements which created a conflict of interest between the contracting class representatives and the remainder of the class. Indeed, once the settlement thresholds were met, the contracting class had no incentive to proceed to trial and risk their $75,000 for the possibility of only a trivial gain while the remainder of the class was best served by obtaining the highest sum possible (through litigation or otherwise).

The Ninth Circuit noted that the district court, in its equitable powers, had broad discretion to deny attorneys' fees for breach of ethical obligations and was not forced to follow state law precedent.

Knowingly and willfully representing clients with conflicting interests was deemed particularly "egregious", especially in this case where the conflicts were in the retainer agreements from the outset of the representation.

SOUTH CAROLINA

The SC Supreme Court held that the existence of an unwaivable conflict does not establish in itself a claim for legal malpractice and that when a lawyer breaches his fiduciary duty, the fiduciary duty is absorbed into legal malpractice, unless the client shows specific facts grounding a separate action.

On August 15, 2012, the SC Supreme Court affirmed the lower court's decision in a case of legal malpractice and breach of fiduciary duty. *RFT v. Tinsley Adams.*[5]

RFT Management Co., L.L.C. ("RFT") sued Tinsley & Adams, L.L.P. and Welborn D. Adams (collectively, "Law Firm") for claims arising out of Law Firm's work in closing a real estate transaction. RFT entered into agreements to purchase two lots from Lake Greenwood Developers, L.L.C. ("Developer") subject to buy-back rights that could later be exercised by Developer. Developer did not own the lots

[3] BAR/BRI, whose LSAT courses were a subject of this litigation, was a subsidiary of West Publishing at the time of the filing of the suit.

[4] The incentive agreements were entered into by Van Etten Suzumoto & Beckett LLP which later merged into MGW.

[5] Case no. 2010-175606.

at the time the agreements were executed but would later obtain title to the lots prior to closing through buy-back agreements with the previous purchasers.

Law Firm performed most of the closings for Developer and handled the transaction with RFT. RFT retained Law Firm to handle the closing under an agreement that limited Law Firm's representation to preparation of a deed of conveyance and ministerial acts associated with the closing. The agreement stated that Law Firm would not negotiate on behalf of RFT or provide advice to RFT as to whether it should proceed with the transaction. Closing occurred but Developer did not subsequently have the funds to complete amenities in the community.

RFT sued on legal malpractice, breach of fiduciary duty, violation of the SC Unfair Trade Practice Act ("UTPA"), and violation of the SC Uniform Securities Act ("SCUSA").

The trial court, after having merged the breach of fiduciary duty claim into the legal malpractice claim, granted directed verdict for Law Firm on the UTPA and SCUSA claims. Only the legal malpractice claim went to the jury, which sided with Law Firm.

RFT appealed to the South Carolina Supreme Court arguing, for the part that we intend to comment, that the lower court erred in denying its motion for JNOV because Law Firm committed malpractice, as a matter of law, by representing both RFT and Developer at the closing. In addition, RFT argued that, as a matter of law, Law Firm committed legal malpractice by failing to disclose material information, providing false and misleading documents, and closing on a deceptive "flip transaction".

The representation of both RFT and Developer at the closing, according to RFT would constitute an unwaivable conflict of interest.

The Court held that the existence of an unwaivable conflict of interest does not, by itself, establish the remaining elements of a claim for legal malpractice.[6]

As for RFT's argument that the breach of fiduciary duty claim should not have merged into the legal malpractice claim, the Court found that RFT had not alleged or established any specific facts showing that a fiduciary duty claim is distinguishable, in this instance, from a legal malpractice claim.

Even if in principle the two actions are different,[7] when, as in this case, a breach of duty claim arises out of the attorney-client relationship, a legal malpractice claim will ordinarily encompass the breach of fiduciary duty claim.

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[6] In addition, the parties had agreed at trial that the issue of legal malpractice encompassed questions of fact that had to be submitted to the trial court jury. This precluded RFT from contending on appeal that it was entitled to judgment as a matter of law.

[7] While the legal malpractice requires 1) the existence of an attorney-client relationship; (2) a breach of duty; (3) damages; and (4) proximate cause, the elements for breach of duty are (1) the existence of a fiduciary duty; (2) a breach of that duty; and (3) damages proximately caused by the breach.

RFT did not have better luck in its UTPA claim[8] and in its SCUSA claim.[9] The Court affirmed the lower court on both the claims because the latter were based on the same facts that the jury rejected for the legal malpractice claim.

A lawyer may accept a mortgage to secure the lawyer's fees even when the property subject to the mortgage is at issue in the representation.

The Ethics Committee was asked whether it would be unethical for a lawyer to enter into a fee agreement calling for a promissory note secured by real property. The property was the subject of the lawyer's representation which involved various claims and counterclaims regarding the property. *Ethics Advisory Opinion 12-07*.

The Committee opined that the relevant rules were Rule 1.8, 1.5, 1.2, and Rule 1.7(a)(2).

The Committee approved the proposed course of action as not inconsistent with Rule 1.8 so long as the formalities of this rule were adhered to along with the requirement that fees be reasonable under Rule 1.5.

The main issue for the Committee is the possibility of a concurrent conflict of interest under Rule 1.7(a)(2) because the offer of judgment would make the property more valuable and increase the likelihood that the lawyer could collect fees.

The Ethics Committee noted that nearly all decisions made by lawyers impact the collectability of fees and this conundrum is addressed in Rule 1.2 which allocates (after consultation) the decision making authority between the lawyer and client. Ultimately, the lawyer must determine if under Rule 1.7(a)(2) the concurrent conflict resulting from the lawyer's personal interest in the mortgage impedes the lawyer's ability to continue diligently with the representation. The lawyer must also obtain informed consent as to the conflict.

