

## **CUTTING-EDGE LEGAL ETHICS ISSUES FOR TRANSACTIONAL LAWYERS IN A CHANGING, CHALLENGING ECONOMY**

By Joseph H. Flack

A lawyer logs into Facebook and reads a post by an acquaintance that describes being in an accident. The acquaintance lives in a neighboring state. Intending to be helpful, the lawyer posts in response indicating that the person may have a claim, along with some other helpful tips. The lawyer may not have considered that the liability and ethics risks of online social networking might include in this instance a malpractice suit for failing to inform the person about the relevant statute of limitations or disciplinary sanctions for the unlicensed practice of law in a state where the lawyer is not licensed.

This scenario and other relevant ethics problems were discussed at a CLE panel during the ABA Business Section's Spring Meeting in Denver, Colorado. This well-attended panel entitled "Cutting-Edge Legal Ethics Issues for Transactional Lawyers" provided guidance for dealing with the challenging ethics issues that arise in a rapidly changing economy. The committees presenting this panel were the Business and Corporate Litigation, Intellectual Property Transactions, and Professional Responsibility Committees.

### **1. Online Social Networking, Media and Marketing: Deborah G. Shortridge**

Panelist Deborah G. Shortridge, Loss Prevention Counsel for the Attorneys' Liability Assurance Society, Inc., presented on the ethics and liability risks of online social networking—a highly relevant issue for the lawyers of today. Online social networking, something with which most young lawyers are familiar, includes participating in such website programs as Facebook, Twitter, and MySpace. Online social networking also includes blogs, which are websites for thoughts, ideas, and commentary. The issues surrounding online social networking are as relevant as ever. According to Shortridge, 29 of the AMLAW 100 law firms have Twitter accounts, and 12 have Facebook pages.

Lawyers participating in online social networking should be careful anytime a person asks what the lawyer thinks about a specific matter. The lawyer should be aware that a fact-specific response to a posting or question could be interpreted as legal advice by the person to whom it was directed. As a result, an unintended attorney-client relationship may be created. Once the attorney-client relationship is created, a number of ethics rules will apply.

A major ethical risk in online social networking is the disclosure of confidential information. Lawyers who discuss their cases on blogs, Facebook, Twitter, MySpace, or other online media risk violating Rule 1.6(a) unless the client has given informed consent to the disclosure.<sup>i</sup> Even if an unintended attorney-client relationship is not formed, a lawyer may have a duty of confidentiality to another person involved in social networking as a prospective client.<sup>ii</sup> Shortridge discussed an actual case involving disciplinary action brought against a lawyer for online postings describing matters the lawyer was handling even

though the lawyer never named the client. To avoid such risk, lawyers should adhere to the following general principle: do not post specific information online that relates to clients.

Online social networking and blogging implicates the ethics rule on unauthorized practice of law.<sup>iii</sup> Shortridge pointed out that at least one ethics opinion has stated that giving chat-room advice online to a person in a state where the lawyer is not licensed is the unauthorized practice of law.

Ethics rules on advertising and solicitation also pose problems for lawyers involved in online social networking. Caution is recommended in online postings that relate to a lawyer or a lawyer's services, especially given that even truthful reports might be deemed misleading in violation of the rule.<sup>iv</sup> Model Rule 7.1 prohibits lawyers from making false or misleading communications about the lawyer or the lawyer's services.<sup>v</sup> Model Rule 7.2 makes electronic communications subject to Model Rules 7.1 and 7.3.<sup>vi</sup>

Lawyers marketing their services through an online medium should be aware that their audience may cross state lines and implicate the non-uniform ethical restrictions on advertising in other jurisdictions. It is important to keep in mind that most of the population does not know what lawyers do, so what lawyers may think is obvious may be misleading to a non-lawyer. The ethics rules are generally protective of clients and prospective clients. What if a lawyer asks a client to post positive information about the lawyer on a third party website that evaluates lawyers? Some jurisdictions' allow client testimonials. Others do not. The chance of a technical violation of another state's ethics restrictions is great.

Conflicts of interest can also arise when lawyers share information online. Model Rules 1.7 addresses conflicts of interest as to current clients, and Model Rule 1.9 addresses them as to former clients.<sup>vii</sup> One problem in this area arises when lawyers communicate with a party whose interests are adverse to a current or prospective client of the lawyer or his law firm. A lawyer could be prevented from representing a party in a matter because the lawyer received information online from a social networking participant that must be kept confidential under Model Rule 1.18.<sup>viii</sup>

A lawyer should remember a few important points before sharing information online. Know the risks and rules of online social networking. Don't share confidential information. Avoid giving legal advice—that is, don't apply law to facts. Use disclaimers and legends, and adjust privacy settings. Talk to ethics expert when in doubt and develop a relationship with that expert. Know the rules on advertising. The ABA's website has an analysis over 100 pages covering the differences between the Model Rules advertising restrictions and the rules of various states.

