2014 UPDATE ON LEGAL ETHICS

Andrew J. Luskin
Ackerman, Levine, Cullen,
Brickman & Limmer, LLP
1010 Northern Boulevard, Suite 400
Great Neck, New York 11021
(516) 829-6900
aluskin@alcllp.com

THE NEW YORK RULES OF PROFESSIONAL CONDUCT
(Effective April 1, 2009)

The following is a summary of some of the more relevant changes in lawyers' professional responsibilities. Where appropriate, the "new" Rules of Professional Conduct are compared to provisions of the former Code of Professional Responsibility.

The Rules of Professional Conduct are numbered from 1.0 to 8.5. Rule 1(a) through (x) consists of "terminology," meaning definitions. Some definitions are identical to those in the former Code of Professional Responsibility (the "Code"), some differ from the former Code, and some had no counterpart in the former Code.

Terminology

Examples: Rule 1.0(d) refers to Rule 1.6 for the definition of "confidential information," a term that was used in the former DR 4-101(A).

Rule 1.6 provides that "confidential information" means information gained during or relating to the representation of a client, whatever its source, that is:

(a) protected by the attorney-client privilege;

(b) likely to be embarrassing or detrimental to the client if disclosed; or

(c) information that the client has requested be kept confidential

The former DR 4-101(A) distinguished between "confidences" and "secrets." A confidence was protected by the attorney-client privilege, while "secret" referred to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or likely to be detrimental to the client.

Rule 1.6 has abandoned the distinction between "confidences" and "secrets" and has broadened the scope of what constitutes "confidential information."

Rule 1.6(a) provides that a lawyer may not knowingly use or reveal confidential information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

(1) The client gives informed consent, which is defined in Rule 1.0(j);

(2) The disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community*;

(3) The disclosure is permitted under subparagraph (b). That subdivision allows a lawyer to reveal confidential information:

- To prevent reasonably certain death or substantial bodily harm;
- To prevent the client from committing a crime;
- To correct a legal opinion or representation of the lawyer, where the lawyer reasonably believes that a third person continues to rely on the opinion or representation and where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;
- To secure legal advice about compliance with the Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm*;
- To defend the lawyer of the lawyer's employees and associated against an accusation of wrongful conduct, or to establish or collect a fee; or
- When permitted or required under the Rules or to comply with other law or court order.

**Provision new to Rules; no counterpart in former DR 4-101*

Note: Rule 1.6 deals with a lawyer's duty in respect of confidential information learned *during* or *relating* to the representation of a client. It does not address confidential information that the lawyer learns from a *prospective* client, where the lawyer is not ultimately engaged. That circumstance is addressed in Rule 1.18.

Rule 1.18 deals with a lawyer's duties to prospective clients. A "prospective client" is a person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter.

Rule 1.18(b) provides that:

> Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

This provision addresses when a lawyer may use or reveal information learned during a consultation with a *prospective* client, where no attorney-client relationship ensues. Rule 1.18 also speaks to the representation of a client with interests adverse to those of a prospective client in the same or a substantially related matter.

Rule 1.18 provides that the lawyer may not represent a client whose interests are adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter.

If a lawyer is disqualified under this provision, then no lawyer in the firm may knowingly represent the client with interests adverse to those of a prospective firm client in the same or a substantially related matter, with certain exceptions that are set forth in subparagraph (d). The exceptions basically involve both the affected client and the prospective client giving "informed consent" (defined in Rule 1.0[j]) in writing, or the law firm taking certain screening measures within the firm and the additional requirement that a reasonable lawyer would conclude that the law firm will be able to provide competent and diligent representation in the matter.

"Informed consent" is a new term for lawyers in the realm of professional responsibility. It was not defined in the former Code.

"Informed consent," defined in Rule 1.0(j), means agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.

Note: Rule 1.18 contains exceptions to who constitutes a prospective client within the meaning of the rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming an attorney-client relationship, is not a prospective client. Also, a person who communicates with a lawyer for the

purpose of disqualifying the lawyer from handling a materially adverse representation in the same or a substantially related matter is not a prospective client within the meaning of Rule 1.18.

Rule 1.2 addresses the scope of representation and allocation of authority between lawyer and client.

Rule 1.2(a) is similar to, but uses different language than, the former DR 7-101(A). The rule requires a lawyer to abide by a client's decisions concerning the objectives of representation. In addition, a lawyer must consult with the client as to the means by which the objectives of the representation are to be pursued. A lawyer shall abide by a client's decision whether to settle a matter.

In a criminal case, a lawyer must abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive a jury trial, and whether the client will testify. *(This provision has no counterpart in the former DRs, but does have a similar, although not identical, provision in EC 7-7.)*

Rule 1.2 introduces a new concept that has no counterpart in the former Code:

Rule 1.2(c) provides that a lawyer may limit the scope of representation if the limitation is reasonable under the circumstances, the client gives informed consent (defined in Rule 1.0[j]), and where necessary notice is provided to the tribunal and/or opposing counsel. *(The commentaries do not give examples of when such notice is required.)*

Rule 1.2(b) elevates what was contained in EC 2-36 to Rule status, providing that a lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities.

Rule 1.5: This rule addresses fees and the division of fees and is rooted in DR 2-106. A fee is excessive when, after a review of the facts, a reasonable lawyer would be left with a definite and firm conviction that the fee is excessive. Note that unlike DR 2-106, Rule 1.5 covers not just fees, but also expenses.

Rule 1.5(b) is important and has no counterpart in DR 2-106. This provision requires a lawyer to communicate to a client the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible. The information must be communicated to the client before or within a reasonable time after commencement of the representation and it must be in writing where required by statute or court rule. This provision does not apply,

however, when the lawyer will charge a regularly represented client on the same basis, or at the same rate, and perform services that are of the same general kind as previously rendered to, and as previously paid for by, the client. Any changes in the scope of the representation or the basis or rate of the fee or expenses shall also be communicated to the client.

Although Rule 1.5(b) has no counterpart in DR 2-106, the rule is similar in substance to the first part of the Written Letter of Engagement rule in New York's courts. But Rule 1.5(b) applies to all engagements, not just those where the fee is expected to be at least $3,000. The Written Letter of Engagement Rule contained an exception where the fee is expected to be less than $3,000.

With respect to contingency matters, Rule 1.5(c) is identical in substance to DR 2-106(D), but the rule adds that the written terms of the contingency fee engagement must clearly notify the client of any expenses for which the client will be liable regardless of whether the client is the prevailing party.

Rule 1.5(d) is identical in substance to DR 2-106(C), but prohibits a nonrefundable retainer fee. It does, however, permit a reasonable minimum fee if the retainer agreement defines the minimum fee in plain language and sets forth the circumstances under which such fee may be incurred and how it will be calculated.

Rule 1.5(g), addressing the sharing of fees, is similar in substance to DR 2-107(A), but is couched in broader terms. The DR prohibited, with certain exceptions, fee sharing with a lawyer who was not a partner in or associate of the lawyer's firm. The rule, however, uses broader language, prohibiting fee sharing among lawyers who are not associated in the same law firm, except as provided in the rule. The rule appears to be a bit more permissive toward fee splitting than the former DR.

Rule 1.5(g) also requires disclosure to the client of the share of the fee that each lawyer will receive and requires the client's agreement to be confirmed in writing. The former DR required client consent, but did not explicitly require that the client be informed of the share of the fee that each lawyer would receive or that the client consent in writing.

Conflicts of Interest
(Rules 1.7, 1.8, and 1.11.)

Rule 1.7: Conflicts of interests with current clients.

Rule 1.8: Specific conflict rules affecting current clients.

Rule 1.11: Special conflicts of interests for former and current government officers and employees.

Rule 1.7: Subdivision (a) combines personal conflicts of a lawyer, formerly in DR 5-101, with client-to-client conflicts, which was the subject of DR 5-105. It also combines into a single paragraph restrictions on accepting representation and continuing representation, concepts that were treated separately under the former Code.

