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Professionalism Perspectives

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Committee Leadership

In This Issue

Leadership Notes

From the Editor's Desk

By Karen E. Rubin

Greetings to the LPEC! Our fall edition spotlights some cutting-edge concerns from writers who demonstrate the breadth of the ethics issues facing our profession:

- The statistics on how many lawyers suffer from depression, anxiety, and substance abuse are truly alarming, and you may have taken DRI's lawyer stress survey earlier this year. Joshua A. Klarfeld of Ulmer & Berne LLP discusses why lawyer well-being is an ethics issue and what is being done to address it.
- Have you been hired to represent a company and wondered about whether you can or should also represent the company's non-party employee? Bruce C. Hamlin, of Lane Powell PC has answers for you.
- When your firm brings a lateral hire on board, the due diligence can be daunting. Noah D. Fiedler and Anthony E. Davis of Hinshaw & Culbertson LLP's Lawyers for the Profession® Practice Group, highlight the necessity of that process in their report on a case with a surprising holding on the apparent authority of a moonlighting lateral.

And of course, we have words from Lawyers' Professionalism and Ethics Committee Chair Tom Feher, who shares upcoming events, including a webinar you won't want to miss, and the upcoming DRI Annual Meeting.

If you have topics you'd like us to consider, or an article to contribute, just let me know!

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From the Chair

By Thomas L. Feher

Greetings, fellow LPEC members and readers.

I hope you all enjoy this edition of our newsletter, which features articles on some very timely and helpful topics, by some very great authors from our community (and beyond). Thank you to our editor, Karen Rubin and to authors, Bruce Hamlin, Joshua Klarfeld, Noah Fiedler and Anthony Davis. And don't hesitate to send us topics (or articles) that are of interest. We are here to help educate DRI's members—including on topics they didn't know they were or should be interested in.

I hope you are all taking the opportunity to follow and read our community blog, where Karen posts frequent (short!) articles on ethics and professionalism topics, often with a nice Hollywood reference just for fun. These are found on the community page and you should check there often so you never miss one.

Our committee is proud to sponsor a webinar on October 4 titled **No Tell/Do Tell: The ABA's Recent Ethics Opinions on Attorney Communications with the Public and the Client**. It will deal with two recent ABA ethics opinions, one that discuss a lawyer's ability to discuss or blog about a client's case publicly and another that discusses when a lawyer must tell a client about a mistake made during a representation. These are both timely and important. You can register here.

Finally, I hope I will see you next month at the Annual Meeting in San Francisco. For those of you who haven't pulled the trigger yet, there is still time! San Francisco is a lot

of fun for sightseeing, learning and, of course, networking! Hope to see you at our business meeting and the receptions!

Tom

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Feature Articles

Lawyer Well-Being: It's an Ethics Issue, Too

By Joshua A. Klarfeld

You are a young associate and it's 2:00 a.m. It's been a long day of document review, research, and briefing in what feels like the biggest, most important case of your career. You're ready to settle down and get some sleep before starting up again in a few hours. And then your cell phone buzzes. You have an email. Diligently, you open the email, which happens to be from the senior partner on the case, copying you on his message to another member of the team.

You assume the email contains some great insight the senior partner wants to share right away. Why else would he be emailing at 2:00 in the morning? But no. The partner is writing to berate you unfairly and call your work ethic into question. Your mind begins to race. What did you do wrong? Did you leave the office too early? Did you forget to return a phone call or respond to an email? Did you miss a deadline? Did you cite a case incorrectly? Did you produce a privileged document? Was there a typo in the brief you filed last week?

In the moment, the answers don't matter. Despite the long hours, despite skipping family events, despite checking your email countless times an hour (even on weekends), despite working through "vacations," despite never turning down an assignment, you have somehow failed. No, it's worse than that; you are a failure. You feel like you are falling into a black abyss.

Of course, it's not just this one email. This has been building for a long time. The stresses of college and law school, getting good grades, scoring well on exams, securing a place on law review, landing that great summer clerkship, getting a job offer, making sure you pass the bar exam, and doing everything in your power to get great reviews as an associate—it all piles up. This email is just the straw that breaks the camel's back. And in that moment, you are swamped by anxiety and depression that have also been building up for a long time. The next day, you can barely function.