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[8] The Court disagreed with the lower court on point of the general inapplicability of the UTPA to the legal profession; while according to the lower court an attorney is not subject to a UTPA claim because of the exemption of matters subject to regulatory authority (a business should not be subject to a claim for something required by law, statute, or regulation), the Supreme Court held that the exemption was not applicable to the legal profession, which could be held accountable on UTPA grounds. However, RFT should have shown -- which it did not -- (1) that Law Firm engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected the public interest; and (3) RFT suffered monetary or property loss as a result of the Law Firms unfair or deceptive acts.

[9] On SCUSA grounds the Court found that even if hypothetically, the transaction in which the Law Firm assisted involved a security, because the SCUSA claim was based on the same factual allegations as the legal malpractice claim that were rejected by the jury, RFT could not prevail because of the limitation contained in the retainer agreement. Indeed, the latter provided that Law Firm would perform neither a due diligence on the title nor on the Developer's financial condition.

Guidance on a title insurance company's review of attorney trust accounts.

Ethics Advisory Opinion 12-08 addresses the propriety of audits performed on attorney trust accounts by an off-site title insurance company.[10] Because the facts before the Ethics Committee were sparse, they did not issue a definitive answer and instead provided general principles.

The overarching theme is that lawyers may provide limited information to title insurance companies subject to their duty of confidentiality under Rule 1.6. The opinion gives specific guidelines on a number of aspects.

An out-of-state law firm may advertise in South Carolina using the pictures of attorneys not licensed in South Carolina if the billboard is not misleading.

The Ethics Advisory Committee issued an opinion that an out-of-state law firm with one attorney licensed in SC and the others not licensed in SC may advertise via billboards in South Carolina displaying pictures of all the attorneys in the firm, as long as the billboard does not mislead the public by implying that the lawyers who are not licensed in South Carolina will perform services in South Carolina, and is not otherwise misleading. *Ethics Advisory Opinion 12-09*.

Indeed, Rule 7.2(d) requiring an advertisement to include the name and office address of at least one lawyer responsible for its content, does not require that that lawyer be licensed in South Carolina.

NEW YORK

A claim for legal malpractice consisting of failure to advise still requires a showing of causation.

In *G&M Realty, L.P. v. Masyr*,[11] the Appellate Division, First Department held that a client must always prove that the attorney's negligence was the proximate cause of a damage they suffered, even when the alleged negligence consisted of letting a building permit elapse. In particular, the clients -- to recover for

[10] The opinion deals with a quite common situation in which a real estate lawyer is both the closing attorney for the real estate transaction and the agent for the title insurance company.

[11] Slip opinion 05257 (June 28, 2012).

malpractice -- must demonstrate that they were in a position to use the building permit.

In this case, law firm represented G&M Realty, L.P. ("G&M") in a land use zoning matter, assisting G&M in obtaining a special permit for commercial construction. Prior to its lapse, the law firm failed to inform G&M that the permit would expire unless it was renewed.

G&M sued for malpractice. The principal for G&M testified that during the time the permit was in force, he would have never initiated construction on the building without first securing a tenant, which he never had. Therefore it was held that G&M was never in a position to take advantage of the permit. As a result, Attorneys possible negligence in not renewing the permit was not the proximate cause of G&M's inability to utilize the commercial permit.

A lawyer who receives a misdirected communication must notify the sender but does not have to destroy or return it.

The New York City Bar Committee on Professional Ethics issued Formal Opinion 2012-01 which contemplates the ethical obligations of a lawyer who receives a misdirected document.[12]

Whether by email, fax, regular mail, voice mail, or other means, a lawyer who receives a document[13] that the lawyer knows or reasonably should know was inadvertently sent should promptly notify the sender in accordance with Rule 4.4(b) of the New York Rules of Professional Conduct. The rule is applicable regardless of the sender. The lawyer does not have any duty under the rules with regard to return, destruction, or retention of the document.

The Committee added, however, that the rule applies only to items "inadvertently sent". Thus, the rule would not apply where a third party obtains a document improperly and then purposefully transmits it to the lawyer. In addition, metadata sent to a lawyer raises different ethical considerations.

The New York City Bar endorses the ABA's proposed amendments regarding fee sharing with non-lawyers.

The New York City Bar Committee on Professional Ethics shared its comments on proposed amendments to the Model Rules of Professional Conduct 1.5(e) and 5.4 with the ABA Commission on Ethics 20/20. The Committee endorsed the proposed

[12] To the extent the standards in Opinion 2003-04, which addressed the same topic but was issued before the New York Rules of Professional Conduct were adopted, go beyond what is required by Rule 4.4(b), it was withdrawn by the Committee.

[13] The term "document" includes email and other electronically stored information subject to being read or put into readable form. New York Rules of Professional Conduct Rule 4.4, New York State Bar Association comment 2.

amendments that would address problems arising from both domestic and foreign jurisdictional inconsistencies regarding non-lawyer ownership interests in law firms.

Model Rule 1.5(e) currently provides that two or more law firms may, under certain circumstances, divide a legal fee generated from a matter. Issues arise when one law firm is governed by Model Rule 5.4 which prohibits non-lawyer owners while another firm is located in a jurisdiction that permits non-lawyer ownership. The proposed amendments to the Rule allow the fee sharing under these circumstances so long as the non-lawyer owners provide services that assist the law firm in its legal representation.

A similar issue arises when a New York law firm has offices in multiple jurisdictions with the same conflicting ethical rules. The amendments would address this situation in Model Rule 5.4 to provide that intra-firm fee sharing is permitted with the same caveats.[14]

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

[14] The Commission 20/20 and the NY City Committee concur on the practical considerations that law firms currently use accounting tactics which essentially allow fee sharing with non-lawyers and, therefore, the amendments would explicitly allow what is already occurring.