Rule 1.7 also provides that a lawyer may not represent a client if a reasonable lawyer would conclude that doing so would involve the lawyer in representing differing interests. While using the term "differing interests," this provisions omits some of the more lengthy language of the former Code that applied the proscription "if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the lawyer's representation of another client."

Rule 1.7 provides certain exceptions notwithstanding the existence of a current conflict of interest. These exceptions are partly similar to those in the former DR 5-101 and 5-105(C):

(1) If the lawyer reasonably believes that he or she 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.

Rule 1.8 contains special conflicts of interest rules involving current clients. This rule is somewhat long because it pieces together from several of the former DRs a variety of provisions involving the lawyer's relationship with a client. Rule 1.8 encompasses various provisions and concepts from the former:

- DR 5-104(A) and (B), involving transactions between lawyer and client;
- DR 4-101(B)(2), involving the preservation of client confidential information;

- DR 5-104(B), involving a lawyer acquiring literary or media rights with respect to the subject matter of the representation;

- DR 5-103(B), involving a lawyer's advance or guarantee of financial assistance to the client;

- DR 5-107, involving a lawyer's acceptance of compensation from someone other than the client, and a lawyer's participation in an aggregate settlement involving two or more clients;

- DR 6-102, involving a lawyer making an agreement with a client prospectively to limit the lawyer's liability for malpractice;

- DR 5-103(A), involving a lawyer acquiring a proprietary interest in the cause of action or subject matter of litigation; and

- DR 5-111, involving a lawyer entering into sexual relations with a client.

Rule 1.11: This rule governs former and current government officers and employees. The rule is similar in substance to the former DR 9-101(B), and it expressly requires a former public servant to comply, as well, with Rule 1.9(c), which protects a former client's confidential information. This requirement applies regardless whether the lawyer was employed by a government agency in a legal capacity or, for example, in an administrative, policy or advisory position.

Rule 1.11 also requires that a firm seeking to escape imputed disqualification must act "promptly and reasonably" to set up a screen. Rule 1.11(b)(1) sets out four features of a satisfactory screen, and 1.11(b)(2) preserves the "appearance of impropriety" criterion of DR 9-101(B)(1)(b).

To set up the screen, a firm must act promptly and reasonably to:

(i) Notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;

(ii) Implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;

(iii) Ensure that the disqualified lawyer is apportioned no part of the fee from the representation; and

(iv) Give written notice to the appropriate government agency to enable it to ascertain compliance with the provisions of the Rule.

DR 9-101(B)(1) had no notification requirement. The commentary to Rule 1.11 says that notice to the appropriate government agency, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

Rule 1.11(c) is similar in substance to DR 9-101(B)(2), but adds a definition for "confidential government information," a term also used in the former DR. "Confidential Government Information" means information that has been obtained under governmental authority and that, at the time the rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public.

Rule 1.11(e) is new. It provides that the term "matter," as defined in Rule 1.01(l), does not include or apply to agency rulemaking functions.

Rule 3.3: This rule addresses conduct before a tribunal and finds its roots in portions of DR 7-102, 7-106, and 7-108.

Rule 3.3, like the former DR, prohibits lawyers not only from knowingly making false statements of fact or law to a tribunal, but the rule also requires lawyers <u>to correct</u> a false statement of material fact or law previously made to the tribunal by the lawyer.

The rule contains some language changes from the DRs, stating, for example, that a lawyer may not offer or use evidence that the lawyer knows to be false. The former DR stated that a lawyer may not knowingly use perjured testimony or false evidence. Rule 3.3 is very similar to its former Code counterpart but with some subtle changes.

Another language change from the DRs is found in Rule 3.3(a)(3). It provides that 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. The DRs had a similar provision, stating that in such a situation, the lawyer was required promptly to call upon the client to rectify a fraud that the client perpetrated upon the tribunal and, if the client did not remediate the fraud, the lawyer was required to disclose it to the tribunal. With respect to a third party, the former DR required the lawyer simply to disclose the fraud to the tribunal. The rule does not distinguish between the client and others, but simply requires the

lawyer to take "reasonable remedial measures, including, if necessary, disclosure to the tribunal."

What happens when a lawyer is required to disclose a client's fraud to a tribunal, but in doing so the lawyer would have to reveal confidential information? The new rule is not as gracious to clients as the former DR counterpart. Rule 3.3(c) provides that the lawyer's obligation to disclose the fraud to the tribunal exists, even if the lawyer will have to disclose information otherwise protected by Rule 1.6.

This is a radical change from the DRs. Whereas the former DRs prohibited the lawyer from disclosing protected information to a tribunal, the rule requires the lawyer to do so if necessary to disclose the client's fraud, assuming other, less drastic remedial measures have failed.

Rule 3.3(d) applies to *ex parte* proceedings and has no counterpart in the DRs. It requires a lawyer in an *ex parte* proceeding to inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Rule 4.4: Entitled "Respect for Rights of Third Persons," has no counterpart in the DRs. It is relatively concise and provides that:

> (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass or harm a third person or use methods of obtaining evidence that violate the legal rights of such a person.
>
> (b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

The first part of the rule should require no discussion. But the second part has received some attention in recent years. The rule requires notification of receipt of a document that was sent inadvertently to the receiving lawyer. The rule is silent as to whether or not the lawyer may read such an item.

The commentary to Rule 4.4 makes clear that for purposes of this rule, "document" includes email and other electronically stored information subject to being read or put into readable form. The commentary states, in substance, that a lawyer who reads or continues to read a document that contains privileged or

confidential information may be subject to court-imposed sanctions, including disqualification and evidence-preclusion.

The commentary also states that whether or not the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of the rules, as is the question of whether or not the privileged status of a document has been waived.[1] Similarly, the rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person.

Note: Rule 26(b)(5)(B) of the Federal Rules of Civil Procedure[2] poses a duty on the receiving party to take steps to mitigate the effect of inadvertent disclosure. Accordingly, a lawyer who receives an inadvertent disclosure in a federal lawsuit must consider the federal procedural rule in addition to New York's Rule 4.4(b).

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[1] *See* Altman, James, M., "Inadvertent Disclosure and Rule 4.4(b)'s Erosion of Attorney Professionalism," *N.Y.S. Bar Ass'n Journal*, November/December 2010, 20-27. The article provides a comprehensive discussion of Rule 4.4(b) and expresses the view that the rule is unsatisfactory and should be amended to provide appropriate protection for confidential information.

[2] Rule 26(b)(5)(B) provides:

> *Information Produced*. If information produced in discovery is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

RULES AMENDMENTS

Rule 7.4 of the Rules of Professional Conduct

By joint order of the Appellate Divisions, Rule 7.4 was amended effective January 1, 2014. The Rule, entitled "Identification of Practice and Specialty," prescribes when a lawyer may state the fact of certification in a particular area of law or law practice by a private organization approved for that purpose by the American Bar Association, or by the authority of another state or territory with jurisdiction over such specialization. The Rule amendment modified the text of a required disclosure and adds a new subsection 3 to prescribe when the required disclosure satisfies the requirement that it be "prominently made."

Part 522 of the Rules of the Court of Appeals

In a December 2, 2013 press release, the Court of Appeals announced a rule change authorizing out-of-state attorneys employed as in-house counsel in New York to provide pro bono legal services in state. In-house counsel admitted in New York face no barrier to rendering pro bono services. Until this rule change, however, in-house counsel in New York who are not admitted in this State could not render pro bono legal services to the public.