You are hardly alone. The National Task Force on Lawyer Well-Being recently recounted the sobering findings of the ABA's 2016 joint study with the Hazelden Betty Ford Foundation of 13,000 practicing lawyers:

- struggling with depression - 28 percent;
- struggling with anxiety - 19 percent;
- struggling with stress - 23 percent.

Between 21 and 36 percent of the respondents qualified as "problem drinkers."

Those numbers are staggering—over a quarter of responding attorneys suffer from depression (perhaps the greatest rate of any profession), and possibly over a third have a drinking problem. And who is most at risk for depression and drinking problems? According to the Task Force report: "[Y]ounger lawyers in the first ten years of practice and those working in private firms[.]"

Remember when your professor told you on the first day of law school to look to the left, look to the right, and said that one of the three of you won't graduate? Well, consider sitting at graduation and looking to the left, looking to the right, and realizing that one of the three of you is likely to have a drinking problem and nearly that many will suffer from depression or anxiety in the years to come.

Make no mistake: Lawyer well-being is an ethics issue. As the National Task Force noted in its report, what is at stake is nothing less than "many lawyers' basic competence."

The anecdotal experience of those involved in the lawyer disciplinary system confirms that in many cases the ethics issues that put a lawyer on the path to professional discipline—failure to return client phone calls, neglect of client work, missing deadlines, sloppy handling of client trust accounts—are fueled by the lawyer's impaired mental health or by substance abuse, including alcohol.

And it sometimes doesn't take a lot to make us lose our way. Our own drive to succeed, and our feelings of perfectionism in a profession that demands the highest standards in carrying out our duties to our clients, can do us in. A lawyer suspended for inflating her billable hours after going on her honeymoon (subscription required) and realizing that she would fall short of her firm's quota poignantly spoke in her disciplinary response of being "someone who has excelled her entire life and set high expectations for herself." When she raised the concern about missing the target with her practice group leader, the partner tried to be reassuring, but the message failed to reassure the associate. She appears to have been undone by the stress of her work and the thought of failing.

Fortunately, you're going to hear a lot about lawyer well-being in the near future. The American Bar Association says that it is "on a mission to give the legal industry a new focus: improving the well-being of lawyers," in light of the "alarmingly high rates" of depression, anxiety, and substance abuse. We are starting to hear about efforts to destigmatize mental illness in the law firm setting, and recent books like Mark Cuban's have detailed the profession's drug issues. Law students are insisting on services to address their needs.

DRI itself is on board. This past July, DRI solicited anonymous participation in a University of Alabama-sponsored survey of lawyers and their perceived work stress. The data gathered from the survey will be made available to DRI and its members in an effort to help lawyers develop and increase their "stress hardiness." If you took the survey, you may have found the questions themselves to be self-revealing.

But you do not need to wait for the ABA—or, worse, disciplinary counsel—to come to you. Every state in the union has an assistance program, usually funded through the state supreme court, to help lawyers, judges and law students cope with mental health and substance abuse concerns. Here is a link to a directory of state programs. Ethics rules can exempt the lawyer staff members of these programs from the duty to report misconduct they become aware of when a member of the profession seeks help. (*See* Model Rule of Professional Conduct 8.3(c); check your local version for any variation.)

As a profession—and as individuals—we need to do a much better job of making sure that we can realize our potential as people and lawyers. As the National Task Force says, "To be a good lawyer, one has to be a healthy lawyer." If you need help, try to reach out to get it. And if you can aid any of the many lawyer well-being initiatives at the national or local level, please do so. Our obligation to each other as humans demands that we not be mere bystanders in the face of this serious problem.

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If One Client Is Good, How About Two?

Defending Non-Party Witnesses at Deposition

By Bruce C. Hamlin

At first blush, when defending a corporation, it seems logical to represent several clients, rather than one. Often, corporate defense counsel will undertake the representation of an employee or a former employee who has not been named as a party in the litigation, but who has been subpoenaed for a deposition. When the defense counsel acts prudently, that approach is permissible, and may protect the confidentiality of deposition preparation sessions, for example.