## **2. Representation of Multiple Lenders in a (Deeply) Troubled Economy – William Freivogel and Andrew F. Halaby**

In the past when economic times were better, a lawyer would get a file from a lending client. The scope of the representation may not have been well-defined, and often not in writing. The duration of the representation may not have been clear, and recurring work

could continue for years. The understandings with the client about use of confidential information, and representation of the lender's interest vis-à-vis other lenders remained unstated. But did it matter then? Ethically, such issues always matter. From a practical standpoint, though, these issues did not matter because loans performed and paid and loan modifications were not driven by financial duress but by other factors. Lenders routinely waived conflicts, and law firms represented multiple lenders who each made loans to entities owned and controlled by the same guarantor.

The world has changed. The new reality is that lenders are losing money, loans are not performing, security interests are inadequate, and guarantors cannot pay the deficiencies. Some lenders may not survive. The commercial real estate market may be declining, and many commercial real estate loans are underwater. Lending institutions or their receivers may be looking for ways to pass off losses to law firms, as in the 1980s and early 1990s during the savings and loan crises when the Resolution Trust Corporation targeted hundreds of lawyers and their firms, forcing them to pay huge sums of money.

Although the economic conditions have changed, the ethics rules have not. New ethics challenges have emerged. Andrew F. Halaby<sup>ix</sup> and widely-respected ethics consultant William Freivogel<sup>x</sup> addressed these issues in their panel segment on ethics risks in representation of multiple lenders during tough economic times. Their discussion of the ethics problems centered on hypothetical fact patterns given at the outset. These provided an excellent context for their discussion of Model Rules 1.6 (confidentiality), 1.7 (current client conflicts), 1.9 (former client conflicts), and 1.10 (the imputation rule) in the lending context.

Consider one of the hypotheticals used. Lawyer A and Lawyer B work at the same law firm. Lawyer A has a client, Lender 1. Lawyer B has a client, Lender 2. Lender 1 has made a loan to Single Asset Entity X. Lender 2 has made a loan to Single Asset Entity Y. Both loans are guaranteed by the same person, Guarantor. Lawyer A assisted Lender 1 in the original loan transaction involving SAE X and Guarantor. Assume that both loans are underwater, and that Guarantor has inadequate finances to pay both lenders—a zero-sum situation. Lawyer A represents Lender 1 the matter of the defaulted loan to SAE X and Guarantor.

If Lender 2 comes to Lawyer B after SAE Y defaults and asks for a “scorched earth approach” to collection from SAE Y and Guarantor, the first question for Lawyer B is whether Lender 1 is a current client of the firm.<sup>xi</sup> Absent appropriate consents, this approach on behalf of Lender 2 creates an ethical problem involving a concurrent conflict of interest and problems with confidentiality duties. The imputation rule makes both lenders the clients of both lawyers.<sup>xii</sup> In representing Lender 2, Lawyer B cannot use the confidential information in Lawyer A's file for Lender 1.<sup>xiii</sup> The duty of loyalty bars Lawyer B from undermining Lender 1's legal position and affecting Lender 1's ability to get paid on its loan to SAE X and Guarantor.<sup>xiv</sup> Neither lawyer, moreover, can obtain informed consent to the conflict from the other lawyer's client. If Lawyer B tries to get Lender 1 to consent to the conflict, Lawyer B has to use Lender 2's confidential information to explain the conflict, and to get a waiver from Lender 2 to use its confidential information in obtaining a conflict waiver from Lender 1 requires revealing confidential information about Lender 1 to Lender 2. The upshot is that

some conflicts are unwaivable because informed consent cannot be obtained without violating Model Rule 1.6.

Freivogel and Halaby presented other useful hypotheticals involving the same basic fact pattern. These can be found in the materials for this CLE panel located in the Meetings Portal of the ABA website's Business Section. Frievogel has a website guide that is a great ethics resource for attorneys as well.<sup>xv</sup>

### **3. Intellectual Property Challenges in a Changing Economy – Scott C. Sandberg**

The risk of patent or trademark infringement and related litigation has increased a great deal during this recent recession. Intellectual property becomes more vulnerable when economic times worsen. Panelist Scott C. Sandberg<sup>xvi</sup> discussed ethical and attorney-client privilege issues arising in the context of intellectual property. He explained that the legal standards for willful patent and trademark infringement are evolving. Certain aspects of such standards, Sandberg said, are moving away from a simple or even gross negligence standard towards a standard where the risk of infringement must have been "known or obvious to the infringing party" in order to be considered willful.<sup>xvii</sup>

In a non-litigation context, clients request opinions on whether their products infringe a patent or trademark. The opinions, investigation and advice of counsel become important in the infringement litigation context later on because they are very often used as a defense to a willful infringement claim. A defendant in an infringement case argues as a defense that it relied on the lawyer's opinion or advice. Injecting advice or opinions of an attorney into the litigation raises the issue of waiver of the attorney-client privilege.