Now, such in-house attorneys who are duly registered as in-house counsel under Part 522 of the Rules of the Court of Appeals are allowed to perform voluntary pro bono service in New York, including by appearing before courts and other tribunals for such purpose. In performing pro bono services, out-of-state, duly registered in-house counsel may not hold themselves out as an attorneys admitted in New York. Also, before any appearance before a tribunal, a registered in-house counsel must provide notice to the tribunal that the attorney is not admitted to practice in New York but is registered as in-house counsel pursuant to Part 522. Such notice shall be in a form approved by the Appellate Division;

ARTICLE

Think Before You "Speak": What Lawyers Can And Cannot Say In The Digital Age

80 Def. Couns. J. 252

By Bradley C. Nahrstadt and W. Brandon Rogers

This article contains a thoughtful discussion of the ethical considerations applicable to attorney websites, social media, blogs, legal advice forums and chat rooms, and similar modes of digital communication.

ETHICS OPINIONS

Lawyer's Duty to Report Wrongdoing of Client

Is a lawyer required to disclose false information submitted by a prospective client to a court or tribunal under penalty of perjury?

New York State Bar Association
Committee on Professional Ethics

Opinion 963 (March 19, 2013)

- Applicable Rules: 1.6(a), (b)(2), 1.9(c), 1.18, 3.3(a) and (b)

A civil legal services attorney determined that a prospective client, who was a convicted level-three sex offender, had submitted materially inaccurate and conflicting name and address information on an application in an administrative law matter, while also failing to provide his current address, as required of convicted sex offenders. The legal services agency determined not to represent the prospective client, it never filed an appearance on his behalf, but the matter remained pending. Did the legal services attorney have an ethical obligation to advise the administrative tribunal of the inaccuracies in the prospective client's pedigree information? Did counsel have an ethical obligation to alert local police or the sex offender registry as to the whereabouts of the person who sought representation?

The person who sought the legal representation was at least a "prospective client" within the meaning of Rule 1.18(a) of the New York Rules of Professional Conduct. The person contacted the legal services agency to discuss possible representation, and spoke about it by telephone with a staff attorney of the legal service agency. The information that counsel learned about the prospective client constituted "confidential information" within the meaning of Rule 1.6(a). Rule 1.18(b) protects confidential information of prospective clients.

In this case, the legal services attorney learned by inspecting the administrative record, with authorization provided by the prospective client, that the person had supplied conflicting pedigree information and that he had not fulfilled his obligation to file his current address with the state's sex offender

registry. Rule 1.18(b) prohibits a lawyer who has had discussion with a prospective client from using or revealing "information learned" in consultation with that person, except to the extent that such disclosure would be permitted by Rule 1.9 with respect to information of a former client.

Rule 3.3 is the only Rule containing provisions that *require* a lawyer to disclose confidential information protected by Rule 1.6(a). The Committee concluded that nothing in Rule 3.3(a) *required* the legal services attorney either to disclose to the administrative tribunal what he had learned about the prospective client, or report that person to the police or the sex offender registry:

- Rule 3.3(a)(1) did not apply, because the lawyer had made no false statements to the tribunal;

- Rule 3.3(a)(3) did not apply. The main thrust of this provision is to prohibit an attorney, in conduct before a tribunal, from offering or using evidence that the lawyer knows to be false. Because the lawyer never made an appearance in the case, and did not and would not represent the prospective client before the tribunal, he did not and would not offer or use the false information on the person's application; and

- Rule 1.6(b)(2) does not permit disclosure of confidential information concerning a completed or past crime. It applies only to the disclosure of confidential information as necessary to prevent a client from committing or continuing the commission of a crime.

Reporter's Remark: The State Bar ethics committee determined that the lawyer learned information about the prospective client that constituted "confidential information" within the meaning of Rule 1.6(a). Yet Rule 1.18, dealing with prospective clients, refers to "information learned in the consultation." The Rule does not refer to "confidential information," as defined in Rule 1.6. Likewise, in defining "confidential information," Rule 1.6(a) refers only to clients, without mention of prospective clients. One therefore might wonder whether information that a lawyer learns about a prospective client can ever constitute "confidential information" under Rule 1.6(a) and be subject to the protections of that Rule. Furthermore, is the scope of information learned by a lawyer from a prospective client, and protected by Rule 1.18, coterminous with "confidential information" as defined in Rule 1.6(a)? Finally, discussion in this State Bar ethics opinion did not consider whether information that a lawyer obtains or gleans from an external source (in this case the record of the administrative tribunal for the prospective client's matter), and does not obtain directly from the prospective client, falls within the realm of information

contemplated by Rule 1.18. In this scenario, was the lawyer's discovery that the prospective client had not been forthcoming with the information he supplied in his administrative tribunal application really protected under the Rules? The prospective client did not reveal to the lawyer the fact of the prospective client's inaccurate or false administrative tribunal application, or his failure to keep his sex offender registry data current as the law required. Rather, the lawyer compared information supplied to him directly by the prospective client with conflicting information that the lawyer learned by reviewing the administrative agency record. The lawyer thus had to connect the dots to determine that the prospective client had engaged in misbehavior in connection with his application to the administrative tribunal. Did the ethics committee err by assuming that what the lawyer learned enjoyed protection under Rule 1.18?

Legal Blog Authored by Attorneys

Is a blog written by an attorney considered lawyer advertising subject to the advertising rules?

New York State Bar Association
Committee on Professional Ethics

Opinion 967 (June 5, 2013)

- Applicable Rules: 1.0(a) & (c); 7.1(k)

The inquiring lawyer is a columnist who became employed by a corporation that promotes work-life balance. The lawyer will write a blog that will be titled as the blog of that lawyer, using the lawyer's name. The blog will not address legal topics but will include posts about work-life balance.

The committee concluded that the blog did not constitute attorney advertising, subject to Rule 7.1, including the retention and preservation requirements, because the lawyer's blog will not discuss legal matters and its primary purpose is not for the retention of the lawyer.

Query: What if the blog were to discuss of legal matters but not for the primary purpose of securing business for the lawyer?

Lawyer's Obligation to Disclose Potential Fraud on Tribunal

Does a lawyer who has not appeared before a tribunal have a right or duty to disclose confidential information protected by Rule 1.6 to correct a prior false

statement by the lawyer, made to opposing counsel before commencement of a proceeding but that later might be used as evidence before the tribunal?

New York State Bar Association
Committee on Professional Ethics

Opinion 982 (October 2, 2013)

- Applicable Rules: 1.0(b), 1.0(q), 1.0(c), 1.6(a), 1.6(b)(3), 3.3(a), 3.3(b)

The inquiring lawyer represented a client in an estate matter in which the will had not yet been offered for probate but likely would be offered. The lawyer believed that a will contest would ensue between siblings. The lawyer's client, one of the siblings, provided the lawyer with seemingly credible and material information that the lawyer conveyed to opposing counsel but later learned was inaccurate. Receiving counsel strongly questioned the accuracy of the information, and the lawyer then learned, after confronting the client, that the information was in fact inaccurate. The lawyer terminated the representation and notified opposing counsel, but without referring to the information that the lawyer previously had conveyed to counsel and now knew to be false.

The lawyer had no reasonable basis to believe that opposing counsel was relying on the false information, since counsel had strongly questioned its accuracy. But the lawyer was concerned that some party to the prospective probate proceeding would submit the lawyer's false statement to the court. Accordingly, the lawyer asked whether or not disclosure of the client's false information was permissible or obligatory.

The Committee concluded that the lawyer had no duty and no right to disclose a fraud that involved confidential information protected by Rule 1.6 when the lawyer did not appear before the tribunal. Rule 1.6(b)(3) does not apply in this instance, because opposing counsel strongly questioned the accuracy of the lawyer's statement, so the lawyer did not "reasonably believe" that opposing counsel was relying in the statement that the lawyer learned to be false. Rule 3.3 requires a lawyer to disclose a client's fraud, including by revealing confidential information protected by Rule 1.6, in certain circumstances. Rule 3.3, however, is concerned expressly with information that a lawyer imparts to a tribunal. The committee declined to interpret Rule 3.3 to require a lawyer to disclose a client's fraud when the lawyer is not the one who personally conveyed the false information to the tribunal. This conclusion is in contrast to a reading that other states give to Rule 3.3, where a lawyer is said to be required to correct information

that another lawyer submits to a court, assuming that the information originated with the non-appearing lawyer.