However, such joint representation must be undertaken carefully, as a recent decision from the Eastern District of Tennessee and a recent New York City Bar Association ethics opinion illustrate.

The "No Contact" Rule and Its Implications

By way of background, applicable privilege law and Model Rule of Professional Conduct (MRPC) 4.2 (as adopted with variations by the states) determine which current and former employees are accessible to contact by opposing counsel and which are off limits. That is important because all parties have the right, unless the witness objects, to interview witnesses in private without the opposing lawyer present. *International Business Machines Corp. v. Edelstein*, 526 F.2d 37, 42 (2d Cir. 1975).

In fact, much pre-filing and pretrial investigation is accomplished by interviews of fact witnesses. Assuming that the interview process is directed at the gathering of evidence that is neither perjured nor false (MRPC 3.4(b), 4.1(a), 8.4(c)), there are few limits on the conduct of an attorney carrying out that investigation.

However, MRPC 4.2, which is sometimes called the "no-contact rule," provides that "in representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."

Thus, if the witness is a client of the defense counsel, and the interviewing lawyer knows that the witness is represented by a lawyer on that subject, then the witness is off-limits. (MRPC 4.2.) On the other hand, a lawyer may not "blockade" witnesses in order to keep them out of reach of opposing counsel. (MRPC 3.4(a).) For example, a lawyer may not advise a witness, particularly an unrepresented witness, to refuse to be interviewed. (MRPC 4.3, MRPC 3.4(a).)

Model Rule 4.2 refers to representation by a "lawyer," but the phrase is actually a term of art. The precise meaning of the phrase differs from jurisdiction to jurisdiction. (In a multi-jurisdictional case, it will be important to consult the law in the place where the interview takes place. MRPC 8.5 (disciplinary choice of law).) A few examples may be helpful.

In Oregon (the author's home jurisdiction), the term includes a current member of corporate management or an officer of a corporation, who are considered represented by the corporation's counsel. Legal Ethics Op. 2005-80 (Ore. St. Bar Aug. 2005, rev. May 2016.) The term also includes a current employee whose conduct is at issue. *Id.* (For example, if the case involves a truck accident, the driver of the truck is likely represented by counsel for purposes of MRPC 4.2. A relief driver who witnessed the truck driver's conduct is likely not represented by counsel for purposes of MRPC 4.2.) Former employees and former management are not deemed to be automatically represented by counsel for purposes of the no-contact rule. (Of course, when interviewing a former employee or member of management, the interviewer cannot invade the attorney–client privilege.) Still, communications by corporate counsel with a former employee about the subject of that former employee's employment are subject to the attorney–client privilege. *Id.*

By contrast, under Washington law, current employees are considered "parties" for purposes of the rule if, under applicable non-disciplinary law, the individual has managing authority sufficient to give that person the right to speak for and bind the corporation. *Wright v. Group Health Hosp.,* 691 P.3d 564 (1984). Unlike Oregon, "[o]nce the employment relationship has ended, all future communications with corporate counsel are immediately discoverable." C. Aveni, "Attorney–Client Privilege Does Not Apply to Former Employees," ABA Litigation News (Jan. 31, 2017). *See also Newman v. Highland School Dist.*, 381 P.3d 1185 (Wash. 2016).

These principles all point to a best practice: If corporate defense counsel wishes to insulate all discussions with a non-party former employee, that individual must be an additional client of corporate counsel. However, such joint representation must be undertaken carefully.

Tennessee Waltz—or Disqualification?

A decision from the Eastern District of Tennessee raises important issues that ought to be part of defense counsel's calculus.

In Greg Adkisson v. Jacobs Engineering Group, Inc., (E.D. Tenn. 2016), the court denied a motion to disqualify corporate counsel for conduct that involved drafting declarations for a number of former employees, and for offering representation to former employees in connection with their depositions. The Court's consideration of the motion to disqualify contains a careful discussion of several rules of professional conduct.