The changing legal standards for willful infringement can also create ethical problems. Such problems include the possibility of (i) compromising the confidentiality of attorney-client communications,<sup>xviii</sup> (ii) compelling counsel to act as a witness,<sup>xix</sup> and (iii) complicating counsel's compliance with its duty of candor to a tribunal or duty of disclosure to opposing parties.<sup>xx</sup>

Model Rules 1.7 and 1.9 are implicated when lawyers give advice or non-infringement opinions to a current or former client and then later litigate infringement cases against the affiliates or subsidiaries of same client or former client. Model Rule 2.3 prohibits a lawyer from evaluating a matter affecting a client if the lawyer knows it is likely to materially and adversely affect the client's interests.<sup>xxi</sup> This rule is applicable, for example, in the situation in which a lawyer renders an opinion for one client as to infringement of a patent or mark that affects another client who has a competing or conflicting interest affected by the opinion.

Under Model Rule 3.1, opinion counsel's advice to a client on an infringement issue may affect whether trial counsel has a good-faith basis to defend a willful infringement claim. In US PTO proceedings where lawyers make representations in the course of prosecuting patents and registering trademarks, Model Rules 3.1, 3.3(a)(1), and 3.4 prevent

a lawyer from making frivolous claims, false statements of fact or law, or knowingly concealing information.

It is no longer clear that a lawyer in a firm can litigate a patent when another lawyer in the same firm has prosecuted that patent for the client. The law is in flux. In any event, transactional lawyers should understand the ethical problems with the seamless representation model of a client.

- (1) See, e.g., ABA MODEL RULES OF PROF'L CONDUCT R. 1.6 (2009). This model rule has been adopted in some form in every state except California, which has its own confidentiality rule. See Cal. Bus. Prof. Code § 6068(e).
- (2) ABA MODEL RULES OF PROF'L CONDUCT R. 1.18 (2009).
- (3) ABA MODEL RULES OF PROF'L CONDUCT R. 5.5 (2009).
- (4) ABA MODEL RULES OF PROF'L CONDUCT R. 7.1 cmt. 3 (2009).
- (5) ABA MODEL RULES OF PROF'L CONDUCT R. 7.1 (2009).
- (6) ABA MODEL RULES OF PROF'L CONDUCT R. 7.2 (2009).
- (7) ABA MODEL RULES OF PROF'L CONDUCT R. 1.7, 1.9 (2009).
- (8) ABA MODEL RULES OF PROF'L CONDUCT R. 1.18 (2009).
- (9) Partner, Snell & Wilmer, Phoenix, AZ. Halaby was the Chair of the CLE panel.
- (10) Chair of the Professional Responsibility Committee of the ABA Section of Business Law.
- (11) Lawyer A's scope of representation with Lender 1 may not have been adequately defined or in writing.
- (12) MODEL RULES OF PROF'L CONDUCT 1.10 (2009).
- (13) MODEL RULES OF PROF'L CONDUCT 1.6 (2009).
- (14) MODEL RULES OF PROF'L CONDUCT 1.7(a) (2009).
- (15) William Freivogel, Freivogel on Conflicts, <http://www.freivogelonconflicts.com> (last visited May 27, 2010).
- (16) Partner, Snell & Wilmer LLP, Denver, CO.
- (17) See *In re Seagate Tech., LLC*, 497 F.3d 1360, 1370 (Fed. Cir. 2007) (en banc). This case and others are discussed the CLE panel materials, which include PowerPoint slide printouts and an article by David G. Barger and Scott C. Sandberg entitled Update on

Culpable Mental States and Related Ethical and Privilege Implications in Federal Civil Litigation.

(18) See MODEL RULES OF PROF'L CONDUCT R. 1.6 (2009).

(19) See MODEL RULES OF PROF'L CONDUCT R. 3.7 (2009).

(20) See MODEL RULES OF PROF'L CONDUCT R. 3.1, 3.4 (2009).

(21) See MODEL RULES OF PROF'L CONDUCT R. 2.3(b) (2009).

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