Note: This opinion makes it clear that the applicable analysis deals with protected information under Rule 1.6. The committee did not consider the lawyer's obligation where, in a similar scenario, the false information is protected by attorney-client privilege. While the committee opines on the Rules of Professional Conduct, it does not analyze questions of law.

Query: Because "confidential information" includes, among other things, information protected by attorney-client privilege, is the committee's opinion helpful or relevant? In other words, if a client imparts false information to a lawyer, which the lawyer in turn conveys to opposing counsel, wouldn't the client's communication almost always be protected by attorney-client privilege? If so, then perhaps the committee's analysis is inapplicable.

Advertising and the Virtual Law Office

New York State Bar Association
Committee on Professional Ethics

Opinion 964 (April 4, 2013)

- Applicable Rules: 7.1(h), 7.5(a), 8.4(c)

May a lawyer use a commercial mail box service location on his or her business card or letterhead in lieu of an actual office address?

The inquiring lawyer an immigration law practice primarily on-line or by other electronic means of communication. The lawyer meets with clients and others only by appointment, usually by telephone or skype or at the client's or other person's location and only rarely at her home. Rule 7.1(h) requires all lawyer advertisements to include the principal law office address of the lawyer whose services are being offered. The language unambiguously requires a physical office address.

The committee distinguished between a business card that a lawyer uses to secure business and a card used only to identify the lawyer. The committee opined that when a business card or letterhead is used in the ordinary course of professional practice or social intercourse without primary intent to secure retention – but simply to identify the lawyer – then the advertising rule does not apply.

The practical effect of this opinion seems obvious: How many lawyers print business cards solely for identification purposes and never to use with the primary intent to help secure business?

Disclosure of Client Wrongdoing

What is the responsibility of a lawyer whose matrimonial client has read the opposing party's e-mails, although she has not communicated the content of the e-mails to the lawyer?

New York State Bar Association
Committee on Professional Ethics

Opinion 945 (November 7, 2012)

- Applicable Rules: 1.6, 3.3, 4.4(b), and 8.4(d)

A matrimonial client disclosed to her lawyer that she had access to, and had been reading, her spouse's e-mails, including e-mails with counsel. Although the client did not disclose the contents of the e-mails to her lawyer, the client may have been using her knowledge of the contents in making decisions about the litigation. Must the lawyer disclose the client's conduct?

Conclusion: No, not unless the lawyer knows that the client is committing a crime or fraud and no remedial measures other than disclosure will prevent harm to the opposing party (*see* Rule 3.3[b]), or governing judicial decisions or other law require disclosure. The lawyer's knowledge is covered by Rule 1.6 ("Confidentiality of Information"), so disclosure by the lawyer is not permitted unless an exception applies.

Query: Is the improper interception of the adversary's e-mails a criminal violation under the federal Computer Fraud and Abuse Act, 18 U.S.C. § 1030, *et seq.* or the Stored Communications Act, 18 U.S.C. § 2701, *et seq.*? If so, then would Rule 3.3(b) apply in any instance in which a lawyer learns that a client improperly has accessed the adversary's e-mails? If Rule 3.3(b) does apply, then what measures must the lawyer take to comply? Would the answer change depending on whether or not the attorney is provided with the improperly-obtained e-mails?

Lawyer's Purchase of Mailing List to Solicit Interest in Lawyer's e-Mail Educational Newsletter

May a lawyer ethically purchase a list of names to whom e-mails will be sent to solicit interest in joining the lawyer's e-mail newsletter distribution system?

New York State Bar Association
Committee on Professional Ethics

Opinion 947 (November 14, 2012)

- Applicable Rules: 7.1, 7.2, 7.3

Attorneys are encouraged to educate the public to recognize their problems to facilitate the intelligent selection of lawyers (Rule 7.1, Comment 1). Attorneys also are encouraged to participate in educational and public relations programs concerning the legal system with particular reference to legal problems that frequently arise (Rule 7.1, Comment 9). Educational newsletters and seminars given by law firms are not "advertisements" under Rule 7.1(a),[3] and solicitations are a subset of advertisements under Rule 7.3(b). Accordingly, the offering of a subscription to attorney newsletters and/or seminars is not a solicitation subject to Rule 7.3, so long as the communication includes no solicitation for the utilization of the firm's legal services.

Jury Research and Social Media

May an attorney use social media websites to research potential or sitting jurors?

New York City Bar Association
Committee on Professional Ethics:

Formal Opinion 2012-2

Applicable Rules: 3.5(a)(4), 3.5(a)(5), 3.5(d), 8.4

[3] Under Rule 1.0(a), an "Advertisement" means any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers.

A lawyer may use social media websites for juror research so long as no communication occurs between the lawyer and the juror as a result of the research. Attorneys may not research jurors if the research will result in a communication to the juror or potential juror. An attorney must not use deception to gain access to a juror's website or to obtain information, and third parties working for the lawyer must comport with the same restrictions that apply to counsel. The committee opined that a juror's receipt of a "friend" request (or similar invitation) on a social network site as a result of an attorney's research would constitute a prohibited communication under Rule 3.5 if the attorney was aware that her actions would cause the juror to receive such message. Attorneys are responsible for understanding the functionality of any social media service that they intend to use for juror research. Even accidental automated notice to a juror may constitute a violation of Rule 3.5.

New York County Lawyers' Association Formal Opinion No. 743 (May 18, 2011) considered whether after the completion of voire dire and commencement of trial a lawyer routinely may conduct ongoing research on a juror on Twitter, Facebook , or other social networking sites. Rules 3.5(a)(4) and (a)(5) prohibit lawyers from communication or causing others to communicate with a potential or sitting juror, and in certain instances with a discharged juror. This committee concluded that during the evidentiary or deliberation phases of a trial, a lawyer may visit the publicly available social networking site of a juror but may not take any action that would result in any kind of communication with the juror or the juror becoming aware of the lawyer's monitoring of the juror's site. In the event the lawyer were to learn of any juror misconduct through such online research, the lawyer would be required promptly to comply with Rule 3.5(d) and bring such misconduct to the tribunal's attention before engaging in any further significant activity in the case.

Referrals of Clients; Notice to Clients of Legal Fees

May a lawyer ethically enter into an arrangement with a non-lawyer firm to accept referrals of clients whose legal fees, in an amount not disclosed to the client, would be taken from the fee paid by the client to the non-lawyer firm?

New York State Bar Association
Committee on Professional Ethics:

Opinion 942 (November 2, 2012)

- Applicable Rules: 1.5(a) & (b), 1.8(f), 5.4(a), 5.5(b), 7.2(a), 8.4(b)

A non-lawyer firm ("NL Firm") sold logo, website, and marketing services to hedge fund managers. The NL Firm also sold template legal documents such as limited partnership agreements to provide fund managers with a cost effective "do it yourself" option. The customers paid a flat fee to the NL Firm for its services and the legal document templates. NL Firm states in its materials that it is not a law firm and that the customer should consult a lawyer. NL Firm also proposed to offer to its customers, for a higher flat fee, an option that would include a referral to an outside attorney with expertise in hedge funds and securities law. The attorney would provide the client with an engagement letter and "standard hedge fund legal services," but the attorney's fees would be paid by NL Firm out of the flat fee it receives from its customer. The attorney's engagement letter would not state the amount of the fee to be paid by NL Firm to the lawyer, and the client would not otherwise be so advised.

The committee noted, but did not answer, several questions that arise under various provisions of the Judiciary Law concerning the legality of the activities of NL Firm with respect to its provision of legal document templates and its arrangements with lawyers. If, for example, the sale of legal templates constitutes the unauthorized practice of law, then under Rule 5.5(b), the lawyer would be prohibited from aiding such unauthorized practice by NL Firm.