First, plaintiffs alleged that the law firm's representation of the nonparty witnesses during depositions constituted a concurrent conflict of interest in violation of Tennessee's

version of MRPC 1.7(a). The court did express concern about the differing interests of the witness and the corporate defendant. For example, the court discussed the possibility that individual witnesses might contradict each other, requiring cross- examination. (Joint representation also ordinarily means that communications with one client will be shared with all of the joint clients. Non-party witnesses being deposed may not understand that their communications will be shared with your other client.) The court found that the firm's actions did not rise to the level of conduct requiring disqualification, but it did admonish the firm for failure to obtain informed consent. (The advisability of informed consent was also one of the subjects of NYCBA Formal Op. 2016-2.)

Second, the court considered whether there was an unlawful obstruction of evidence. Plaintiffs alleged that the firm's representation of non-party witnesses effectively prevented plaintiffs' counsel from communicating with independent witnesses. The court noted that plaintiffs were not prevented from asking questions under oath. But the court did notice inconsistency in the way that counsel instructed witnesses not to answer on the basis of privilege. Finding that conduct "troubling," the court ordered that there be an immediate conference with the court following any instruction to a non-party not to answer on the basis of privilege.

Jacobs Engineering Group is not the only case to deal with the issue of "blockading" of witnesses. *See Jewell-Rung Agency, Inc. v. Haddad, Ltd.*, 814 F. Supp. 337, 343 (S.D.N.Y. 1993) (court warned defense counsel that its policy of offering to represent former employees of corporate clients at no cost "presents potential for abuse in that it provides a means for the corporate party to exert influence and control over a non-party witness").

Does Offer to Represent = Improper Solicitation?

Another issue that the *Jacobs Engineering Group* court considered was the assertion that offering to represent non-party deponents amounted to improper solicitation of legal employment. Because the assumed motive of the offer to represent the non-party was not to gain additional fees, the court again found no disqualifying conduct. But the result of such an analysis will likely depend on the law in the jurisdiction where the offer of representation is made.

For instance, in its Formal Op. 2016-2 (July 22, 2016), the New York City Bar Association ethics committee opined that an offer of representation could be made without running afoul of New York's solicitation rule. But there are also contrary authorities. See ABA Informal Ethics Op. No. 828, March 3, 1965 ("Indeed, it could be even considered the improper solicitation of clients to offer to represent a non-party witness simply because he or she responded to the attorney's deposition subpoena.")

One factor that seems to trouble courts is the extent of the offer of representation. Without reading too much into decisions in this area, it appears that an offer to represent a former officer or management employee will be better received—less likely to be perceived as blockading or improper solicitation—than a blanket offer to *all* former employees.

Last Thoughts

Finally, there is a point that was not part of the *Jacobs Engineering Group* decision. If the lawyer undertakes to represent the non-party witness *only* for purposes of the deposition, then the representation may be considered a limited-scope representation for purposes of MRPC 1.2(c). The New York City Bar Association's Formal Op. 2016-2 considered that issue and concluded that any limitations must be disclosed and must be reasonable under the circumstances.

To return to the corporate defense counsel's moment of decision—do I represent just the defendant, or a number of former employees—and if so, only during the non-party witnesses' depositions, or for a more extended time? Defense counsel needs to consider several issues. Do the interests of the witnesses and the corporate defendant differ? Do I need informed consent? And, is it appropriate for me to make a blanket offer of representation to everyone who receives a subpoena?

Treading carefully here, with due regard for the rules of the road in the relevant jurisdiction, is the best practice.

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Working in the Moonlight

Due Diligence When Bringing Laterals and Their Cases into Your Firm

By Noah D. Fiedler and Anthony E. Davis


When a law firm hires a lateral attorney, what due diligence must the firm undertake in connection with the clients and matters brought by the lateral hire? A recent Ohio appellate court decision demonstrates the importance of thorough lateral hire screening. The Ohio court reversed a firm's summary judgment victory in a legal malpractice suit, rejecting the argument that a lateral never properly brought the underlying matter to the firm, and was only "moonlighting" when he worked on it.

Whose Case Is It?