Beyond the potential for unauthorized practice of law, the arrangement between the lawyer and NL Firm would violate Rule 1.5(b), which, subject to an exception not applicable here, requires the lawyer to communicate to a client the basis or rate of the fee and expenses for which the client will be responsible.[4]

Query: If the client is not responsible to pay the lawyer's fee, why would Rule 1.5(b) apply? If Rule 1.5(b) applies in this context, then how do attorneys in similar circumstances, where a third party pays the legal fees, comply with the Rule?

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[4] Rule 1.5(b) provides in relevant part that:

> A lawyer shall communicate to a client the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible. This information shall be communicated to the client before or within a reasonable time after commencement of the representation and shall be in writing where required by statute or court rule.

Payment for Marketing Services
Based on Contacts Developed

May a lawyer compensate a marketing firm on the basis of the number of potential or actual clients whom the marketing firm introduces to the lawyer?

New York State Bar Association
Committee on Professional Ethics:

Opinion 902 (January 13, 2012)

- Applicable Rules: 7.1, 7.2, 7.3, 8.4(a)

Cross-Reference: N.Y.S.B.A. Op. 887 (2011) (law firm may not pay employee marketer a bonus based on referrals of particular matters or based on law firm profitability if such profits are substantially related to employee's marketing efforts)

A collection attorney sought to contract with a marketing firm to receive referrals of physicians from whom the attorney might seek collection work. The attorney preferred to pay the marketing firm on the basis of "benchmarks and results," including a fixed fee for each physician introduction and meeting that the firm arranged for the lawyer, plus an additional fee if and when the physician retained the attorney to handle a certain number of collection cases.

The proposed arrangement involved Rule 7.1 (attorney advertising) and could include advertising targeted at specific recipients, constituting solicitation covered by Rule 7.3(b), which prescribes limitations on personal solicitations and those made by telephone or interactive computer-accessed communication.

Rule 7.2(a), with exceptions (including payment of referral fees as allowed by Rule 1.5[g]), prohibits a lawyer from paying compensation, or giving anything of value, or otherwise providing a reward, in exchange for the referral of clients. Consequently, the proposed compensation arrangement would be inconsistent with Rule 7.2(a) and hence impermissible.

Revocation of Consent to Conflict

What must happen when a lawyer jointly represents two co-defendants pursuant to a valid consent to both the dual representation and to any future conflicts that might arise between the clients, and one client later revokes consent?

New York State Bar Association
Committee on Professional Ethics:

Opinion 903 (January 30, 2012)

- Applicable Rules: 1.7(a) & (b), 1.9(a) & (C), 1.10(a), 1.16(b), (d) & (e)

At the time they validly consented to dual representation, the two clients had no differing interests. But given the potential for conflict between co-defendants, each client waived in advance any conflict that might arise between them as the case progressed.

Two years into the case, after substantial discovery, one client determined that its interests differed significantly from the interests of the other, and that client revoked its prior consent to the lawyer's simultaneous representation. The clients' initial consent to the simultaneous representation did not address whether or not, in the event of a consent revocation, the lawyer could continue to represent either client and whether the lawyer could use or reveal confidential information obtained from the client who had revoked consent.

A client has the right to discharge its lawyer at any time for virtually any reason. Under Rule 1.16(b)(3), a lawyer must withdraw from representation when discharged, unless a tribunal's permission for withdrawal is required and the tribunal denies permission to withdraw.

Rule 1.7 addresses conflicts of interests with current clients. Comments [4] and [5] consider a conflict that arises after representation commences, and states that ordinarily a lawyer must withdraw from the representation unless the lawyer has obtained the client's informed consent under Rule 1.7(b). Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined by the lawyer's ability to comply with duties owed to the former client and represent adequately the remaining client, given the lawyer's duties to the former client.

Rule 1.9 (Duties to Former Clients) must be considered in the analysis. When differing interests arise during a common representation and prohibit a lawyer from continuing to represent both clients absent the informed consent of both clients, Rule 1.9(a) will prohibit the lawyer from opposing either client in the same matter, and the lawyer therefore must ordinarily cease representing both clients. But where a client revokes consent previously given and relied upon in the undertaking of a conflicting or potentially conflicting representation, the revocation of consent might not preclude the lawyer from continuing to represent the other client.

Comment [21] to Rule 1.7 addresses client revocation of consent and states that whether revocation of consent to the client's own representation precludes the lawyer form continuing to represent the other client depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other clients, and whether material detriment to the other clients or the lawyer would result.

Non-Applicability of Rules 1.9 and 1.10 to Paralegals and Legal Assistants

What is the responsibility of a law firm that hires a newly-admitted lawyer who formerly worked as a paralegal or legal assistant at another law firm, where he or she acquired confidential information about a client who is adverse to a client of the lawyer's new employer?

New York State Bar Association
Committee on Professional Ethics:

Opinion 905 (January 30, 2012)

- Applicable Rules: 1.6(c), 1.9(b), 1.10(a) and (c), 5.1(a), Comment [4] to Rule 1.10

Rule 1.9 (Duties to Former Clients) and 1.10 (Imputation of Conflicts of Interest) do not apply to a lawyer who acquired confidential information while working solely as a paralegal or legal assistant. Yet a law firm that hires a lawyer who acquired confidential information as a paralegal or legal assistant at another firm is not without obligation or duty. The Michigan Bar opined (RI-285, 1996) that Rules 1.9 and 1.10 do apply in the case of a paralegal who acquired confidential information and then becomes a lawyer.

The New York State Bar Association ethics committee interprets these rules more narrowly. A paralegal is not "associated" with a law firm within the meaning of Rules 1.9 and 1.10. Accordingly, because the new lawyer was not a lawyer at his former firm, Rule 1.10 (Imputation of Conflicts of Interest) does not apply.

But Rules 1.6 (Confidentiality of Information) and 5.3 (Lawyer's Responsibility for Conduct of Nonlawyers) nevertheless require a lawyer to ensure that the lawyer's nonlegal employees (paralegals and assistants) preserve confidential information acquired during employment. In this instance, Rule 5.1 would require the firm hiring the newly-admitted attorney to make reasonable efforts to ensure that the new lawyer conforms to the Rules of Professional Conduct. Once the new lawyer is admitted to practice, the lawyer has an independent obligation to ensure that he does not reveal any confidential information learned in his former employment.

Communication with Subject of Investigation Known to be Represented by Counsel

May a lawyer representing a victim of a financial crime communicate directly with the target of the criminal investigation for the purposes of seeking restitution for the lawyer's client?

New York State Bar Association
Committee on Professional Ethics:

Opinion 904 (January 30, 2012)

- Applicable Rules: 1.0(k) & (l), 4.2(a)

An investor who lost money in a particular investment believed the loss was due to criminal conduct of another. The investor complained to authorities, who commenced a criminal investigation of the subject. The subject had not yet been arrested or indicted, but public news reports indicated that the subject was represented by legal counsel in the criminal investigation. The victim's lawyer did not question the news reports, so it was assumed that the lawyer had actual knowledge (*see* Rule 1.0[k]) of the subject's representation by counsel.

The victim asked his lawyer to communicate directly with the subject of the criminal investigation, outside the criminal process, to secure restitution of the victim's loss. May the lawyer communicate directly with the subject?

Rule 4.2 (the "no-contact" rule) prohibits a lawyer from communicating, or causing another to communicate, about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized by law to make the direct communication.

Would the inquiring lawyer's communication with the criminal investigation subject be about the same "matter," within the meaning of Rule 4.2(a)? Rule 1.0(l) defines "matter" broadly, including any litigation, judicial or administrative proceeding, case, claim, application, request for a ruling or other determination, contract, controversy, investigation, charge, accusation, arrest, negotiation, mediation, or any other representation involving a specific party or parties.

The prosecutor's criminal investigation and the inquiring attorney's civil restitution claim were separate matters, although inextricably intertwined. The criminal investigation included parties, processes, and issues unique to determination of criminal responsibility. The prosecutor had no involvement in the civil restitution matter, while the investor was a party to the civil, but not the criminal, matter. The matters thus were related but not the same.