In *McFarland v. Niekamp, Weisensell, Mutersbaugh & Mastrantonio, LLP*, the plaintiff-clients (the "clients") engaged a law firm (the "first firm") to pursue a claim against their former stockbroker, and their case was assigned to an associate attorney. The associate met with the clients, reviewed documents and drafted a complaint, which he claimed to have filed. When the associate left the first firm to open his own firm, the clients agreed to continue their representation with him. He later closed his firm and joined a second law firm, but failed to inform his clients.

Through an internet search, the clients learned the attorney had joined the second firm. After a receptionist at the second firm confirmed that the attorney worked there, the clients met with the attorney and received his new business card, which identified him as an employee of the second firm. Over the next several months, the clients called to repeatedly inquire about the status of their case, leaving messages with the attorney's assistant, other administrative employees, and partners of the second firm. The clients also communicated with the assistant and firm employees to schedule meetings. Ultimately, the attorney ceased communicating with the clients.

The clients later discovered that the lawyer had never filed the complaint and that the statute of limitations had expired. The clients sued the second firm, alleging that it was vicariously liable for the attorney's alleged malpractice, because the attorney had apparent authority to represent clients on the firm's behalf.

The second firm prevailed in the trial court, winning summary judgment in its favor on the issue of apparent authority. The trial court found there was no evidence that the second firm did anything to make the clients believe they were clients of the firm or that the attorney had authority to represent them.

The clients appealed the trial court's decision. On appeal, the second firm argued that the attorney's representation of the clients was outside the scope of his employment because he failed to comply with the firm's policies for bringing a new client to the firm. Without having done so, the second firm asserted that he was merely "moonlighting" when he worked (or didn't work) on the case, and any malpractice should not be attributable to the firm.

Questions of Fact

The appellate court reversed, determining that a question of material fact on the issue of apparent authority existed, and ending the second firm's hopes for a quick exit from the malpractice suit. (The state supreme court denied review.)

The court imputed to the second firm its office staff's knowledge of the lateral attorney's representation of the clients. The court of appeals found ample evidence that the staff knew about the clients, including: the numerous messages that the clients left with the second firm (25 over the course of a year); notes reflecting what the clients were calling about (wanting "a status update," and a "copy of [the] letter"); and communication from the office staff to the clients attempting to schedule a meeting. These actions were all "indicia of firm involvement or representation of the client's interests," the appellate court said.

Additionally, the second firm listed the lateral attorney on its website, holding him out to the public as being a lawyer of the firm. Similarly, the court said that the firm business cards with the lawyer's name on them were more evidence of the lawyer's apparent authority to represent clients on the second firm's behalf.

Cautionary Tale

This case serves as a cautionary example of the risks a law firm undertakes when hiring a lateral attorney with

portable business, the dangers that arise when lawyers engage in "moonlighting," and the importance of support staff in managing a law firm's risk.

A firm faces possible exposure for a lateral attorney's acts or omissions in representing a client, even where the attorney's representation violates the firm's policies and procedures, (*e.g.*, where the matter is not formally transferred and/or the usual new client intake process is not performed).

In order to avoid such exposure, it is critical that law firms implement due diligence procedures to ensure a number of things:

- the lateral attorney identifies and reports to the firm all existing clients and/or matters that the lateral attorney is bringing to the firm;
- the client has consented to the firm's representation;
- the proper intake process has been performed for every new client and every matter;
- the firm agrees to the scope of representation;
- a responsible partner is assigned to each incoming matter to supervise the lateral attorney's work; and
- sufficient file management procedures (*e.g.*, docketing statutes of limitation and issuing timely status reports) are followed.

In addition, the case illustrates the value of training support staff in risk management, including expressly creating and supporting a culture that encourages staff to identify and report violations of file intake and management procedures, and other anomalies. Indeed, this decision shows that the staff's knowledge may be sufficient to create a duty on the part of the firm towards "clients" —even clients of which the firm is unaware.

Noah D. Fiedler has extensive experience defending lawyers in malpractice claims and in disciplinary proceedings, as well as counseling individual lawyers, law firms and legal departments on risk management, loss prevention, and ethics issues. He is the partner-in-charge of Hinshaw's Milwaukee, Wisconsin office, and serves as co-editor of Hinshaw's Lawyers' Lawyer Newsletter and Cyber Alerts.

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