The inquiring attorney did not know if the criminal investigation subject's lawyer also would represent the client in the civil restitution matter but had strong reason to believe that the criminal lawyer's representation would extend to the civil matter. Furthermore, it was apparent that the subject's chosen approach to the civil restitution matter potentially could have a spillover effect in the criminal matter.

The committee concluded that given the close relationship between the civil and criminal matters, the inquiring attorney was obliged to comply with the "no-contact" rule (Rule 4.2). The committee noted that several of its prior opinions have concluded that a lawyer who has a reasonable basis to believe that a party may be represented by counsel has a duty of inquiry to ascertain whether in fact that party is represented by counsel in the particular matter. The necessary extent of the inquiry will depend on the circumstances.

In this case, the inquiring lawyer was obliged to communicate with the lawyer representing the subject in the criminal investigation. If the criminal lawyer advised that he was not representing the subject in the civil matter, then Rule 4.2 would not bar direct communication with the subject.

Use of Social Media to Secure Information for Litigation

May a lawyer access Facebook or MySpace pages of an adverse party in pending litigation to obtain information about the party for use in the lawsuit?

New York State Bar Association
Committee on Professional Ethics:

Opinion 843 (September 10, 2010)

- Applicable Rules: 4.1, 4.2, 4.3, 5.3(b)(1), 8.4(c)

This issue was first posed to the NYSBA Committee on Professional Ethics in 2010. The Philadelphia Bar Association's Professional Guidance Committee analyzed the propriety of "friending" an unrepresented adverse witness in a pending lawsuit to obtain potential impeachment material. *See* Philadelphia Bar Op. 2009-02 (March 2009). In that case, the witness' Facebook and MySpace pages were accessible only with the witness' permission, by acceptance of a "friend" request. The inquiring lawyer sought to have a third party send a "friend" request to the witness in order to gain access to the witness' Facebook and MySpace pages and provide information therefrom to the lawyer, while concealing the requester's association with the lawyer and the real purpose behind the "friending."

Applying Pennsylvania Rule of Professional Conduct 8.4(c), the Philadelphia committee conclude that the inquiring lawyer could not ethically use a third party to obtain access to a private social media page for the purpose of obtaining information for the lawyer to use as impeachment material against the witness.

In the New York case, in contrast, the inquiring lawyer sought to view publicly accessible social media pages, which involved no deception in violation of Rule 8.4(c).[5] The New York committee opined that obtaining information

[5] The Rule provides:

A lawyer or law firm shall not:

. . .

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

about a party available in the publicly accessible portions of social media sites is similar to obtaining information that is available in publicly accessible online or print media, or through a subscription research service such as Nexis or Factiva, which are all permissible information gathering techniques and sources.

Note**:** the Philadelphia opinion involved an unrepresented *witness*. Attempting to "friend" an unrepresented *party* would implicate Rule 4.2 (the "no-contact" rule), which prohibits a lawyer from communicating with the represented party about the subject of the representation absent prior consent from opposing counsel. "Friending" and *unrepresented* party would implicate Rule 4.3, which prohibits a lawyer from stating or implying that he or she is disinterested, requires the lawyer to correct any misunderstanding as to the lawyer's role, and prohibits the lawyer from giving legal advice other than the advice to secure counsel if the other party's interests are likely to conflict with those of the lawyer's client. The Committee did not address these issues.

Lawyer's Use of Outside Online Storage Provider for Client Confidential Information

May a lawyer use an online data storage system to store and back up client confidential information?

New York State Bar Association
Committee on Professional Ethics:

Opinion 842 (September 10, 2010)

- Applicable Rules: 1.4, 1.6(a), and 1.6(c)
- Prior Relevant NYSBA Opinion: 709 (1998) (duty to preserve client confidential information when transmitting such information electronically)

The Committee considered whether lawyers may store client confidential information in the "cloud" (online computer data storage systems maintained on Internet servers around the world). The inquiring lawyer sought to store client confidential information in the cloud to ensure that the data would not be lost if the lawyer's computer crashed or otherwise lost the information. The online data storage system at issue was password-protected and the stored data was encrypted.

The Committee noted that a lawyer must not only refrain, without client consent, from disclosing client confidential information, but also must take reasonable care affirmatively to protect a client's confidential information. In addition, Rule 1.6(c) commands lawyers to exercise reasonable care to prevent

employees, associates, and those whose services the lawyer uses from disclosing or using client confidential information. But as the Committee also noted, Rule 1.6 does not have a lawyer guaranteeing that client confidential information is secure from *any* unauthorized access.

The Committee concluded that a lawyer may use online data storage providers to store client confidential information provided that the lawyer takes reasonable care to ensure that the system is secure and that client confidentiality will be maintained. "Reasonable care" may include consideration of the following steps:

> (1) Ensuring that the online data storage provider has an enforceable obligation to preserve confidentiality and security, and that the provider will notify the lawyer if served with process requiring the production of client information;
>
> (2) Investigating the online data storage provider's security measures, policies, recoverability methods, and other procedures to determine if they are adequate under the circumstances;
>
> (3) Employing available technology to guard against reasonably foreseeable attempts to infiltrate the data that is stored; and/or
>
> (4) Investigating the storage provider's ability to purge and wipe any copies of the data, and to move the data to a different host, if the lawyer becomes dissatisfied with the storage provider or for other reasons changes storage providers.

The Committee cautioned that because technology changes rapidly, the lawyer remains duty-bound periodically to reconfirm that the provider's security measures remain effective in light of technology advances. Lawyers also must keep abreast of legal developments involving potential waiver of attorney-client privilege in the use of advancing technologies.[6]

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[6] *See, e.g., Scott v. Beth Israel Med. Center,* 17 Misc. 3d 934, 847 N.Y.S.2d 436 (Sup. Ct. N.Y. Co. 2007) (Ramos, J.) (e-mails between hospital employee and his personal attorneys not privileged; employer's computer use policy and e-mail stated that

footnote continued

Note: The issue of "cloud computing" is a topic of consideration by the ABA Commission on Ethics 20/20 (*see* pp. 20-22, below).

Contacting Former Clients Represented by Successor Counsel

May a lawyer contact a former client to discuss matters within the scope of successor counsel's representation, when the former client is known to have successor counsel?

New York City Bar Association Committee on Professional and Judicial Ethics:

Opinion 2011-1

- Applicable Rule: 4.2(a)

A lawyer might seek to communicate with a former client to discuss matters relating to the prior representation, including, for example, where the lawyer seeks to collect a fee, or to obtain the former client's permission to return or destroy the client's file after the lawyer has been discharged. Rule 4.2 prohibits a lawyer from communicating or causing another to communicate with a party the lawyer knows to be represented by counsel about the subject matter of such representation, unless the lawyer has the consent of other lawyer or is authorized by law to do so.

Although Rule 4.2 expressly applies when a lawyer is representing a client, the Committee noted that the weight of authority interprets the "no-contact" rule to apply even when the lawyer acts on the lawyer's own behalf and thus not in the representation of a client. The Committee adopted the conclusion of Illinois and Rhode Island that Rule 4.2 *does* prohibit such communication even when the lawyer acts on the lawyer's own behalf, so long as the intended communication falls within the scope of successor counsel's representation.

The Committee noted, however, that Rule 4.2 does not stand as a blanket prohibition against all communication between a lawyer and the lawyer's former

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employees had no reasonable expectation of privacy in e-mails sent over the employer's e-mail server).

client. Such a *per se* rule would unduly restrict an attorney's ability to communicate with a former client about matters as to which the client is not represented by counsel. Consequently, the Committee concluded, a lawyer's inquiry to a former client about unpaid fees would not violate Rule 4.2 if the lawyer had no reason to believe that the former client was represented by new counsel in connection with the payment of the former lawyer's fees. But where the inquiring lawyer knows that the former client is represented by counsel with regard to the unpaid fee issue, the lawyer may not, under the guise of acting *pro se*, communicate with the former client.

The Committee expressed the view that "given the ambiguity of the rule and its potential for creating a trap for the unwary . . . the Courts should consider amending the rule to clarify its intended scope and purpose."

Group Radio Advertising

May a lawyer participate in a group radio advertisement that does not disclose the lawyer's name, principal law office address, and telephone number, but instead directs listeners to contact an agent who provides that information violates Rule 7.1(h)?

New York State Bar Association
Committee on Professional Ethics:

Opinion 839 (March 16, 2010)

- Applicable Rule: 7.1(h)

The Committee opined that a lawyer may not participate in a group radio advertisement that directs listeners to contact an agent to obtain the lawyer's name, office address, and telephone number. Rule 7.1(h) expressly requires that:

> All advertisements shall include the name, principal law office address and telephone number of the lawyer or law firm whose services are being offered.

The Committee concluded that the rule is clear and unambiguous and requires disclosure of the prescribed information on all lawyer advertising. The Committee acknowledged that its opinion effectively precludes lawyer participation in group radio advertising involving more than a few lawyers, and recommended that the NYSBA and the courts give serious consideration to amending the rule.

Lawyer's Duty to Disclose
Client Fraud to Tribunal

When a lawyer learns that a client committed fraud on a tribunal before the April 1, 2009 effective date of the Rules of Professional Conduct, regardless when the lawyer learned of the client's fraud, the lawyer is governed by DR 7-102(B)(1) of the former Code of Professional Responsibility.

New York State Bar Association
Committee on Professional Ethics:

Opinion 831 (August 14, 2009)

- Applicable Rules: 3.3 and DR 7-102(B)(1) (of the former Code of Professional Responsibility)

A lawyer who represented a client accused of a misdemeanor arranged a plea bargain that allowed the client to plead guilty to the violation of disorderly conduct. The client would avoid incarceration under her sentence of a conditional discharge provided that she was not arrested within six months of her plea. In the course of her plea, the client represented to the court and the prosecutor that she had "stayed out of trouble" since the misdemeanor arrest. A short time later, but after April 1, 2009, the client told her lawyer that in fact she had been arrested in a different county the week before her plea.

Both the new Rules of Professional Conduct and the former Code of Professional Responsibility address a lawyer's obligations when a client engages in fraudulent conduct before a tribunal. Both provisions require a lawyer to take remedial action, but the outcome is different under each provision in terms of whether the lawyer must disclose the client's fraud and the definition of "fraud."

Old Code: DR 7-102(B)(1) of the former Code required a lawyer who learned of client fraud upon a tribunal promptly to call upon the client to rectify the fraud. If the client refused or was unable to do so, the lawyer was required to reveal the fraud to the affected person or tribunal, *except when the information was protected as a confidence or secret.*

Rules of Professional Conduct: Rule 3.3(b) provides:

> A lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable

> remedial measures, *including, if necessary, disclosure to the tribunal*. (Emphasis added.)

Under the new rule, the lawyer must disclose the client fraud to the tribunal, even if the information is otherwise protected as a confidence or secret. Under the former Code, "fraud" was not defined specifically but was clarified to exclude conduct that, although characterized as fraudulent by statute or administrative rule, lacked an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations that reasonably could be expected to induce detrimental reliance by another. *See* "Definitions" section of former Code of Professional Responsibility.

In contrast, Rule 1.0(i) contemplates a *broader* concept of "fraud," providing that:

> "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction or has a purpose to deceive, provided that it does not include conduct that, although characterized as fraudulent by statute or administrative rule, lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations that can be reasonably expected to induce detrimental reliance by another.

The language of Rule 3.3(b) provides no meaningful guidance as to whether or not it applies when the client fraud occurred before the April 1, 2009 effective date of the rule. The rule could be interpreted by its plain language to apply even if the client fraud occurred before April 1, 2009. The Committee, however, rejected such an interpretation, because the new rule is a "dramatic break from the prior understanding of a lawyer's duties in the face of improper conduct by a client or witness."

The Committee concluded that a client, even one who has engaged in fraud, should be able to rely on the "rules of the road" governing the lawyer-client relationship and the lawyer's duty to disclose a client's fraud on a tribunal, as they existed when the client committed the fraud on the tribunal.

Interestingly, the Committee noted that some writers have questioned whether Rule 3.3 is consistent with the protections afforded under the Fifth and Sixth Amendments of the United States Constitution. In addition, as the Committee also wrote, "[t]here is also some question whether the new requirement of Rule 3.3, a court-adopted rule, can override the statutory protection to the

attorney-client privilege afforded by CPLR 4503(a)." The Committee expressed no opinion on these issues.

CASES

In re Amgen Inc.,
2011 WL 2442047 (E.D.N.Y. Apr. 6, 2011)

The "no-contact" rule and government lawyers

The corporate petitioner (Amgen Inc.) sought a protective order against the federal government, contending that government lawyers investigating the company violated Rule 4.2 (the "no-contact" rule).[7] The petitioner asked the court to impose on the federal government, rather than on any particular attorneys, prophylactic measures to ensure that future contacts between the government and employees of Amgen would conform to the requirements of Rule 4.2.

This matter arose from disagreement about the interpretation of Rule 4.2, which applies by local court rule to attorneys admitted to practice in the Eastern District of New York, even if they are not members of the New York bar. Rule 4.2 also applies by federal statute to attorneys employed by the federal government who engage in practice in New York (*see* 28 U.S.C. § 530B[a]; the McDade Act, providing that attorneys for the federal government are to be bound by state professional rules, to the same extent and in the same manner as other attorneys in that state).

Three *qui tam* lawsuits were pending against Amgen under the federal False Claims Act, two of which were still unsealed when Amgen sought its protective order. In the unsealed case, the government declined to intervene, but it was conducting an investigating before determining whether or not to intervene in the others. At the same time, the government was assisting a grand jury investigation into the same matters at issue in the *qui tam* lawsuits.

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[7] Much of this decision considered whether or not the court had the authority to enforce Rule 4.2 in the circumstance presented. That issue is not relevant for the purpose of this discussion and therefore is not addressed here. In his report and recommendation, Magistrate Judge James Orenstein concluded that the district court lacked the authority to grant relief to Amgen. He nevertheless analyzed the merits of the Amgen petition in the event that the referring district judge concluded that she had the requisite authority to grant relief. The district court, however did adopt the report and recommendation in its entirety and dismissed Amgen's petition.

Federal law enforcement agents served several grand jury subpoenas upon Amgen employees, while also seeking to interview several current and former employees of the company, sometimes in conjunction with serving a subpoena. The government previously had sought the assistance of Amgen's counsel in arranging the interviews but did not do so with respect to the interviews at issue. When Amgen protested, the government stated its intention to continue to contact current Amgen employees whom the government did not know to be represented by counsel.

Amgen moved for a protective order and asserted that the government agents violated Rule 4.2 by interviewing company employees. Amgen asked the court to require the government to coordinate with Amgen's counsel any further communication with employees. Amgen also asked the court to condition further government contact of Amgen employees on (i) the government not inquiring or discussing privileged (attorney-client or work product) matters with the employees, and (ii) the government abiding by the New York Rules of Professional Conduct.

The government contended that a federal court need not accept as binding the interpretation that Rule 4.2 would receive in New York State courts. New York considers a corporate "party" to include corporate employees whose acts or omission in the matter under inquiry are binding on the corporation (those employees, in effect, are considered alter egos of the corporation). Relying on a decision of the Second Circuit Court of Appeals,[8] the government asserted that federal law, rather than New York State law, controls the interpretation of Rule 4.2 in connection with federal investigations and in matters concerning federal government attorneys in federal courts. The government thus urged that the New York "alter ego" definition of "party" should not control the interpretation of Rule 4.2 in connection with Amgen's petition.

The government misplaced its reliance on *Simels*. The McDade Act (28 U.S.C.§ 530B) expressly requires government lawyers to conform to ethics rules of the states in which they practice, not just the rules of their local federal courts. Consequently, as Magistrate Judge Orenstein concluded, it is immaterial that the Amgen court might see fit to interpret the no-contact rule more narrowly than a

[8] *Grievance Comm. for S. Dist. of New York, v. Simels*, 48 F.3d 640 (2d Cir. 1995) (federal courts have an independent interest in defining the no-contact rule for themselves, even where they explicitly incorporate such rules from state law).

New York State court would interpret the rule. The McDade Act requires federal government lawyers to adhere to New York's *version and interpretation* of Rule 4.2.

Beyond the threshold matter of rules interpretation, under Rule 4.2 Amgen had to show that it was a "party" to the same "matter" as the government. The magistrate judge concluded that Amgen could not satisfy this requirement. Amgen, but not the government, was a party to the *qui tam* actions, and Amgen was not a party to the grand jury investigation. The court thus determined that Rule 4.2 was not implicated in the circumstances present, because Amgen and the United States were not both parties to the same matter within the meaning of the rule.[9]

Federal courts have wrestled with various issues concerning the application of the no-contact rule in the context of federal criminal investigations and prosecutions.[10] Amgen will not be the last decision on this subject.

Levitt v. Brooks,
2012 WL 447161 (2d Cir. Feb. 14, 2012)

Revealing a client outburst concerning a fee dispute does not Violate Rule 1.6

Brooks, a defendant in a federal criminal securities fraud case, appealed from a judgment granting his former lawyer's motion to compel payment of outstanding attorneys' fees from forfeited bail funds held by the government. The Second Circuit Court of Appeals upheld the post-trial ancillary jurisdiction that the district court exercised over the attorney-client fee dispute. Brooks argued, among other points, that in the course of presenting the fee dispute, Levitt, his former attorney, impermissibly revealed that when informing Brooks that he would withdraw from the case if Levitt did not pay his outstanding legal fees, Brooks

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[9] The court rejected the government's contention that it held a trump card over Rule 4.2, because its overt investigative communications were "authorized by law," within the meaning of Rule 4.2(a). The court was unable to "identify any constitutional provision, statute, or rule that *now* authorizes the communications about which Amgen complains." 2011 WL 2442047, at *17.

[10] *See, e.g., Simels*; *United States v. Hammad,* 846 F.2d 854, *amended,* 858 F.2d 834 (2d Cir. 1988); *In re Chan,* 271 F.Supp.2d 539 (S.D.N.Y. 2003); *United States v. Talao,* 222 F.3d 1133 (9th Cir. 2000).

became belligerent and hissed or spit at Levitt and screamed a vulgar remark. Brooks contended, among other things, that in his attorneys' fees motion, Levitt improperly revealed Brooks' vulgar remark, in violation of Rule 1.6 (Confidentiality of Information).

The court soundly rejected the contention that the lawyer violated Rule 1.6, or otherwise engaged in professional misconduct, in revealing to the trial court the client's vulgar remark. A communication concerning the fee to be paid to a lawyer has no direct relevance to the legal advice to be given. Rather, such communication is an unprivileged, collateral matter to the lawyer's representation of the client. Rule 1.6 protects *information* that a lawyer gains during or relating to a representation. Here, the client's vulgar remark contained no material information beyond the use of profanity directed at counsel.

The Hot Topic of Document Mining: Beware of Hidden Metadata in Word Processed Documents

Metadata is electronically stored information about a document that is embedded in the software. Metadata contains information about the creation or modification of the document. Although often innocuous, the embedded data can be significant and perhaps even privileged.

The following articles offer useful information about metadata in word processed documents:

- Metadata – What Is It and What Are My Ethical Duties?" LLRX.com (Law and technology resources for legal professionals), January 5, 2009. The article is accessible at:

http://www.llrx.com/node/2130/print

- "Metadata: The Ghosts Haunting e-Documents," *Georgia Bar Journal*, February 2008, at pp. 16-25. The article is accessible at:

http://gabar.org/public/pdf/GBJ/feb08.pdf.

- "Control metadata in your legal documents." The article is accessible on the Microsoft website at:

http://office.microsoft.com/en-us/word-help/control-metadata-in-your-legal-documents-HA001140034.aspx?CTT=1

"New Legal Ethics Minefield: Metadata," *ABA Journal*, April 1, 2007. The article is accessible at:

http://www.abajournal.com/magazine/metadata_minefield

Note: This article refers to a 2001 opinion of the NYSBA Committee on Professional Ethics (Opinion 749, Dec. 14, 2001), which opined that attorneys may not use computer technology to "surreptitiously obtain privileged or otherwise confidential information" of an opposing party. This conclusion departs from ABA Formal Opinion 06-442 (Aug. 5, 2006), which concluded that the ABA Model Rules of Professional Conduct contain no specific prohibition against a lawyer's reviewing and using embedded information in electronic documents.

The Maryland State Bar Association's Committee on Ethics has opined, like the ABA, that it is not an ethics violation to look at metadata received from opposing counsel. Opinion 2007-09 (Oct. 19, 2006).

The Florida Bar has issued a 2006 opinion concluding that lawyers may not look for metadata in documents they receive from other lawyers in the representation of their clients.

Note a 2004 ethics opinion of New York State Bar Association concerning e-mailing metadata in documents:

E-Mailing Documents that may Contain Hidden Data Reflecting Client Confidences and Secrets: N.Y. State 782 (12/8/04) ***(considered under the former Code of Professional Responsibility)***

- ***Former Code Sections:*** DR 1-102(A)(5); 4-101(B), (C), (D); EC 4-5

Does a lawyer who transmits documents containing "metadata" reflecting client confidences or secrets violate DR 4-101(B)?

Metadata consists of data hidden in word processing documents that are generated during the course of creating and editing such documents. Metadata may include fragments of data from files that were previously deleted and overwritten data. Metadata also may reveal the identities of persons who worked on documents, the name of the organization on whose system documents initially were created, information concerning prior drafts, editorial comments, strategy considerations, and the like.

In many instances, metadata reveal information that is either privileged or the disclosure of which would be detrimental or embarrassing to the client. Former DR 4-101(B)(1) prohibited lawyers from "knowingly" revealing a client confidence or secret, except when permitted under of five exceptions enumerated in DR 4-101(C). Former DR 4-101(D) provided that a lawyer shall exercise reasonable care to prevent his or her employees, associates, and others whose are utilized by the lawyer from disclosing or using confidences or secrets of a client." A lawyer who uses e-mail and other technology to communicate must use reasonable care and assess the risks attendant to the use of the technology in the circumstances. *See* N.Y. State 709 (1998).

When a lawyer sends a document by e-mail, he or she must exercise reasonable care to ensure that the communication does not disclose client confidences or information prejudicial to the client. What constitutes reasonable care will vary with the circumstances, including the subject matter of the document, whether it was based on a template used in another matter for another client, whether there have been multiple drafts of the document with comments from multiple sources, whether the client has commented on the document, and the identity of the intended recipients of the document. In some circumstances, the Committee opined, reasonable care may require the lawyer to stay abreast of technological advances and the potential risks in transmitting documents electronically.

Finally, lawyer-recipients should not exploit an inadvertent or unauthorized transmission of client confidences or secrets. In N.Y. State 749 (2003), the Committee concluded that the use of computer technology to access client confidences and secrets revealed in metadata constitutes an "an impermissible intrusion on the attorney-client relation in violation of the Code." N.Y. State 749.

LAWYER WEBSITES

The ABA Committee on Ethics and Professional Responsibility issued its Formal Opinion 10-457 (August 5, 2010), addressing lawyers' use of websites to communicate with the public. This opinion discusses various aspects of lawyer websites and integrates discussion of state bar opinions from around the country. The opinion, based on the ABA Model Rules of Professional Conduct, as amended by the ABA House of Delegates through August 2010, is comprehensive and offers guidance to lawyers in their use of websites to advertise and communicate with the public.